

*These notes refer to the Public Services Ombudsman (Wales) Act 2005 (c. 10)  
which received Royal Assent on 7 April 2005*

# **PUBLIC SERVICES OMBUDSMAN (WALES) ACT 2005**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Public Services Ombudsman (Wales) Act which received Royal Assent on 7 April 2005. The explanatory notes have been prepared by the National Assembly for Wales in conjunction with the Wales Office, in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given. A Glossary of terms used frequently in these Notes appears at the end of these Notes.

### **SUMMARY**

3. The Act establishes the office of the Public Services Ombudsman for Wales. The offices of the Welsh Administration Ombudsman, the Health Service Commissioner for Wales and the Social Housing Ombudsman for Wales are to be abolished. The Commission for Local Administration in Wales (including the office of the Local Commissioner for Wales) is also to be abolished. Broadly speaking, the Act makes provision for the Ombudsman to investigate those matters that currently are investigated by the existing ombudsmen/commissioners in Wales. The Ombudsman will have responsibility for investigating maladministration and service failure by the Assembly; its sponsored public bodies (the equivalent, in Wales, of non-departmental public bodies) and a number of other publicly funded bodies; Welsh health service bodies (primarily NHS Trusts and Local Health Boards in Wales), certain health service providers in Wales, local government bodies in Wales and social landlords in Wales. Thus there will be a unified ombudsman service in Wales.

4. The Act is organised in 3 Parts. Part 1 deals with establishing the office of the Ombudsman and making further provision in relation to that office. Part 2 of the Act deals with the Ombudsman's powers of investigation, which matters the Ombudsman can investigate and which authorities can be investigated ("listed authorities"). There is power for the Assembly to amend the list of listed authorities. Part 2 also sets out

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who can complain to the Ombudsman and the manner of complaint. It provides the Ombudsman with powers to obtain information, evidence and documents etc. in relation to the discharge of his functions under Part 2. The Part also deals with matters relating to the Ombudsman's reports and sets out his powers to consult, co-operate, work and report jointly with other specified ombudsmen and commissioners. In addition there are restrictions imposed on the disclosure of information obtained for the purposes of discharging the Ombudsman's functions under Part 2. Finally, this Part provides for certain miscellaneous matters such as the Ombudsman's power to issue guidance, a duty on listed authorities to publicise complaints procedures, protection from defamation claims and additional provision relating to the powers of listed authorities to pay compensation. Part 3 makes provision about the Ombudsman's functions in relation to the conduct of local government members and employees and for the abolition of the offices of Welsh Administration Ombudsman, Health Service Commissioner for Wales, Social Housing Ombudsman for Wales and for the abolition of the Commission for Local Administration in Wales (including the office of the Local Commissioner for Wales). Finally, this Part makes general provision relating to amendments and repeals, commencement, transitional provision and interpretation etc.

## **TERRITORIAL EXTENT AND DEVOLUTION**

5. Principally, the Act extends to England and Wales but an amendment or repeal made in this Act has the same extent as the provision that it amends or repeals. It is, however, primarily concerned with the investigation by the Ombudsman of complaints of maladministration or service failure in relation to the action of listed authorities that exercise functions in Wales or in relation to Wales. Consequently, the Act primarily applies to Wales. Various powers to make subordinate legislation and other functions are conferred on the National Assembly for Wales.

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## **COMMENTARY ON SECTIONS**

### **PART 1: THE PUBLIC SERVICES OMBUDSMAN FOR WALES**

#### **Section 1: The Public Services Ombudsman for Wales**

6. This section establishes the office of the Public Services Ombudsman for Wales. Schedule 1 to the Act makes further provision in relation to the office of the Ombudsman.

#### **SCHEDULE 1: PUBLIC SERVICES OMBUDSMAN FOR WALES: APPOINTMENT ETC.**

7. Generally, the Schedule makes provision with regard to the office of the Ombudsman; his/her powers to appoint staff and expert advisers; his/her power of delegation; requirements in relation to annual and extraordinary reports and estimates of the income and expenditure of his/her office and accounts, audit and value for money examinations into the use of the resources of the Ombudsman's office.

8. *Paragraphs 1 to 3* make provision as to the appointment, status and term of office of the Ombudsman.

9. *Paragraph 4* makes provision for the appointment of an acting Ombudsman where the office of the Ombudsman becomes vacant. Sub-paragraph (8) provides that, generally, an acting Ombudsman is to be regarded as the Ombudsman during the period for which the acting Ombudsman holds office. Consequently, an acting Ombudsman is able, for example, to exercise the Ombudsman's full range of powers with regard to the obtaining of information, evidence and the production of documents under sections 13, 14 and 15.

10. *Paragraphs 5, 6, 7 and 8* make provision with regard to:

- a) the persons who are disqualified from being the Ombudsman (or acting Ombudsman),
- b) the offices etc. which the Ombudsman (or acting Ombudsman) is disqualified from holding whilst he or she is the Ombudsman, and

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- c) the offices etc. which a person who has ceased to be the Ombudsman (or acting Ombudsman) is disqualified from holding for the period of three years from the time at which he or she ceased to hold office as the Ombudsman (or acting Ombudsman as the case may be).

In addition, the Ombudsman's disqualification from being a member of the Assembly is governed by sections 12 and 13 of the GOWA (as amended by paragraphs 62 and 63 of Schedule 6 to this Act).

11. **Paragraph 9** makes provision with regard to the remuneration of the Ombudsman (or acting Ombudsman as the case may be).

12. **Paragraph 10** makes provision for the expenses of the Ombudsman to be met by the Assembly, so far as they are not met out of income received by the Ombudsman.

13. **Paragraph 11** makes provision for the Ombudsman to appoint such staff on such terms and conditions as he/she considers necessary. Members of the Ombudsman's staff are not civil servants.

14. **Paragraph 12** enables the Ombudsman to obtain advice (whether on payment or not) as the Ombudsman considers appropriate in relation to the discharge of his/her functions.

15. **Paragraph 13** provides that the Ombudsman may authorise any person to discharge his/her functions on his/her behalf. However, the Ombudsman cannot make arrangements, under this Act or otherwise, with the Assembly for the exercise by one of the other's functions or for the provision of certain specified services by one to the other.

16. **Paragraph 14** makes provision for annual and extraordinary reports by the Ombudsman.

17. **Paragraph 15** makes provision so that in each financial year the Ombudsman must prepare an estimate of the income and expenses of his/her office which is then considered by the Assembly Cabinet which must then lay the estimate, with or without modifications, before the Assembly.

18. **Paragraphs 16, 17, 18, 19 and 20** make provision with regard to the accounts that the Ombudsman is required to keep, audit of those accounts by the Auditor General for Wales, accounting officer arrangements and examinations by the Auditor General for Wales and/or the Comptroller and Auditor General in relation to the

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economy, efficiency and effectiveness with which the Ombudsman has used the resources of his/her office.

19. **Paragraph 21** provides the Ombudsman with supplementary powers.

## **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

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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)).

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### **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



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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 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.

## **SCHEDULE 2: EXCLUDED MATTERS**

38. This Schedule makes provision as to matters that are excluded from the Ombudsman's jurisdiction. Under section 10(2), the Assembly may by order, add, remove or amend an entry appearing for the time being in this Schedule.

### **Section 11: Decisions taken without maladministration**

39. Section 11(1) provides that the Ombudsman cannot question the merits of any decision taken by a listed authority in the exercise of any discretion if that decision was taken without maladministration. Consequently, provided that there is no delay, bias, neglect, turpitude etc. in relation to the decision (including where the decision relates to alleged service failure), the Ombudsman is not entitled to question that decision. So, where a listed authority has, without maladministration, reached a policy decision in which it has weighed up all relevant matters (including, for example, resources), the Ombudsman is not entitled to question that decision.

40. However, by virtue of section 11(2), section 11(1) does not apply to the extent that a decision is taken in consequence of the exercise of professional judgement which appears to the Ombudsman to be exercisable in connection with the provision of:

(a) health care, or

(b) social care.

This is intended to cover decisions taken in consequence of the exercise of clinical judgement (to reproduce the effect of section 3(7) of the Health Service

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Commissioners Act 1993). However, since section 11(2) refers to decisions taken in consequence of the exercise of professional judgement which appears to the Ombudsman to be exercisable in connection with the provision of either health or social care, it is wider than section 3(7) of the 1993 Act, so extending the remit of the Ombudsman.

***Decisions not to investigate etc.***

**Section 12: Decisions not to investigate or to discontinue investigation**

41. Section 12(1) provides that the Ombudsman must prepare a statement of reasons in relation to any decision by him/her not to begin or to discontinue an investigation. This includes the situation where, under section 3, the Ombudsman has resolved a complaint and therefore decided not to undertake an investigation. Under section 12(2), the Ombudsman must send a copy of that statement to:

- a) the person who made the complaint to him/her; and
- b) the listed authority to which the complaint relates.

42. Under section 12(3), the Ombudsman may send a copy of the statement to any other person.

43. The Ombudsman may publish such a statement if the requirements of section 12(4) are met. The Ombudsman may only publish such a statement if he/she considers that it is in the public interest to do so. In reaching his/her view, the Ombudsman must take account of the interests of the person aggrieved and any other persons he/she thinks appropriate.

44. Section 12(7) and (8) provides that when the Ombudsman prepares a statement that:

- a) names any person (other than the listed authority concerned); or
- b) includes anything which, in the opinion of the Ombudsman, is likely to identify any person and which, in the opinion of the Ombudsman, can be omitted from the statement without impairing its effectiveness,

the Ombudsman may only include such information in the version of the statement that he/she is required or empowered to send or which he/she publishes if it is in the public interest to include such a name or identifying particulars. In reaching his/her

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view, the Ombudsman must have regard to the interests of the person aggrieved and any other persons he/she thinks appropriate.

45. In the case of the version of the statement that the Ombudsman is required to send, under section 12(2), to the person who made the complaint and the listed authority, it is not anticipated that it would be difficult for the Ombudsman to show that it is in the public interest to include such information. This is because, in such cases, there is likely to be a strong public interest in those parties knowing the names and identities of persons that the Ombudsman considers it necessary to refer to in the statement. Indeed, in many cases such a statement is likely to name or identify only the person aggrieved, the listed authority that took the action which is the subject of the complaint, and those of its employees who are relevant (e.g. if the employee of the listed authority took the action complained of).

### *Investigation procedure and evidence*

#### **Section 13: Investigation procedure**

46. Section 13(3) provides that, subject to the requirements in subsections (1) and (2) of that section, it is for the Ombudsman to decide the procedure for conducting an investigation. The Ombudsman could, for example, establish different procedures for different types of complaints and he/she could, in any particular case, depart from any such established procedures if he/she considered it appropriate.

47. Section 13(4)(a) makes it clear that the Ombudsman may make such inquiries as he/she thinks appropriate. Section 13(4)(b) provides that it is for the Ombudsman to decide whether a person may be legally represented or be represented in some other way (e.g. by an independent advocate).

48. Section 13(5) empowers the Ombudsman to make payments towards the expenses of persons assisting him/her in an investigation, provided that they are properly incurred, and to pay certain allowances. It is for the Ombudsman to determine whether it is appropriate to make such payments or to impose any conditions on such payments.

49. Section 13(6) puts beyond doubt that the fact that the Ombudsman is investigating a matter does not affect the validity of any action taken by the listed authority in relation to the matter under investigation. Nor is any power or duty of the authority to take further action with respect to that matter affected.

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#### **Section 14: Information, documents and evidence**

50. The Ombudsman has wide powers to require the production of information or documents in relation to an investigation (section 14(1) and (2)) and to require certain persons to provide him/her with any facilities he/she may reasonably require (section 14(3)). The latter provision may be needed, for example, if the Ombudsman were to require the use of certain computer hardware or software to view documents or information provided.

51. The Ombudsman has the same powers as the High Court in relation, amongst other things, to the taking of evidence from witnesses (section 14(2)).

52. Section 14(4) provides protection for those from whom the Ombudsman may require evidence or the production of information or documents. Such a person cannot be required by the Ombudsman to give any evidence or produce any documents which that person could not be compelled to give or produce before the High Court.

53. Section 14(5) prevents information from being withheld by the Crown on the ground that it is subject to an obligation to keep it secret or a restriction on its disclosure.

54. The effect of section 14(6) is that, in relation to the Ombudsman's power to require evidence or the production of information or documents, the Crown cannot rely on either its special privileges or immunities to defeat the Ombudsman's right of access to such information or on the protection that would otherwise be afforded by section 14(4).

#### **Section 15: Obstruction and contempt**

55. Section 15(1) and (2) enable the Ombudsman to certify to the High Court that, in his/her opinion, a person has without lawful excuse obstructed him/her (or a member of his/her staff etc.) in the discharge of his/her functions under Part 2 or that the person has acted in a way that, if the act was done in relation to High Court proceedings, would amount to a contempt of court.

56. The Ombudsman cannot issue such a certificate if the alleged obstruction or contempt arises merely because the person concerned has taken some further action in respect of the matter under investigation (see section 15(3) and section 13(6)).

57. If the Ombudsman issues such a certificate then the High Court may inquire into the matter and if the High Court finds that the person concerned has obstructed the Ombudsman, the High Court may deal with the person as if he/she had committed contempt in relation to the High Court (section 15(5)).

### ***Reports of investigations***

#### **Section 16: Reports of Investigations**

58. Section 16(1) provides that after conducting an investigation the Ombudsman must, unless he/she decides to report under the alternative procedure set out under section 21, prepare a report on his/her findings and send a copy of that report to the persons specified in section 16(2).

59. In relation to a person who is a family health service provider in Wales or independent provider in Wales the Ombudsman is required to send his/her report to the provider (as the listed authority) and to those persons with whom the provider has contracted, undertaken or arranged to provide the services that are the subject of the complaint. The Ombudsman is not required to send a copy of the report to every person with whom that provider has (or had) contracted, undertaken or arranged to provide any services (section 16(2)(d) and (e)).

60. The Ombudsman may publish his/her report if the requirements of section 16(4) are met. The Ombudsman may only publish such a report if he/she considers that it is in the public interest to do so. In reaching his/her view, the Ombudsman must have regard to the interests of the person aggrieved and any other persons he/she thinks appropriate.

61. Section 16(7) and (8) provides that when the Ombudsman prepares a report that:

- a) names any person (other than the listed authority concerned); or
- b) includes anything which, in the opinion of the Ombudsman, is likely to identify any person and which, in the opinion of the Ombudsman, can be omitted from the report without impairing its effectiveness,

the Ombudsman may only include such information in the version of the report that he/she is required or empowered to send, or which he/she publishes, if it is in the public interest to include such a name or identifying particulars. In reaching his view, the Ombudsman must have regard to the interests of the person aggrieved and any other persons he/she thinks appropriate.

62. In the case of the version of the report that he/she is required to send, under section 16(1)(b), to the person who made the complaint and the listed authority etc., it is not anticipated that it would be difficult for the Ombudsman to show that it is in the public interest to include such information. This is because, in such cases, there is

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likely to be a strong public interest in those parties knowing the names and identities of persons that the Ombudsman considers it necessary to refer to in his report. Indeed, in many cases such a report is likely to name or identify only the person aggrieved, the listed authority that took the action which is the subject of the complaint and those of its employees that are relevant (e.g. because it is the employee who took the action that is the subject of the complaint).

### **Section 17: Publicising reports**

63. Section 17(1) to (4) requires listed authorities that receive a copy of a report under section 16(1)(b) to make specified arrangements for publicising such reports. The listed authority is required, within specified time-scales, to make copies of the report available at one or more of its offices and via its website (if any). Members of the public have a right, free of charge, to inspect, make copies of and view the report via the authority's website (if applicable). The right to take copies would include downloading an electronic copy via the authority's website. Members of the public also have the right to require the listed authority to supply copies of the report, for which the authority can charge a reasonable sum. It is an offence for any person wilfully to obstruct a member of the public in the exercise of these rights (section 17(7) and (8)).

64. The Ombudsman may, after taking account of the public interest and the interests of the person aggrieved and any other persons he/she thinks appropriate, direct that the publicity requirements are not to apply in relation to a particular report (section 17(9) and (10)). The Ombudsman also has the power to give directions with regard to the discharge by listed authorities of their functions under section 17 (section 17(5) and (6)).

### **Section 18: Publicising reports: health care providers**

65. Section 18 makes provision for the application of section 17 with modifications in relation to persons who are listed authorities by virtue of being family health service providers in Wales or independent providers in Wales. The effect of the modifications is that it is the person with whom the provider contracted or made arrangements (or to whom he/she undertook) to provide the relevant services on whom the publicity requirements fall, rather than on the listed authority (i.e. the family health service provider or independent provider).

### **Section 19: Action following receipt of a report**

66. Section 19 provides that if, following an investigation, the Ombudsman reports (under section 16) that the person aggrieved has sustained injustice or hardship

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as a consequence of the action investigated, the listed authority concerned is required to consider the Ombudsman's report and notify him/her of the action that it has taken or proposes to take in response and also of the time within which it will take any action that it proposes to take. The listed authority must make the notification within one month starting on the day that it receives the report or such longer period as the Ombudsman in his/her discretion specifies.

### **Section 20: Non-action following receipt of a report**

67. If the Ombudsman is satisfied that the listed authority has wilfully disregarded his/her report without lawful excuse, the Ombudsman may, under section 20(1), issue a certificate to that effect to the High Court.

### **Section 21: Reports: alternative procedure**

68. The full reporting procedure under sections 16 to 19 does not apply if the Ombudsman decides to report under the alternative procedure set out in section 21.

69. If, after an investigation, the Ombudsman concludes that the person aggrieved:

- a) has not sustained injustice or hardship as a consequence of the action investigated; or
- b) has sustained such injustice or hardship and the listed authority concerned agrees within the permitted period (as defined in section 21(3)) to implement the Ombudsman's recommendations,

then the Ombudsman may decide to report under the alternative procedure under section 21 but only if he/she is satisfied that the public interest does not require him/her to report under the full reporting procedure set out in sections 16 to 19.

70. A report under the alternative procedure in this section is subject to the same restrictions with respect to naming or identifying individuals as a report under section 16 (section 21(9) and (10)).

### ***Special reports***

### **Section 22: Special reports**

71. Under section 22, the Ombudsman may issue a special report if the listed authority has failed to take the steps required in response to a report made under

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section 16 (full reports), a report made under section 21 (alternative procedure reports) or following a resolution of the complaint under section 3. For example, a listed authority may fail to notify the Ombudsman, within one month of receiving a section 16 report, of the action that it has taken or proposes to take in response to the report. In such cases, the Ombudsman may issue a special report (section 22(2)(a)). The Ombudsman may also, for example, issue a special report if a listed authority has given the notification under section 19 within the time-scale set out there but the Ombudsman is not satisfied:

- a) with the action taken or proposed by the listed authority; or
- b) with the period within which the listed authority has stated that it will take that action; or
- c) that the listed authority has taken the action that it stated that it would take within the specified period.

72. The Ombudsman may make whatever recommendations he thinks appropriate in a special report with respect to the action he/she thinks should be taken to remedy the injustice or hardship suffered by the person aggrieved and to prevent similar injustice or hardship being caused again (section 22(8)(b)).

73. Section 22(9) sets out to whom the Ombudsman is required to send a copy of a special report. The requirement depends on whether the original report was a full report under section 16, a report made under section 21 (alternative procedure reports) or a statement made following a resolution of the complaint under section 3.

### **Section 23: Special reports: supplementary**

74. Section 23 makes further provision with regard to special reports. In particular, a special report is subject to the same restrictions with respect of naming or identifying individuals as a report under section 16 (section 23(4) and (5)) and section 23(7) applies sections 17 and 18 (requirements as to publicising reports) to special reports.

### **Section 24: Special reports relating to the Assembly**

75. A special report relating to a complaint against the Assembly must be laid before the Assembly by the First Minister and, unless action to the satisfaction of the Ombudsman has been taken or proposed, then the First Minister must 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. The First Minister



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is able to delegate this function to, for example, another Assembly Minister, under section 62(5) GOWA.

76. Section 24(3) requires that the Assembly's standing orders must include provision for any such motion to be moved as soon as reasonably practicable except in cases where action to the satisfaction of the Ombudsman is taken or proposed.

### ***Consultation and co-operation***

#### **Section 25: Consultation and co-operation with other ombudsmen**

77. Section 25(1) and (2) requires the Ombudsman to consult another specified ombudsman whenever he/she thinks that a complaint is about a matter that could be the subject of investigation by that other ombudsman. The other ombudsmen that the Ombudsman is required to consult are specified in section 25(7). There is power for the Assembly, by order, to amend this list of specified ombudsmen (section 25(8) and (9)).

78. Where the Ombudsman is required to consult with another ombudsman on a matter, he/she may also co-operate with that other ombudsman on that matter (section 25(3)). The consultation and co-operation may extend to anything relating to the matter. Examples of matters on which there may be consultation and co-operation are set out in section 25(4), namely:

- a) how an investigation into the complaint should be conducted;
- b) the form, content and publication of a report following an investigation.

79. Section 25(5) and (6) provides that, where such consultation takes place, the Ombudsman and any of the specified ombudsmen (other than the Scottish Public Services Ombudsman) can conduct joint investigations and publish joint reports.

80. In cases of consultation on a complaint, the Ombudsman will be able to use his/her supplementary powers in paragraph 21 of Schedule 1 to the Act to forward a copy of the complaint to the other ombudsman. Furthermore, the Ombudsman could use those supplementary powers to inform the person who has made the complaint how he or she can make a complaint to the other ombudsman.

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## ***Disclosure***

### **Section 26: Disclosure of information**

81. Section 26(1) provides that information obtained in relation to or in connection with complaints about a listed authority is to be kept confidential except in limited circumstances.

82. Section 26(2) provides for the exceptions where such information may be disclosed, namely:

- a) for the purposes of deciding whether to investigate a complaint; for the purposes of an investigation; for the purposes of resolving a complaint and for the purposes of reporting on an investigation;
- b) for the purposes of consulting, co-operating, working and reporting jointly with other ombudsmen in accordance with section 25;
- c) for the purposes of certain proceedings or for inquiries with a view to taking certain proceedings;
- d) where the Ombudsman considers it is in the public interest, for the purposes of protection from or avoiding or minimising etc. any threat to the health or safety of any person or persons;
- e) in the case of information within section 26(3) to (5) to the Information Commissioner.

83. Section 26(6) provides that neither the Ombudsman nor a member of his/her staff or other person acting on his/her behalf or assisting him/her can be required in any proceedings (except proceedings specified in section 26(2)) to disclose information coming to his knowledge in deciding whether to investigate a complaint; during an investigation of a complaint; in resolving a complaint; or in consulting, co-operating, working or reporting jointly on a complaint with another ombudsman.

### **Section 27: Disclosure prejudicial to the safety of the State or contrary to the public interest**

84. Section 27(1) provides that a Minister of the Crown may give notice to the Ombudsman that disclosure of any document or information or class of document or

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information specified in the notice would, in the opinion of the Minister, be prejudicial to the safety of the State or otherwise contrary to the public interest.

85. Where such a notice is given this Act neither authorises or requires the Ombudsman, a member of his/her staff or any other person acting on his/her behalf or assisting him/her, to disclose such specified information.

86. Where the Ombudsman or a member of his/her staff etc. is obliged by virtue of some other legal requirement to disclose the information then nothing in this section prevents that person from complying with that obligation.

### **Section 28: Listed Authorities**

87. This section introduces Schedule 3, which lists the persons (in the Act referred to as “listed authorities”) who are liable to investigation by the Ombudsman. In the main, the listed authorities set out in Schedule 3 are subject to investigation by one or other of the existing Welsh ombudsmen.

88. Section 28(2) gives the Assembly power, by order, to amend Schedule 3 by adding or removing listed authorities or changing their entries. Before doing so the Assembly must consult the Ombudsman and any other persons it thinks appropriate (section 28(4)). Section 28(3) provides that an order adding a person to Schedule 3 as a listed authority may apply the Act to that person with modifications. The power to make an order under this section is subject to certain restrictions set out in sections 29 and 30.

89. An order under section 28(2) is to be made by statutory instrument (see section 44(1)) and is Assembly general subordinate legislation (section 44(3)). Consequently, such an order will be subject to the Assembly’s subordinate legislation procedures.

### **SCHEDULE 3 LISTED AUTHORITIES**

90. This Schedule lists the persons who will initially be subject to the remit of the Ombudsman. Under section 28, the Assembly may by order add to, remove or amend an entry appearing for the time being in this Schedule.

### **Section 29: Restrictions on power to amend Schedule 3**

91. Section 29(1) prevents the Assembly from changing its own status as a listed authority.

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92. Section 29(2) to (5) sets out the criteria that a person must meet before the Assembly may add that person as a listed authority under section 28(2). Thus, additions to the list in Schedule 3 may only be made if the person to be listed:

- a) discharges functions in relation to Wales (“in relation to Wales” does not mean that the function has to be performed physically in Wales, although in most cases that will be the case). It does not matter that the person also discharges functions otherwise than in relation to Wales; and
- b) has functions some or all of which are in a field in which the Assembly also has functions. For example, if a person’s functions are in the field of agriculture then it is eligible for listing (assuming the other criteria are met) because the Assembly has functions in that field. However, if the person has functions directly in relation to prison services (and no other functions in a field in which the Assembly has functions), then that would not be the case, as the Assembly does not have such functions in that field. The scope of this restriction will vary over time as the fields in which the Assembly has functions change; and
- c) falls within section 29(3), (4) or (5).

93. Section 29(6) prevents the Assembly adding to Schedule 3 by order:

- a) a Special Health Authority which discharges its functions only or mainly in England; or
- b) a nationalised industry or undertaking.

### **Section 30: Provisions in orders adding persons to Schedule 3**

94. Section 30(1) provides that when adding a person to the list, the Assembly must, in the order, specify which of the person’s functions fall within the Ombudsman’s remit.

95. Section 30(2) and (3) provides that in the case of every person to be added to Schedule 3 by order, the Assembly must be satisfied that the function(s) of that person which are to fall within the Ombudsman’s remit are in a field in which the Assembly also has functions. Section 30(3) further provides that in the case of a person falling within section 29(5) the functions to be within the Ombudsman’s remit must also be functions of a public nature. Consequently, if a person only falls within section 29(5)

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and discharges functions some of which are functions of a public nature and some of which are not, the Assembly cannot specify all of that person's functions as being functions within the remit of the Ombudsman.

### *Miscellaneous*

#### **Section 31: Power to issue guidance**

96. Section 31(1) gives the Ombudsman power to issue guidance to listed authorities about good administrative practices. This will enable the Ombudsman to set bench marks for listed authorities. The Ombudsman has a further power to issue guidance to listed authorities under section 33(3). Section 31(3) provides that listed authorities are required to have regard to the Ombudsman's guidance under section 31 when discharging their functions. Listed authorities should not depart from that guidance unless there is good reason to do so. When discharging his/her functions in relation to a complaint under this Act, the Ombudsman can take into account whether or not and to what extent a listed authority has complied with his/her guidance under section 31.

#### **Section 32: Protection from defamation claims**

97. Section 32 provides that the following are absolutely privileged for the purposes of defamation, namely:

- a) any publication (which will bear its usual meaning within the law relating to defamation) of any matter by the Ombudsman, a member of his/her staff or another person acting on his/her behalf or assisting him/her in the discharge of his/her functions under the Act;
- b) any publication of a matter in any report published by a person in the discharge of its functions under section 17 (requirement on listed authorities to publish the Ombudsman's report of an investigation); and
- c) any publication in certain communications concerning a complaint, namely:
  - (i) communications between a listed authority (including a member or co-opted member, officer or member of staff or another person acting on behalf of or assisting in the discharge of the functions of that authority) and the Ombudsman (or his/her staff or persons acting on his/her

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behalf or assisting him/her in the discharge of his/her functions);

(ii) communications between the person aggrieved or the person making the complaint on behalf of the person aggrieved and an elected member of the Assembly; and

(iii) communications between the person aggrieved or the person making the complaint on behalf of the person aggrieved and the Ombudsman (or his staff, persons acting on his behalf or assisting him in the discharge of his functions).

98. This provision generally replicates similar protection under the legislation relating to other ombudsmen.

### **Section 33: Publicity for complaints procedures**

99. Section 33 imposes (and makes further provision in relation to) a duty on listed authorities to provide information to the public about:

- a) their right to make a complaint to the Ombudsman;
- b) the authority's own right to refer a complaint that has been made to it, to the Ombudsman; and
- c) how members of the public may contact the Ombudsman.

### **Section 34: Compensation for the person aggrieved**

100. This section confers a power on listed authorities to pay compensation to a person by or on behalf of whom a complaint has been made to the Ombudsman in respect of the matter, which is the subject of the complaint. Some listed authorities may have existing powers that would be wide enough for this purpose (see for example the power available to various local government bodies acting under section 92 Local Government Act 2000). Section 34 will ensure that all listed authorities will have such a power. It is not dependent on the Ombudsman actually investigating and reporting on the complaint and so, for example, could be used where the Ombudsman has assisted in negotiating an amicable resolution of the complaint.

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### **PART 3: MISCELLANEOUS AND GENERAL**

#### *Conduct of local government members and employees*

#### **Section 35: Conduct of local government members and employees**

101. Section 35 introduces Schedule 4. That Schedule amends Part 3 of the Local Government Act 2000 on the conduct of local government members and employees. Until this section and Schedule come into force it is the responsibility of the Local Commissioner for Wales (established under Part 3 of the Local Government Act 1974) to investigate alleged breaches by a relevant authority in Wales of its code of conduct. Section 35 and Schedule 4 makes provision so that it will now be for the Ombudsman to discharge those functions.

#### **SCHEDULE 4: CONDUCT OF LOCAL GOVERNMENT MEMBERS AND EMPLOYEES**

102. This Schedule makes amendments to Part 3 of the Local Government Act 2000 (“the 2000 Act”). That Part deals with the investigation of complaints as to the standards of conduct of local government members and employees. Until this Schedule comes into force the function, in Wales, of investigating such allegations is vested in the Local Commissioner for Wales, but in England that function is vested in the Standards Board established under that Part 3 of that Act. The Ombudsman is now to take over the investigative functions of the Local Commissioner for Wales and this Schedule makes the necessary amendments to Part 3 of the 2000 Act to give effect to that.

103. There is one substantive change in these amendments. Paragraph 22 of Schedule 4 to this Act amends section 81(7) of the 2000 Act. Section 81 makes provision for the disclosure and registration of members’ interests. Section 81(7) requires the monitoring officer of each relevant authority, whether in Wales or in England, to send a copy of that authority’s register to the Standards Board in England, but not to the Local Commissioner for Wales. That was an unintended effect of that legislation. The opportunity is being taken now to correct that. In future, monitoring officers of all relevant authorities in Wales (including police authorities in Wales) will be required to make copies of the register available to the Ombudsman (but in the case of police authorities in Wales they will still be required, also, to make a copy available to the Standards Board in England).

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### ***Abolition of existing bodies and offices***

#### **Section 36: Abolition of existing bodies and offices**

104. This section provides for the abolition of the Commission for Local Administration in Wales (which will include the abolition of the office of Local Commissioner for Wales) and of the offices of the Welsh Administration Ombudsman, the Health Service Commissioner for Wales and the Social Housing Ombudsman for Wales.

#### **Section 37: Transfer of property, staff etc.**

105. This section introduces Schedule 5, which makes provision for the transfer of property, staff etc. from the bodies and offices abolished under section 36 to the Ombudsman. See below as to Schedule 5.

#### **SCHEDULE 5: TRANSFER OF STAFF, PROPERTY ETC.**

106. This Schedule makes provision for the transfer of staff, property, rights and liabilities from the existing ombudsmen whose offices etc. are being abolished (see section 36) to the Ombudsman.

#### **Section 38: Undetermined complaints**

107. This section provides a general transitional provision relating to undetermined complaints. Basically, if a complaint falls within section 38(1) or (3) then the complaint can be continued by, or made (or referred) to and continued by, (respectively) the Ombudsman. In such cases, the Ombudsman will deal with the complaint in accordance with the pre-existing legislation relating to that complaint and not under Part 2 of this Act.

### ***General***

#### **Section 39: Amendments and repeals**

108. This section introduces Schedules 6 (consequential amendments) and 7 (repeals).



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#### **Section 40: Commencement**

109. Sections 40 to 46 will come into force on Royal Assent. The other provisions of the Act will come into force in accordance with provision made by the Assembly by order.

#### **Section 41: Interpretation**

110. This section defines terms used in the Act. In particular section 41(6) enables the Ombudsman, for example, to investigate action taken on behalf of a listed authority in the same way as he/she can investigate action by the listed authority itself.

#### **Section 42: Former health care providers and social landlords: modifications**

111. This section confers power on the Assembly to make regulations modifying the application of the Act in respect of complaints made against former family health service providers in Wales, former independent providers in Wales and former social landlords in Wales. This will give the Assembly power to modify appropriately the application of the Act where a complaint is made against a person who was at the time of the action complained of a family health service provider in Wales, an independent provider in Wales or a social landlord in Wales but subsequently ceased to be such a listed authority. For example, it will enable the Assembly to modify sections 16 (reports of investigations); 17 (as it relates to publicising reports: health care providers); and section 19 (action following receipt of a report) in such cases.

#### **Section 43: Consequential, transitional provisions etc.**

112. This section empowers the Assembly by order to make consequential, incidental, supplementary, transitional, saving etc. provision in consequence of the Act. In particular, section 43(2) empowers the Assembly to amend, repeal or revoke any enactment (other than one contained in an Act passed in a session after that in which this Act was passed) for such purpose.

#### **Section 44: Orders, regulations and directions**

113. This section contains provision applicable to any power in the Act to make orders or regulations or to issue directions. Section 44(1) provides that the Assembly's powers under the Act to make orders or regulations are to be exercisable by statutory instrument. Section 44(3) provides that such orders and regulations are to be regarded as Assembly general subordinate legislation. Therefore, such orders and regulations will be subject to the Assembly's subordinate legislation procedures.

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## **Section 45: Extent**

114. The Act generally extends to England and Wales, although in practice the effect of its application is largely confined to Wales. The Act also extends to Scotland and Northern Ireland but this is only in respect of amendments and repeals to legislation having effect also in those countries.

## **COMMENCEMENT**

115. Sections 40 to 46 (inclusive) will come into force on Royal Assent. Section 40 provides that the other provisions of the Act will come into force in accordance with provision made by the Assembly by order.

## **GLOSSARY OF TERMS**

116. In these Explanatory Notes, the terms set out in the left-hand column of the table below have the meanings attributed to them in the right-hand column of the table.

“action” or “act”	=	includes a failure to act (and related expressions are to be construed accordingly)
Assembly	=	the National Assembly for Wales
Assembly First Minister/First Minister	=	the Assembly First Secretary (see section 53(1) Government of Wales Act 1998)
GOWA	=	Government of Wales Act 1998
local authority in Wales	=	as defined in section 41(1) of the Act
Ombudsman	=	the Public Services Ombudsman for Wales
person aggrieved	=	the member of the public who claims to have sustained injustice or hardship as a result of the action of the listed authority that is the subject of the complaint

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service failure	=	an alleged failure in a service provided by a listed authority, or an alleged failure by a listed authority to provide a service which it was the authority's function to provide
Welsh health service body	=	as defined in section 41(1) of the Act

## HANSARD REFERENCES

The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament.

Stage	Date	Hansard reference
House of Lords		
Introduction	24 November 2004	Vol 667 Col 21 - 22
Second Reading	16 December 2004	Vol 667 Col 1429 - 1443
Committee	25 January 2005	Vol 668 Col GC 365 - 422
Report	10 February 2005	Vol 669 Col 906 - 927
Third Reading	2 March 2005	Vol 670 Col 234
House of Commons		
Introduction	2 March 2005	
Second Reading	4 April 2005	Vol 432 Col 1139 - 1157
Remaining Stages	6 April	Vol 432 Col 1511 - 1519

Royal Assent – 7 April 2005

House of Lords Hansard Vol. 671 Col. 950

House of Commons Hansard Vol. 432 Col. 1641

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