

Public Services Ombudsman (Wales) Bill Bill Summary

March 2019



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Public Services Ombudsman (Wales) Bill: Bill Summary

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Paper Overview:

This paper provides a summary of changes agreed at Stage 2 of the Finance Committee's Public Services Ombudsman (Wales) Bill.



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Introduction

On 2 October 2017, the Chair of the Finance Committee introduced the **Public Services Ombudsman (Wales) Bill** (the bill) and **Explanatory Memorandum**. The Committee Bill, would, if passed, replace the existing legislation - the **Public Services Ombudsman (Wales) Act 2005** (the 2005 Act), which governs the functions of the Public Services Ombudsman for Wales (the Ombudsman).

Provisions within the Bill as introduced aim to make the Public Services Ombudsman for Wales' services **easier to access**. This will be achieved by removing requirements that a complaint must be received in written form as prescribed in the 2005 Act. The Bill also makes provision for the Ombudsman to undertake **own-initiative** investigations and to publish model **complaints-handling procedures** (CHP) for listed authorities (as set out in Schedule 3).

The Bill makes specific provision to allow the Ombudsman to investigate private medical treatment, including nursing care, when treatment was received as part of a **public/private health pathway**. The Bill does not make provision for the Ombudsman to investigate private health services in isolation, however.

The Explanatory Memorandum for the Bill notes:

The Bill makes provision about the office of the Ombudsman and the investigatory functions of the role. It also requires the Ombudsman to publish a statement of principles concerning complaints-handling procedures of listed authorities and enables the Ombudsman to publish model complaints-handling procedures.

The Bill also 'future proofs' access to the Ombudsman's services and allows his office to develop guidance to respond to future developments, such as the changing nature of electronic communications and advances in technology.

Senedd Research published a **Bill Summary of the Public Services Ombudsman (Wales) Bill** in March 2018. That summary provides an overview of the key provisions, the structure and background to the legislation, and includes the Committee's view on the general principles of the Bill. It also includes a summary of the financial implications of the Bill.

Stage 1 Scrutiny

The Bill was scrutinised at Stage 1 of the Assembly's legislative process by both the Equality, Local Government and Communities Committee (ELGC) and the Constitutional and Legislative Affairs (CLA) Committee.

The ELGC Committee considered the general principles of the Bill and also considered the financial implications of the Bill (since the Finance Committee could not scrutinise its own Bill). The Committee heard oral evidence between 29 November 2017 and 25 January 2018 from a number of stakeholders, including the WLGA, Health Inspectorate Wales, NHS Confederation and the Independent Sector Complaints Adjudication Service (ISCAS). It received **written evidence via a public consultation**, held two scrutiny sessions with the Member in Charge of the Bill, the Public Services Ombudsman for Wales and the Cabinet Secretary for Finance.

The Committee in its **Stage 1 Committee Report** made a total of 19 recommendations, and the rationale behind them are set out in the Committee's **Stage 1 report on the General Principles of the Bill**, published in March 2018. Critically, the Committee recommended that the Assembly agrees to the general principles of the Bill.

The CLA Committee took evidence from the Member in Charge of the Bill and the Cabinet Secretary for Finance on 15 January 2018. The Committee had a specific focus on matters relating to the legislative competence of the National Assembly to pass the Bill, the drafting of the Bill, and observations on specific powers to make subordinate legislation.

The CLA Committee in its **Stage 1 Report** made 1 recommendation.

The motion to agree the general principles of the Bill took place in **Plenary on 21 March 2018**. The principles of the Bill were agreed, with 47 in favour, and 1 against.

However, the Cabinet Secretary for Finance (at the time) did not immediately move to introduce a Financial Resolution in relation to the Bill in the conventional way, that would allow the Bill to proceed to Stage 2. This was to allow for additional work to be undertaken to the Explanatory Memorandum (EM) and the Regulatory Impact Assessment (RIA), which the Cabinet Secretary for Finance described as requiring 'more robust analysis of costs in some areas'. As a result of this additional work, a **Revised Explanatory Memorandum**, which incorporates the RIA and Explanatory Notes was published in July 2018.

The Financial Resolution in relation to the Bill was agreed in **Plenary on 17 July 2018**, with 47 in favour and 1 against. The Cabinet Secretary for Finance during the debate on the financial resolution thanked the Member in Charge of the Bill, in particular for the:

...way in which he has worked with the Government over the weeks that have passed since that Stage 1 debate and the very careful attention that he has paid to making the changes that allow me to say today that the Government is able to recommend that the Assembly agrees the financial resolution.

The Assembly duly voted to agree the financial resolution, which allowed the Bill to proceed to Stage 2 scrutiny.

Amendments at Stage 2

Stage 2 began on 22 March 2018, running until 24 January 2019. The ELGC Committee met to consider and dispose of the Stage 2 amendments on **31 January 2019**.

In total, there were 230 amendments put forward at Stage 2, although 1 was withdrawn. The majority of amendments were put forward by the Member in Charge of the Bill, the Chair of the Finance Committee, Llyr Gruffydd AM. The Welsh Government proposed 1 amendment, and there were 10 Member amendments.

In summary:

- 218 amendments were proposed by the Member in Charge - 217 were agreed, and one fell;
- The Welsh Government's proposed amendment was agreed;
- Six amendments were proposed by the Conservative Member for North Wales, Mark Isherwood AM - two amendments were withdrawn, two were not moved and two were not agreed;
- Four amendments were proposed by the Plaid Cymru Member for Rhondda, Leanne Wood AM - one amendment was not moved, two were withdrawn, and one fell.

The Bill as amended at Stage 2 has been **published on the Assembly's website**.

The amendments were grouped into 32 separate sections, with a significant proportion considered to be drafting or technical amendments.

Member in Charge Amendments

On a general note, the Member in charge was not of the view that the amendments proposed at Stage 2 would have significant impact on the financial implications of the Bill. All but one of the Member in Charge's amendments were agreed, while one amendment fell. Unless otherwise specified, each group of amendments were agreed without a need for a vote.

Group 1 relates to drafting matters, and did not impact or alter the policy intent of the Bill.

Group 2 had one amendment (171) which relates *Disqualification*. Currently, an Ombudsman is disqualified for a period of time from holding office at a listed authority unless the Assembly Commission approves otherwise. The amendment proposed replacing the 'Commission' with 'a committee of the Assembly'.

Group 3 relates to *Repeals and consequential*. These amendments were primarily technical in nature, although the Member in Charge noted that the substantive amendment was amendment 129. This amendment changes section 74 to include specific provisions from the 2005 Act and ensure subordinate legislation continues to apply once the Bill becomes an Act.

Group 4 relates to *Fees*. One amendment (143) was included in this group. Originally, the Bill only allowed the Ombudsman to keep fees in relation to the cost incurred for reporting under Part 3 of the Bill. The amendment would allow the Ombudsman to retain the fees raised under Part 5 also.

Group 5 relates to Schedule 1 of the Bill, specifically around annual reports and accounts. The most significant change allows the Auditor General for Wales (AGW) flexibility to submit certified accounts after the default four month deadline.

Group 6 amendments relate to *removing reference to "complaint referred to the Ombudsman"*. The amendments aim to make it 'easier to cross-reference in the Bill'.

Group 7 relates to the *Power to investigate complaints made or referred*. The key amendments within this group were amendments 4 and 5. According to the Member in Charge, they 'reflect that the ombudsman is able to investigate health-related services that are captured under the proposed new section 16, which will be inserted by amendment 24'.

Group 8 amendments relate to *own-initiative investigations*. The key amendments are 11 and 12, which amend Part 3 of the Bill. The Bill as introduced included criteria that needed to be satisfied before the ombudsman could commence an own-initiative investigation. The amendments removed this criteria, and replaced it with a 'duty for the ombudsman to publish criteria, as well as setting out requirements for the consultation and approval of them' (Member in Charge). Amendments to the same effect were also moved for Part 5 of the Bill, relating to social and palliative care. The Minister summarised the key aspects of this group of amendments:

The amendments in this group highlight the central requirements of the power for the ombudsman to conduct own-initiative investigations and they give the National Assembly the flexibility to consider how well the criteria are working and to change them as appropriate. Amendments 11 and 80 also ensure that, whatever the criteria for an own-initiative investigation, the public-interest test will form the basis of any investigation. This must always be the central reason for which these powers are used.

Group 9 relates to *who can make complaints* to the Ombudsman. The key amendment in this group was amendment 14, which clarifies that the persons entitled to make a complaint to the Ombudsman include a person authorised in writing to do so by the person aggrieved. Even if the person aggrieved is incapable of authorising in writing, the ombudsman can still accept the complaint in ‘any way that the Ombudsman feels appropriate’.

Group 10 is specific to *complaints procedures*. There were numerous amendments in group 10, but one of the key amendments was amendment 17, which required the ombudsman to explain the implications of making an oral complaint to the person who made the complaint. It changes the reference to ‘person aggrieved’ to the ‘person who made the complaint’, as the aggrieved may not be capable of communicating with the ombudsman.

Group 11 relates to *matters which can be investigated*. Six amendments were tabled, 4 from the Member in Charge, and 2 from Mark Isherwood AM. The key amendments in this group are 23 and 24 which doesn’t change the intention of the Bill, but inserts a new section 16. The Minister for Finance and Trefnydd noted that:

Amendments 23 and 24 are a crucial change to ensure the policy intention of giving the ombudsman power to investigate public/private healthcare is enacted as intended.

[...] Removing the definition of ‘private health services provider’ will help to avoid any confusion about which parts of the Bill apply to which bodies—for example, to primary care, which could have fallen under that definition as previously drafted.

In relation to Mark Isherwood AMs amendments, the Member in Charge stated that in his view, these amendments ‘severely restrict the private health providers that the Ombudsman could investigate’.

The Member in Charge amendments were agreed, amendments 24A and 24B were withdrawn.

Group 13 relates to *discontinuing investigations*. This group of amendments were considered to be ‘tidying up amendments’ and do not change the policy intent of the Bill according to the Member in Charge.

Group 14 relates to *investigation procedures*. The key amendments in this section relate to sharing of proposals for an investigation, and providing listed authorities with an opportunity to comment on them.

Groups 15 & 16 relate to *reports*. Most notable of the amendments are the ones that remove the requirement on listed authorities, when considering whether to enter into a contract for services with a private health provider, ‘to have regard to a report published by the ombudsman.’ This also goes for special reports.

Group 17 amendments relate to future injustices. The Member in Charge of the Bill noted the following regarding the key amendments:

Amendments 43, 44, 48 and 50 reflect that the ombudsman may conclude that a person is in future likely to sustain injustice or hardship, and not just that a person has sustained injustice or hardship. In Part 5, relating to social and palliative care, amendments 101, 102, 105 and 106 have the same effect.

Group 21 *Complaints handling principles*. Amendments in this group provide for, according to the Member in Charge for a ‘better balance between the ombudsman’s freedom to draft the statement of principles and the Assembly’s ability, of course, to reject the statement of principles if it feels that is necessary’. Importantly, as a result of this set of amendments, listed authorities will be required to have complaints-handling procedures.

Group 22 relates to the *model complaints handling procedures*. Specifically, the amendments confirm that model CHPs cannot conflict with any legislation that applies to a listed authority. All amendment within this groups were agreed, although amendments 61-63 and 65-70 went to a vote. Both Conservative Members abstained with all other Members in favour.

Group 24 *Working jointly with others*. The Member in Charge noted that the ‘amendments in the group implement recommendation 2 of this committee’s [ELGC] Stage 1 report’, and makes clear that the ombudsman and specified persons are ‘clear as to when they can work jointly on matters’.

Other amendments included in this group also provide clarity around consultation with other commissioners and Welsh Ministers when a matter could be investigated by more than one body. Amendment 152 inserts a new section to the Care Standards Act 2000, which provides that the ‘powers of the children’s commissioner and the ombudsman to work jointly are set out on the face of legislation’.

Group 25 *Disclosure of information.* Among the amendments in this group are amendments to make provision for the Auditor General for Wales to share relevant information with the Ombudsman when working together. The Member in Charge noted that he had brought amendment 118 ‘in response to recommendation 7 of this committee’s Stage 1 report, which asked me to consider balancing the protection against the leaking of draft reports and the protection for the auditor general’. Other significant amendments seek to include references to the Data Protection Act 2018.

Group 26 *Defamation.* Amendments in this group are there to protect listed authorities and the AGW from claims for defamation.

Group 29 *Review of Act.* The amendment places a duty on an Assembly Committee to review the Bill, and should it become an Act, a report should be undertaken five years after the Act received Royal Assent. However the Member noted that he refers Members to his earlier comments on the ‘possibility that this provision may change at Stage 3, depending on the Commission’s Stage 3 amendments’.

Groups 30, 31 and 32 provide for amendments to *Interpretations, Regulation making powers and the Overview.*

The key amendment in these three groups is amendment 139, which gives the Welsh Ministers power to make regulations that amend, revoke or repeal any enactment, including an enactment in this Bill. The Member in Charge notes:

Now, while this expands the power that is set out in the Bill as introduced, it puts the Welsh Ministers in the same position they are under the 2005 Act.

[...] The use of these powers will, of course, be closely scrutinised by the CLA committee itself.

Welsh Government Amendments

The Welsh Government’s only amendment to the Bill at Stage 2 was amendment 222 (Group 28 - *Welsh language requirements*).

The amendment by the Minister for Finance and Trefnydd, Rebecca Evans AM, proposed to leave out section 71 of the Bill, which had made provision for the Ombudsman to prepare and publish a Welsh language strategy. In its place, the amendment inserted a provision that would ensure that the PSOW is subject to Welsh language standards.

The amendment was agreed.

Committee Member Amendments

All 10 of the Member amendments proposed were not agreed during the ELGC Committee’s Stage 2 scrutiny. Of these, amendments 227, 228 (Group 12 - *Decisions taken without maladministration*) and 229 (Group 27 - *Independent Review Panel*) tabled by Leanne Wood AM, and amendments 24A and 24B (Group 11 - *Matters which can be investigated*), 223 (Group 19 - *Nolan Principles*) and 226 (Group 18 - *Listed authorities*) tabled by Mark Isherwood AM, were either withdrawn or were not moved.

The most significant Member amendments included the following:

Amendment 224 (Group 20 - *Compensation*), tabled by Mark Isherwood AM proposed to include a provision for the Ombudsman to recommend that a listed authority make a compensation payment to an aggrieved person. The Member proposing the amendment noted:

This amendment introduces a direct power for the ombudsman to recommend financial redress on the face of the Bill. The ombudsman has directly requested this power to be included to shield his office from potential legal proceedings.

[...] The ombudsman considers that any legal challenges have the potential to limit his ability to provide just and fair remedies for citizens in Wales. In view of the current wording of section 34 of the 2005 Act and the ombudsman’s wide discretion to make recommendations, the ombudsman considers that any such challenge would be at odds with the Public Services Ombudsman (Wales) Act 2005. However, an amendment giving the ombudsman a direct power to award financial redress would place the matter beyond any doubt and would protect the office from legal challenge, such as that experienced in England and Northern Ireland.

Both the Member in Charge and the Minister were of the belief that the Ombudsman already had wide discretionary powers to make recommendations, which can include recommending compensation. The amendment went to a vote, with 6 Against and 2 For. The amendment was not agreed.

Amendment 225 (Group 23 – *Definition of palliative care*), also tabled by Mark Isherwood AM proposed to insert a provision that would provide for a broader meaning of “**palliative care**”. In moving the amendment, the Member stated that:

Amendment 225 broadens the definition of palliative care to include both World Health Organization and National Institute for Health and Care Excellence guidelines.

[...] this amendment places a duty on the ombudsman to consider relevant guidance that would widen out the definition of palliative care as a matter of course to reflect what it truly encompasses in its entirety.

The Member in Charge does not believe that this Bill should ‘interfere with such definitions’, which were inserted into the 2005 Act by the Social Service and Well-being (Wales) Act 2014. The amendment was not agreed.

Amendment 229 and 230 (Group 27 – *Independent Review Panel*), tabled by Leanne Wood AM, proposed establishing an *Independent Review Panel* to review the performance of the Ombudsman in discharging his or her functions. The provision would have allowed the Panel to review and investigate a matter referred to it by a person who has had their complaint considered and decided upon by the Ombudsman. Under the proposed Schedule (amendment 230), the Assembly would have been responsible for appointing and pay remuneration to the members of the Independent Review Panel, including payments towards pensions.

While there was some sympathy for the principle of the proposal, there were some significant concerns that the Independent Review Panel would provide for another layer of bureaucracy and cost to the public purse. The Minister for Finance and Trefnydd stated:

If I were to support this proposal, I would need to be convinced that this layer of regulation would lead to an improvement in public services beyond that which could be achieved by the extra investment. It would also be important to consider what qualifications a member might need to effectively review the ombudsman’s decisions and on what criteria those decisions should be challenged. At this stage, I cannot see a compelling case that creating an independent review panel of this nature for the ombudsman would be an effective use of public money.

The Member in Charge re-iterated the Minister’s views, noting that:

As the ombudsman is already accountable to the Assembly and to the courts, I believe the likely costs of this approach would outweigh any benefits.

[...] the creation of an independent review panel would probably require more detailed amendments setting out the powers of the panel and the full procedure that would apply to the panel’s investigations. So, like many others, I remain unconvinced that this is appropriate at this point.

Leanne Wood AM in her response noted that this was a probing amendment, and called for further exploration of this matter:

I would like to see this matter explored further if that is possible

[...] No ombudsman could possibly get everything right, so surely it’s important to prevent that further injustice by introducing another set of eyes to look reasonably at an aggrieved person’s case. In summary, Plaid Cymru would welcome the opportunity to have further discussions with the Member in charge and the Welsh Government on this policy aim, including further clarity around potential cost in comparison to the present arrangements that the ombudsman has in place, and how we may take that forward at Stage 3.

Amendment 229 was withdrawn under Standing Order 26.66(i), and consequently, amendment 230 fell.

Next steps

Stage 3 of the Public Services Ombudsman (Wales) Bill commenced on 1 February 2019. During this stage, Assembly Members, the Member in Charge and Welsh Ministers will be able to submit amendments to the Bill as amended at Stage 2.

Stage 3 consideration will take place in Plenary on 13 March to consider amendments to the Bill (as amended at Stage 2). Following Stage 3, it is anticipated that the Assembly will be asked to vote on whether to pass the Bill at Stage 4. No date has yet been set for Stage 4.

More information on the **National Assembly's Legislative Process can be found on its website**. For further information on the Bill, please contact the ELGC Clerking team on **SeneddCommunities@assembly.wales**.