

RHONDDA CYNON TAF COUNTY BOROUGH COUNCIL

MUNICIPAL YEAR 2015/2016

**STANDARDS COMMITTEE
26th November 2015**

AGENDA NO.3(c)

**REPORT OF THE MONITORING
OFFICER**

**DRAFT PUBLIC SERVICES OMBUDSMAN
(WALES) BILL 2015**

1. PURPOSE OF THE REPORT

To advise Members of the draft Public Services Ombudsman (Wales) Bill 2015.

2. RECOMMENDATIONS

- 2.1. That Members note the contents of the draft Public Services Ombudsman (Wales) Bill 2015.

3. BACKGROUND

- 3.1 In May 2015 the National Assembly For Wales' Finance Committee published the results of its inquiry set up to consider the role and powers of the Public Services Ombudsman for Wales.
- 3.2 The inquiry found that whilst the current 2005 Act governing his role has been effective over the past 10 years, there is a need to future-proof legislation and ensure it is citizen-centred.
- 3.3 The Ombudsman has a vital role in ensuring that any member of the public who believes they have suffered injustice through maladministration or service failure by a public body, are able to make a complaint with the reassurance that their complaint will be dealt with fairly and independently by the Ombudsman.
- 3.4 The Ombudsman had five particular areas that he believed would improve the current Act. These included own initiative investigation powers, oral complaints, complaints handling across public services, extending the Ombudsman's jurisdiction to include the private healthcare providers (in certain circumstances) and links with the courts.

- 3.5 The Finance Committee considered these proposed changes and additional powers and formed the view they would strengthen the Ombudsman's role and ensure the most vulnerable individuals, who are often most reliant on public services feel confident in complaining to the Ombudsman and have the right to a fair response to their complaint.

4. DRAFT PUBLIC SERVICES OMBUDSMAN (WALES) BILL 2015 (PSOW BILL)

- 4.1 Following of from the Finance Committee's inquiry the Committee is now consulting on a draft PSOW Bill.
- 4.2 The draft PSOW Bill uses the Public Services Ombudsman (Wales) Act 2005 as its base, but adds new sections in places. In the main these new sections relate to the changes and additional powers requested by the Ombudsman and set out in paragraph 3.4 above.
- 4.3 The Finance Committee is currently consulting on the draft PSOW Bill and the Consultation document and the Explanatory Notes to the draft Bill are set out at Appendix 1 to this report. Members are asked to note its contents.

21 October 2015

Dear Sir/Madam

Consultation on the draft Public Services Ombudsman (Wales) Bill

The [Finance Committee](#) is calling for evidence on the **draft Public Services Ombudsman (Wales) Bill**. To assist with its consideration, the Committee would welcome your views on the draft Bill.

Background

On 21 January 2015, the Finance Committee agreed to undertake an inquiry to consider extending the powers of the Public Services Ombudsman for Wales (“the Ombudsman”) and should the evidence support the extension of the Ombudsman’s powers the Committee would consider introducing a Committee Bill. (Full details of the Committee’s initial inquiry are available on the [Committee’s webpage](#).)

In May 2015, the Committee published its report on [Consideration of Powers: Public Services Ombudsman for Wales](#) and recommended that a Bill should be introduced into the Assembly. The Committee agreed to consult on a new draft Bill which would re-enact much of the existing [Public Services Ombudsman \(Wales\) Act 2005](#) but with new provisions recommended by the Committee in its report.

To assist with its considerations of the draft Bill, the Committee would welcome your views on the questions attached at Annex A.



Invitation to contribute to the inquiry

The Committee welcomes responses in Welsh or English from both individuals and organisations and will hold oral evidence sessions in due course.

Submissions should be no longer than five sides of A4, with numbered paragraphs, and should focus on matters set out below. Please see [guidance for those providing evidence for committees](#).

If you wish to submit evidence, please send an electronic copy (preferably a word version) of your submission to SeneddFinance@Assembly.Wales

Alternatively, you can write to:

Committee Clerk
Finance Committee
National Assembly for Wales
Cardiff Bay, CF99 1NA.

Submissions should arrive by **18 January 2016**. It may not be possible to take into account responses received after this date.

The Committee would be grateful if you could forward a copy of this letter to any individuals or organisations that might like to contribute to the review. A copy of this letter will be placed on the National Assembly's website with an open invitation to submit views.

Disclosure of Information

The Assembly's [policy on disclosure of information](#) is available, please ensure that you have considered these details carefully before submitting information to the Committee. Alternatively a hard copy of this policy can be requested by contacting the Clerk (Leanne Hatcher 0300 200 6343).

Yours sincerely



Jocelyn Davies AC / AM

Cadeirydd / Chair



Annex A

Consultation questions

Please comment on as many of the questions as relevant to you/your organisation, providing an explanation of each answer given:

General

01. Would the draft Bill improve the effectiveness of the role of the Ombudsman?
If so how?
02. What, if any, are the potential barriers to implementing the provisions of the draft Bill? Does the draft Bill take sufficient account of them?
03. Are there any unintended consequences arising from the draft Bill?
04. At what point should the impact of this legislation be evaluated?

Power to investigate on own initiative

05. Do you have any comments on the new power in section 4?
06. Does the inclusion of this power raise any unintended consequences in the rest of the draft Bill?
07. With whom should the Ombudsman consult under section 4(2)?
08. Should the Ombudsman have the power to initiate an investigation based on action that took place prior to the draft Bill/Act receiving Royal Assent (see section 4(4))? If so, should there be a cut-off point, beyond which the Ombudsman should not carry out an own initiative investigation?
09. What kind of issues should be included in the criteria for own initiative investigations under section 5?
10. What kind of evidence should be available to the Ombudsman to justify an own initiative investigation (see section 5(2))?

Who can complain

11. Do you have any comments on the new definition of “member of the public” in section 7(2)?



Requirements for complaints made and referred to the Ombudsman

12. Do you have any comments on the new requirements for complaints made to the Ombudsman in section 8?
13. How should the proposed guidance for making a complaint to the Ombudsman be published and what formats should be available?

Matters which may be investigated

14. Do you have any comments on the new provision enabling the Ombudsman to investigate the whole complaint when a combination of treatment has been received by public and private health services providers (see sections 10(1)(d) and 10(2))?
15. Does section 10(2) adequately cover anyone who has received a combination of public and private treatment?
16. Does the broadening of the matters which may be investigated in section 10(2) raise any unintended consequences in the rest of the draft Bill?
17. Is the definition of “private health services” in section 71 broad enough to cover anyone who has received a combination of public and private treatment?
18. Should the Ombudsman have powers to recover costs incurred in investigating private health services?
19. Do you have any comments on the new definition of “family health service provider in Wales” in section 71, which is intended to capture, for example, a GP practice as a whole rather than just an individual GP?

Investigation procedure and evidence

20. Do you have any comments on the procedure set out in section 16, in so far as it relates to the procedure for conducting an own initiative investigation?
21. Should the Ombudsman’s power in relation to obtaining information, documents, evidence and facilities also apply to own initiative investigations and investigations into private health services (see section 17)?

Listed Authorities

22. Do you have any comments on the restrictions on power to amend Schedule 3 (see section 30(2) in particular), which are significantly narrower than the restrictions found in the 2005 Act?



23. Are there any other bodies that should be included in the list in Schedule 3 'Listed Authorities'?

Complaints–Handling

24. Do you have any comments on sections 33 – 39 (which mirror sections 16A to 16G of the Scottish Public Services Ombudsman Act 2002)?
25. Is section 38(b) adequate to allow listed authorities to comply with their duties under other enactments, such as Freedom of Information duties?

Part 4: Investigation of complaints relating to other persons: social care and palliative care

26. Should Part 4 remain a standalone Part? Or should such investigations be brought within the Part 3 investigations process?
27. If Part 4 should be brought within Part 3, are there any specific elements of Part 4 that should survive? Or can a blanket approach be applied?

Part 5: Investigations: supplementary

28. Do you have any comments on sections 62, 63 and 64, which provide for joint and collaborative working with specified Commissioners and the Auditor General for Wales?
29. Should sections 62 and 63 cover future Commissioners that may be created by the Assembly, including the Future Generations Commissioner for Wales?
30. Are there any further technical changes required in Part 5 of the draft Bill, to reflect the broadening of matters which may be investigated?

Appointment etc

31. The provisions of paragraphs 5 to 8 of Schedule 1 (disqualification) reflect largely the current provisions in the 2005 Act. Do these provisions require updating?
32. Paragraph 7 of Schedule 1 provides that a person who has ceased to hold office as the Ombudsman or as an acting Ombudsman is disqualified from a list of roles (listed in paragraph 7(1)) for a period of two years. Is the two year period appropriate?
33. Do you have any comments on the matters which are included within "paid office" in paragraph 8 of Schedule 1?



Financial implications

34. Do you have a view on the financial implications of the new provisions set out in the draft Bill?

Other comments

35. Do you have any other comments you wish to make about the draft Bill or any specific provision within it?



Draft Public Services Ombudsman (Wales) Bill

Explanatory Notes

The Draft Public Services Ombudsman (Wales) Bill uses the Public Services Ombudsman (Wales) Act 2005 as its base, but adds new sections in places. These Explanatory Notes cover those ‘new’ sections only.

Section 4 – Power to investigate on own initiative

This power allows the Ombudsman to investigate a matter whether the Ombudsman has received a complaint or not, so it allows the Ombudsman to initiate an investigation.

This has a significant effect on the interpretation of the Bill – when the word “investigation” is used in Part 3, it can mean either an investigation under section 3 or an investigation under section 4. For example, section 17 applies “in relation to an investigation conducted under this Part”. Therefore, section 17 applies in relation to an investigation under section 3 and an investigation under section 4.

Like the power under section 3, the power in section 4 can only be used to investigate matters the Ombudsman is entitled to investigate. Sections 10 to 14 set out the matters which may be investigated.

However, a matter can only be investigated under section 4 if it relates to action taken after the Bill receives Royal Assent. If the action took place before Royal Assent, then the Ombudsman cannot use the power in section 4 to investigate.

Royal Assent is when the Queen formally agrees to make a Bill into an Act. The date of Royal Assent for every Act can be found at the start of the Act, after the long title.

Section 5 – Criteria for own initiative investigations

The Ombudsman must establish and publish criteria that have to be satisfied before the power in section 4 can be used to investigate a matter. When deciding whether to use the power in section 4, the Ombudsman must satisfy the criteria.

It is for the Ombudsman to decide what the criteria should include, but the criteria must set out the evidence that will be required before the power in section 4 can be used.

Section 7 – Who can complain

Only a “member of the public” can make a complaint to the Ombudsman. This section excludes two categories of persons from being “members of the public” – this means that persons acting in the capacity of a listed authority or a private health services provider cannot make a complaint to the Ombudsman.

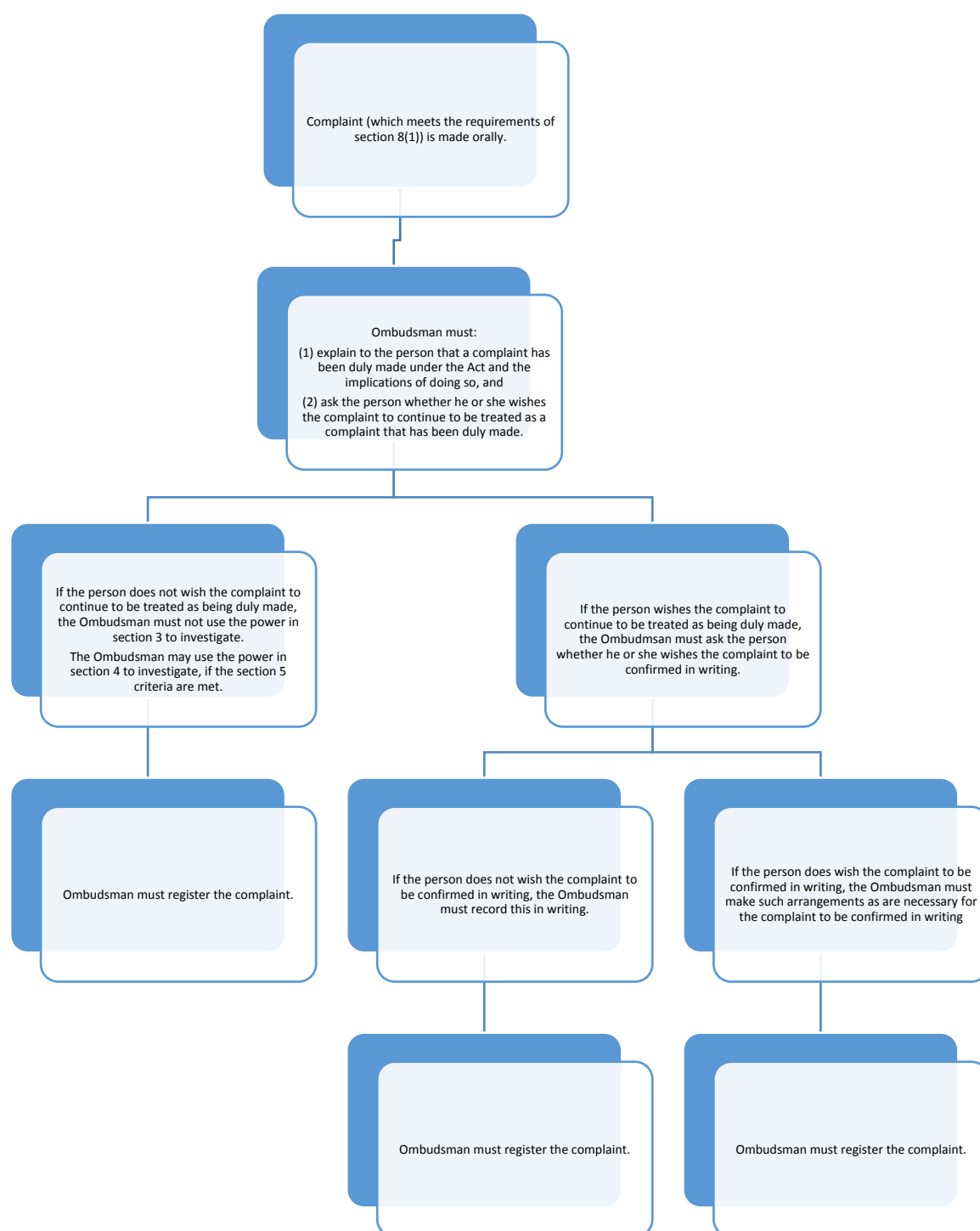
However, this does not prevent someone who is, for example, an employee of a listed authority from making a complaint, provided the person is making the complaint in his/her personal capacity.

Section 8 – Requirements: complaints made to the Ombudsman

If a person wishes to make a complaint to the Ombudsman, the complaint must satisfy the requirements of this section.

But section 8 does not specify the exact requirements of a complaint. The exact requirements will be set out in guidance published by the Ombudsman. Therefore, persons who wish to complain should read that guidance in order to help them make a complaint.

If the guidance specifies that a complaint may be made orally, section 8 sets out additional requirements. Those additional requirements can be illustrated as follows:



Section 10 – Matters which may be investigated

Sections 10(1)(d) and (2) allow the Ombudsman to investigate certain matters relating to private health services. This has a significant effect on the interpretation of the Bill – each time the word “investigation” is used in Part 3, it may include an investigation into private health services. For example, the duty to publish a report of investigations under section 19 would apply where the Ombudsman has investigated private health services.

“Private health services” is defined in section 71 to mean:

- (a) medical treatment provided in a private hospital, and
- (b) private medical treatment provided in an NHS hospital.

Section 10(2) defines the circumstances in which the Ombudsman can investigate private health services. The circumstances are:

- (a) the person must have received medical treatment in the form of relevant action by a listed authority (relevant action is defined in section 10(4) and all listed authorities are listed in Schedule 3),
- (b) the person must have also received private health services, and
- (c) the Ombudsman cannot effectively or completely investigate the relevant action without also investigating the private health services.

Therefore, section 10(2) acts as a check on the power to investigate private health services, because it limits the circumstances in which private health services can be investigated.

Sections 11 to 13 set out further restriction on matters which may be investigated. However, the matters set out in sections 10(1) and 10(2) have a significant effect on the interpretation of the Bill. Read with the powers in sections 3 and 4, the Ombudsman can:

- 1 – investigate a listed authority following a complaint (using section 3 or section 4)
- 2 – investigate private health services following a complaint (using section 3 or section 4)
- 3 – investigate a listed authority where there has been no complaint (using section 4)
- 4 – investigate private health services where there has been no complaint (using section 4).

(In each case, the section 4 power can only be used if the section 5 criteria are met.)

Section 16 – Investigation procedure

Sections 16(2) sets out the procedure to be followed when the Ombudsman uses the power in section 4 to initiate an investigation. The procedure requires the Ombudsman to prepare an investigation proposal (i.e. a proposal which includes the reasons for the investigation and how the section 5 criteria have been met).

Under sections 16(4) and (5), the Ombudsman must specify further procedural requirements to be followed when the Ombudsman uses the power in section 4 to initiate an investigation. Such requirements must include procedures allowing those under investigation opportunity to comment.

Section 23 – Action following receipt of a report: investigation of private health services

If the Ombudsman concludes that a person has sustained injustice or hardship in consequence of private health services, and the Ombudsman’s conclusions are published under section 19(4), then the Ombudsman must give the private health services provider reasonable opportunity to notify the Ombudsman of:

- (a) the action the private health services provider has taken (or proposes to take), and
- (b) the time within which such action is to be taken (unless it has already been taken).

Section 23(3) provides an incentive for the private health services provider to take proper action in response to the Ombudsman's conclusions. This is because a listed authority must have regard to any action (good or bad) taken by the private health services provider when the listed authority is deciding whether to enter into a contract for services with the private health services provider.

The duty to have regard requires:

- (a) that the listed authority must be aware of its duty to have regard,
- (b) the duty to be fulfilled before and at the time the decision is taken; it involves a conscious approach and state of mind,
- (c) the duty must be exercised in substance, with rigour and with an open mind; it is not a question of ticking boxes,
- (d) the duty is non-delegable; the duty will always remain on the listed authority,
- (e) the duty is a continuing one,
- (f) it is good practice for a listed authority to keep an adequate record showing it has actually considered the duty and pondered relevant questions.

Section 30 – Restriction on power to amend Schedule 3

Section 30(2) provides that an order to amend Schedule 3 may add a person only if the person has functions dischargeable in relation to Wales or a part of Wales (even if those functions are also dischargeable otherwise than in relation to Wales).

But such an order can never remove the Welsh Ministers or the National Assembly for Wales from the list of listed authorities in Schedule 3.

Section 33 – Complaints-handling: statement of principles

This section requires the Ombudsman to publish a statement of principles concerning complaints-handling procedures of the listed authorities in Schedule 3. The Ombudsman must consult on the first such statement and any material changes and must obtain Assembly approval before publishing these.

Subsection (12) defines “complaints-handling procedures” to mean procedures of listed authorities which examine complaints or review decisions in respect of action taken by a listed authority where the matter in question is one in respect of which a complaint to the Ombudsman can be made and investigated under the Bill.

Subsection (2) requires every listed authority to have a complaints-handling procedure (or procedures) in respect of action taken by that listed authority, and these procedures must comply with the published statement of principles. Subsection (3) also requires a listed authority which has statutory responsibility for a complaints-handling procedure in relation to, or operated by, another listed authority, to ensure that these procedures comply with the statement of principles.

Section 34: Model complaints-handling procedure

This section enables the Ombudsman to publish model complaints-handling procedures (“model CHPs”) for listed authorities. Model CHPs must also comply with the statement of principles published by the Ombudsman. Subsection (6) ensures that listed authorities specified under section 35(1) must comply with any published changes to the relevant model CHP, but it is left to the Ombudsman to decide whether to direct the listed authority to resubmit a description of its complaints-handling procedure under section 37(1). If the Ombudsman withdraws a model CHP, any related specifications under section 35(1) cease to have effect.

Section 35 – Model complaints-handling procedures: specification of listed authorities

This section enables the Ombudsman to specify any listed authority to which a model CHP is relevant. A specified listed authority must have a complaints-handling procedure that complies with the relevant model CHP. On being specified, a listed authority must submit a description of its complaints-handling procedure which takes account of the model CHP within 6 months. The listed authority may, with the Ombudsman's consent, disapply aspects of the model CHP if this is necessary for its effective operation. Specifications can be revoked at any time.

Section 36 – Declarations of non-compliance

This section enables the Ombudsman to declare that a complaints-handling procedure of a specified listed authority does not comply with the relevant model CHP, and if not specified, that the procedure does not comply with the statement of principles. The Ombudsman must give reasons in writing and may also specify changes that would allow the declaration to be withdrawn. The listed authority must send a description of its complaints-handling procedure to the Ombudsman within 2 months of the declaration, having taken account of the reasons for non-compliance and any changes specified by the Ombudsman.

Section 37 – Submission of description of complaints-handling procedures: general

This section gives the Ombudsman a power to require a listed authority to submit a description of its complaints handling procedure within 3 months or such other period as the Ombudsman thinks fit. A shorter period has effect even if the period given in section 35(3) or 36(4) has not yet expired. A listed authority is also required to provide additional information on request. This enables the Ombudsman to get an adequate description of a listed authority's complaints-handling procedure.

Section 38 – Complaints-handling procedures: application to other enactments

This section provides that the duties in sections 33(2) and (3) and 35(2) do not apply to the extent that the relevant listed authority lacks the necessary powers to ensure compliance with the duties, for example, where another body is responsible for determining or approving the procedures to be followed. In addition, the duties in sections 33(2) and (3) and 35(2) do not apply to the extent that they are inconsistent with any other enactment. The latter applies to the extent, for example, that another piece of legislation expressly provides on the face of that legislation that the relevant procedures of a listed authority must apply in a way, or contain provision, that is inconsistent with these duties.

Section 39 – Complaints-handling procedures: promotion of best practice

This section imposes duties on the Ombudsman in relation to complaints-handling by listed authorities to (1) monitor practice, (2) promote best practice and (3) encourage co-operation and the sharing of best practice. Listed authorities must co-operate with the Ombudsman in the exercise of these duties except to the extent that they lack the necessary powers to ensure compliance with the duty, or the duty is inconsistent with any other enactment.

Section 62 – Working jointly with other Commissioners

This section allows the Ombudsman and other Commissioners to work jointly in relation to certain matters.

The other Commissioners are the Commissioner for Older People in Wales, the Welsh Language Commissioner and the Children's Commissioner for Wales.

Section 63 – Working collaboratively with other Commissioners

This section allows the Ombudsman and other Commissioners to work collaboratively in relation to certain matters.

The other Commissioners are the Commissioner for Older People in Wales, the Welsh Language Commissioner and the Children's Commissioner for Wales.

Section 64 – Working jointly with the Auditor General for Wales

This section allows the Ombudsman and the Auditor General for Wales to work jointly in relation to certain matters.

Section 68 – Investigations commenced before sections 3, 4 and 42 come into force

If the Ombudsman has already commenced an investigation under the 2005 Act when the powers in sections 3, 4 and 42 come into force, then the Ombudsman must continue with the investigation as if the 2005 Act remained in force.

Local Government Act 1972

As Amended by

The Local Government (Access to Information) Act 1985

Standards Committee

26th November 2015

Report of Monitoring Officer

BACKGROUND PAPERS

Public Services Ombudsman For Wales Bill 2015