



RESEARCH PAPER 05/26
23 MARCH 2005

The Public Services Ombudsman (Wales) Bill

[HL]

Bill no 76 of 2004-5

This Bill establishes the office of Public Services Ombudsman for Wales and transfers the functions of the Welsh Administration Ombudsman, the Health Service Commissioner for Wales, the Local Government Ombudsman and the Social Housing Ombudsman to the new office, creating a unified ombudsman service for Wales. Adam Peat is already carrying out these functions, but legislative underpinning for this is considered necessary. The Bill needs to be taken at Westminster since the Assembly lacks powers to make primary legislation. The Bill has proved relatively uncontroversial, but one Opposition amendment was passed at Lords report stage to give the Ombudsman power to apply to the High Court where an authority wilfully disregards the report of the Ombudsman without lawful excuse. The Bill is due its second reading in the Commons on 4 April 2005, having completed all its stages.

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Summary of main points

This Bill will establish the office of the Public Services Ombudsman for Wales, combining the offices of the Welsh Administration Ombudsman, the Health Service Commissioner for Wales, the Social Housing Ombudsman for Wales, and the Local Government Ombudsman (Commission for Local Administration in Wales). There is no separate Standards Board in Wales, and complaints about misconduct by councillors are investigated by the Local Ombudsman. All these ombudsman services will be amalgamated in one body with one ombudsman, creating a unified ombudsman service. A similar convergence has already taken place in Scotland. The policy offers a 'one stop shop' for the citizen and has been widely welcomed. The Bill also reflects developments in policy relating to ombudsmen which has shifted away from formal reports on individual acts of maladministration towards systemic reviews, alternative methods of dispute resolution and broader guidance for the public sector.

One office holder, Adam Peat, has already been undertaking these offices in Wales, but a proper statutory underpinning was considered necessary, and the Bill has been pressed for by the Welsh Assembly Government. The Bill will also:

- give the Ombudsman new powers to promote the resolution of disputes without the need to issue formal reports
- allow the Ombudsman to issue guidance on the requirements of good administrative practice

The Bill sets out a list of bodies to which the jurisdiction of the Ombudsman will apply which may be amended by the Assembly. There are arrangements to consult and co-operate with other ombudsmen.

The Bill was modified in the Lords to allow for the:

- appointment of the Ombudsman on a seven year, non renewable term of office, with formal consultation of the Assembly
- broadening of the existing power to examine matters relating to clinical judgement in areas of health and social care
- Creation of a power to allow the ombudsman to apply to the High Court where the relevant public authority has disregarded his recommendations without lawful excuse.

This last amendment was the only one that proved controversial. It was narrowly agreed to, against Government opposition, by 91 votes to 86.

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I Background

A. Ombudsman schemes

The key features common to all ombudsman schemes, which make them attractive as mechanisms for complaints handling and dispute resolution and which distinguish them from, for example, arbitration and mediation, may be summarised as follows:

- Ombudsmen offer access to justice which might not otherwise be available, offering redress not available from the Courts and in cases which might not be considered by the Courts.
- Ombudsmen are independent and impartial and conduct their investigations in private.
- Ombudsman schemes are free to complainants.
- Ombudsmen can usually take account of what is fair and reasonable in all the circumstances, and are not bound by a strict interpretation of the law or precedent.
- It is not necessary for the complainant to obtain professional advice in order to make a complaint to an Ombudsman.
- Ombudsmen do not name complainants but they all publish digests of their decided cases. Some publish reports in which they name organisations which are the subject of the complaint.
- Compliance with an Ombudsman's recommendations is secured by a variety of means - by law, by contract, by a regulator or by the moral force and the standing of the Ombudsman. Non-compliance is rare.
- Ombudsman schemes make extensive use of informal settlements and conciliation; some offer access to mediation.
- Ombudsmen level the playing field between the under-represented complainant and the large and powerful organisation which is the subject of the complaint.
- Ombudsmen are inquisitorial, not adversarial, and investigations are conducted in private. Ombudsmen can examine records, interview witnesses and use professional experts where appropriate. The procedure for investigations can be tailored to the circumstances of the case.¹

Other than with a small number of schemes, the ombudsman's decision is not binding on the complainant, who may take the matter to court if he or she wishes. In a scheme where the ombudsman's decision is binding, the complainant is informed of this in the literature published by the ombudsman. There is no right of appeal against the merits of the decisions of any of the public sector ombudsmen. The decisions of these ombudsmen are, however, subject to judicial review. Complainants have to complain to the body by whose

¹ This summary is taken from a note prepared by Alys Thomas from the Assembly's Members' Research Service, *The Public Ombudsman (Wales)(HL) Bill 2004-05, Members' Research Service Research Paper 05/001*. This paper is available at <http://www.wales.gov.uk/keypubmrs/content/05-001.pdf> This Research Paper draws extensively on the Assembly's Members' Research Service Paper 05/005

actions they are aggrieved and give them a reasonable opportunity to respond before they come to the ombudsman. There are time limits for this, although ombudsmen have discretion to accept late complaints. They will also accept complaints made on behalf of others – provided the complainant has given consent – and so advisers can make complaints on behalf of their clients.

B. Background in Wales

1. Welsh Administration Ombudsman

The Welsh Administration Ombudsman was created by the *Government of Wales Act 1998* (s111 and Schedule 9). The Ombudsman can consider complaints about the administrative actions of the following bodies (or organisations acting on their behalf):

- The National Assembly for Wales
- The Arts Council of Wales
- The Care Council for Wales
- The Countryside Council for Wales
- The Environment Agency (for matters relating to Wales)
- The Forestry Commissioners (for matters relating to Wales)
- The Higher Education Funding Council for Wales
- The National Council for Education and Training for Wales (but excluding anything done by virtue of its role as successor to the former Further Education Funding Council for Wales)
- The Office of Her Majesty's Chief Inspector of Education and Training in Wales
- The Sports Council for Wales
- Urban Development Corporations (where established for urban development areas wholly in Wales)
- The Wales Tourist Board
- The Welsh Development Agency
- The Welsh Language Board

Some of these bodies are expected to be absorbed into the Assembly following the review of its sponsored public bodies.²

There is no requirement for an Assembly Member to refer the complaint to the Ombudsman, unlike the Parliamentary Commissioner for Administration in the UK which can only accept complaints via an MP (the MP filter.) Tenure of office is until retirement age of 65.

² For further information see Assembly Members Research Service Research Paper 04/020 *The Reform of Assembly Sponsored Bodies* at <http://www.wales.gov.uk/keypubmrs/content/0420.pdf>

2. The Health Ombudsman for Wales

The Health Service Ombudsman for Wales looks into complaints made by or on behalf of people who have suffered because of unsatisfactory treatment or service by, or provided on behalf of, the National Health Service (NHS). The Ombudsman can only look into complaints against private health providers if the treatment was funded by the NHS. Further detail is available in the first Annual Report from the Health Service Ombudsman for Wales.³

From devolution until November 2003 the offices of Welsh Administration Ombudsman and Health Service Commissioner for Wales were held by the individual holding the office of UK Parliamentary Ombudsman, latterly Ann Abraham.

3. Local Government Ombudsman for Wales

The Local Government Ombudsman for Wales (LGOW) investigates complaints by members of the public that they have suffered injustice as a result of maladministration by certain local authorities in Wales, not including community councils.⁴ The official title for this office is the Commission for Local Administration in Wales. In 2003/04 the LGOW determined 605 complaints.⁵ The Office acquired further powers under the *Local Government Act 2000* to investigate allegations that members of local authorities in Wales had failed to comply with the code of conduct applicable to local authorities. Since the end of 2001 all county, county borough and community councils, all fire, national park and police authorities and all joint authorities in Wales have been obliged to have a code of conduct (incorporating the provisions of the model code of conduct issued by the National Assembly for Wales on 28th July 2001) as to how their members should behave, and all members must agree to abide by that code.

Responsibility for enforcing the code rests with the Local Government Ombudsman for Wales. The Ombudsman can investigate an allegation that a member or co-opted member of these authorities has failed, or may have failed, to comply with the authority's code of conduct. Such an allegation may be made by anyone. In 2003/04 the Ombudsman received 183 allegations of which 85 had been accepted for further investigation by 31 March 2004; of these, 26 were found not to have breached the code.⁶

4. Social Housing Ombudsman for Wales

The *Housing Act 2004* created an office of the Social Housing Ombudsman for Wales to investigate complaints against Registered Social Landlords. *The Public Services*

³ This was laid before the Assembly on 18 October 2004

⁴ See HC 234 2004-5 Q96

⁵ See Local Government Ombudsman for Wales: Commission for Local Administration in Wales, *Annual Report for the year ended 31 March 2004*, available at http://www.ombudsman-wales.org/english/pdfs/annual_reports/2004/Commission_Report_2004_E.pdf

Ombudsman (Wales) Bill [HL] proposes that this should be also be brought within the unified ombudsman service.

In 2003-4 the number of complaints made to the ombudsmen schemes was as follows:

| | |
|--|-----------------|
| Local government complaints | 629 |
| Local government allegations of breach of code | 183 |
| NHS complaints | 209 |
| Welsh Assembly Ombudsman | 64 ⁷ |

On 1 October 2003, Adam Peat, formerly Director of the Local Government and Culture Department in the Welsh Assembly Government, was appointed Commissioner for Local Administration in Wales and Health Service Commissioner for Wales and on 4 November 2003, designated as the non-statutory Public Services Ombudsman for Wales by the First Minister, Rhodri Morgan, and the Secretary of State for Wales, Peter Hain.

The intention to appoint Adam Peat to the post of Welsh Administration Ombudsman was also announced but he could not take up the post in 2003 because statute precluded one person from holding all three offices simultaneously. However, the *Regulatory Reform (Local Commissioner for Wales) Order 2004: Ombudsman Appointments in Wales*, which came into force in September 2004, removed that restriction and Mr Peat was appointed Welsh Administration Ombudsman on 4 November 2004. The House of Commons Regulatory and Reform Committee considered this order in July 2004. The Committee was of the view that a proper ‘statutory footing’ was needed and recommended that ‘the Government should include a *Public Services Ombudsman (Wales) Bill* in its legislative programme for the 2004-05 Session.⁸

C. Consultation Papers

In November 2002 the Welsh Assembly Government (WAG) published a consultation paper, *Ombudsman’s Services in Wales: Time for Change*, on a proposal to bring together the separate Offices of Welsh Administration Ombudsman, Health Service Commission Wales and the Commission for Local Administration in Wales to create a unified Ombudsman’s jurisdiction for Wales, led by a single individual.⁹

The WAG received 45 responses to its consultation which were unanimous in agreeing to the principle of a single ombudsman’s office in Wales with powers to investigate public bodies. A majority favoured the suggested title of Public Services Ombudsman for Wales.

⁶ Ibid

⁷ Written Evidence from the Local Government, Health Service and Welsh Administration Ombudsman to Welsh Affairs Select Committee HC 234 2004-5

⁸ *Regulatory Reform Tenth Report* HC 900 Session 2003-4 at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdereg/900/90002.htm>

⁹ Welsh Assembly Government, *Ombudsman’s Services in Wales: Time for Change?*, Consultation Paper, November 2002, www.wales.gov.uk/keypubconsultation/content/ombudsman/ombudsman-e.pdf

Some respondents favoured the appointment of deputies, possibly with expertise with regard to health and local government. Others felt that if a new structure was to be created with the appointment of a single ombudsman, the appointment of one or more deputies would appear to contradict this ethos and potentially create a bureaucratic and impractical institution.

Most respondents favoured a fixed term appointment with an option for a second but views differed as to the length of a term of office from between five and ten years.

Most respondents agreed that existing funding arrangements should be retained and the overwhelming view, regardless of what, if any, new structures were put in place was that maintaining the independence of the new ombudsman's office should be paramount.

A further consultation paper, *A Public Services Ombudsman for Wales, Powers and Jurisdiction*, was published in October 2003 aimed at shaping a precise remit of the new office.¹⁰ The main points at issue were the:

- ◆ scope of the new Ombudsman's jurisdiction in terms of the bodies which may be subject to investigation, and the matters which may (and may not) be the subject of investigation;
- ◆ pursuing a complaint – for example, whether the Ombudsman should accept oral complaints;
- ◆ resolving complaints and redress and whether the new Ombudsman should have additional powers either to enforce his or her recommendations through the courts or impose sanctions on public bodies which fail to act in accordance with them.

In March 2004, the annual plenary debate in the National Assembly for Wales on bids for primary legislation included a proposal for a bill creating a Public Services Ombudsman for Wales. During the debate the First Minister, Rhodri Morgan, stated:

Our proposal for a Bill to create a unified ombudsman's office for Wales has received wide support, and was endorsed by the Assembly last year. It offers the prospect of a joined-up system of considering and redressing complaints, complementing the joined-up approach to the delivery of services, which is a key feature of our approach. The Bill would establish a new office to replace three existing ombudsman services, which cover local government, health services and a range of public sector agencies, including ourselves, currently covered by three separate ombudsman offices. The new office would assume all of those responsibilities and investigate complaints of maladministration, but would also have new powers to promote the resolution of disputes between the individuals and public bodies that they are complaining about, without the need to issue formal reports in each and every case.

¹⁰ Welsh Assembly Government, *A Public Services Ombudsman for Wales: Powers and Jurisdiction*, Consultation Paper, October 2003, <http://www.wales.gov.uk/keypubconsultation/content/ombudsman/cons-2003-e.pdf>

Access to the ombudsman service would become easier, because it would, in essence, be a Welsh one stop shop, but it would still be necessary for the complainant to have used the public body's own internal complaints machinery before expecting the ombudsman to investigate his or her grievance. The ombudsman would also be able to issue guidance to the bodies within its jurisdiction on the requirements of good administrative practice, and in that way, the ombudsman's investigation of complaints will provide a basis of learning and improving for our public agencies and contribute to the continuous improvement in public services, which we continue to strive for.¹¹

A *Public Services Ombudsman (Wales) Bill (HL)* was included in the 2004 Queen's Speech.

D. The Scottish experience

In Scotland, the former ombudsmen's offices of the Scottish Parliamentary and Health Service Ombudsman, the Local Government Ombudsman for Scotland and the Housing Association Ombudsman for Scotland were merged into one in 2002, creating the Scottish Public Services Ombudsman (SPSO). The Ombudsman is appointed by the Queen on the recommendation of the Scottish Parliament.

The Ombudsman is Professor Alice Brown. She has three part-time Deputies who support her in her work. Each deputy has experience in particular areas of public administration such as local government or health. However, each is able to consider complaints across the full range of the SPSO's jurisdiction, and is not confined to his or her particular area of expertise.

The *Scottish Public Services Ombudsman Act 2002* was introduced by the Scottish Executive and had cross party support. Key changes made by it included:

- ◆ removing the need for complaints to go through MSPs (the 'filter');
- ◆ greater accessibility to the Ombudsman including provision for a person to authorise a representative to complain on their behalf, and to allow oral complaints to be accepted in special circumstances;
- ◆ publication of all investigation reports;
- ◆ empowering the Ombudsman to publicise cases where an injustice has not been remedied; and
- ◆ appointment of the Ombudsman and deputies by the Queen on the nomination of the Parliament.

¹¹ Report of Proceedings 4 March 2004

Full details are given in Scottish Parliament Information Centre Research Paper 01/22.¹² Professor Brown gave written evidence to the Welsh Affairs Select Committee enquiry into the Bill in which she stated that there had been clear benefits from the establishment of a one stop shop in Scotland and welcomed the robust provisions on independence, the clarity of powers of investigation and jurisdiction and the highlighting of proactive powers such as issuing guidance to public authorities.

E. The Northern Ireland experience

The title of Northern Ireland Ombudsman is a popular name for two offices:

- The Assembly Ombudsman for Northern Ireland; and
- The Northern Ireland Commissioner for Complaints.

One person, Tom Frawley, currently holds both offices. The Office of Northern Ireland Ombudsman was originally established in 1969, but the current powers and responsibilities are laid down in the *Ombudsman (Northern Ireland) Order 1996* and the *Commissioner for Complaints (Northern Ireland) Order 1996*.¹³ On 1 December 1997 these were extended, by the *Commissioner for Complaints (Amendment) (Northern Ireland) Order 1997*, to include complaints about doctors, dentists, pharmacists and optometrists (ophthalmic opticians) providing family health services and by other health care professionals in Health and Personal Social Services. The Northern Ireland Ombudsman is appointed by the Queen as head of state, and reports to the Northern Ireland Assembly. The most recent annual report is for 2003-4.¹⁴

The Northern Ireland Ombudsman investigates complaints from people who claim to have suffered injustice because of maladministration by the bodies which are specified in the legislation.¹⁵ This includes all local councils, education and library boards, health and social services boards and trusts, as well as all government departments and their agencies. The Assembly Ombudsman for Northern Ireland has an Assembly Member filter in operation, so that complaints about Government departments must be referred by an Assembly Member.

The Commissioner for Complaints has enforcement powers in that he may apply to the Attorney General for powers to go to the High Court where a public authority has refused to put right an injustice.¹⁶ There are also powers of compensation to persons aggrieved.¹⁷ The use of these powers is extremely rare and are not available to the Northern Ireland Ombudsman.

¹² This is available at http://www.scottish.parliament.uk/business/research/pdf_res_papers/rp01-22.pdf

¹³ SI 1996/1297 and 1997/1298 respectively

¹⁴ Available at <http://www.ni-ombudsman.org.uk/annrep2003.pdf>

¹⁵ See website at <http://www.ni-ombudsman.org.uk/whatdo.htm>

¹⁶ Article 17 of SI no1297/1996

The Northern Ireland Ombudsman currently provides an investigatory service to the Committee on Standards and Privileges of the Northern Ireland Assembly in respect of cases of complaint against Members of the Assembly. This service is operated on a case by case basis and investigatory action is initiated by the Committee. Complaints about Members of the Assembly are directed to the Clerk of Standards in the Northern Ireland Assembly and not to the Northern Ireland Ombudsman.

A recent Parliamentary Question to the Secretary of State for Northern Ireland raised the issue of the right of Northern Irish MPs to make a complaint to the Ombudsman:

Mr. Beggs: To ask the Secretary of State for Northern Ireland if he will take steps to amend legislation to enable Northern Ireland Members of Parliament to submit complaints to the Northern Ireland Ombudsman. [183234]

Mr. Paul Murphy: The jurisdiction of the Northern Ireland Ombudsman relates to specified Northern Ireland bodies, which fall within the competence of the Northern Ireland Assembly. That is why the Ombudsman (NI) Order 1996 makes provision for complaints to be referred to the Ombudsman by Members of the Northern Ireland Assembly rather than Members of Parliament. There are no plans to amend the legislation in respect of referral of complaints to the Ombudsman. Meanwhile, the rights of the citizen to have effective access to the Ombudsman through any of the 108 Members of the Assembly remain in place.¹⁸

F. The UK parliamentary ombudsman

There are no immediate plans to combine the functions of the Parliamentary Ombudsman set out in the *Parliamentary Commissioner for Administration Act 1967* with those of the Health Services Ombudsman or the Local Government Ombudsman for England. There has been a succession of reports calling for legislative reform of the office. The select committee on the parliamentary ombudsman made major proposals in 1993, recommending that its chairman and the Leader of the Opposition have a statutory role in the appointment of the Ombudsman. It also proposed that the funds for the office should be voted directly by Parliament on estimates prepared for a Public Appointments Commission, clearly modelled on the Public Accounts Commission, that is a separate body to take responsibility for setting the budget of the office.¹⁹ The then Government agreed to amending legislation making the staff public servants and an equivalent to the Public Accounts Commission to supervise a budget voted directly by the House of Commons.²⁰ No legislative time has yet been made available.

¹⁷ Article 16 of SI no 1297/1996

¹⁸ HC Deb 12 July 2004 c757w

¹⁹ PCA Select Committee First Report HC 1993-94. See also R. Gregory, P. Giddings and V. Moore 'Auditing the Auditors: The select committee review of the powers, work and jurisdiction of the ombudsman 1993' *Public Law* Summer 1994

²⁰ Government reply to the First Report from the Select Committee on the Parliamentary Commissioner for Administration HC 619 session 1993-94

Lack of legislative time has also prevented clarification of the status of the Ombudsman and the removal of the MP filter. A private member's bill, the *Parliamentary Commissioner (Amendment) [HL] Bill* introduced by Lord Lester of Herne Hill, seeks to abolish the filter and has passed through all its Lords stages, but is not expected to make progress in the Commons this session.²¹ The continued existence of the filter means that the office is still handling only 3,000 cases a year, way below overseas equivalents such as Australia which deals with 20,000 cases annually. Therefore it can be argued that the office lacks evidence to make authoritative judgments.

The then parliamentary ombudsman, Sir Michael Buckley, and Sir Edward Osmotherly, then Chairman of the Local Government Commission for England, together lobbied the Government for a comprehensive review of the ombudsman system in 1998-9. In response, a review by the Cabinet Office was published in April 2000. It recommended a new Commission to cover the remits of the parliamentary ombudsman, the health service commissioner and the local government ombudsman. The Commission would be chaired by one of the ombudsmen for the purposes of representing it externally and for laying an annual report before Parliament. It noted that the concept of the ombudsman as a 'tool of Parliament' had had the effect of treating the customer as the MP and not the complainant, thus excluding the latter from the investigative and reporting process and recommended the end of the MP filter.²²

When the report was considered by the select committee, it emerged that there was support from MPs for the abolition of the MP filter and in July 2001 the Government announced that there was broad agreement for the review's main recommendations. But no legislative time has been made available. The Public Administration Select Committee has drawn attention to the uncertainties which result for the office, as well as for Health Service Commissioner and the Local Government Ombudsmen.²³ In a recent evidence session with the current Ombudsman, Ann Abraham, she expressed her frustration that there was no immediate sign of legislation to remove the MP filter.²⁴ Further background on reform proposals for the parliamentary ombudsman is given in Standard Note no 1887 *Reform of the Parliamentary Ombudsman's Role* and in the observations by Sir Edward Osmotherly in *The Advisor*.²⁵

²¹ Bill 5 of 2004-5. Third Reading in the Lords was on 3 March 2005

²² 'Review of the Public Sector Ombudsmen in England' by Philip Collcutt and Mary Hourihan ('The Collcutt report') Cabinet Office April 2000

²³ *Ombudsman issues* HC 448 Session 2002-03

²⁴ Uncorrected transcript of oral evidence to Public Administration Select Committee 2 December 2004 Ann Abraham, Q3 at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmpublicadm/uc50-i/uc5002.htm>

²⁵ at <http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-01887.pdf> and see Osmotherly, E; 'Ombudsmen', *The Advisor* No.100, November/December 2003. pp. 6-10, http://www.bioa.org.uk/BIOA-New/Advisor_Article_Ombudsmen_Osmotherly.pdf

II The passage of the bill

A. Committee hearings at Westminster and in the Assembly

Under Standing Order 137A, a House of Commons committee may meet formally with the committee of a devolved administration. This followed recommendations for this power from the Procedure Committee.²⁶ The first such joint committee hearings were held to scrutinise the draft *Transport (Wales)* bill in 2004.²⁷ The Welsh Affairs Select Committee and the National Assembly for Wales Local Government and Public Services Committee held joint hearings into the *Public Services Ombudsman Bill* in January 2005.

The separate reports were published in February 2005. The summary of the report from the Welsh Affairs Committee was as follows:

We welcome the Public Services Ombudsman (Wales) Bill, which has the potential to provide a modern, flexible and accessible service for members of the public. This report makes a number of minor recommendations that would improve the Bill.

We are not convinced that the reduction in the length of tenure of the Ombudsman from ten to seven years, as introduced in the House of Lords, improves the Bill. We recommend that a five year appointment, with the possibility of reappointment for a further five years, represents a better balance between the need for stability in post and the need to reinvigorate the office on a periodic basis.

The Bill sets out all those authorities that may be subject to investigation by the Ombudsman. Individual Community Health Councils are included in that list but the Board of Community Health Councils is not. We recommend that the Board of Community Health Councils be included in the list of “listed authorities”.

The Bill allows for the Ombudsman to conduct inquiries into maladministration as a result of an authority’s failure to comply with its obligations to the Welsh language. This power overlaps with the role of the Welsh Language Board. We ask the Government to provide further information on how the Ombudsman and the Welsh Language Board will manage that overlap.

The Bill, as currently drafted removes the power of the Ombudsman in England to transfer cases to the Welsh Ombudsman. While there are many provisions in the Bill to facilitate joint working between Ombudsmen, we believe that the retention of this power is necessary. We recommend that the Government, retain in the Bill, the power of the Ombudsman in England to transfer cases to the Welsh Ombudsman.²⁸

²⁶ HC 582 2003-4

²⁷ HC 759 2003-4

²⁸ HC 234 of 2004-5

A separate report was produced by the Assembly's Local Government and Public Services Committee.²⁹ Its recommendations were in line with those of the Welsh Affairs Committee, and there were no serious divisions of opinion between the committees.

B. The Bill's stages in the Lords

The Bill was introduced into the Lords on 24 November 2004³⁰ and had its second reading on 16 December 2004. It was debated in Grand Committee on 25 January 2005, indicating that the bill was expected to be non-controversial, since there are no divisions using this procedure.³¹ Report stage was taken on 10 February, the day after the publication of the report of the Bill from the Commons Welsh Affairs Select Committee. The third reading was formal only on 2 March 2005. It was subject to some minor amendments, but in general the Bill's provisions found wide support and there was only one division on an Opposition amendment during its passage. This amendment related to the enforceability of Ombudsman decisions and was successful.³² It is discussed in more detail below in Part III.

C. The Bill and the 'Richard Test'

Background on the provisions which apply to primary legislation for Wales is given in Part IV of this paper. In the second reading debate in the House of Lords, Lord Rowlands, who had been a member of the Richard Commission, stated:

Therefore, I find myself applying what I call the Richard test: does the Bill before this House, or Parliament, containing Wales-only clauses, or a Welsh-only Bill, like this one, pass the Richard test? Is it framed in such a way as to maximise the legislative competence of the National Assembly? I find that this Bill passes the test. When looking at some of the provisions in the Bill, I see an attempt to allow the Assembly subsequent power to amend and to alter, in the light of experience, the provisions in the Bill.

Clause 10(2), for example, will allow the Assembly to add, to alter, or to remove matters that fall within the ombudsman's jurisdiction. It will enable the Assembly to alter Schedule 2 of the Bill, which makes provision for excluded matters. The Assembly will have that important area of legislative competence as a result of the passing of the Bill.

I find pleasure in Clause 27(2), which gives the Assembly powers by order to amend Schedule 3 by adding or removing the listed authorities. However,

²⁹ Available at [http://www.wales.gov.uk/servlet/DocumentsLaid?area_code=37B1A026000BF4FD0000436C00000000&document_code=N0000000000000000000000000000000028661&month_year=2|2005&p_arch=post&module=dynamicpages](http://www.wales.gov.uk/servlet/DocumentsLaid?area_code=37B1A026000BF4FD0000436C0000000&document_code=N0000000000000000000000000000000028661&month_year=2|2005&p_arch=post&module=dynamicpages)

³⁰ HL Bill 3 of 2004-5

³¹ *Lords Companion to Standing Orders and Guide to Proceedings of the Lords*, para 6.90

³² HL Deb 10 February c926. The amendment was passed by 91 votes to 86 at report stage

absolutely correctly, one restriction is placed on that competence in Clause 28(1), which provides that the Assembly cannot remove itself from the jurisdiction of the ombudsman. I am sure that we would all agree that that should not be a possibility.

There was some discussion at Lords committee stage about the power under Clause 43 which allows the Assembly to repeal or revoke previous enactments or any future enactments passed in the current session. The power was considered by the Delegated Powers and Regulatory Reform select committee, which raised no objection to the clause.³³ Lord Evans of Temple Guiting said, for the Government:

As we all know, this is the Henry VIII power. As I said, it is not unusual to have such a provision in the Bill. While it is intended that the Bill itself should deal with most minor and consequential amendments to other Acts, there is no guarantee that it will have picked up all such amendments. A power is therefore given by order to make such amendments or repeals after the Bill is enacted. The power will not, however, extend to an enactment in an Act of the UK Parliament which is passed in a Session after that in which this Bill is passed. So the power is limited in that respect.³⁴

III The Bill's current provisions

The *Explanatory Notes* give a clause by clause explanation of the provisions of the Bill. This Part of the Paper offers a guide to key aspects.

A. Appointment and term of office of the Ombudsman

The Bill, as originally introduced, provided for the Ombudsman to be appointed by the Crown on the recommendation of the Secretary of State, following the precedent of the Auditor General for Wales, set out in the *Public Audit (Wales) Act 2004*.³⁵ This was in contrast to arrangements in Scotland where the Auditor General was appointed on the recommendation of the Scottish Parliament. In relation to the Auditor General for Wales, non statutory arrangements were made to allow input from the Assembly. Agreement was reached between the Presiding Officer of the Assembly and the Secretary of State that the Assembly would conduct the selection process on behalf of the Crown. The selection panel would be independent of the Welsh Assembly Government and would be supported by the Assembly Parliamentary Service. The panel was chaired by the Chair of the Assembly Audit Committee, with an independent assessor from the Office of the Commissioner for Public Appointments to observe the processes. The Assembly passed a unanimous motion of recommendation of the successful candidate, Jeremy Colman, on 3

³³ HL 19 2004-5

³⁴ HL Deb 25 January 2005 cGC420

³⁵ See Research Paper 04/45 *The Public Audit (Wales) Bill [HL]* for background

November 2004 and the Secretary of State made the formal recommendation to Her Majesty.

Nevertheless, there was pressure to make consultation of the Assembly a statutory right in the *Public Services Ombudsman (Wales) Bill* [HL] during Lords committee stage,³⁶ and a Government amendment was passed to Schedule 1 at report stage in the Lords noting that appointment would be made only “after prior consultation with the Assembly”.³⁷ Presumably this relates to the Assembly as a debating and revising chamber rather than the Welsh Assembly Government. There is at present not a clear statutory distinction between these two constituent parts of the Assembly. For further details see Part IV of this Research Paper.

There was also some debate about the length of the term of office. The Bill initially gave the Ombudsman a ten year term with no possibility of re-appointment. There are different models for the appointments of such constitutional watchdogs and no overall template for use has so far emerged in the UK. The Children’s Commissioner for Wales was appointed on a seven year term. Further background is given in Library Research Paper 03/87 *Officers of Parliament: A Comparative Perspective*.

Facing concern from Conservatives and others that ten years was too long a term, at Committee stage in the Lords the Government indicated that it would table an amendment to reduce the term to seven years, which would be non-renewable.³⁸ This was achieved at report stage.³⁹ However, opposition remains to seven years: Lord Roberts of Conwy, for the Conservatives, preferred a five year term which could be renewable.⁴⁰ The Welsh Affairs Committee noted that the witnesses to its inquiry had supported a ten year term:

23. There appeared to be a general level of agreement in the House of Lords that a seven year period of appointment was appropriate. However, that was not the views and experience of our witnesses, who considered a ten year appointment as appropriate. We recommend that the Government reconsider its decision to reduce the length of tenure of the Ombudsman in the light of our evidence. Should the Government believe that a balance needed to be made between security of tenure and the opportunity to re-invigorate the office, we recommend it reconsider appointments on a five year basis with the possibility of reappointment for a further five years.⁴¹

The Queen may relieve the Ombudsman of office if he or she requests it or if the Secretary of State recommends it for reasons of a medical nature or misbehaviour. The

³⁶ HL Deb 25 January 2005 cGC365-68

³⁷ HL Deb 10 February 2005 c906

³⁸ HL Deb 25 January 2005 cGC371

³⁹ HL Deb 10 February 2005 c907-909

⁴⁰ HL Deb 10 February 2005 c908

⁴¹ HC 234 2004-5

Secretary of State may only make this recommendation after consulting the National Assembly. These powers are set out in Schedule 1 of the Bill. Amendments were passed on report to clarify that Members of the Assembly are not eligible for the office of Ombudsman.⁴²

Currently Assembly Standing Order 6.6. (xv) requires that 'time shall be made available in each twelve month period' for a debate on the annual report of the Welsh Administration Ombudsman. Schedule One provides for the annual report to be laid before the Assembly. The Government successfully resisted amendments in the Lords to extend this requirement by also laying the report before both Houses at Westminster.⁴³

B. Funding and staff

Ombudsman staff will not be civil servants and this is provided for in para 11 of Schedule 1. Currently, the staff belonging to the Welsh Administration Ombudsman are civil servants, and this provision was welcomed by the Welsh Affairs Committee as reinforcing the independence of the office. The budget is to be laid before the Assembly Cabinet for approval, meaning that it is the executive which supervises expenditure. In Scotland the budget of the Public Services Ombudsman is approved by the Scottish Parliamentary Corporate Body (the equivalent to House of Commons Commission) and so comes from the parliamentary budget. The Ombudsman will be audited by the Auditor General for Wales.

During the second reading in the Lords Lord Roberts of Conwy, for the Opposition, stated:

One would have thought that there would be immediate financial savings from such an amalgamation of functions, but paragraphs 113 and 114 of the Explanatory Notes suggest otherwise. They refer to initial set-up costs and funding being provided by the Assembly and,

"a modest increase in resources",

being required to deal with the manpower effects of the Bill's implementation. I am sure that noble Lords will wish to know in due course what those extra initial costs amount to and what savings are anticipated later.

Lord Evans stated:

The Assembly must fund the office, but, if it is minded not to agree an estimate of expenses, it must consult the Secretary of State and lay the estimate, as amended,

⁴² HL Deb 10 February 2005 c911

⁴³ HL Deb 25 January 2005 cGC380-381

before the Assembly. That important control prevents the Assembly limiting investigations through underfunding.

C. Jurisdiction of the Ombudsman

The current powers and responsibilities of the Welsh Administration Ombudsman are set out in the *Government of Wales Act 1998*. The Ombudsman investigates complaints from members of the public that they have suffered injustice because of maladministration by Welsh public bodies that come within his or her jurisdiction. ‘Maladministration’ means poor administration or the wrong application of rules. Some examples include:

- avoidable delay
- faulty procedures or failing to follow correct procedures
- not telling you about any rights of appeal you have
- unfairness, bias or prejudice giving advice which is misleading or inadequate
- refusing to answer reasonable questions
- discourtesy, and failure to apologise properly for errors
- mistakes in handling your claims
- not offering an adequate remedy where one is due.

The term maladministration was first used in debates on the *Parliamentary Commissioner Act 1967* when the concept of ombudsmen was first introduced into the United Kingdom, but was not defined in that statute. However, the Welsh model will be broader since the Ombudsman will be entitled to investigate matters other than maladministration, as set out in the *Explanatory Notes*:

Clause 7: Matters which may be investigated

29. Clause 7(1) provides that the Ombudsman is, subject to clauses 8 to 11, entitled to investigate:

- a) 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'

These terms are described more fully in the *Explanatory Notes*. Schedule 3 sets out the ‘listed authorities’ which are subject to the jurisdiction of the Ombudsman. These include:

- The Assembly (but not legislative, semi judicial or judicial aspects)
- Local government, fire and police
- Environment e.g. National Park authority, Environment Agency
- Health and social care, e.g. health boards and NHS trusts
- Housing e.g. social landlords in Wales
- Education and training e.g. school governing bodies in relation to school admissions, Higher Education Funding Council for Wales
- Arts and Leisure e.g. Arts Council, Sports Councils
- Miscellaneous e.g. Welsh Development Agency and Welsh Language Board

There is provision to add to the list in Clause 28 and Schedule 3 subject to certain restrictions in Clauses 29 and 30. An amendment at Lords committee stage was made by the Government in response to requests from the current Ombudsman, Adam Peat. He has asked for adequate powers to consider the consequences for individuals of decisions made as a result of the exercise of professional judgment across a wider arena than matters of clinical judgement, narrowly conceived.⁴⁴ The Government's amendments were passed at report stage in the Lords to give the Ombudsman a right of consultation when the Assembly changes an entry in Schedule 2.⁴⁵

D. Procedures for investigating complaints

The Bill takes into account developments in the methods of ombudsmen which have moved away from the full investigation mode towards dispute resolution. Clause 3 gives the Ombudsman a wide power to take steps to resolve complaints without proceeding to a formal investigation. The UK parliamentary ombudsman has asked for this type of more general power to be incorporated into the 1967 Act, which governs his operations.

Clause 5 of the Bill deals with the requirements of making a complaint to the ombudsman. It requires that complaints be submitted in writing although the Ombudsman is empowered to accept a complaint other than in written form if he or she considers it reasonable to do so.

Clause 7 (1) states that the Ombudsman is entitled to investigate:

- ◆ Alleged maladministration by a listed authority in connection with a 'relevant action';
- ◆ an alleged failure in a 'relevant service' provided by a listed authority; or
- ◆ an alleged failure by a listed authority to provide a 'relevant service'.

Definitions of 'relevant action' and 'relevant service' are covered by Clause 7 (3) and (4) of the Bill. The Explanatory Notes state that:

The definitions are designed to ensure that it is only the functions of listed authorities in, essentially, their public capacity that can be investigated.⁴⁶

This means that the Ombudsman is entitled only to investigate alleged maladministration in the discharge of a listed authority, falling under Clause 7 (3) (e), in respect of its administrative functions. In the case of the Assembly, itself a listed authority, this means that the Ombudsman would not be entitled to investigate its legislative, judicial or quasi-judicial functions.

⁴⁴ HL Deb 25 January 2005 cGC398

⁴⁵ HL Deb 10 February 2005 c916

⁴⁶ *Public Services Ombudsman (Wales) Bill (HL)*, Explanatory Notes, para 30

E. Areas excluded from investigation

As the *Explanatory Notes* state, 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 (clause 9(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 Ombudsman may choose to investigate the complaint (clause 9(2)). In normal circumstances, the aggrieved person should have brought the matter to the attention of the relevant authority and given that body an opportunity to investigate and respond.

Schedule 2 sets out specific areas of exclusion, such as personnel matters for civil servants or crime investigations by the police. There are similar but not identical provisions in Schedule 3 of the *Parliamentary Commissioner Act 1967*.

F. Enforcement powers

This has proved to be the one of the most controversial issues of this Bill. In general, ombudsman schemes for the public sector do not have enforcement powers but seek to have their recommendations accepted through persuasion and publicity. An Opposition amendment at Lords report stage has however given some enforcement powers to the Ombudsman (see below).

Clauses 17 to 24 deals with the requirements of listed authorities to publicise reports and action to be taken following the receipt of a report. Clause 17(1) to (4) require listed authorities that receive a copy of a report to make specified arrangements for publicising them. The listed authority is required, within specified time-scales, to make copies of the report available at one or more of its offices and on its website. Members of the public have a right to inspect, make copies, require the listed authority to supply copies of the report and to view the report free of charge on the website. It is an offence for any person wilfully to obstruct a member of the public in the exercise of these rights.

Clause 19 provides that if, following an investigation where the Ombudsman reports that the aggrieved person has sustained injustice or hardship as a consequence of the action investigated, the listed authority concerned must consider the Ombudsman's report and notify him or her of the action that it has taken or proposes to take in response and also indicate a timescale for action.

In certain circumstances the Ombudsman may decide to report under an alternative procedure under clause 21 but only if he or she is satisfied that the public interest does not require him or her to report under the full reporting procedure set out in clauses 16 to 19.

The Ombudsman may make whatever recommendations he or she deems appropriate in a special report with respect to the action to be taken to remedy the injustice or hardship

suffered by the person aggrieved and to prevent similar injustice or hardship being caused again.

The Ombudsman has power to issue a special report if the listed authority refuses to implement his recommendation. If the report relates to a complaint against the Assembly, the First Minister must under clause 24 give the Assembly notice of his intention to table a motion asking the Assembly to approve the Ombudsman's recommendations as contained in the special report. This function may be delegated to another Minister under the *Government of Wales Act 1998* and clause 23(3) requires the Assembly to amend its standing orders to provide for a motion to be moved as soon as reasonably practical.

Clause 27 gives a Minister of the Crown a veto power that disclosure of any document or information or class of document would 'in the opinion of the Minister' be prejudicial to the safety of the State or otherwise contrary to the public interest'. This reproduces the original wording of s11(3) of the *Parliamentary Commissioner Act 1967*. This power has only been used once recently: the UK Government issued a certificate blocking disclosure of information about ministerial conflicts of interest on the grounds that it would be contrary to the public interest under s11(3). The *Guardian* subsequently applied for judicial review, and the Government abandoned the attempt to use this statutory power.⁴⁷ Lord Evans defended the power at committee stage as necessary to protect confidential information and noted that judicial review was available as a remedy in cases of abuse of power.⁴⁸

There has been interest in extending the Ombudsman's powers to allow him to apply to the court for enforcement powers. This issue was raised in the consultation paper of October 2003.⁴⁹ The issue was not covered in any detail in the Welsh Affairs Committee report, and in her evidence the UK parliamentary commissioner, Ann Abraham, warned of the dangers of introducing a more legalistic approach to investigations if decisions were made binding.⁵⁰ When questioned, Adam Peat noted that the mechanics in practice had been satisfactory, stating: "providing a power of compulsion would frankly be overkill and might jeopardise what is currently a generally very cooperative relationship with local government in particular".⁵¹

In the second reading debate in the Lords, Lord Prys Davies raised the issue of enforcement and compensation:

I also found it surprising that the opportunity has not been taken to give power to the ombudsman to order the payment of damages by an offending authority where the aggrieved citizen has suffered an injustice or hardship as a

⁴⁷ "Open and shut case: Freedom of Information" *Guardian* 19 March 2004

⁴⁸ HL Deb 25 January 2005 cGC414

⁴⁹ *A Public Services Ombudsman for Wales- Powers and Jurisdiction* Welsh Assembly Government

⁵⁰ HC 234 2004-5 Q164

⁵¹ HC 234 2004-5 Q112

consequence of maladministration. That point was made very powerfully by the noble Lord, Lord Carlile of Berriew, at the meeting in the Gladstone Room.

I understand from the Welsh Assembly officials that the public authorities that were consulted on this proposal were totally opposed to it. Well, they would be, but I venture to suggest that on this particular issue the Assembly Government were possibly too readily impressed by the response of the public authorities.

Lord Evans responded:

My noble friend also asked: why are there no enforcement powers for the ombudsman's recommendations? That follows from existing arrangements. The only ombudsman's recommendations that have been legally enforceable are in Northern Ireland, where different considerations apply. No doubt we will return to that matter, but your Lordships will be aware that legal enforcement of ombudsman's recommendations would be an extremely radical move.

At Lords committee stage Conservative, Liberal Democrat and Labour peers supported the principle of an amendment by Lord Roberts of Conwy to apply to the High Court for a certificate where an authority has not complied with a recommendation of the ombudsman.⁵² At report stage the Opposition moved a similar amendment which was passed by 91 votes to 86.⁵³ Lord Roberts of Conwy explained the reasons for his amendment as follows:

My Lords, we had some discussion of the proposed new clause in Committee. Its purpose is clearly to give the ombudsman the support of the judiciary, in the event that a listed body refuses to carry out his recommendations. He is safeguarded in relation to the Assembly, in that he can prepare a special report if the Assembly has failed to satisfy him. His recommendations in that report must be the subject of a Motion, which the Assembly itself must approve or disapprove. With the Assembly First Minister obliged to submit the Motion, the ombudsman's recommendations are very likely to be upheld.

But that procedure applies only where the Assembly itself as a corporate body is the listed body complained against. A whole string of other listed bodies appears in Schedule 3, and the question arises of what happens if the ombudsman is dissatisfied with any of them. It seems to me that all he can do is produce a special report naming and shaming the body concerned.

I do not think that that is a satisfactory conclusion or remedy where an individual has suffered an injustice or hardship and the requirements of Clause 21 have not been met. The new clause provides that in circumstances where a listed authority has wilfully disregarded the ombudsman's report without lawful excuse, he may issue a certificate to that effect to the High Court, which would consider the appropriate action to take.

In Committee, the Minister told us:

⁵² HL Deb 25 January 2005 GC406-410

⁵³ HL Deb 10 February 2005 c919

"The Government do not believe that it is either necessary or desirable to give powers to the ombudsman to enforce his recommendations through any of the methods envisaged in these amendments. The Government are satisfied that the naming and shaming of listed authorities, including the Assembly, is effective in ensuring that the ombudsman's recommendations are acted upon. This is reinforced by the excellent record of authorities in Wales when it comes to complying with the existing Welsh ombudsman's recommendations. However, I see"—

said the Minister—

"that the noble Lord, Lord Livsey, is shaking his head".—[*Official Report*, 25/1/05; col. GC 408.]

It is true that over the past five years Welsh authorities have accepted the ombudsman's findings and acted upon them. But they have not always been so compliant and there is no guarantee that they will be in future. The dissenting head shake by the noble Lord, Lord Livsey of Talgarth, suggests that their record has not been as eximious as the Minister may have been led to believe. I checked on the matter this week with the local government ombudsman for England and his office gave me a string of authorities which have declined to provide the remedy recommended by the ombudsman. Some reports dating back to 1999 have still not been acted upon.

Nevertheless, I am prepared to accept that a reference to the High Court would be the last resort and, it is to be hoped, one that would never prove necessary in Wales. At the same time, I think that we would be foolish not to provide against such an eventuality because one recalcitrant authority intent on proving that the ombudsman had no teeth could well undermine the entire system.

There is also the other side of this coin. A listed authority may feel very strongly, and possibly rightly, that the ombudsman has come to a wrong conclusion. It should have the right of appeal—the right to seek a totally independent view. I realise that the new clause is probably imperfect, given that it should spell out the High Court's jurisdiction in this area, but I am sure that the government draftsman could soon remedy that defect. I beg to move.⁵⁴

The clause, as amended, now reads:

20 Non action following receipt of a report

(1) If the Ombudsman is satisfied that the condition in subsection (2) is met in relation to a listed authority, he may issue a certificate to that effect to the High Court.

(2) The condition is that the listed authority has wilfully disregarded his report without lawful excuse.

Clause 34 confers a power on listed authorities to pay compensation to a person aggrieved by maladministration. The *Explanatory Notes* explain that most authorities may already have this power under s92 of the *Local Government Act 2000*, but the new clause will also enable compensation to be paid where the Ombudsman has assisted in negotiating an

⁵⁴ HL Deb 10 February 2005 c918-919

amicable resolution of the complaint. No upper limit is set in the clause for the amount of compensation to be paid. However, compensation under ombudsman schemes is generally small compared with punitive damages in the courts.

G. Guidance and publicity

Clause 30 allows the Ombudsman to issue guidance to listed authorities about good administrative practices, enabling benchmarks to be set. Authorities are required to have regard to the guidance. Clause 33 imposes a duty on listed authorities to publicise the right of complaint to the Ombudsman.

H. Conduct of local authority employees and members

Clause 35 and Schedule 4 of the Bill amend Part 3 of the *Local Government Act 2000* to transfer responsibility for investigating alleged breaches of codes of conduct for local government members and employers to the Ombudsman from the Local Government Ombudsman for Wales. As the *Explanatory Notes* makes clear, the only substantive change is that monitoring officers of all relevant authorities will be required to make copies of the register of members' interests available to the Ombudsman.

The amalgamation of the various ombudsman offices was welcomed by the Welsh Local Government Association (WLGA) in its response to the "*Time for a change*" consultation paper.⁵⁵ The move was also welcomed by all parties during Second Reading in the House of Lords on 16 December 2004; and in its evidence to the Commons and Assembly committees WLGA reiterated its support.

I. Consultation and cooperation with other ombudsmen

Clause 25(1) and (2) requires the Ombudsman to consult other specified ombudsmen whenever it is considered that a complaint could be subject to investigation by another ombudsman. The ombudsmen are listed:

- ◆ the Parliamentary Commissioner for Administration;
- ◆ Health Service Commissioner for England;
- ◆ a Local Commissioner;
- ◆ the Scottish Public Services Ombudsman;
- ◆ a housing ombudsman appointed in accordance with a scheme approved under section 51 of the Housing Act 1996 (c.52);
- ◆ the Children's Commissioner for Wales.

The National Assembly for Wales is empowered to alter this list. The Welsh Affairs Select Committee recommended the retention of the power for the UK Ombudsman to

⁵⁵ Welsh Local Government Association Co-ordinating Committee, 31st January 2003, *Ombudsmen's services in Wales : "time for change?" consultation*, available at <http://www.wlga.gov.uk/index3e.htm>

transfer cases to the Welsh Ombudsman. A full briefing of how joint working would operate is contained in the evidence from the Wales Office to the Delegated Powers and Regulatory Reform Committee.⁵⁶

J. Deputy Ombudsmen

The *Scottish Public Services Ombudsman Act 2002* (1[2]) makes specific references to ‘Deputy Ombudsmen’ who may be appointed by the Monarch ‘on nomination of the Parliament’. The Welsh Bill makes no specific reference to deputies although clause 1(13) ‘provides that the Ombudsman may authorise any person to discharge his/her functions on his/her behalf’. There was some discussion in the Welsh Affairs Committee report about the potential need for deputies, but it concluded, as did the Assembly Local Government and Public Services Committee, that there was sufficient flexibility in the Bill for the Ombudsman to appoint the staff he or she considered necessary.

K. The Welsh Language

Clause 8(1) of the Bill provides that the Ombudsman cannot investigate a complaint relating to the functions of listed authority otherwise than in relation to Wales although Clause 8(2) makes it clear that the Assembly may exercise functions otherwise than in relation to Wales, for example in relation to the cross border functions specified in the *Government of Wales Act 1998*.

However, Clause 8(3) establishes 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 clause 8(1). There was discussion in the reports from the Welsh Affairs Committee and the Assembly Local Government and Public Services Committee about the need for further clarification from the Government on the relationship between the Welsh Language Board and the Ombudsman.

L. Transfers, transitional arrangements commencement and extent

Schedule 5 makes provision for the transfer of staff and property etc to the new Ombudsman. Clause 43 gives the Assembly power to make regulations modifying the application of the Bill to make some transitional arrangements for the completion of certain types of enquiries.

Commencement for these clauses will be on royal assent, but generally the Bill’s provisions will be brought into effect by order. Any set up and compliance costs will be borne by Assembly funding, and manpower implications are expected to be marginal

⁵⁶ HL 19 2004-5

according to the *Explanatory Notes*. The Bill primarily applies to Wales, but extends formally to England and Wales.

IV Primary legislation and current powers of the National Assembly for Wales

The *Government of Wales Act 1998* granted devolution in Wales in the form of executive devolution; the prerogative powers of the Secretary of State for Wales were transferred to ministers of the National Assembly. Westminster retains the exclusive powers to pass primary legislation for Wales and the Assembly derives its powers either from functions transferred to it under *Transfer of Functions Orders* made under Section 22 of the 1998 Act or from powers conferred on the Assembly by individual Acts. The Assembly may make secondary legislation only where it is given specific power to do so in an Act; these powers are given to the Assembly as a whole.

A. What has been devolved

The subject areas in which functions have been devolved to the National Assembly for Wales are listed in Schedule 2 of the *Government of Wales Act 1998*. These areas include agriculture, the environment, health and health services, housing, local government, culture, tourism, transport and planning. Areas that remain reserved to Westminster include constitutional matters, foreign policy, defence, macro-economic policy and taxation, overseas trade, employment legislation; social security and broadcasting. For further details see Library Research Paper 03/84, *An introduction to devolution in the UK*.⁵⁷

Section 22(1) of the *Government of Wales Act 1998* provided for the transfer of any functions exercisable by a UK minister in relation to Wales, or for the function to be exercisable concurrently with the Assembly, or with the agreement of the Assembly. The transfer of functions orders are made under section 22. The first of these, the *National Assembly for Wales (Transfer of Functions) Order 1999*,⁵⁸ lists in Schedule 1 a series of enactments which confer functions on the Assembly. In many of the Acts only certain sections are transferred. Schedule 2 of the Order lists enactments where UK ministers are constrained in the exercise of their functions by the requirement to reach agreement with the Assembly or to consult with it. There has been criticism of the devolution settlement because of the lack of clarity over which functions have been transferred to the Assembly. The list in the *Transfer of Functions Order* is not by subject but regnal year for each Act. The Welsh Affairs Committee examined the legislative arrangements for Wales in its fourth report of 2002-03, *The primary legislative process as it affects Wales*.⁵⁹ The Committee commented that ‘it is evident that the *Government of Wales Act 1998* and the

⁵⁷ Available at <http://www.parliament.uk/commons/lib/research/rp2003/rp03-084.pdf>

⁵⁸ SI 1999 no 672

⁵⁹ HC 79, 2002-03

subsequent *Transfer of Functions Orders* no longer give a clear picture of the breadth and depth of the powers of the National Assembly.⁶⁰

B. How further powers can be conferred on the Assembly

The different ways of conferring further powers on the National Assembly for Wales are as follows:

- Powers can be directly conferred by new Acts;
- Amendments can be made to Acts listed in the *Transfer of Functions Orders*;
- Amendments can be made to the original *Transfer of Functions Orders* ie by making further *Transfer of Functions Orders*;
- By amending the *Government of Wales Act 1998*

The Assembly Government can formally submit its own proposals for new primary legislation in devolved areas. These have to be approved by the Assembly in plenary session. These proposals are then sent to the Secretary of State for Wales who decides a decision as to which he will support in Cabinet negotiations on the legislative programme.

The primary legislative options for Bills dealing with devolved policy issues are either a Wales-only Bill or a combined Bill ie with Wales only or England and Wales clauses. Guidance was drawn up for UK Government departments on consulting the Assembly government on new legislation affecting the Assembly's responsibilities. Devolution Guidance Note no 9, *Post-devolution primary legislation affecting Wales*, states that the Welsh Assembly Government should always be consulted on Bills which:

- Confer new functions on the Assembly;
- Alter the Assembly's existing functions (including legislation on, for instance, freedom of information, which would affect the overall discharge of its duties and those of public bodies for which it is responsible); or
- Otherwise affect areas which are the responsibility of the Assembly, including where it will be responsible for implementation in Wales, though policy control remains with the UK Government.⁶¹

Section 31 of the *Government of Wales Act 1998* places a duty on the Secretary of State for Wales to consult the Assembly about the legislative programme at the beginning of each Session and this includes a duty of personal attendance by the Secretary of State at a plenary session of the Assembly.

⁶⁰ Ibid, para 9

⁶¹ *Post-devolution primary legislation affecting Wales: Devolution Guidance Note 9*. Available at <http://www.dca.gov.uk/constitution/devolution/guidance/dgn09.pdf>

C. The Richard Commission and proposals for the Assembly to have primary legislative powers

The Labour/Liberal Democrat coalition in the first term of the National Assembly for Wales agreed that there should be an independent commission to examine the powers and electoral arrangements of the Assembly. The *Partnership Agreement* of October 2000 made the following commitment:

We will, before the end of the Assembly's first term, establish an independent Commission into the powers and electoral arrangements of the National Assembly in order to ensure that it is able to operate in the best interests of the people of Wales. This review should investigate *inter alia* the extension of proportionality in the composition of the Assembly, and of the relevant competencies devolved. The review shall publish its recommendations in the first year of the second term of the National Assembly in order to enable adequate reflection on the Assembly's first complete term. Whilst recognising that this Partnership Agreement will have expired on completion of this review, we will ensure that arrangements are put in place in advance to ensure that the Assembly *as a whole* has the opportunity to press the UK Government to bring forward any appropriate primary legislation, necessary to ensure that its recommendations can be fully implemented.⁶²

On 18 April 2002, the First Minister, Rhodri Morgan, announced that the Commission would be chaired by the Rt Hon Lord Richard of Ammanford PC QC. The Richard Commission published its report on 31 March 2004 and said that the status quo was not an option; there had been considerable changes to the Assembly's powers since 1999 but this had happened on an ad hoc basis instead of being based on an agreed policy on an extension of powers.

The Commission proposed a new legislative framework which would allow legislation extending to England and Wales to continue at Westminster; Wales-only legislation could originate in the Assembly which would amount to primary law making powers. The Commission noted how in practice there had continued to be legislation for Scotland at Westminster through the Sewel Convention. The report considered and rejected the Northern Ireland model of three categories of legislative powers: excepted, transferred and reserved, in favour of a more Scottish based model, whereby all matters are devolved to the Assembly unless specifically reserved to Westminster.

The Richard Commission's main proposals were as follows:

⁶² *Putting Wales First: A Partnership Agreement for the People of Wales*, 6 October 2000
<http://www.wales.gov.uk/organicabinet/content/putting.html#9.%20Better%20Government:%20Putting%20Wales%20First>

- Wales Bill needed to amend Government of Wales Act and confer primary law-making powers on the Assembly;
- Bill specifies reserved matters (Westminster legislates); everything is devolved to the Assembly unless specifically reserved;
- Corporate body structure replaced with executive and legislature;
- Assembly can construct its own rules of procedure and Standing Orders, adopted by a majority of two thirds;
- Executive powers in a particular field can be devolved even if the Assembly has no corresponding primary legislative powers;
- Cardiff legislative programme might contain around four to six government Bills a year;
- Change in Membership and electoral system;
- Option of tax-varying power.

The Government has indicated that there will be further consultation on the proposals to give the Assembly primary legislative powers following the publication of a White Paper after the next general election. For further information see Library Standard Note no 3018 *Report of the Commission on the Powers and Electoral Arrangements for the National Assembly for Wales*.⁶³

⁶³ at <http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-03018.pdf>