

PUBLIC SERVICES OMBUDSMAN (WALES) ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Investigation of Complaints

Power of investigation

Section 2: Power of investigation

20. By virtue of section 2(1) the Ombudsman may only investigate a complaint relating to a matter if:
 - a) the complaint has been duly made or referred to him/her, and
 - b) he/she is entitled to investigate that matter.
21. [Sections 7 to 11](#) set out the matters that the Ombudsman is entitled to investigate. Section 2(2) and sections 4 and 5 set out the circumstances where a complaint is duly made to the Ombudsman. Section 2(3) and section 6 set out the circumstances where a complaint is duly referred to the Ombudsman by a listed authority.
22. [Section 2\(4\)](#) enables the Ombudsman to accept complaints even if specific requirements as to the way it has been made or referred have not been fulfilled if he/she considers it reasonable to do so. Section 2(5) and (6) provide the Ombudsman with a wide discretion as to whether to begin, continue or discontinue an investigation. Section 2(7) makes it clear that the Ombudsman may begin or continue an investigation even if the complaint has been withdrawn. This covers the situation, for example, where a complaint has been made in relation to a listed authority's action which affects more than one person but where the complaint that has been withdrawn was put forward as the 'lead' complaint. In such cases, where the 'lead' complaint has been withdrawn, it will be open to the Ombudsman to begin or to continue an investigation as he/she sees fit.

Section 3: Alternative resolution of complaints

23. [Section 3](#) provides the Ombudsman with a wide power to take steps to resolve complaints without proceeding to a formal investigation. The power is available to the Ombudsman to use instead of or in addition to the power to investigate.

Complaints

Section 4: Who can complain

24. [Section 4\(1\)\(a\)](#) maintains the current position that a member of the public (the "person aggrieved") is only entitled to complain to the Ombudsman if he or she claims to have sustained injustice or hardship as a result of maladministration or service failure (as the case may be). It is not only individuals who can complain to the Ombudsman. So,

for example, companies or other corporate bodies could complain to the Ombudsman. Listed authorities acting in their capacity as listed authorities cannot complain to the Ombudsman (section 4(2)).

Section 5: Requirements: complaints made to the Ombudsman

25. Complaints to the Ombudsman must, generally, be made in writing (which would include by electronic means) (section 5(1)(a)). However, under section 2(4) the Ombudsman may decide to accept a complaint otherwise than in writing if he/she thinks it is reasonable to do so. For example, if the person aggrieved has a disability which makes it difficult for that person to make his or her complaint in writing, the Ombudsman has discretion to decide whether to accept an oral complaint instead.
26. **Section 5(1)(b)** provides that the time-limit for making a complaint to the Ombudsman is one year from the day that the person aggrieved first has notice of the matters complained about. Again, under section 2(4), the Ombudsman has discretion to consider a complaint made outside that time limit if he/she considers that in the circumstances of the case it is reasonable to do so. The Assembly has a power to make regulations modifying the application of the Act to former family health service providers in Wales, former independent providers in Wales and former social landlords in Wales (section 42). It is anticipated that this power may be used to vary, for example, the time-limit in respect of which complaints about the actions of such persons/bodies must be made to the Ombudsman.
27. Subject to the particular express requirements in the Act it is for the Ombudsman to decide his own procedures and, in particular, section 5(2) provides that it is for the Ombudsman to decide whether the requirements of section 5 have been met in a particular case.

Section 6: Requirements: complaints referred to the Ombudsman

28. This section provides that a listed authority can refer a complaint made to it to the Ombudsman but only if it is made by a person who would have been entitled to make that complaint directly to the Ombudsman. The complaint must also have been made to the authority within a year from the day that the person aggrieved first had notice of the matter complained of. Any such referral must be in writing and the referral must occur before the end of one year beginning on the day on which the complaint was made to the listed authority. Under section 2(4) the Ombudsman may, for the purposes of accepting a referred complaint, disregard either (or both) of those time-limits (as described above) if he/she considers that it is reasonable to do so.

Matters which may be investigated

Section 7: Matters which may be investigated

29. **Section 7(1)** provides that the Ombudsman is, subject to sections 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’.
30. ‘Relevant action’ is defined in section 7(3) and ‘relevant service’ is defined in section 7(4). The definitions are designed to ensure that it is only the functions of listed authorities in, essentially, their public capacity that can be investigated. In the case of a listed authority that falls within section 7(3)(e), the Ombudsman is entitled to investigate alleged maladministration in the discharge of that authority’s administrative functions. The Assembly would be such an authority. Section 7(3)(e) means, for instance, that the Ombudsman is not entitled to investigate the Assembly’s legislative

or judicial functions. In the case of a person added to Schedule 3 (“listed authorities”) to the Act, by order under section 28(2), section 7(3)(d) and (4)(d) provides that the Ombudsman is only entitled to investigate action which that person takes or a service which that person provides in the discharge of that person’s functions which have been specified in the order as falling within the Ombudsman’s remit.

31. The effect of subsection (6) is that where a listed authority appoints a person as a member of staff of a ‘relevant tribunal’, an administrative function of that person is treated as being an administrative function of the listed authority and so that function will fall within the remit of the Ombudsman. A ‘relevant tribunal’ means a tribunal specified by order made by the Assembly (section 41(1)).

Section 8: Exclusion: matters not relating to Wales

32. **Section 8(1)** provides that the Ombudsman cannot investigate a complaint relating to the discharge by a listed authority of its functions otherwise than in relation to Wales. Section 8(2) makes it clear that this restriction does not apply in relation to the Assembly. The Assembly may exercise functions otherwise than in relation to Wales (e.g. the cross border functions referred to in paragraph 3 of Schedule 3 to the GOWA).
33. **Section 8(3)** puts beyond doubt that any function of a listed authority in relation to the Welsh language or any other aspect of Welsh culture is to be regarded as being discharged in relation to Wales and is, therefore, not excluded from the Ombudsman’s jurisdiction by section 8(1).

Section 9: Exclusion: other remedies

34. In general, the Ombudsman cannot investigate a complaint about a matter if the person aggrieved has (or had) a right of appeal, reference or review (as specified) or a remedy by way of proceedings in a court of law (section 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 (section 9(2)).
35. **Section 9(3) and (4)** provides that, unless the Ombudsman is satisfied that it is reasonable for him/her to investigate the matter without the following steps having been taken, then before the Ombudsman can investigate a matter he/she must be satisfied that:
- a) the person aggrieved (or someone acting on that person’s behalf) has brought the matter to the attention of the listed authority concerned, and
 - b) the listed authority has been given a reasonable opportunity to investigate and respond to the complaint.

Section 10: Other excluded matters

36. **Section 10(1)** provides that the Ombudsman cannot investigate the excluded matters set out in Schedule 2 to the Act. Section 10(2) allows the Assembly, by order, to add to, remove or alter the entries appearing, from time to time, in Schedule 2 to the Act. Such an order is to be made by statutory instrument (section 44(1)) and is to be regarded as Assembly general subordinate legislation (section 44(3)). Consequently such orders will be subject to the Assembly’s subordinate legislation procedures. Before making such an order, the Assembly must consult the Ombudsman (section 10(3)).
37. **Section 10(4)** puts beyond doubt that despite the exclusions in Schedule 2 the Ombudsman may investigate the operation by a listed authority of any procedure established to examine complaints or review decisions. So, for example, the Ombudsman is excluded from investigating a matter that relates to the determination of the amount of rent (paragraph 5 of Schedule 2 to the Act). Section 10(4) ensures that

*These notes refer to the Public Services Ombudsman (Wales)
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this does not prevent him from investigating the manner in which a complaint about the determination of rent was considered under an authority's complaints procedure.