

The New Public Services Ombudsman for Wales (PSOW) Act 2019: The story 2014- 2020

Introduction

Being an Ombudsman requires a thick skin. I would never be offended by the assertion that there are more exciting reads than the reflections of an outgoing ombudsman on the passage of revised legislation governing his Office. I have been encouraged by my peer and colleague, Rob Behrens, the UK Parliamentary and Health Service Ombudsman, to set out how the change in Wales was achieved.

In encouraging me to do this, Rob has reminded me that we undertake these jobs, and hold these offices as temporary stewards, and that as my seven year term nears its end, I hope that this account might be of value to other public service ombudsmen who wish to drive change in their own legislation.

My own desire for legislative reform was present from initial reflection on the “reactive” nature of the post; it was the potential for acquisition of systemic and proactive powers which attracted me to the role. Little did I realise that journey would take five years.

New job – a new agenda?

I woke up wet, cold and confused in the grounds of Cardiff Castle early on a spring morning in April 2014. I had been fundraising through participating in a “sleep-out” raising money for homeless charities. Having committed to participate I decided that I couldn’t withdraw even though I knew that I had something important on that day – an interview in the National Assembly for Wales for the post of Public Services Ombudsman for Wales.

At the interview, I made it clear that in my view the office needed to evolve, and that own-initiative powers were necessary. When I was appointed, it was clear that there was an expectation that I should exercise the existing statutory functions fully, rather than just focus on new ones. ¹ⁱ

The job started on 1st August and within weeks I visited the main UK and Ireland public service ombudsman offices , a form of peer based induction. I was very keen to learn from others in terms of what could and had worked to ensure that their offices had coped with the obvious pressures; an ageing population, increasing health-related complaints, greater public expectations, austerity and value for money concerns as well as the need to ensure our services were helping the most vulnerable, the hardest to reach and least likely to complain who might often be the most in need and at risk of injustice.

¹ A pledge that I would honour, using the thematic reporting powers of the 2005 legislation and also issuing special reports against a Health Board and a local authority for non-compliance on early resolution.

In August, I visited Northern Ireland to meet Ombudsman Tom Frawley, a man of experience, who had been in office since 2000”, and to hear about the new legislation being introduced by the Northern Ireland Assembly. Further visits to Jane Martin and Mick King at the English Local Government Ombudsman, Peter Tyndall my predecessor in Wales who had become Ombudsman in Ireland and Jim Martin, the Scottish Public Services Ombudsman, were also very productive.

As well as their views, and those of other high office holders, it was important to get a feel for the views of staff and, perhaps most of all, the people of Wales who used or tried to use our services.

On the first day in the office I spoke with the staff and promised “innovation and influence” – themes that would continue from that morning onwards. Innovation in terms of willingness to adapt to change, from outside or inside, that would make us more efficient and better able to cope, alongside the need to influence the public bodies in our jurisdiction to adopt best practice- and to demonstrate a user-friendly focus.

In terms of the user voice I was greatly affected by the case of Mrs Lewis from Llanelli. She had lost her husband. His treatment had been provided by both the public and private healthcare agencies. This option was increasingly common in Wales. Yet my office could only investigate the public aspects of her late husband’s care – the private aspects were dealt with by a separate organisation. For five and a half years she had to battle before getting the answers she deserved. I was determined that any fresh legislation would give my office the flexibility to look at both public and private healthcare so that no one would have to go through what Mrs Lewis had been through.

The number of health complaints in Wales had doubled over a decade. Sir Idwal Pugh, the former Permanent Secretary of the Welsh Office who became UK Health Ombudsman was concerned that the volume of health complaint cases grew rapidly during his time at the Office: from 582 in 1976-7 to 712 in 1978-9.² - an increase of 22%. The successor public service ombudsman offices across the UK will deal with approximately 27,000 health complaints in 2020. A continued trend would suggest over a million health complaints per annum by 2060 across the UK!

A kaleidoscope of influences affected me, including the work of the American academic Mark Friedman. Mark specialised in “Turning the Curve”. He came to speak to a conference in Wales in September 2014. His work on the balanced score card and proactively tackling apparently irreversible trends was inspiring – could we “turn the curve” and improve complaint handling from public bodies in Wales. I asked him a question – “was it true that command and control could only lead to mediocrity rather than excellence in public services?” He said that there were limits to top down instruction, and there was a need for the citizen’s voice to be heard and empowered.

² *The Ombudsman, Citizen and Parliament* Gregory and Giddings

My views on what were required had crystallised, informed initially by a longer paper on potential reform written by my predecessor Peter Tyndall. Revised legislation had a number of aims including:

Future proofing: to ensure that the legislation continued to be fit for purpose, but that it also addressed future challenges which will affect service users in an ageing society where there are greater levels of physical and emotional vulnerability.

Social justice: that proposals ensure that citizens from more deprived backgrounds, who may be more reliant on public services, will find it easier to make a complaint.

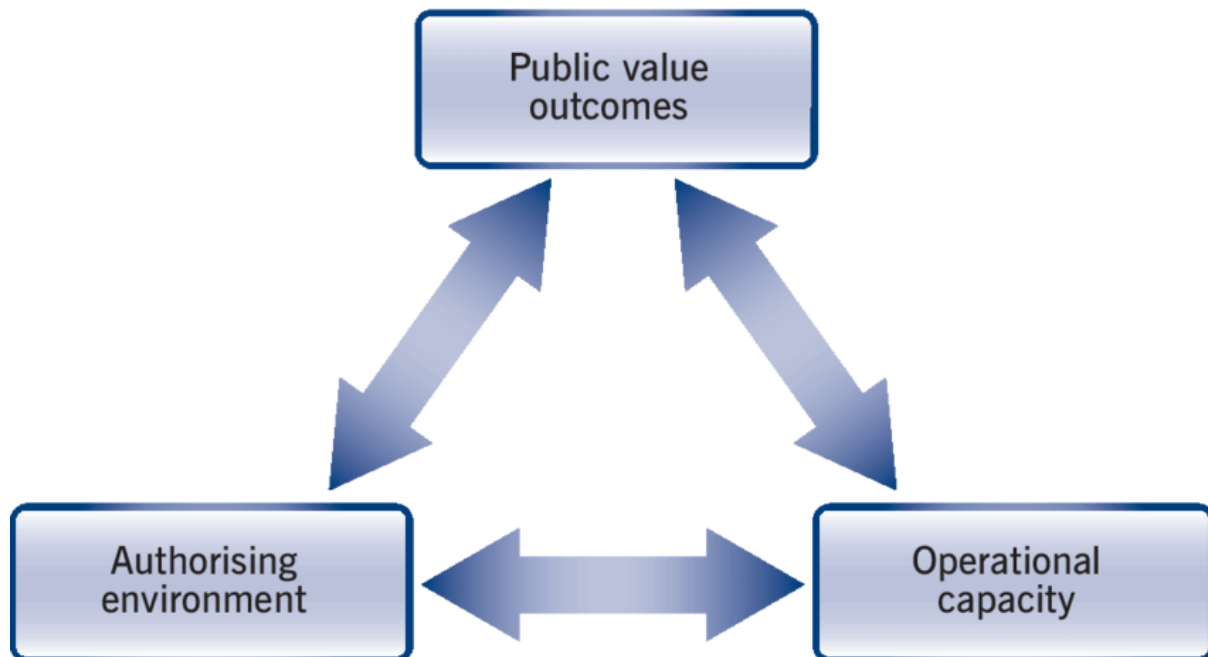
Citizen Centred: proposals should strengthen the citizen's voice and ensure that wherever possible processes follow the citizen rather than the sector or the silo.

Drive complaint handling and public service improvement: that proposals make a real contribution to public service improvement and reform whilst offering excellent value for money.

Driving Change

In 2008 I was fortunate enough to participate in an *Innovations in Governance* leadership training programme at the John F Kennedy School of Governance.

I was particularly impressed by Professor Mark Moore's "strategic triangle"³ a methodology which was brilliant and simple at the same time. In order to create public value and change, it was essential to have a strategic focus on three key aspects – capacity, the authorising environment and the proposition itself. This was to be my toolkit.



Source: Moore, 1995

³ Mark Moore *Creating Public Value*

The fundamental proposition was not about strengthening powers for my office itself, but in delivering more justice for service users and improvement for public services. I knew that I had capacity to make the case for reform, but there would be capacity incentives for others, less maladministration for public bodies in my jurisdiction and a reduction in the ever-increasing workload for my staff. There was also a need to warn of the risk of Wales falling behind and in failing to adopt international best practice. The reforms I desired had to have a resonance across the political spectrum and with all aspects of the authorising environment, public bodies, political parties, the National Assembly, the Government and other key stakeholders. The package of reforms had to have an appeal. Own initiative powers were about empowering the most vulnerable and voiceless in society. Oral complaints were about ensuring that those that needed public services the most were not disadvantaged by those with sharper elbows. Complaint standards were about greater responsiveness to the citizen as was public/private health complaint integration. The authorising environment required convincing not just by me, but by the beacons of good practice in other Celtic countries and from a wider international perspective. It wasn't just about the message but also the messenger, not just about the benefits to the citizen, but to stakeholders themselves.

In Wales, the Ombudsman is accountable to the National Assembly for Wales, and not the Welsh Government. Legislation concerning the Ombudsman is brought forward by the Assembly, and not the Welsh Government. In practice, this means that the legislation is developed by a cross-party Committee, in this case, the Finance Committee.

I set about preparing a paper to put to the Finance Committee advocating reform – and was delighted when the committee, agreed to undertake a formal evidence inquiry from January 2015. The proposals I developed included the following:

Own initiative investigations

Virtually without exception, public services ombudsman offices throughout Europe, and indeed, internationally, have the power to undertake investigations on their own initiative. The Ombudsman in the Republic of Ireland already had such a power and it was shortly to be introduced in Northern Ireland also. Outside of the UK, only five members of the Council of Europe had ombudsman offices who did not have own initiative powers: Belgium, Luxembourg, Azerbaijan, Kyrgyzstan and Liechtenstein.

This is a power normally used sparingly to investigate where there is an obvious problem but no complaint has come forward or to extend an investigation into a complaint to other bodies where it appears that the maladministration or service failure identified is likely to be systemic and affecting people other than the complainant.

I used the example of the Ombudsman in the Republic of Ireland who undertook five systemic reviews between 2001 and 2010 on issues ranging from subventions in nursing home care, tax refunds to widows, refuse collection charges and the rights to nursing home care for older people.

I accepted that it would be important to frame any changes in such a way as to ensure that the power would be used only where appropriate and cases could be referred to regulators or commissioners where this was a more suitable alternative.

I explained that this power was likely to become more important due to the impact of an ageing society with citizens in vulnerable positions either unable or afraid to complain.

Complaint Standards Authority

In Wales, the Ombudsman had developed a model complaints policy to help to achieve consistency across public service providers. Take up had been patchy but was improving. Adoption is voluntary, but strongly encouraged. In theory, with recent changes to the social services statutory complaints procedure, all public services devolved to Wales should be operating a streamlined two stage complaints procedure. However, the problem lies with enforcement. I was conscious of the arrangement in Scotland where a few years previously, the Scottish Ombudsman was given the role of Complaints Standards Authority. The Scottish Ombudsman has found this arrangement to be particularly effective in enabling the office to tackle problems in the standards of complaint handling within the bodies in jurisdiction. I believed that there was a case for adopting such an approach in Wales so that any guidance I gave to bodies on complaints handling had statutory force so that I could help support improvement in public sector complaints handling.

Oral complaints

The existing Welsh legislation was generally helpful in providing access to the office. The requirement for bodies in jurisdiction to tell people about their right to complain had ensured that people could access the office as they needed to. There was, however, a requirement that all complaints should be in writing. Whilst the Ombudsman had discretion to accept a complaint in another form if appropriate, this had to be considered on a case by case basis.

However, in view of the changing nature of electronic communication, and the considerable equalities issues about potentially excluding people who cannot write, including, for example, people with learning disabilities, there was a case to be made for modernising this area of the legislation so that it is explicit in the legislation that complaints may be made orally. At UK level 94% of the population attain literacy level 1 or above, in Wales it is only 87%. Access for people who cannot write should not be discretionary. They should have had the same access as any other service user in Wales. In England legislation had recently been reformed for the Local Government Ombudsman. There

was a danger that in Wales was a greater need but the legislation was lagging behind.

Extension and reform of jurisdiction- Healthcare

With an ageing society the integration of health and social care is an important part of public policy. My jurisdiction had recently been extended to include self-funded social care and hospice care; however, I could not investigate private healthcare, unless it had been commissioned by the National Health Service (NHS). I referred earlier to a case that I could not resolve where a patient had been treated by the NHS, then privately (self-funded) and then again in the NHS. The patient sadly died. I was unable to investigate the private funded healthcare. Clearly there was a need to reform legislation so that where a patient chooses to be treated in both public and private sectors, the complaints process would follow the citizen and not the sector.⁴

Early in 2015, the Committee heard evidence from the then Scottish Ombudsman, Jim Martin and Northern Irish Ombudsman Tom Frawley.

Both argued that the legislation governing the Ombudsman Offices in the devolved countries was already more advanced than that in England and at a UK level. They both strongly endorsed the need for further reform.

Jim Martin particularly focused on the Scottish experience of developing the Complaints Standards Authority model. He explained how it had led to greater consistency, and a reduction in premature complaints. He highlighted the way in which it allowed comparison between the performance of bodies in jurisdiction on complaint handling, but also could highlight where disproportionate numbers of complaints on particular topics might reveal serious service failure.

Tom Frawley explained that the Northern Ireland Assembly at the same time was considering draft legislation which had also been developed by a Committee. He gave many examples of the successful use of own-initiative powers in other jurisdictions.

However, despite the support and evidence made available to the Committee, Leighton Andrews, the then Minister for Public Services was less enthusiastic. Whilst the Finance Committee could initiate its own legislation to extend the powers of the Ombudsman and to make public services more accountable, it would require support from the government in terms of legislative time and a financial resolution as part of the process. When he gave his evidence to the committee in March 2015, it was clear from the outset that he was not minded to give the legislation his support. This meant that nothing could proceed until after the next election.

⁴ Paper to Finance Committee January 2015.

It was a great disappointment to me that, despite the progress made in getting the Finance Committee to take evidence in support of legislation, the broader stakeholder support and the international evidence of effectiveness - and the fact that it was more than 12 months until the next Assembly election and there could be no progress on legislation until then. The risk of trying to push the legislation before the election was that should it fall, it would be nigh impossible to revive it.

The committee reported in May 2015 supporting revised legislation and wrote a legacy document for the next Assembly (including a draft bill). With the current finance chair standing down, I knew that it would be challenging to keep the prospect alive.

My thoughts turned to influencing the political parties, all of whom would be producing Manifestos to put to the electorate. I set about lobbying all the parties and in January I met with Adam Price who at the time was tasked with drafting the Plaid Cymru election manifesto. When published, I was delighted that the 2016 Plaid election manifesto stated:

“by supporting a new Public Service Ombudsman Act which will give ‘own initiative powers’ to proactively deal with public service complaints and systematic failures, and a new Complaints Standards Authority to drive improved responsiveness to citizens’ concerns across the public sector – ensuring that Wales adopts best practice from Scotland, Ireland and mainland Europe.”

This would be a hook which I could use to at least try to secure new legislation in the event of any coalition or confidence or supply agreement involving Plaid and indeed in working with any new Plaid chair of the Finance Committee.

In the spring of 2016 I had also published my first thematic report on the need for a review and improvement of Out of Hours Services in the NHS - it was very high profile, not just in Wales but also in the wider UK. I feared that the use of my statutory powers would set the government against me receiving broader systemic powers.

After circulating a draft of the report, I received a strongly worded response from the Chief Executive of NHS Wales, Andrew Goodall, who said he considered our report “...anecdotal and not sufficiently evidence based to be used to drive whole system change.” Resistance to the report extended to the deputy Chief Medical Officer, and the chief civil servant in Wales, Sir Derek Jones, who wrote to me.

I disagreed.

Despite the push back and defensiveness, once the election was out of the way the new Health Minister did ensure that the report was reviewed and acted upon.

A BBC Wales report broke news of a review into acutely sick patients’ care.

A Welsh Government spokesman said: "Numerous discussions have been ongoing with the Public Services Ombudsman for Wales and a way forward has been agreed. This will take the form of a peer review programme which will look specifically at acutely sick patients. This work will be underway in the new year."

I told the media I was "delighted." I was actually relieved more than delighted! The report's publication had provided a source of debate in the run up to the 2016 election and in First Minister's Questions. The methodology had been rubbish and the then Health Minister had distanced himself from the findings, saying that none of these cases had occurred on his watch. However, I was told that the thematic report had left a bitter case, and that this could affect the appetite and the support for more powers. Yet throughout the campaign for more powers I was at pains to underline the need for more improvement, and less maladministration and service failure.

The relief I felt was that, for all the opposition, for all the pushback from the most powerful people in the Health system and the Welsh Government, we achieved change! It was reassuring to see a maturing executive understand the importance of accountability and contestability despite its inconvenience.

If at first, you don't succeed TRY AGAIN

There was a period of instability following the election, but ultimately Plaid's Simon Thomas became the new chair of the Finance Committee. By this time, I had been elected to the European Board of the International Ombudsman Institute— and its President was Rafael Ribo, the Catalan Ombudsman. There are strong links between Wales and Catalonia on issues around devolution and language.

Rafael Ribo, along with contributors from Scotland, Northern Ireland, Ireland and the new chair of the Finance Committee, agreed to attend a seminar in Aberystwyth University. The seminar was a great success with participation by the Finance Committee Chair, Peter Tyndall, Jim Martin, Tom Frawley and some excellent academic input.

The headline from BBC Wales news coverage read:

Wales could be "left behind" by other parts of Europe if its public service ombudsman is not given more powers, the role's European head has claimed.

Rafael Ribo, European president of the International Ombudsman Institute, said it would strengthen Wales' ability to deal with complaints. Nick Bennett agreed, saying it would "drive up standards".

A draft Ombudsman bill was consulted on by the fourth Welsh Assembly.

"Current ombudsman legislation in Wales is still highly regarded, but in my view the time has come to provide new powers to ensure Wales doesn't get

left behind," he said. Scrutiny of public services is a crucial driver for improvement and own initiative powers, used effectively, have proved a powerful tool for ombudsmen across Europe."

By 2017 the new legislation was officially supported by the Finance Committee, but the price would include repeating the stage 1 consultation, and preparing an explanatory memorandum and a Regulatory Impact Assessment that would have to be incredibly detailed, not least because the Committee had often been critical of government legislation in this regard. If the Committee was to produce its first ever committee-led legislation, then it had to be above any such criticism.

The staff from my office with support from a consultancy worked hard to ensure that there was clear communication around the new draft legislation. Stage 1 scrutiny proceeded relatively smoothly, though there was some evidence and opinions intended to derail it including "evidence" from one regulator that "these powers don't exist anywhere else in the world!"

It was important to work with government and stakeholders to reassure or dispel where any doubts or misgivings existed.

In November 2017 at the Hague the Dutch Ombudsman, Reinier van Zutphen, hosted an Own Initiative "poldershop" to exchange best practice between those schemes that already had own initiative powers including Sweden, the oldest Ombudsman Scheme in Europe. One of the questions/ risks put to me by government was "What if you were judicially reviewed for refusing to undertake an own initiative?". The response from Sweden was robust: "Not since 1807!"

The Bill had at last been proposed by the Assembly's Finance Committee and it was to be the first committee-proposed Bill ever to be considered in Wales.

In early 2018 I was delighted when the Equality, Local Government and Communities Committee concluded the Bill's aims, to strengthen the powers of the Ombudsman, including allowing him to launch inquiries without first receiving a complaint and investigating private healthcare organisations, were warranted and would strengthen the principles of social justice in Wales.

"The Committee recommends a requirement that own initiative investigations should not be launched without full consultation with relevant regulators beforehand

The committee did require that the Member in Charge (Finance Committee chair Simon Thomas) brought forward a number of amendments at Stage 2, including placing a requirement on the Ombudsman to consult with regulators before embarking on an own initiative investigation, and strengthening the Welsh language

duties and responsibilities. The Member in Charge was also required to publish a revised Explanatory Memorandum and Regulatory Impact Assessment, before Stage 2, taking account of the Committee's recommendations.

The legislative process proceeded at a snail's pace in 2018 to the point that I went public with my concerns in May 2018, the BBC headline read:

New powers to allow the public services watchdog to investigate private healthcare cases may not happen, the Ombudsman has warned.

There are fears new legislation will not happen as the financial resolution will not be agreed in time. The Welsh Government said they needed a "full understanding of the costs". Assembly members voted in favour of the Public Services Ombudsman (Wales) Bill in March with Finance Secretary Mark Drakeford then having six months to give the final go-ahead. I was concerned two months had already passed and the summer recess was fast approaching and yet there had been no progress.

"If this bill falls over the next few weeks then there will be a price to pay and I'm afraid it's going to be public service users in Wales that will have to pay that price," he said.

Simon Thomas, chairman of the assembly's finance committee, which is sponsoring the bill, said talks with the Welsh Government had been "positive" but discussions must take place in a "timely fashion" to avoid a "last-minute rush" or losing the bill altogether.

Eventually the financial resolution was passed before the summer recess, but then another setback, Simon Thomas resigned suddenly as both chair of the Committee and as an AM.

Finally getting there

Llyr Gruffydd AM, became the new member in charge in Autumn 2018. As stage 3 approached he would have to deal with over 300 amendments to the legislation, many of them technical, but nonetheless, he was incredibly impressive in getting up to speed with the legislation and dealing with dissent with gusto.

Further amendments at this stage posed specific risks to the office. One amendment sought to make the ombudsman accountable to an independent review panel, whilst a further amendment would have given the office a role in appealing policy rather than reviewing maladministration. Both amendments failed, and I did not hold back in communicating my concerns to interested parties.

At the stage 3 on 20th March 2019 the legislation passed by 46 to 1 with 3 abstentions.

The Bill proceeded to stage 4, royal assent and commencement order in July 2019.

I was particularly pleased that Mrs Lewis, who had made such an impact on me when I was appointed to the job, gave her reaction to the passing of the bill.

The headline on BBC Wales read

Widow 'thrilled' by bill to let ombudsman probe private health

The report quoted her as saying it was a “great relief” to her that my office would be given the new powers. I very much regard the bill as a legacy to her and her late husband, Peter.

As the legislative process came to an end, no time was wasted in beginning informal consultation with bodies in our jurisdiction. We re-organised the office with a new improvement team. Criteria for both Complaints Standards and Own initiative were prepared for consultation with the National Assembly, as required by the legislation, in a very timely manner.

I recruited two new staff for the Complaint Standards Authority and two existing and very experienced investigators to work on Own Initiative investigations, alongside policy and communications colleagues. We also located our review and service quality functions in the new team to ensure that key messages for bodies in jurisdiction weren't being lost on our own internal operations. As the summer approaches we look forward to launching our first ever Own Initiative proposal and Local Authority Complaint Standards.

Nick Bennett

May2020
