

Report on the Public Services Ombudsman (Wales) Bill

March 2018



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About the Committee

The committee was established on 15 June 2016 to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers, including the quality of legislation.

Committee Chair:



Mick Antoniw AM
Welsh Labour
Pontypridd

Current Committee membership:



Mandy Jones AM
UKIP Wales
North Wales



Dai Lloyd AM
Plaid Cymru
South Wales West



David Melding AM
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1. Introduction

The Committee's remit

1. The remit of the Constitutional and Legislative Affairs Committee (the Committee) is to carry out the functions of the responsible committee set out in Standing Order 21¹ (with the exception of Standing Order 21.8²) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.

2. In our scrutiny of Bills introduced in the National Assembly, our approach is to consider:

- matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and
- any other matter we consider relevant to the quality of legislation.

Introduction of the Bill

3. On 2 October 2017, the Public Services Ombudsman (Wales) Bill³ (the Bill) and accompanying Explanatory Memorandum⁴ was introduced by Simon Thomas AM, Chair of the Finance Committee as an Assembly Committee Bill.

4. The National Assembly's Business Committee referred the Bill to the Equality, Local Government and Communities Committee on 19 September 2017, and set a deadline of 9 March 2018 for reporting on its general principles.⁵

¹ National Assembly for Wales, ***Standing Orders of the National Assembly for Wales***, October 2017

² Functions under Standing Order 21.8 are the responsibility of the ***External Affairs and Additional Legislation Committee***

³ Available on the National Assembly's ***website***.

⁴ ***Public Services Ombudsman (Wales) Bill, Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes***, October 2017

5. We considered the Bill at our meeting on 15 January 2018. We took evidence from the Cabinet Secretary for Finance (Cabinet Secretary) and two Welsh Government officials and Simon Thomas AM, the Member in charge of the Bill (Member in charge) and two Assembly Commission officials.

Background

6. The Explanatory Memorandum accompanying the Bill states that the Bill is intended to:

“...replace existing legislation governing the functions of the Public Services Ombudsman for Wales (the Ombudsman) under the Public Services Ombudsman (Wales) Act 2005 (the 2005 Act).

The Bill makes provision about the office of the Ombudsman and the investigatory functions of the role. It also requires the Ombudsman to publish a statement of principles concerning complaints-handling procedures of listed authorities and enables the Ombudsman to publish model complaints-handling procedures.”⁶

7. The role of the Public Services Ombudsman for Wales (the Ombudsman) was established by the *Public Services Ombudsman (Wales) Act 2005* (the 2005 Act). The 2005 Act brought together the previous functions and powers of the Local Government Ombudsman, the Health Service Commissioner for Wales, the Welsh Administration Ombudsman and Social Housing Ombudsman for Wales.⁷

8. The 2005 Act also made provisions relating to the Ombudsman’s functions. These functions include among others, the Ombudsman’s investigatory powers, powers to seek compensation for the aggrieved and powers to issue guidance to public bodies.

9. In November 2014, the Ombudsman’s powers were extended to cover social services complaints in the private sector.⁸ The provisions for the extended powers are set out in the *Social Services and Well-being (Wales) Act 2014*.

10. The Ombudsman’s role in respect of Code of Conduct complaints was also amended from April 2016 as a result of the *Local Authorities (Model Code of*

⁵ Business Committee, ***Report on the timetable for consideration of Public Services Ombudsman (Wales) Bill***, September 2017

⁶ Explanatory Memorandum, paragraphs 1.1-1.2

⁷ Explanatory Memorandum, paragraph 3.2

⁸ Explanatory Memorandum, paragraph 3.5

*Conduct) (Wales) (Amendment) Order 2016 and the Local Government (Standards Committees, Investigations, Dispensations and Referral) (Wales) (Amendment) Regulations 2016.*⁹

11. The Explanatory Memorandum states that while the Ombudsman's current role is working effectively and the 2005 Act is generally considered a model piece of ombudsman legislation, since 2013 there have been calls to extend the Ombudsman's powers.¹⁰

12. The Communities, Equality and Local Government (CELG) Committee and the Finance Committee in the Fourth Assembly were involved in the consideration of extending the role of the Ombudsman. In 2013, the then Ombudsman, Peter Tyndall, wrote to the Chair of the CELG Committee setting out changes that he believed were required to the 2005 Act, and referred to these during a scrutiny session in November 2013 to discuss his annual report.¹¹

13. At the time, the Local Government and Government Business Secretary, Lesley Griffiths AM, said the Ombudsman raised some worthwhile points. However, she also noted that detailed consideration and discussion was needed, which required the input of the successor Ombudsman. Nick Bennett was appointed in 2014 as the new Ombudsman, and the Explanatory Memorandum notes that in November 2014, the Finance Committee heard from the Ombudsman that "he believed there was an appetite to update the 2005 Act".¹²

14. According to the Explanatory Memorandum, discussions were held with the Welsh Government about the issue and the then Minister for Finance and Government Business, Jane Hutt AM, advised that it would be more appropriate, given that the Ombudsman was answerable to the National Assembly, for the Assembly to lead on any legislative change.¹³

15. The Explanatory Memorandum states that the Finance Committee of the Fourth Assembly undertook an inquiry and launched a consultation on revising the Ombudsman's powers. The consultation sought views from stakeholders, the public and the Welsh Ministers.¹⁴ The Finance Committee of the Fourth Assembly

⁹ Explanatory Memorandum, paragraph 3.6

¹⁰ Explanatory Memorandum, paragraph 3.9

¹¹ Explanatory Memorandum, paragraph 3.11

¹² Explanatory Memorandum, paragraphs 3.12-3.13

¹³ Explanatory Memorandum, paragraph 3.14

¹⁴ Explanatory Memorandum, paragraph 3.18

published its report in May 2015.¹⁵ It recommended that a Bill should be introduced into the Assembly as it was “persuaded by the evidence that there should be a revision to the powers of the Ombudsman”.¹⁶ The Finance Committee then launched a full public consultation on a draft Bill¹⁷ towards the end of the Fourth Assembly and reported in March 2016.¹⁸

16. As stated in the Explanatory Memorandum, the Bill, as introduced, largely consolidates the 2005 Act. However, the Bill also amends and introduces new provisions that widen the powers of the Ombudsman’s office to:

- accept oral complaints;
- undertake own-initiative investigations;
- investigate private medical treatment including nursing care (“private health services”) in a public/private health pathway; and
- undertake a role in relation to complaints-handling standards and procedures.¹⁹

¹⁵ Finance Committee, ***Consideration of Powers: Public Services Ombudsman for Wales***, May 2015

¹⁶ Explanatory Memorandum, paragraph 3.19

¹⁷ Explanatory Memorandum, paragraph 3.20

¹⁸ Finance Committee, ***Consideration of the consultation on the Draft Public Services Ombudsman (Wales) Bill***, March 2016

¹⁹ Explanatory Memorandum, paragraph 5.2

2. Legislative competence

General

17. The Explanatory Memorandum states that the National Assembly has the legislative competence to make provisions in the Bill by virtue of section 108 and Part 1 of Schedule 7 to the *Government of Wales Act 2006*, specifically:

- Paragraph 9: Health and health services;
- Paragraph 11: Housing;
- Paragraph 12: Local government;
- Paragraph 14: Public administration;
- Paragraph 15: Social welfare; and
- Paragraph 19: Water and flood defence.²⁰

Cabinet Secretary's evidence

18. The Cabinet Secretary told us that as this is not a Government Bill, the Welsh Government were happy to rely on the assurances provided by both the Member in charge and the Llywydd that the provisions of the Bill, as introduced are within competence.²¹

Member in charge's evidence

19. The Member in charge told us that he is very confident that the Bill is within the National Assembly's competence.²²

20. We also asked about issues of competence in case the general principles of the Bill were not agreed before the reserved powers model in the *Wales Act 2017*, becomes law on the Principal Appointed Day.²³ The Member in charge told us:

“The Bill is based on the previous Act of 2005, but also on Schedule 7 to the Government of Wales Act 2006, and therefore relates to the public services ombudsman in that context. Now, if this Bill weren't to pass

²⁰ Explanatory Memorandum, paragraphs 2.1-2.4

²¹ CLA Committee, 15 January 2018, RoP [43]

²² CLA Committee, 15 January 2018, RoP [111]

²³ [National Assembly for Wales website, Legislation, Principal Appointed Day](#)

that point that you mentioned, namely the cut-off point for the new legislative competence, then that would raise some questions on competence in its current form. We would have to review the Bill in light of that..."²⁴

Human rights

21. The impact of the Bill on human rights and equality has been assessed by the Member in charge. The Explanatory Memorandum sets out the indirect and direct impact of the Bill on both areas.²⁵ It concludes:

"The Bill secures and strengthens the role that the Ombudsman has in addressing the equality and human rights issues that arise from investigations. That role can have a direct effect on the way that public services are provided, and can therefore have a positive impact on a broad range of equality and human rights issues.

As for the investigatory process itself, the Bill provides greater flexibility for the Ombudsman to help the most vulnerable people in our society, be they vulnerable by reason of disability, age, fear, homelessness or any other status. This will have a further positive impact on equality and human rights issues that have not historically been brought to the attention of the Ombudsman."²⁶

Cabinet Secretary's evidence

22. We asked the Cabinet Secretary what implications the Bill could have upon human rights. He told us that he believes the Bill supports human rights by providing the ability to take oral complaints, as this "assists with the human rights of those people who aren't confident in submitting things in writing".²⁷ The Cabinet Secretary also indicated that the Bill contains regulation-making powers that would protect personal data.²⁸

²⁴ CLA Committee, 15 January 2018, RoP [11]

²⁵ Explanatory Memorandum, paragraphs 12.2-12.32

²⁶ Explanatory Memorandum, paragraphs 12.31-12.32

²⁷ CLA Committee, 15 January 2018, RoP [47]

²⁸ CLA Committee, 15 January 2018, RoP [47]

23. The Cabinet Secretary suggested that should the Bill proceed further in the legislative process, the Welsh Government may wish to raise concerns with the Member in charge around retrospective provisions.²⁹ He said:

“... in creating the new ability to take own-initiative investigations, the Bill allows the ombudsman to look backwards in time, as well as forwards from the point at which the Bill becomes an Act of the Assembly. There is no time limit in the Bill to that retrospective ability. I think you could argue that a non-time-limited ability to go into the past could give rise to some human rights considerations ...”³⁰

24. The Cabinet Secretary stated his belief that the Ombudsman currently does not investigate complaints that are more than one year old.³¹ He suggested that a retrospective period of this sort in relation to own-initiative investigations might allow the Bill to work more effectively and have consideration to human rights issues that may occur in that context.³²

25. An accompanying Welsh Government official acknowledged that the Bill contains safeguards that enable the Ombudsman to consider issues retrospectively but only when the Ombudsman is satisfied that there is still a risk of hardship or maladministration or systematic failure.³³ The Cabinet Secretary added that it was not the Welsh Government’s position that there should be no retrospective ability for the Ombudsman, but the Bill should not allow for “an unfettered right to go back as far as you might ever want to go”.³⁴

Member in charge’s evidence

26. The Member in charge told us the Bill impacts on human rights in two specific ways, namely:

- in respect of the functions of the Ombudsman being “an important part of the architecture of human rights in Wales”,³⁵ and

²⁹ CLA Committee, 15 January 2018, RoP [48]

³⁰ CLA Committee, 15 January 2018, RoP [49]

³¹ CLA Committee, 15 January 2018, RoP [49]; **Letter from Mark Drakeford AM, Cabinet Secretary for Finance, 8 February 2018**

³² CLA Committee, 15 January 2018, RoP [49]

³³ CLA Committee, 15 January 2018, RoP [52]

³⁴ CLA Committee, 15 January 2018, RoP [59]

³⁵ CLA Committee, 15 January 2018, RoP [114]

- because it relates to citizens' rights and deals with the rights of other individuals.³⁶

27. The Member in charge noted that the Ombudsman himself is subject to equalities and human rights legislation and argued that the Bill makes human rights more accessible and clearer in Wales.³⁷

28. On the issue of retrospection, the Member in charge clarified the current position. He said that the Ombudsman, in general, would only investigate going back over a year's period. However, he acknowledged that there is discretion to extend this under the 2005 Act.³⁸

29. In relation to the proposed own-initiative investigations, the Member in charge said that "it's very clear that we're not looking or seeking to make this a retrospective free-for-all".³⁹ He explained that the criteria for own-initiative investigations is specified on the face of the Bill, and that the Ombudsman "must be sure that any own-initiative investigation is in the public interest".⁴⁰ He indicated that this, in general administrative law terms provides for an appropriate safeguard.⁴¹ He added that in addition to an own-initiative investigation having to be in the public interest, there would be additional criteria to meet,⁴² with the matter under investigation being:

- likely to sustain injustice or hardship in consequence of the matter;⁴³ and
- a systemic failure that may cause any person to sustain injustice or hardship.⁴⁴

30. When asked if the Bill almost creates a specific power to be retrospective as it is not possible to define public interest without looking at the history of the failure, the Member in charge replied:

"... I'm very clear that if you're looking at a systemic failure then, yes, you are looking back at things that have happened maybe beyond the

³⁶ CLA Committee, 15 January 2018, RoP [114]

³⁷ CLA Committee, 15 January 2018, RoP [115]

³⁸ CLA Committee, 15 January 2018, RoP [118]

³⁹ CLA Committee, 15 January 2018, RoP [119]

⁴⁰ CLA Committee, 15 January 2018, RoP [119]

⁴¹ CLA Committee, 15 January 2018, RoP [119]

⁴² CLA Committee, 15 January 2018, RoP [119]

⁴³ CLA Committee, 15 January 2018, RoP [120]

⁴⁴ CLA Committee, 15 January 2018, RoP [122]

current year's ability that the ombudsman has to look at complaints, but the point I was making is that it has to be an ongoing failure; it can't be simply a past failure that was dealt with by the intervention of a Government previously ... This has to be something that is currently likely to sustain injustice or hardship."⁴⁵

31. The Member in charge reiterated that the wording of the Bill makes it clear that any systematic failure being investigated cannot be something historic that has already been dealt with appropriately by the relevant authority. He indicated that such cases are likely to be picked up by the Ombudsman through casework or whistleblowing, where maybe a specific complaint has not been made but there is sufficient evidence that meets the criteria set by the Bill.⁴⁶ He said of the Ombudsman:

“...he has to demonstrate that that is happening, otherwise he does not have the power to do it.”⁴⁷

32. The Member in charge also provided some clarification on the retrospective element of own-initiative investigations in correspondence.⁴⁸

Our view

33. We note that no issues have been raised with the Member in charge regarding the National Assembly's ability to make this legislation under section 108 and Schedule 7 to the *Government of Wales Act 2006*.

34. We note that human rights are engaged as outlined in the Explanatory Memorandum and in evidence provided by the Member in charge. We have carefully considered the views of the Member in charge and the Cabinet Secretary. We are satisfied that the Bill allows the Ombudsman to undertake own-initiative investigations in circumstances where there is an on-going failure, which is likely to cause injustice or hardship. We are therefore satisfied that the appropriate safeguards are in place in relation to own-initiative investigations.

⁴⁵ CLA Committee, 15 January 2018, RoP [125]

⁴⁶ CLA Committee, 15 January 2018, RoP [126]

⁴⁷ CLA Committee, 15 January 2018, RoP [126]

⁴⁸ **Letter from the Chair of the Finance Committee, Public Services Ombudsman (Wales) Bill, 30 January 2018**

3. General observations

The need for legislation

Cabinet Secretary's evidence

35. The Cabinet Secretary outlined the Welsh Government's position in respect of the Bill, as introduced. He told us that the Welsh Government "have offered ... caveated support".⁴⁹ He said:

"If you think of the Bill as having four main aspects, then we are broadly content, subject to some relatively minor points with what the Bill proposes in relation to a new ability for the ombudsman to take oral complaints, and the ability of the ombudsman to pursue the privately provided aspects of a healthcare pathway that involves the Welsh NHS as well as the private provider."⁵⁰

36. However, the Cabinet Secretary indicated that although he was not opposed to the other aspects of the Bill, he has some concerns that merit exploration. He told us:

"...we've had some questions to ask, particularly in relation to the own-initiative proposals, which are new and would be the first time that the ombudsman in Wales had such powers, and in the standard-setting aspects of the Bill."⁵¹

37. When asked what thought the Welsh Government had given to introducing legislation in this area, the Cabinet Secretary told us that discussions between his predecessor and the Finance Committee had taken place during the Fourth Assembly about who should take responsibility for taking forward proposals that have been generated by the Ombudsman's office.⁵² He said:

"I think, at that time, the Welsh Government's view—and I think it was, in the end, shared by the Finance Committee—was that, because the ombudsman has powers to scrutinise the Welsh Government itself, the Welsh Government was not best placed to bring those proposals forward. And the ombudsman is, of course, accountable directly to the

⁴⁹ CLA Committee, 15 January 2018, RoP [38]

⁵⁰ CLA Committee, 15 January 2018, RoP [38]

⁵¹ CLA Committee, 15 January 2018, RoP [39]

⁵² CLA Committee, 15 January 2018, RoP [41]

National Assembly. For those reasons, I think our feeling at the time—and still would be—was that the reforms are best promoted via a vehicle that belongs to the Assembly itself rather than to the Executive side.”⁵³

Member in charge’s evidence

38. We asked the Member in charge why it was considered necessary to bring forward this legislation. He told us that this committee Bill, approved by the Finance Committee, is a result of a review of the 2005 Act where the former Ombudsman, Peter Tyndall, produced a report “on what had succeeded in terms of the powers or the new approaches that were required by the ombudsman”.⁵⁴

39. The Member in charge outlined how an Assembly committee in the Fourth Assembly considered this report. However, “at the time ... that committee didn’t have the time or the resources to proceed with preparing a Bill, and therefore, in negotiation with the Finance Committee, it was agreed that the Finance Committee would consult on the draft Bill”, which was completed by the end of the Fourth Assembly.⁵⁵

40. The Member in charge explained that:

“... in this Assembly, the Finance Committee, when I became Chair, actually took hold of the draft, reviewed it, and looked at it in light of some of the evidence that had been received since then and in light of some of the conversations that had taken place with the new Cabinet Secretary who was also new in post at that time ... there were a few changes that were made to that draft Bill and now we have a Bill that has been presented as a Bill to be discussed by the Assembly.”⁵⁶

Consolidation

Cabinet Secretary’s evidence

41. The Cabinet Secretary told us that he believed there were a number of reasons why it is more effective to have a new Bill rather than seek to amend the 2005 Act. He said:

⁵³ CLA Committee, 15 January 2018, RoP [41]

⁵⁴ CLA Committee, 15 January 2018, RoP [107-108]

⁵⁵ CLA Committee, 15 January 2018, RoP [108]

⁵⁶ CLA Committee, 15 January 2018, RoP [109]

“First of all, it’s an opportunity to provide the legislation bilingually, and that’s important for us in Wales, because the original Act, back in 2005, was drawn up in the Commons and the Lords, and it’s only available in English.

The second point is that, in having a new piece of legislation, it will be possible to consolidate everything that is pertinent to the ombudsman in one place, and that assists people generally in terms of accessibility. So, for me, I can see the rationale behind the Finance Committee’s decision to proceed in this particular way.”⁵⁷

Member in charge’s evidence

42. The Member in charge outlined the reasons for not simply amending the 2005 Act and pursuing a new Bill instead. He spoke of the opportunity to bring forward bilingual legislation in an area “that is exceptionally important to public services in Wales”⁵⁸ as the 2005 Act is only available in English. He also stated that rather than making numerous amendments to an existing Act, whereby citizens would have to return to the original piece of legislation, the Bill broadly restates the 2005 Act while introducing four new provisions in an endeavour to follow best practice.⁵⁹

43. Part 5 of the Bill makes provision for the investigation of complaints relating to social care and palliative care. The *Social Services and Well-being (Wales) Act 2014* inserted provisions relating to social and palliative care providers into the 2005 Act. The Member in charge explained why this part of the Bill updates the 2005 Act:

“... it was only two and a half years ago that the Assembly, as a whole, decided that this was the way of dealing with this particular section. We felt that we were overstepping the mark, in a way, if we tried to redo what the Assembly had approved unanimously less than three years ago. That’s why the current Bill is drafted in this way.”⁶⁰

⁵⁷ CLA Committee, 15 January 2018, RoP [62-63]

⁵⁸ CLA Committee, 15 January 2018, RoP [128]

⁵⁹ CLA Committee, 15 January 2018, RoP [128]

⁶⁰ CLA Committee, 15 January 2018, RoP [129]

Our view

44. We welcome the approach adopted by the Member in charge in providing a Bill that is a consolidated piece of legislation and also the positive comments of the Cabinet Secretary in support.

45. We believe it represents the best practice approach our predecessor Committee promoted in its report *Making Laws in Wales*.⁶¹ As both the Member in charge and Cabinet Secretary pointed out in their evidence, it enables legislation of considerable importance in Wales to be available bilingually and the benefits of this to Welsh citizens should not be underestimated.

Balance between what is on the face of the Bill and what is left to subordinate legislation

Cabinet Secretary's evidence

46. We asked the Cabinet Secretary if he believed that the correct balance had been struck between what is on the face of the Bill and what is left to subordinate legislation. He said that he felt generally speaking that the balance is right.⁶² He noted that regulation-making powers are consistent with the same approach in the 2005 Act, which he said was generally well-regarded.⁶³

47. The Cabinet Secretary identified one order-making power, that would provide the Children's Commissioner to consult and work with the Ombudsman, that he felt may be preferable to include on the face of the Bill.⁶⁴ In his view, this would be more straightforward because the Commissioner would have those powers from the outset, which would negate the need for that policy to be triggered by the Welsh Ministers.⁶⁵

Member in charge's evidence

48. We asked the Member in charge how he had decided what to put on the face of the Bill and what to leave to subordinate legislation. He told us that the balance had emerged from the 2005 Act, and based upon the consultation on

⁶¹ Constitutional and Legislative Affairs Committee, *Making Laws in Wales*, October 2015

⁶² CLA Committee, 15 January 2018, RoP [65]

⁶³ CLA Committee, 15 January 2018, RoP [68]

⁶⁴ CLA Committee, 15 January 2018, RoP [69]

⁶⁵ CLA Committee, 15 January 2018, RoP [69]

the draft Bill. He also felt that the parts of the original Act already in force had been effective.⁶⁶

49. The Member in charge confirmed that the regulation-making powers contained in the Bill are all subject to the affirmative procedure. He detailed the approach taken in order to strike the balance between what is on the face of the Bill and what is needed to maintain flexibility. He indicated if a section of the Bill was new then it had been placed on the face of the Bill instead of using subordinate legislation.⁶⁷ He told us:

“...where we were including something that was entirely new and it was possible to put it all on the face of the Bill, we did that, and where we felt that we needed to futureproof or where we felt that we needed to have that debate as time passes and provide that flexibility, we have tried to do it through the affirmative procedure.”⁶⁸

50. With regard to the Cabinet Secretary’s views on powers to work with the Children’s Commissioner, the Member in charge told us:

“I agree that there is a better way to deal with the issue of how the Ombudsman and the Children’s Commissioner in Wales work together and that setting out that detail on the face of the Bill is a better approach than leaving the detail to the Welsh Ministers to make subordinate legislation.”⁶⁹

Our view

51. We are content with the balance between what is on the face of the Bill and what is left to subordinate legislation.

52. We agree with both the Cabinet Secretary and the Member in charge that, in relation to the issue of how the Ombudsman and the Children’s Commissioner in Wales work together, setting out that detail on the face of the Bill is a better approach than leaving the detail to be included in subordinate legislation made by the Welsh Ministers. We trust the Member in charge will table an amendment to the Bill to that affect.

⁶⁶ CLA Committee, 15 January 2018, RoP [131]

⁶⁷ CLA Committee, 15 January 2018, RoP [132]

⁶⁸ CLA Committee, 15 January 2018, RoP [133]

⁶⁹ **Letter from the Chair of the Finance Committee, Public Services Ombudsman (Wales) Bill, 30 January 2018.**

4. Observations on specific powers to make subordinate legislation

Background

53. The Bill includes 13 powers permitting the Welsh Ministers to make subordinate legislation (mainly in the form of regulations). The rationale for the use of these powers and for the National Assembly procedure attached to them is contained in chapter 6 of the Explanatory Memorandum.

54. Of the 13 powers to make subordinate legislation:

- 12 are subject to the affirmative procedure; and
- one has no procedure – the power to make commencement orders.⁷⁰

55. Our scrutiny session focused on those powers of most interest to us and our consideration below considers the specific matters that we wish to draw to the attention of the National Assembly.

Henry VIII powers

Cabinet Secretary's evidence

56. We asked the Cabinet Secretary for his view on the Henry VIII powers (where regulations are used to amend primary legislation) contained in the Bill and if he considered these appropriate. The Cabinet Secretary told us that he believed there to be nine examples of Henry VIII powers in the Bill, six of which mirror the existing position.⁷¹ He suggested that the Bill does not represent “a great new leap into more extensive use of Henry VIII powers”.⁷² We asked the Cabinet Secretary whether he was satisfied that the affirmative procedure is appropriate for the Henry VIII powers contained in the Bill. The Cabinet Secretary noted that six out of the nine Henry VIII powers already have consultation requirements within them.⁷³ He added:

“...the affirmative powers that the Bill proposes, are, very often, stretched towards the superaffirmative without necessarily going all the way

⁷⁰ Explanatory Memorandum, Chapter 6, pages 31-39

⁷¹ CLA Committee, 15 January 2018, RoP [75]

⁷² CLA Committee, 15 January 2018, RoP [75]

⁷³ CLA Committee, 15 January 2018, RoP [79]

towards them. I don't think we have difficulties with that, because, for example, in that example of changes to the criteria for own-initiative investigations, I think it's a very important power to have in the Bill."⁷⁴

57. The Cabinet Secretary concluded that, in general, the Bill is proportionate as the Henry VIII powers are in:

"... narrow, specific areas, and when there is the need to make sure that the Assembly would have the benefit, not just of the Government's perspective, but of the perspectives of others, those consultation requirements will guarantee that the Assembly has that available to them in the affirmative procedure."⁷⁵

Member in charge's evidence

58. We asked the Member in charge why so many of the delegated powers contained in the Bill are Henry VIII powers. The Member in charge told us that the Bill includes nine Henry VIII powers, six of which are restated from the 2005 Act. He confirmed that each of the Henry VIII powers is subject to the affirmative procedure.⁷⁶ He added:

"...there's a strong scepticism about them, and I understand that, particularly when they are widely drawn and really allow Ministers just to slot in what they like into legislation. But I think these are very specific powers relating to very specific parts of the Act."⁷⁷

59. The Member in charge described the purpose of one of the Henry VIII powers where the power taken would allow future changes to the listed authorities. He re-iterated that the power had been "quite narrowly drawn and very relevant to the purpose of the Bill"⁷⁸. He suggested that the power did not "frustrate the Bill in any way"⁷⁹ or give the Welsh Ministers "any powers to do that"⁸⁰.

⁷⁴ CLA Committee, 15 January 2018, RoP [83]

⁷⁵ CLA Committee, 15 January 2018, RoP [84]

⁷⁶ CLA Committee, 15 January 2018, RoP [137]

⁷⁷ CLA Committee, 15 January 2018, RoP [137]

⁷⁸ CLA Committee, 15 January 2018, RoP [138]

⁷⁹ CLA Committee, 15 January 2018, RoP [138]

⁸⁰ CLA Committee, 15 January 2018, RoP [138]

60. He stated that the Bill has been updated without the use of Henry VIII powers where possible by putting more detail on the face of the Bill.⁸¹ He added:

“Where we’ve been able to, we’ve modernised the Bill on the face of the Bill, but where we feel that there will be a need for powers to amend the Bill in future to maintain its relevance to the public sector in Wales and the work of the ombudsman, then ... we have retained or have introduced ... three new powers in that regard, and that’s the purpose of them.”⁸²

61. We asked whether the Member in charge had tried to include so much on the face of the Bill that he then had to try to counterbalance this with the Henry VIII powers. The Member in charge responded saying he “wouldn’t describe it exactly like that”.⁸³ He noted that he had considered whether the *Social Services and Well-being (Wales) Act 2014* could be “introduced and amended on the face of the Bill and taken all the way through”.⁸⁴ However, he said he had found this approach to be too complex and confusing.⁸⁵

62. The Member in charge also explained that it was a conscious decision of the Finance Committee not to seek to amend the powers that were set out in the 2005 Act.⁸⁶ He said that the 2005 Act had been reasonably well accepted and had not received any serious challenge and therefore a decision was taken to restate the Act, accounting for six of the nine Henry VIII powers before adding the additional provisions.⁸⁷ He sighted familiarity, consistency and clarity as guiding principles to this drafting approach.⁸⁸

63. When it was suggested that the Member in charge could still have restated the 2005 Act and used a different procedure, so it was therefore a choice to use Henry VIII powers, the Member in charge agreed it was a choice.⁸⁹

64. We subsequently suggested some form of superaffirmative procedure could have been used in place of the Henry VIII powers. The Member in charge told us:

⁸¹ CLA Committee, 15 January 2018, RoP [139]

⁸² CLA Committee, 15 January 2018, RoP [139]

⁸³ CLA Committee, 15 January 2018, RoP [141]

⁸⁴ CLA Committee, 15 January 2018, RoP [141]

⁸⁵ CLA Committee, 15 January 2018, RoP [141]

⁸⁶ CLA Committee, 15 January 2018, RoP [142]

⁸⁷ CLA Committee, 15 January 2018, RoP [142]

⁸⁸ CLA Committee, 15 January 2018, RoP [143]

⁸⁹ CLA Committee, 15 January 2018, RoP [145]

“The superaffirmative, I think, is very important when the powers to amend primary legislation directly could impinge on human rights, could impinge on individuals’ positions, could impinge on penalties or taxation ... I think it’s extremely important to have things like the superaffirmative if you are going to use Henry VIII powers and not state them on the face of the Bill in those contexts.

I think the context of this Bill is, I would reiterate, quite narrowly drawn. You could argue, in certain terms, that one or two of these could appear on the face of the Bill. But, if you are going to use the powers, then I think the affirmative itself is a very strong sign that the Assembly itself will be examining these. Many of them are linked to consultation; that’s not a superaffirmative procedure in my view. Consultation should happen where appropriate as much as possible ... There is a particular procedure for superaffirmative, which I think should be kept for the principles that I’ve set out rather than applied to what is, at heart, really administrative—important administration, yes, but really administrative. I think the affirmative procedure in front of the full Plenary is a sufficient safeguard there.”⁹⁰

Our view

65. This committee and its predecessor have consistently expressed concern at the excessive use of Henry VIII powers and the application of the negative procedure to such powers. We have accepted that there are circumstances where the use of Henry VIII powers, while not ideal, represents a sensible and appropriate compromise, particularly where the use of primary legislation to make changes to existing Acts would be unduly excessive. However, such powers should always be subject to the affirmative procedure as a minimum.

66. We have therefore given careful consideration to the Henry VIII powers contained in the Bill. While they are significant in number, we note that they are narrow in scope. For that reason, we are content with their use in this Bill. In reaching this view, we also note that six of the nine powers involve consultation.

67. We will have responsibility for scrutinising subordinate legislation under this Bill and will therefore monitor carefully the use of these powers by the Welsh Ministers, should the Bill become law.

⁹⁰ CLA Committee, 15 January 2018, RoP [147-148]

Section 76 – Interpretation

68. Section 76(1) of the Bill gives the Welsh Ministers the power to define “relevant tribunal” in regulations, while section 10 concerns matters which the Ombudsman may investigate. According to the Explanatory Memorandum, section 76(1) allows regulations to capture the administrative functions of specific Welsh tribunals for the narrow purpose of section 10(7) as read with section 10(4)(e). This power has always been available in the 2005 Act and it has been used only once (to specify that the valuation tribunal is a relevant tribunal).⁹¹

69. The regulations are subject to the affirmative procedure because:

“Although the scope of this power is narrow, it is still a power to change primary legislation. Therefore, regulations made under this section should be brought to the Assembly’s attention and properly debated via the affirmative procedure.

This provides an additional safeguard over and above the safeguard contained in the Bill that the Welsh Ministers must consult such persons as they consider appropriate.”⁹²

Cabinet Secretary’s evidence

70. The Cabinet Secretary told us:

“There is an issue at section 76(1) of the Bill, which is a power that is picked up from the 2005 Act, where it is subject to the negative procedure. I think it is suggested that it should be subject to the affirmative procedure in this Bill. Given that it is a power that simply allows Welsh Ministers to ensure that administrative functions of tribunals are treated as such, I don’t think we think that it is a sufficient power to require the affirmative oversight of the National Assembly.”⁹³

Our view

71. We consider the affirmative procedure to be appropriate in respect of this regulation-making power. It is in line with our long-standing principle that regulations which amend primary legislation are subject to the affirmative

⁹¹ Explanatory Memorandum, Chapter 6, pages 36-37

⁹² Explanatory Memorandum, Chapter 6, pages 36-37

⁹³ CLA Committee, 15 January 2018, RoP [95]

procedure. Subjecting such regulations to the affirmative procedure should not introduce any delay to their implementation.

Section 78 – Consequential, transitional provisions etc

72. Section 78(1) of the Bill allows the Welsh Ministers by regulations to make such consequential, incidental or supplementary provision and such transitory, transitional or saving provision “as they think necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this Act”.

73. The Explanatory Memorandum states that the “power is suitable to be delegated because it allows the Welsh Ministers to make consequential etc. provision in the circumstances set out in section 78(1)”.⁹⁴ It also advises that regulations made using the power are subject to the affirmative procedure because:

“It is appropriate that powers of this nature are given proper scrutiny. Therefore, regulations made under this section should be brought to the Assembly’s attention and properly debated...”⁹⁵

74. Section 78(3) of the Bill states that “A reference in any enactment to the Public Services Ombudsman for Wales established under the Public Services Ombudsman (Wales) Act 2005 (c.10) is a reference to the office of the Public Services Ombudsman for Wales which continues under this Act”.

Cabinet Secretary’s evidence

75. The Cabinet Secretary told us that:

“... section 78 of the Bill, isn’t broad enough in relation to the Henry VIII power that it provides, in that it doesn’t include a power to amend primary legislation, despite being subject to the affirmative procedure. We think there may be instances where that would be important, and if it’s not there then we may be in the position of having to bring primary legislation back to the Assembly to put right pretty minor things that would be better done in a more proportionate way.”⁹⁶

76. He added that the equivalent provision in section 43 of the 2005 Act contains a power to amend primary legislation. In his view, there may be

⁹⁴ Explanatory Memorandum, Chapter 6, page 39

⁹⁵ Explanatory Memorandum, Chapter 6, page 39

⁹⁶ CLA Committee, 15 January 2018, RoP [77]

references to the 2005 Act in primary legislation that require consequential amendment and this would be a proportionate way to achieve those objectives.

77. In correspondence the Cabinet Secretary told us that he:

“... may need to bring forward an amendment, later in the Bill’s progress, should it move beyond stage one. The purpose of any such amendment would be to clarify that the power in section 78 extends to amending primary legislation, in the way provided by the 2005 Act.”⁹⁷

78. We asked the Cabinet Secretary about the use of “necessary or expedient” in section 78(1) of the Bill, and whether the Bill should just rely on “necessary”. He said he would give this matter further thought and subsequently told us that “the current drafting offers much needed flexibility” and added:

“It is worth bearing in mind, too, the power to make such provision is limited by the words which appear at the end of section 78(1), i.e. the provision may be made only for the purposes of, in consequence of, or for giving full effect to the Bill’s provisions.”⁹⁸

Member in charge’s evidence

79. In correspondence, the Member in charge addressed the Cabinet Secretary’s concerns about the breadth of section 78 of the Bill:

“Section 78 of the Bill is a narrower version of section 43 of the 2005 Act.

Section 43 of the 2005 Act includes a power to amend primary legislation that was passed before the end of the 2004/2005 Session of the UK Parliament. So the power in section 43 is limited in scope.

The power in section 43 has not been used for 12 years (11 years and 10 months).

An alternative approach to including a Henry VIII element in section 78 of the Bill would be to:

- make all consequential amendments to primary legislation on the face of the Bill, and

⁹⁷ **Letter from Mark Drakeford AM, Cabinet Secretary for Finance, 8 February 2018**

⁹⁸ **Letter from Mark Drakeford AM, Cabinet Secretary for Finance, 8 February 2018**

- broaden the scope of the transitional provision in section 78(3) of the Bill to capture in one sweep any amendments that may have been missed from the face of the Bill.

I am happy to explore further the consequential amendments that are needed to primary legislation (and that are not already achieved by section 78(3)) and to discuss with the Cabinet Secretary whether the above alternative approach might still leave gaps in consequential amendments, meaning that the Henry VIII power would need to be included in section 78 (and whether that should be limited to a power to amend primary legislation made before the Bill becomes an Act, along the lines of how section 43 of the 2005 Act was limited, as noted above).⁹⁹

80. We also asked the Member in charge about the use of the term “expedient” in section 78(1) of the Bill, suggesting that it gives the Welsh Ministers powers that are too wide. In response he said he accepted concerns about the use of the term but noted that the powers weren’t drawn as widely as in Government Bills, adding that:

“...we have tried to narrow it down to what we believe to be necessary ... the other thing that we’ve introduced here, which is different, is that even these powers are under the affirmative procedure, and that’s not happened before, certainly not under a Government Bill. So, even these consequential and transitional arrangements—yes, they’re quite wide, but, again, they’re brought in under an affirmative procedure, not a negative procedure, which I think tries to follow what this committee has advocated in the past.”¹⁰⁰

81. In correspondence he told us:

“In addition to the points I made before the Committee, I would like to add some further principles that confine the meaning of ‘expedient’ in the context of this Bill. I accept that ‘expedient’ has a subjective element and it is not a hard-edged term. But there are two important limitations on the use of the ‘expedient’ power:

⁹⁹ **Letter from the Chair of the Finance Committee, Public Services Ombudsman (Wales) Bill, 30 January 2018**

¹⁰⁰ CLA Committee, 15 January 2018, RoP [155]

- the Welsh Ministers must act proportionately and reasonably as a matter of public law. So, for example, the Welsh Ministers cannot use the ‘expedient’ power in a disproportionate way or in an irrational way;
- the Welsh Ministers cannot use this expedient power (or any other power in the Bill) in such a way as to frustrate the purposes of the Bill. This is a well-established legal principle, called the Padfield principle, that the courts will enforce. One clear purpose of this Bill is to help people who have suffered injustice or hardship, and no matter how wide a power is in the Bill, the Welsh Ministers cannot use the power to frustrate that purpose – to do so would be acting illegally. So in the context of this particular Bill, that is a very important limitation on the use of powers.

And, of course, any inappropriate use of these powers would be brought to the attention of this Committee and the Committee would prepare a report criticising the inappropriate use before any vote is taken in Plenary.”¹⁰¹

Our view

82. It has been our consistent view that the Welsh Government should adopt a more targeted approach rather than taking the widest powers available to them. This committee Bill should be no exception. Our particular concern is in relation to section 78(1) and the use of the words “necessary or expedient”. In our view, the word “necessary” would be sufficient.

Recommendation 1. We recommend that the Member in charge should table an amendment to the Bill to delete the words “or expedient” from section 78(1).

83. We note that the Cabinet Secretary is considering tabling an amendment to clarify that the power in section 78 extends to amending primary legislation and that the Member in charge is happy to explore this matter further. Should any such amendment be tabled subsequently, it is of course our view that the power should be subject to the affirmative procedure.

¹⁰¹ **Letter from the Chair of the Finance Committee, Public Services Ombudsman (Wales) Bill, 30 January 2018.**