

# Agenda – Y Pwyllgor Cydraddoldeb, Llywodraeth Leol a Chymunedau

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Lleoliad:	I gael rhagor o wybodaeth cysylltwch a:
Ystafell Bwyllgora 3 – Senedd	Naomi Stocks
Dyddiad: Dydd Mercher, 13 Rhagfyr 2017	Clerc y Pwyllgor 0300 200 6565
Amser: 09.00	<a href="mailto:SeneddCymunedau@cynulliad.cymru">SeneddCymunedau@cynulliad.cymru</a>

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Rhag-gyfarfod (09.00 – 09.15)

## 1 Cyflwyniad, ymddiheuriadau, dirprwyon a datgan buddiannau

## 2 Bil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru): sesiwn dystiolaeth 6

(09.15 – 10.00)

(Tudalennau 1 – 26)

Catrin Edwards, Rheolwr Polisi ac Eiriolaeth, Hospice UK

Jonathan Ellis, Cyfarwyddwr Polisi ac Eiriolaeth, Hospice UK

## 3 Bil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru): sesiwn dystiolaeth 7

(10.00 – 11.00)

(Tudalennau 27 – 55)

Sally Taber, Cyfarwyddwr, Gwasanaeth Dyfarnu Cwynion y Sector Gofal Iechyd Annibynnol

Gerry Evans, Dirprwy Brif Weithredwr, Gofal Cymdeithasol Cymru

David Francis, Prif Arolygydd Cynorthwyol, Arolygiaeth Gofal a Gwasanaethau Cymdeithasol Cymru

Dr Kate Chamberlain, Prif Weithredwr, Arolygiaeth Gofal Iechyd Cymru

Egwyl (11.00 – 11.10)

## 4 Bil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru): sesiwn dystiolaeth 8

(11.10 – 11.55)

(Tudalennau 56 – 62)



Kevin Thomas, Cyfarwyddwr Gwasanaethau Corfforaethol, Swyddfa Archwilio  
Cymru

Martin Peers, Pennaeth y Gyfraith a Moeseg, Swyddfa Archwilio Cymru

## **5 Papurau i'w nodi**

### **5.1 Llythyr at y Llywydd mewn cysylltiad â'r Cydsyniad Deddfwriaethol Atodol ar y Bil Arweiniad a Hawliadau Ariannol**

(Tudalennau 63 – 64)

### **6.1 Llythyr at y Gweinidog dros Dai ac Adfywio mewn cysylltiad â'r Cydsyniad Deddfwriaethol Atodol ar y Bil Arweiniad a Hawliadau Ariannol**

(Tudalennau 65 – 66)

## **7 Cynnig o dan Reol Sefydlog 17.42 (vi) i wahardd y cyhoedd o weddill y cyfarfod**

## **8 Bil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru): trafod y dystiolaeth a ddaeth i law o dan eitemau 2, 3 a 4**

(11.55 – 12.10)

## **9 Trafod y flaenraglen waith**

(12.10 – 12.30)

(Tudalennau 67 – 72)

Mae cyfyngiadau ar y ddogfen hon

## 1. About Hospice UK

- 1.1 Hospice UK was founded in 1984 and is the leading charity supporting hospice and palliative care throughout the UK. Our vision is hospice care for every person in need and our mission is to enable hospice care to transform the way society cares for the dying and those around them.

## 2. About this response

- 2.1 Hospice UK welcomes the opportunity to provide evidence to the Equalities, Local Government and Communities Committee to support its scrutiny of the Public Services Ombudsman (Wales) Bill.
- 2.2 This response draws on the experience of hospices in Wales supporting and caring for people with terminal or lifeshortening conditions, and from the knowledge and experience of Hospice UK working at a national level for people with palliative care needs. We have limited our comments to those issues affecting people who need hospice and palliative care.

## 3. Context

- 3.1 The Social Services and Well-being (Wales) Act 2014 made amendments to the Public Services Ombudsman (Wales) Act 2005 to the effect that the Ombudsman's remit was extended to cover unresolved complaints about independent palliative care and social care.
- 3.2 Hospice UK and independent hospices in Wales welcomed this change, which provided additional channels of redress for patients and families in circumstances of heightened distress and vulnerability.
- 3.3 The Bill as currently drafted reinstates the 2014 changes. It further sets out the legal framework for complainants to make oral complaints and for the Ombudsman to conduct Own Initiative Investigations in relation to social care and independent palliative care, as per the proposed framework for listed authorities.

## 4. Part 5: Investigation of complaints relating to other persons: Social Care and Palliative Care

### 4.1 Patient pathways and integration

- 4.1.1 People receiving palliative care from Independent palliative care providers (hospices) are almost invariably referred to this service from the NHS following treatment for a lifeshorting or terminal condition.
- 4.1.2 A person accessing care from an independent palliative care provider is likely also to be accessing care and support from a range of services simultaneously, including: the NHS through GPs, District Nurses and specialists in secondary care; social care, including domiciliary care or within a care home.

4.1.3 The service pathway of a person cared for by an independent palliative care provider is very likely to include NHS, and possibly private health provider, input.

## 4.2 An equalities approach: regional service provider variation

4.2.1 Palliative care in Wales is provided by a mix of independent providers and NHS providers. With reference to inpatient facilities in particular, a local population will often be served *either* by an NHS provider *or* an independent hospice.

4.2.2 The Bill as drafted creates a standalone investigation regime for independent palliative care providers (and social care providers). This is separate from the mainstream investigation regime that applies to NHS palliative care providers.

4.2.3 Under the Bill as drafted, a complaint made to the Ombudsman by a person supported by an NHS palliative care provider will follow a different investigation regime from a patient receiving equivalent treatment from an independent palliative care provider.

## 4.3 Issues and inconsistencies requiring clarification

4.3.1 The proposed framework where independent palliative care (and social care) follows a standalone investigation regime from the mainstream investigation regime for NHS and private healthcare providers does not appear to follow the principle of “investigat[ing] a whole complaint” (50, Explanatory Memorandum) that has led to the preferred option (Option 2) in relation to “extend[ing] the Ombudsman’s jurisdiction to allow investigation of complaints in a public/private health service pathway” (50). There may be occasions when a person’s complaint about an independent palliative care provider can be best investigated in relation to their care pathway in its entirety, which may also include NHS care.

4.3.2 The Explanatory Memorandum sets out that the separate investigation regimes had been taken forward in the current drafting of the Bill in light of the Fourth Assembly’s Finance Committee’s recommendation, despite responses to the consultation on the draft Bill that strongly recommended one integrated system. It notes that

This was because of the specific nature of social and palliative care and the fact that merging the two regimes would create one very complex and intricate regime. (26)

4.3.3 Given the already integrated nature of a service pathway for a person receiving palliative care from an independent provider, Hospice UK is unaware of any specific features of this service that makes it incompatible with a mainstream investigation process by the Ombudsman. We welcome any clarification in this area.

4.3.4 With respect to the complexities and intricacies of merging the two regimes, Hospice UK understands from evidence given by the Chair of the Finance Committee, Simon Thomas AM, to the ELGC Committee in Evidence Session 1 on 29 November 2017 that this would have involved complex and technical drafting of legislation. There was also a view that mainstreaming the investigatory regimes was inappropriate given that the Assembly had taken a decision to include independent palliative care and social care within the Ombudsman’s remit as recently as 2014. We would welcome further information about the complexities and intricacies of integrating the investigatory regimes to enable us to comment further on this issue.

4.3.5 Failing to integrate the investigation process for all providers in this Bill could be seen as a missed opportunity to improve seamless, integrated provision for complainants. However, Hospice UK does not, in principle, object to a separate investigatory regime for independent palliative care providers (and social care) if the burden of bureaucracy is placed on the Ombudsman and its office rather than the complainant, providing that:

- 4.3.5.1 People escalating complaints to the Ombudsman in relation to independent palliative care providers have the same rights and access as people escalating complaints in relation to NHS providers.
- 4.3.5.2 Clear guidance is provided, both for people escalating complaints and for hospices who will direct persons to the Ombudsman, about how to present a complaint about a service pathway that may include the independent palliative care provider, NHS and social care provision.

## 5. Definition of “palliative care service” could exclude some users from Ombudsman’s services

- 5.1 Hospice UK is concerned that there is the potential that some people cared for by hospices – those receiving palliative care services in their broadest sense, as well as carers supported prior to and during bereavement – could be excluded from access to the Ombudsman’s services due to the narrow definition of palliative care as set out in the Bill.
- 5.2 Independent palliative care providers take a holistic approach to palliative care. This encompasses a range of person-centred services for both the patient and their carers. Hospice care places equal emphasis on someone’s clinical, physical, emotional, social and spiritual needs and responds by offering diverse care services such as complementary therapies, bereavement support as well as expert clinical care.
- 5.3 In the Bill as currently drafted the Ombudsman may investigate a complaint that relates to an independent palliative care provider if “the independent palliative care provider has received public funding [...] in respect of a palliative care service that it provides in Wales.” (43(2))
- 5.4 Hospices receiving public funding are likely to receive this to deliver a palliative care service with a narrower definition than that adopted by the hospice movement, namely to provide clinical and physical care only.
- 5.5 63(2) states that a “Palliative care service’ means a service the main purpose of which is to provide palliative care”, which provides little clarity on what falls within the remit of this definition.
- 5.6 A potential solution is to move away from the specific type of care to the type of provider, e.g. “a non statutory provider of health and care services who has received statutory funding in the last three years”.

## 6. Own initiative investigations

- 6.1 People in receipt of palliative care, and their families, who are facing end of life are at their most vulnerable and should be afforded all protections to ensure that their care, or the care of a loved one, is not jeopardised, or seen to be jeopardised, by raising a concern. We therefore support the Bill’s policy intention to “protect the most vulnerable” (EM, 16) through the introduction of new powers to the Ombudsman to investigate on own initiative, where criteria are met.
- 6.2 We welcome the inclusion of criteria 45(2)(a) (parallel to 5(2)(a)), which cites the case of “vulnerable or disadvantaged person[s]” who may feel unable to make a direct complaint either to the independent palliative care provider or Ombudsman for fear of “sustain[ing] injustice or hardship in consequence” of making that complaint.
- 6.3 Own initiative investigations must always work in favour of vulnerable and disadvantaged persons. We therefore agree that any changes to the criteria set out in

primary legislation should be subject to the Assembly's affirmative procedure, as per 45(5).

- 6.4 Again, should separate investigatory frameworks for independent palliative care and other listed authorities be retained, people in receipt of care from independent palliative care providers must have the same recourse to the Ombudsman as those receiving palliative care from the NHS.
- 6.5 Further clarification regarding the remit of the Ombudsman and the relevant inspectorate – whether Health Inspectorate Wales or Care and Social Services Inspectorate Wales – is required to ensure there is no duplication of efforts in investigating failures of services or care through “Own initiative investigations”. Hospices registered as charities are also accountable to, and regulated by, the Charity Commission, which issues rules and guidance on delivering public services.

## Introduction

1. The Independent Sector Complaints Adjudication Service (ISCAS) welcomes the opportunity to respond to the Committee's call for evidence on this Bill and Explanatory Memorandum. As per the Committee's request, ISCAS's response addresses the Bill's terms of reference namely:
  - Accept oral complaints
  - Undertake own initiative investigations
  - Investigate private medical treatment including nursing care in a public/private pathway
  - Undertake a role in relation to complaints handling standards and Procedures
2. ISCAS provides a complaints management framework for the independent healthcare sector incorporated in its Code of Practice in the four countries. Compliance with the Code maximises healthcare operators' ownership of complaints using local resolution procedures. The Code's Stage 3 adjudication affords dissatisfied complainants an independent review process with independent adjudication procedures. It gives providers closure of the complaints process, and a learning opportunity, at low cost.
3. ISCAS is managed by the Centre for Effective Dispute Resolution (Cedr) and is independent from the Trade Association AIHO which includes WIHA as part of its membership. WIHA members of AIHO are encouraged to be subscribers of ISCAS where they are treating private patients.
4. An Information Sharing Agreement is in place between ISCAS and Healthcare Inspectorate Wales (HIW). This is currently in the process of being updated.
5. Accompanying this consultation for reference are the suite of ISCAS documents that are available to all WIHA Subscribers. These are the ISCAS Code of Practice for Complaints Management (2017), the Patients' Guide to the ISCAS Code, ISCAS Position Statements on Complaints Management and Practising Privileges (in draft) , Complaints Management: Fees (in draft) and the Guidance for Managing Unacceptable Behaviour by Complainants. These documents are all displayed on the ISCAS website - [www.iscas.org.uk](http://www.iscas.org.uk)



6. An annual report on ISCAS activities is also produced. The 2016 report is attached. This contains the overall Adjudicator costs from January 2016 to March 2017 together with the Goodwill payments that are afforded to complainants during that period.
7. A copy of the 2016 ISCAS training programme is also attached
8. ISCAS provided evidence for the National Assembly for Wales Finance Committee on the consideration of powers for the Public Services Ombudsman (PSO) for Wales in January 2015 and also on the 18 January 2016. ISCAS also gave evidence to the National Assembly for Wales Finance Committee.

### **Terms of Reference Comments**

9. *The general principles of the Public Services Ombudsman (Wales) Bill and the need for legislation to deliver the stated policy intention.*

ISCAS welcomes this Bill and believes it will be beneficial for patients who have a complaint spanning treatment across the NHS and independent healthcare sectors. It is right that the complaints process should follow the patient (citizen). The Ombudsman already has jurisdiction over complaints made about NHS-funded treatment provided by ISCAS subscribers in Wales.

10. *Provisions of the Bill which set out the new powers for the Ombudsman to: accept oral complaints;*

ISCAS tabulates how complaints can be submitted in both its Code and Patients Guide. Oral complaints would be accepted under the ISCAS Code.

11. *Provisions of the Bill which set out the new powers for the Ombudsman to: undertake own initiative investigations;*

ISCAS recognises the value of 'own initiative investigations' undertaken by Ombudsmen services to patients and hospital providers. All ISCAS subscribers are encouraged to recognise the Duty of Candour. ISCAS is in possession of leaflets on this subject from avma (Action against Medical Accidents). A session on this was provided during the 2016 ISCAS training session.

12. *Provisions of the Bill which set out the new powers for the Ombudsman to: undertake a role in relation to complaints handling standards and procedures*

This seems a good initiative in reducing variation in effective complaints handling standards and procedures across public services in Wales. ISCAS's understanding is that this does not apply to the independent healthcare sector. ISCAS has liaised with both HIW and the Welsh Government during the process of updating the 2013 ISCAS Code. Excellent comments were received and incorporated into the 2017 ISCAS Code. ISCAS provides annual training for subscribers on complaints handling and will be

implementing a more formal monitoring and improvement quality assurance system in March 2018 when ISCAS subscribers are asked to renew their subscription. ISCAS will be introducing a sign off of self-declaration at provider level to support good governance in complaint management.

13. *Provisions of the Bill which set out the new powers for the Ombudsman to: investigate private medical treatment including nursing care in a public/private health pathway;*

As per ISCAS's previous submission, we welcome this provision and believe it will be beneficial to patients in these circumstances. It is noted in the Explanatory memorandum para 3.44 the Ombudsman comments on a case that transgressed both the public and private sectors and the length of time it took for that case to come to Adjudication. In practice, the number of complaints against WIHA subscribers that reach an external review stage is very small. The number of complaints that involve combined NHS and private treatment is even smaller. ISCAS would be happy to establish an information sharing protocol with the Ombudsman as it does with Healthcare Inspectorate Wales in order to take this potential new power forward .

14. *The financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum).*

ISCAS recognises that the inclusion of investigations of the private health service element in a public/private health service pathway will have a small, but direct, financial impact on the Ombudsman, costing £17,535 over 5 years (Table 4, page 56). WIHA who are also giving evidence has calculated the cost of including such cases will make up less than 0.1% of the Ombudsman's yearly budget (using figures from 2017-18 found within the Summary Table on Page 45). We also note in Paragraph 11.11 of the Explanatory Memorandum that the Ombudsman could accommodate the additional cost within existing resources.

15. ISCAS recognises the right of the Ombudsman to serve a costs recovery notice on a private health service provider as a means of recovering additional costs incurred by the Ombudsman where the provider **has obstructed** the Ombudsman or done something which would amount to contempt of court if the investigation were proceeding in the High Court.

16. **Sections 21 and 22: Publicising reports and Section 24: Action following receipt of a report: investigation of a private health services provider.** ISCAS management produce quarterly a summary of the Adjudications finalised with the outcome, recommended learning and actions required which is presented to the ISCAS Advisory Governance Board. From this the themes for taking forward learning are recorded and included in the annual report.

*17. Any potential barriers to the implementation of the Bill's provisions and whether the Bill takes account of them*

ISCAS is not aware of any potential barriers to the implementation of the Bill's provision and notes that the Ombudsman is not seeking to extend to all private health service providers.

*18. Whether there are any unintended consequences arising from the Bill*

ISCAS do not anticipate any unintended consequences for independent healthcare providers arising from the Bill.

**Conclusion**

In summary, ISCAS subscribers support the extension of the PSOW's remit to investigate complaints that include both an NHS and a private health element of care.

We are also pleased to note that there will be a review of the legislation after five years from the date of the Act receiving Royal Assent and further reviews thereafter as Welsh Ministers deem appropriate.

ISCAS looks forward to providing oral evidence to the committee and responding to any further questions on the terms of reference.

**29 November 2017**

**Annexes:**

[ISCAS annual report 2016](#)

[ISCAS Code of Practice 2017](#)

[ISCAS Patients' Guide to the ISCAS Code](#)

[ISCAS Guidance for Managing Unacceptable Behaviour by Complainants](#)

[ISCAS Annual Training Conference](#)

## **ISCAS Position Statement**

### **Complaints Management: Fees**

#### **ISCAS Position Statement on Fees:**

The ISCAS position is that subscribing Independent Healthcare Providers (IHPs) are required to be transparent regarding fees charged to service users and that includes those fees charged by those granted practising privileges.

#### **Background to position statement:**

The Independent Adjudicators (IAs), engaged by ISCAS to adjudicate on complainants at stage 3 of the independent sector complaints process, identify areas of learning from adjudications. The IAs have identified that a theme in the heads of complaints of adjudications involves a lack of transparency on the fees charged to service users. This includes ambiguity surrounding the fees levied by the IHP and those levied by those granted practising privileges.

#### **ISCAS Code and Practising Privileges Principles:**

The ISCAS Code states that the Code includes complaints about those healthcare professionals granted practising privileges working in subscribing IHPs. Practising privileges are a well-established system of checks and agreements whereby doctors can practise in hospitals and clinics without being directly employed by them. There is more information in the ISCAS position statement on practising privileges.

#### **Accountability Framework subscribing IHPs:**

The Registered Person (IHP) retains the responsibility for the management and monitoring of systems and processes that support continuous quality improvement and learning, including complaint management. In addition, the Registered Person is responsible for providing written statements to service users regarding the amount and method of payment of fees (see below – CQC Regulations in England).

The Registered Person in the IHP is responsible for supervising the service provision (for example, Regulated Activities or similar such as diagnosis, treatment or surgery). The Registered Person (for example the Nominated Individual who may be at

corporate level) is responsible for ensuring 'fit and proper' Registered Managers are engaged.

The Registered Manager is responsible for engaging 'fit and proper' staff, including those with practising privileges. The Registered Manager is responsible for ensuring that those engaged to deliver the Regulated Activity for which the IHP is registered, operate in accordance with the approved policies and procedures of the IHP, including information on fees.

The Registered Manager must ensure that where there are hosting, renting or sub-contracted arrangements in place with other registered providers, the contract or service level agreement clearly defines the boundaries of responsibilities for the activities taking place, including information on fees.

As from 31<sup>st</sup> December 2017 the Private Healthcare Market Investigation Order 2014 (as amended) requires operators of private healthcare facilities to ensure that consultants (as a condition of permitting a consultant to provide private healthcare services at that facility) supply private patients with information about fees in writing, prior to outpatient consultations (see 22.3 below for detail on the information). As from 28<sup>th</sup> February 2018 operators of private healthcare facilities are required to ensure that consultants are provided with an appropriate template (approved by CMA) in order to disclose to a patient, prior to further tests or treatment, the costs and rationale for treatment (see 22.4 below for detail).

**Relevant regulations:**

The Care Quality Commission (Registration) Regulations 2009 make it clear that the provider (Registered Person) must be transparent about the costs of care and treatment. Regulation 19 states:

*(1) Where a service user will be responsible for paying the costs of their care or treatment (either in full or partially), the registered person must provide a statement to the service user, or to a person acting on the service user's behalf (a) specifying the terms and conditions in respect of the services to be provided to the service user, including as to the amount and method of payment of fees; and (b) including, where applicable, the form of contract for the provision of services by the service provider. (2) The statement referred to in paragraph (1) must be (a) in writing; and (b) as far as reasonably practicable, provided prior to the commencement of the services to which the statement relates.*

**Extract on Fees Private Healthcare Market Investigation Order 2014 (as amended)**

22. Information concerning consultants supplied to the information organisation and to private patients.

22.2 The operator of a private healthcare facility shall, as a condition of permitting a consultant to provide private healthcare services at that facility, require the relevant consultant to supply private patients with information in writing to be provided:

(a) as from 31 December 2017, prior to outpatient consultations, in accordance with article 22.3 and article 22.6; and

(b) as from 28 February 2018, prior to further tests or treatment, whether surgical, medical or otherwise, in accordance with article 22.4 and article 22.6; and shall provide the consultant with an appropriate template approved by the CMA for these purposes, in standard wording and in a clearly legible font.

22.3 Consultants must supply the following information to a patient prior to an outpatient consultation:

(a) the estimated cost of the outpatient consultation or consultations, which may be expressed as a range, so long as the factors which will determine the actual cost within the range are explained;

(b) details of financial interests of any kind, which the consultant has in the medical facilities and equipment used at the premises;

(c) a list of all insurers which recognise the consultant;

(d) a statement that insured patients should check with their insurer the terms of their policy, with particular reference to the level and type of outpatient cover they have; and

(e) the website address of the information organisation, and a statement in standard wording as agreed with the information organisation indicating that this website will give patients useful information on the quality of performance of hospitals and consultants.

22.4 The following information must be disclosed by a consultant to a patient prior to further tests or treatment:

(a) the reason for the relevant further tests or treatment;

(b) an estimate of the cumulative consultant cost of the treatment pathway which has been recommended. This should either include all consultant fees that will be charged separately from the hospital fee, or should include contact details for any other consultants whose fees are not included in the quote or, where applicable for self-pay patients, the total package price for treatment, where the consultant has agreed this with the operator of the relevant private healthcare facility;

(c) a statement of any services which have not been included in the estimate, such as those resulting from unforeseeable complications. Where alternative treatments are available but the appropriate treatment can only be decided during surgery, the estimate should set out the relevant options and associated fees; and

(d) the website address of the information organisation, and a statement in standard wording as agreed with the information organisation indicating that this website will give patients useful information on the quality of performance of hospitals and consultants.

22.5 For tests or treatment given on the same day as the consultation, the information specified in article 22.4 may be given orally rather than in writing.

22.6 Consultants shall supply patients with information in accordance with article 22.3 at the same time as the outpatient consultation appointment is confirmed with the patient, and other than in case of emergency shall supply patients with information in accordance with article 22.4 either within the two working days following the final (pre-treatment) outpatient consultation or prior to surgery, whichever is sooner.

22.7 Subject to Article 22.8, the operator of a private healthcare facility shall ask every privately-funded patient undergoing any inpatient, day-case or outpatient procedure, including diagnostic tests and scans at that facility, to sign a form confirming that the relevant consultant provided the information required by Article 22.4, and shall take appropriate action if there is evidence that a consultant has failed to do so. Alternatively, private hospital operators shall take equivalent measures, as approved by the information organisation and its members to monitor and enforce compliance with article 22.

22.8 The duties in Article 22.7 owed by the operator of a private healthcare facility do not apply in the case of a private patient who attends a consultation at premises which are not part of the relevant facility and who does not thereafter have treatment at the relevant facility pursuant to attending the consultation.



## ISCAS Position Statement

### Complaints Management and Practising Privileges

#### ISCAS Position Practising Privileges:

The **ISCAS position** is that subscribing Independent Healthcare Providers (IHPs) are required to provide a **single response** to a complaint. The response to complaints shall be based on an investigation that involves all relevant persons, whether those are staff who are engaged through an employment contract, agency / bank staff, or those who are granted of practising privileges. IHPs may need to obtain statements or feedback from those granted practising privileges, including on matters of the consent process, but this should be incorporated into a single response to the complainant from the IHP.

#### Background to position statement – poor practice:

The Independent Adjudicators (IAs), engaged by ISCAS to adjudicate on complainants at stage 3 of the independent sector complaints process, identify areas of learning from adjudications. The IAs have identified an increasing number of adjudications that show limited cooperation in the complaints process between the IHP and those medical practitioners that the IHP engages through practising privileges. Furthermore, the IAs have identified that poor documentation with regard to the consent process, as a theme in the complaints they are asked to adjudicate upon.

It is **not acceptable** for Consultants with practising privileges (or other persons engaged by the IHP) to write **separate responses** to complainants. IHPs that continue to permit multiple points of communication and responses to be forwarded the complainant will be deemed to be non-compliant with the ISCAS Code. As stated above the position of ISCAS is that the IHPs shall provide a single response to a complaint that incorporates feedback from all relevant clinicians including consultants with practising privileges.

#### ISCAS Code and Practising Privileges Principles:

The ISCAS Code states that the Code includes complaints about those healthcare professionals granted practising privileges working in subscribing IHPs. Practising privileges are a well-established system of checks and agreements whereby doctors can practise in hospitals and clinics without being directly employed by them. The

ISCAS Code also outlines the regulatory requirements and information about the system regulators with respect to complaint management.

The ISCAS Code does not provide details about how practising privileges operate in IHPs or information on the consent process. ISCAS and the IAs refer to the following documents published by the Association of Independent Healthcare Organisations (AIHO):

- Key Principles in Practising Privileges: <https://aiho.org.uk/689-aiho-practising-privileges-principles/file>
- Key Principles in Consent and Capacity: <https://aiho.org.uk/707-aiho-consent-and-capacity-key-principles-july-2017/file>

The Key Principles in Consent and Capacity states that *“it is important to have in mind that consent is a process which must be precisely documented”*. ISCAS position is that subscribers shall ensure those with practising privileges can answer the key question: *“would this record help me remember what happened, what was said and most importantly the thinking behind my decision if I am not here to continue the patients care, if there is an audit or if the matter comes to court in years to come?”*

#### **Accountability Framework subscribing IHPs:**

The relevant regulations of the four home countries define specific roles and responsibilities, as well as the meaning of practising privileges (see below – IH regulations). The Registered Person (IHP) retains the responsibility for the management and monitoring of systems and processes that support continuous quality improvement and learning, including the consent process and complaint management.

The Registered Person is responsible for supervising the service provision (for example, Regulated Activities or similar, such as diagnosis, treatment or surgery). The Registered Person (for example the Nominated Individual who may be at corporate level) is responsible for ensuring ‘fit and proper’ Registered Managers are engaged.

The Registered Manager is responsible for engaging ‘fit and proper’ staff, including those with practising privileges. The Registered Manager is responsible for ensuring that those engaged to deliver the Regulated Activity for which the IHP is registered, operate in accordance with the approved policies and procedures of the IHP, including complaints management and consent.

The Registered Manager must ensure that where there are hosting, renting or sub-contracted arrangements in place with other registered providers, the contract or service level agreement clearly defines the boundaries of responsibilities for the activities taking place, including complaints management and consent.

**Relevant regulations and guidance - England:**

In 1999 the Fifth Report of the House of Commons Health Select Committee (on the Regulation of Private and Other Independent Healthcare), identified that the directing body should accept responsibility for compliance with relevant regulation by those to whom it grants practising privileges.

In April 2002 The Private and Voluntary Health Care (England) Regulations 2001 (PVH) came into force and the requirements of “Registered Providers” with respect to practising privileges, were defined in regulations and the National Minimum Standards. In 2010 in England the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 came into force supported by the Essential Standards.

The current regulations in England (The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014) continue to include practising privileges within the employment definition, for the purposes of those regulations (that is, not with reference to any employment law). The current interpretation is that employment means:

- *employment under a contract of service, an apprenticeship, a contract for services or otherwise than under a contract, and*
- *the grant of practising privileges by a service provider to a medical practitioner, giving permission to practice as a medical practitioner in a hospital managed by the service provider,*
- *and “employed” and “employer” is to be construed accordingly;*

The Care Quality Commission guidance on the scope of registration states for practising privileges to apply:

- *.....it means that all aspects of the consultation must be carried out under the hospital’s management and policies. For example, being subject to the hospital’s requirements for clinical governance and audit, and the hospital’s policies and systems for complaints and for records (with the hospital owning*

*the records). It means that the hospital takes responsibility for ensuring that essential levels of quality and safety are met. In practice, this may be done quite readily through granting 'practising privileges'.*

- *....doctors (or other health care professionals) sometimes practise in outpatient departments under their own arrangements, with the hospital only acting as landlord. In that case, where the doctor or other health care professional is carrying on regulated activities independently of the hospital, the doctor or other health care professional must register [with CQC], as this does not amount to the exercise of practising privileges.*

#### **Relevant regulations and guidance - Scotland:**

The regulations in Scotland (The Healthcare Improvement Scotland (Requirements as to Independent Health Care Services) Regulations 2011) also define employment within the context of those regulations:

- *In these Regulations, references to employing a person include employing a person whether or not for payment and whether under a contract of service, a contract for services or otherwise than under a contract, and allowing a person to work as a volunteer; and references to an employee or to a person being employed are to be construed accordingly and includes a registered medical practitioner or registered dentist having practising privileges who provides medical or dental care within the independent health care service.*

#### **Relevant regulations and guidance - Wales:**

The regulations in Wales (The Independent Health Care (Wales) Regulations 2011) define practising privileges and state how employee is to be construed:

- *"practising privileges", in relation to a medical practitioner, refers to the grant to a person who is not employed in an independent hospital of permission to practise in that hospital.*
- *In these Regulations, unless the contrary intention appears, references to employing a person include employing a person whether under a contract of service or a contract for services and references to an employee or to a person being employed is to be construed accordingly.*

#### **Relevant regulations and guidance – Northern Ireland:**

The regulations in Northern Ireland (The Independent Health Care Regulations

(Northern Ireland) 2005) define practising privileges and state what employing a person includes:

- *“practising privileges” in relation to a medical practitioner, refers to the grant to a person who is not employed in an independent hospital of permission to practise in that hospital.*
- *In these Regulations, references to employing a person include employing a person whether under a contract of service or a contract for services.*

Social Care Wales is a Welsh Government sponsored body established under the Regulation and Inspection of Social Care (Wales) Act, 2016 to protect, promote and maintain the safety and well-being of the public in Wales.

Our aims, as set out in our strategic plan, are to:

- Provide public confidence in the social care workforce
- Lead and support improvement in social care
- Develop the early years and social care workforce

In order to provide public confidence we make sure the social care workforce is fit to practise through our regulatory role by maintaining professional standards and assuring high-quality accredited training.

We are responsible for maintaining a register of social care workers which currently includes social workers, social care managers and children's residential care workers. By 2022 domiciliary care workers and adults' residential care workers will also be registered. We investigate complaints against registered care workers through our fitness to practise process.

### **Key points and matters requiring clarification**

- **We welcome the inclusion of private health services, including nursing care within the Ombudsman's remit, but would seek further clarity on how investigations in these areas would relate to the work of other regulatory bodies with responsibilities in these areas, including Social Care Wales (par 1).**
- **We would seek clarification on how provisions in the Bill which allow the exercise of professional and clinical judgement in social care relate to the powers and responsibilities of Social Care Wales (par 2).**
- **We welcome the provisions in relation to joint working. However, we note the lack of detail about joint working with those referred to, including Social Care Wales (par 8).**

### **General comments**

1. We welcome the extension of the Ombudsman's remit to include maladministration in private health services, including nursing care. This will provide for greater consistency. We believe that they will help to ensure that the complexity of healthcare arrangements does not stand in the way of important investigations about alleged service failures. The provisions will also promote equality and fairness by giving these complainants the same opportunities for redress. However we would seek further clarity on how investigations in these areas would relate to the work of other regulatory

bodies with responsibilities in these areas, including us.

2. Recently the National Assembly has introduced two major laws on the regulation of social care<sup>1</sup>. In this context, we would like a clear definition of clinical judgment as it relates to social care. We would also question whether the reference to social care in 14(2) should be removed. This is because in relation to section 14 of Part 3, the Explanatory Memorandum refers to *decisions taken in consequence of the exercise of clinical judgment*. 'Clinical judgement' could be interpreted as being related to the practise of an individual care worker, which is an area which is already covered in law through Social Care Wales' remit (see 5.1). Furthermore, clinical judgment usually relates to health care and it is not, therefore, clear why social care is expressly referred to in 14(2) alongside the reference to health care. Therefore, we would question how these provisions in the Bill relate to the existing powers and responsibilities of Social Care Wales.
3. We would like to know whether fitness to practise panels is to be regarded as relevant tribunals for the purposes of the Bill. We would also like to have clarity about whether a decision about whether to refer a matter to a fitness to practise panel under relevant fitness to practise rules would be regarded as part of an administrative or judicial function.
4. There is a lack of clarity about what is meant by the following reference in section 10 of Part 3: *discharge of any of its administrative functions*. We would welcome more information about this because it will help us to identify the areas of our work that will fall within the Ombudsman's remit and allow us to make an informed comment about the provision.
5. Section 10(1)(c) refers to alleged failure by a listed authority to provide a relevant service and we would like more information about the meaning of relevant service in the context of our work. As far as we can see, this information is not available in the Bill or the Explanatory Memorandum.
6. We feel that Part 3, Section 3 would be clearer if 3(8) were set out, rather than just referred to. If the Ombudsman requires the agreement of the complainant to use Section 3, it would be best if this was clearly stated in Section 3.
7. We welcome the provisions in section 65 of Part 6 in relation to joint working. However, we note the lack of detail about joint working with those referred to in section 65(2)(f) - any person exercising regulatory functions in Wales. We fall within this category and are one of the specified persons listed in Schedule 3. Therefore, we seek further clarification on this important point.
8. Section 65 requires the Ombudsman to inform and consult us about relevant matters where he considers it appropriate. However, we feel that we need a stronger guarantee than this, especially as we are moving towards registering

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<sup>1</sup> The Social Services and Well-being (Wales) Act 2014 and the Regulation and Inspection of Social Care (Wales) Act 2016

domiciliary care workers and this group of workers is specifically mentioned in Part 5 of the Bill.

9. We would like to know whose complaint investigation will take priority where there are parallel investigations by Social Care Wales and the Ombudsman about the same or related issues. We would also question how the Ombudsman will ensure impartiality in investigations into our handling of a complaint (under our complaint or review processes) where the Ombudsman has already been investigating complaints about the same or related issues.

### **Oral complaints**

10. We recognise that some complainants face difficulties when they are required to submit their complaints in writing. We therefore welcome and support the proposal to permit oral complaints to the Ombudsman. However, we would draw attention to the possibility of an increasing number of complainants choosing to submit oral complaints out of convenience rather than necessity and the drain on resources this might cause.
11. We note that the Ombudsman's website contains details of advocacy and advice organisations and would suggest that the Ombudsman continue to direct people to these valuable sources of support and work with these organisations to make it easier for them to support complainants. This could reduce the pressure on the Ombudsman's staff in the event of a rise in the number of people choosing to submit oral complaints.
12. We also feel that the oral complaint process will have to be carefully managed to prevent misuse by vexatious complainants and to avoid disputes about the accuracy of transcribed complaints and the extent to which these reflect the views and wishes of the complainant.

### **Ombudsman initiated investigations**

13. We welcome and support the new power enabling the Ombudsman to initiate his own investigations. We believe that this will offer greater protection to vulnerable members of society who may be reluctant to make a complaint about public services. Where the new power leads to the identification of systemic problems and results in measures to eradicate them, the benefits will be even greater.
14. However, it is our view that there is a need for greater clarity about the Ombudsman's power to continue with an investigation where the complainant does not want the complaint to be regarded as duly made. Section 8(5) of Part 3 prevents the Ombudsman's from carrying out an investigation in these circumstances. However, it appears that the Ombudsman can proceed with an investigation under section 4 whether the complaint has been duly made or not. While we support the ability to do this but there may be practical difficulties where the main complainant would not wish to be involved. We would welcome further information about this provision.



## **Complaints handling standards and procedures**

15. Social Care Wales has two complaints-handling procedures; one for complaints about social care workers and one about for complaints about our how we operate. The process for complaining about social care workers is largely set out in the Regulation and Inspection of Social Care (Wales) Act 2016 and it is likely that we will want to rely on section 41(1)(b) or section 37(4) of the Bill to justify a decision to deviate from (or use a modified version of) a model complaints-handling procedure.
16. We would welcome information about whether, under section 38(1), the Ombudsman will be able to draw attention to approved non-compliance, where an organisation has relied on sections 41(1)(b) or section 37(4) to obtain consent to deviate from the model complaints handling procedure. This could help the organisations involved avoid unnecessary challenges to their processes based on alleged non-compliance.



## **Care and Social Services Inspectorate Wales (CSSIW)**

### **Written Submission in respect of the Public Services Ombudsman (Wales) Bill**

#### **General observations:**

CSSIW has a positive and constructive relationship with the Public Services Ombudsman Wales (PSOW) based on a clear understanding and respect for each other's independent roles. We have a Memorandum of Understanding which is due for revision with the imminent introduction of the Regulation and Inspection of Social Care Wales Act 2016.

CSSIW registers and inspects a wide range of care services. CSSIW has no powers in relation to complaints about care services but is keen to follow up any concerns arising from complaints and where necessary will take enforcement action. Regulations expect care providers to have a clear complaints procedure. When people cannot get satisfaction from a care provider and the care is funded by a public authority they can take their complaint to the public authority.

In Wales, where the care is not funded, people can turn to the PSOW. Although the take up has been low we believe the PSOW provides a very important route for achieving resolution.

We are aware that there are some issues which are contractual (e.g. fees) and where CSSIW has no provenance. We also know that some providers give notice to residents and their relatives when complaints are made. The extent to which these matters are Trading Standards issues or matters for the PSOW is an area for determination. The importance of providing a safeguard in these matters will be highlighted in the imminent Competition and Markets Authority report on the care home market.

CSSIW also inspects Local Authorities. There are specific regulations setting out how complaints about Local Authorities must be handled with ultimate recourse to the PSOW. CSSIW has no powers in relation to complaints about Local Authorities but we do use the learning from complaints to inform our inspections and to require improvement.

CSSIW has also been the subject of a small number of complaints raised with the PSOW. We have found the PSOW to be clear when deciding which cases will and will not be investigated and to be fair and where necessary challenging in reaching its findings and making requirements of us.

**The committee asked for comments on the following:**

- *The general principles of the Public Services Ombudsman (Wales) Bill and the need for legislation to deliver the stated policy intention;*

These seem sound and build upon the arrangements currently in place.

- *the provisions of the Bill which set out the new powers for the Ombudsman to:*
- *accept oral complaints;*

We believe this is important for the reasons stated.

We note that people using care services are more likely to be vulnerable and lack the ability and confidence to initiate a written complaint.

Promoting accessibility to the PSOW enables greater equality and is supportive of people's rights.

The inclusion of electronic communication is sensible going forward.

- *undertake own initiative investigations;*

As explained in the Bill, issues may surface for which no individual has locus, insight or the intention to make a complaint but where a failure in administration has resulted in poor outcomes. It will be important for the PSOW to have clear criteria so PSOW responsibilities do not overlap those of regulatory bodies. For example anonymous complaints about care services. The strength of the PSOW function is that it can look across public systems and at the interconnectivity and systems failures where as regulatory bodies are commonly concerned with constituent parts. This is also an issue considered in the White Paper, *Services Fit for the Future, Quality and Governance in Health and Care in Wales*

- *investigate private medical treatment including nursing care in a public/private health pathway;*

We do not have a particular view on this. Clearly co-ordination and working closely with Health Inspectorate Wales and the Community Health Councils would need to be considered.

- *undertake a role in relation to complaints handling standards and procedures;*

This would seem sensible. The PSOW has much to contribute from the learning reflected in the PSOW's "casebook". There is an "invest to save" argument here. The more the PSOW can do to promote better complaint handling upstream the less the PSOW should need to do to investigate complaints at a later stage.

- *any potential barriers to the implementation of the Bill's provisions and whether the Bill takes account of them;*

We do not have a particular view on this.

- *the appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 6 of Part 1 of the Explanatory Memorandum);*

These seem reasonable to enable future proofing of the Act and to provide a mechanism to respond to changes and learning from PSOW activity.

- *whether there are any unintended consequences arising from the Bill;*

We do not have identified any intended consequences.

- *the financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum);*

We do not have a particular view on this.



**David Francis**  
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Dyddiad: 29 Tachwedd 2017

Ein cyf:

Annwyl Chloe

**RE: Ymateb i'r ymgynghoriad ar yr Bil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru)**

Gwelir yn atodedig, fel y gofynnwyd, llythyr sy'n rhoi cyflwyniad ysgrifenedig ar y Bil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru).

Yn gywir



Dr Kate Chamberlain  
Prif Weithredwr  
**Arolygiaeth Gofal Iechyd Cymru**

**Gwirio bod pobl yng Nghymru  
yn derbyn gofal da**

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**Tachwedd 2017**

**Ymgynghoriad ar Fil Ombwdsmon Gwasanaethau  
Cyhoeddus (Cymru)**

## Materion cyd-destunol

1. Mae Arolygiaeth Gofal Iechyd Cymru (AGIC) yn croesawu'r cyfle i gyfrannu at y gwaith craffu ar Fil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru). Rydym wedi fframio ein hymateb yn bennaf yng nghyd-destun cyfrifoldebau'r Ombwdsmon o ran darparwyr iechyd a gofal cymdeithasol, er ein bod yn cydnabod bod ei bwerau'n ymestyn yn ehangach na hynny. Cafodd ein rôl ei hamlinellu yn Atodiad 1.
2. Mae adroddiad interim yr Adolygiad Seneddol o Iechyd a Gofal Cymdeithasol yng Nghymru yn nodi:  
*“Mae consensws cryf ymhlith y rhanddeiliaid y gwnaethom siarad â nhw ynghylch y cyfeiriad cyffredinol tuag at ddarparu iechyd a gofal cymdeithasol di-dor, sy'n canolbwyntio ar y canlyniadau sydd o bwys i'r unigolyn.”*
3. Mae symud tuag at y cyfeiriad hwn yn cefnogi nifer o'r pwerau newydd.  
**Cwynion ar lafar.** Croesewir yr hyblygrwydd i dderbyn cwynion yn y ffordd sydd fwyaf hygyrch a phriodol i'r sawl sy'n cwyno.  
**Llwybr cyhoeddus/preifat.** Croesewir y gallu i archwilio'n llawn i amgylchiadau gofal unigolyn pan fod y gofal hwnnw'n croesi'r ffin rhwng cyrff rhestredig a gofal iechyd preifat.  
**Safonau delio â chwynion.** Dylai cyflwyno prosesau cyson a di-dor ar gyfer delio â chwynion ar draws ffiniau gwasanaethau symleiddio'r broses a darparu eglurder ar gyfer y cyhoedd.
4. Bydd hi'n bwysig sicrhau bod y gwaith o weithredu'r pwerau yn y Bil hwn yn ymwybodol o ddatblygiadau deddfwriaethol perthnasol, ac wedi'i alinio â'r datblygiadau hyn, fel deddfwriaeth bosib yn dilyn Papur Gwyn “Gwasanaethau sy'n Addas i'r Dyfodol”, sydd hefyd yn mynd i'r afael â'r angen i alinio safonau a phrosesau cwyno ar draws iechyd a gofal cymdeithasol.

## Darpariaeth i'r Ombwdsmon dderbyn cwynion ar lafar

5. Rydym yn croesawu'r hyblygrwydd yn y Bil, sy'n caniatáu i'r Ombwdsmon amlinellu ffurf a chynnwys cwynion yn y canllawiau. Bydd hyn yn sicrhau bod yr Ombwdsmon yn medru nodi'n glir beth fydd yn cael ei drin fel cwyn ffurfiol, gan fod pobl yn defnyddio technoleg mewn ffyrdd gwahanol (e.e. e-bost, negeseuon testun, Twitter).
6. Rydym yn cefnogi'r ddarpariaeth y dylai'r Ombwdsmon fedru derbyn cwynion ar lafar. Gallai rhai pobl ei chael hi'n anodd mynegi eu hunain yn ddigonol yn ysgrifenedig ac felly byddai'n cynorthwyo mynediad i ganiatáu i gwynion gael eu cyflwyno mewn amrywiaeth o ddulliau.

7. Fodd bynnag, bydd hi'n bwysig bod yr Ombwdsmon yn cofnodi'r wybodaeth ar ffurf ysgrifenedig a chadarnhau gyda'r unigolyn sy'n cwyno bod y cofnod yn adlewyrchu'n gywir y materion roedd am eu codi. Dylid gwneud hyn ar lafar ar yr adeg y caiff y gŵyn ei gwneud, p'un ai a yw'r unigolyn sy'n cwyno yn dymuno derbyn cadarnhad ysgrifenedig ai peidio.
8. Gellid dadlau bod Cymal 8 (9) yn rhy benodol ac nid yw'n mynd yn ddigon pell ar gyfer dibenion monitro mynediad a chanlyniadau. O bosib, gellid ei aralleirio ar hyd y trywydd, "Mae'n rhaid i'r Ombwdsmon gynnal cofrestr o'r holl gwynion, y modd y cawsant eu derbyn, a'r canlyniad." Gallai hyn helpu i fonitro a gwerthuso p'un ai a yw cwynion llafar yn fwy neu'n llai tebygol o fynd ymlaen at ymchwiliad ffurfiol.

### **Darpariaeth i ymestyn awdurdodaeth yr Ombwdsmon i ganiatáu ymchwilio i gwynion mewn llwybr gwasanaeth iechyd cyhoeddus/preifat**

9. Gwnaeth Deddf Gwasanaethau Cymdeithasol a Llesiant (Cymru) 2014 ymestyn awdurdodaeth yr Ombwdsmon i gynnwys cartrefi gofal, gofal cartref a gofal lliniarol. Yn gyffredinol, rydym yn croesawu darpariaethau sy'n alinio trefniadau iechyd a gofal cymdeithasol, ble y bo'n briodol, ac sy'n osgoi gwahaniaethau sectoraidd mympwyol.
10. Rydym yn cefnogi'r ddarpariaeth i'r Ombwdsmon ystyried y gofal a'r driniaeth a ddarperir gan ddarparwr gofal iechyd preifat pan fod y gofal/triniaeth honno wedi deillio o'r GIG, neu wedi bod yn rhan o lwybr gofal unigolyn sydd wedi cynnwys y GIG hefyd. Mae hyn yn ymddangos yn synhwyrol ac mae'n cefnogi'r egwyddor o ofal di-dor sy'n canolbwyntio ar yr unigolyn.

### **Pŵer i ymgymryd â rôl mewn perthynas â safonau a gweithdrefnau delio â chwynion**

11. Mae'r Bil yn caniatáu i'r Ombwdsmon gyhoeddi datganiad o egwyddorion yn ymwneud â delio â chwynion, a chyhoeddi gweithdrefnau enghreifftiol ar gyfer delio â chwynion. Mae'n caniatáu i'r Ombwdsmon ddatgan diffyg cydymffurfiaeth gan gorff rhestredig. Mae'n ofynnol hefyd i'r Ombwdsmon ysgwyddo rôl wrth oruchwylio'r gwaith o weithredu gweithdrefnau delio â chwynion, gan gynnwys hybu arfer gorau.
12. Rydym yn ystyried y byddai safoni gweithdrefnau cwyno o gymorth i'r cyhoedd. Mae'r mater hwn yn ymwneud yn uniongyrchol â'r cynnig ar gyfer alinio prosesau ac archwilio cwynion ar y cyd ar draws y maes iechyd a gofal cymdeithasol, fel yr amlinellir ym Mhapur Gwyn "Gwasanaethau sy'n Addas i'r Dyfodol". Credwn pan fod dinasyddion yn



derbyn gofal integredig y dylent allu cwyno unwaith yn unig, yn hytrach na gwneud dwy gŵyn ar wahân i wasanaethau iechyd a gwasanaethau gofal cymdeithasol. O dan yr amgylchiadau hyn, bydd hi'n bwysig bod corff clir sy'n arwain yr ymchwiliad i'r gŵyn gyda'r awdurdod i arwain ar ran y ddau gorff.

13. Bydd angen ystyried ymhellach ynglŷn â sut y bydd hyn yn ymddangos i ddinasyddion a allai fod yn derbyn gofal gan gyfuniad o wasanaethau iechyd, gwasanaethau cymdeithasol a darparwyr gofal annibynnol, yn arbennig o ystyried yr ymestyniad i awdurdodaeth yr Ombwdsmon i archwilio llwybr gwasanaeth iechyd cyhoeddus/preifat.
14. Ar y cyfan, rydym yn ystyried y byddai o fudd pennaf i'r cyhoedd gael corff sy'n gyfrifol yn benodol am sicrhau bod prosesau cwyno yn gweithredu'n gyson ac yn ddi-dor er budd pennaf i'r cyhoedd. Rydym hefyd yn croesawu'r cyfle mae hwn yn ei gynnig i sicrhau bod data cyson a chymaradwy yn cael ei gasglu ar draws y gwasanaethau cyhoeddus ac yr adroddir amdano.

### **Darpariaeth i'r Ombwdsmon ymgymryd ag ymchwiliadau yn ôl ei gymhelliant ei hun**

15. Mae'r Bil yn cydnabod bod nifer o gyrff sydd eisoes yn ymgymryd â'r math hwn o adolygiad ac y bydd hi'n bwysig sicrhau nad oes unrhyw orgyffwrdd rhwng rolau'r arolygiaethau a'r rheoleiddwyr, Archwilydd Cyffredinol Cymru, a chomisiynwyr.
16. Mae'r berthynas rhwng AGIC a'r Ombwdsmon wedi datblygu'n dda yn ystod y blynyddoedd diwethaf a chytunwyd ar Femorandwm Cydddealltwriaeth yn amlinellu sut y bydd y ddau sefydliad yn cydweithio ar faterion sydd o ddiddordeb cyffredin.  
<http://hiw.org.uk/docs/hiw/publications/160728psowmoucy.pdf>
17. Er bod y Bil yn cyfeirio at "unrhyw unigolyn sy'n gweithredu swyddogaethau rheoleiddiol yng Nghymru" fel "unigolyn penodedig" at ddibenion yr ymgynghoriad gyda'r Ombwdsmon, nid yw'n cynnwys y pwerau i gydweithredu, cynnal ymchwiliadau ar y cyd, a pharatoi adroddiadau ar y cyd gyda rheoleiddwyr yn yr un ffordd ag y mae'n gwneud ar gyfer comisiynwyr ac Archwilydd Cyffredinol Cymru. Byddai'n siomedig pe bai'r ddeddfwriaeth yn cyfyngu ar allu AGIC ac Ombwdsmon Gwasanaethau Cyhoeddus Cymru i weithio gyda'i gilydd er lles y cyhoedd, effeithlonrwydd ac effeithiolrwydd.

### **Y dirwedd ehangach**

18. Mae'r pwerau newydd i weithredu fel Awdurdod Safonau Cwynion ac ymgymryd ag ymchwiliadau yn ôl ei gymhelliant ei hun yn cynrychioli

datblygiad sylweddol o ran rôl yr Ombwdsmon. Mae'r rôl bresennol yn canolbwyntio ar lefel yr unigolyn, gan edrych i mewn i gwynion unigolion am wasanaethau cyhoeddus a darparwyr gofal annibynnol yng Nghymru. Bydd y pwerau newydd yn golygu bod yr Ombwdsmon hefyd yn gweithredu ar lefel y system, gan sicrhau bod systemau cwynion yn gweithio'n effeithiol yn gyffredinol ac yn archwilio patrymau a thueddiadau i nodi materion systemig posib ar gyfer archwiliad pellach.

19. Ar lefel yr unigolyn, nid oes unrhyw gorff arall sy'n gyfrifol am ymchwilio i gwynion am wasanaethau gan gyrrff rhestredig pan fod aelod o'r cyhoedd yn anhapus gyda'i ymateb gan y darparwr gwasanaeth gwreiddiol. Golyga hyn fod rôl yr Ombwdsmon yn weddol hawdd i'w chyfleu.
20. Ar lefel y system, mae amrywiaeth eang o gyrrff gwahanol sydd â chyfrifoldeb dros nodi ac archwilio problemau systemig wrth gyflenwi gwasanaethau cyhoeddus. Mae'r rhain yn cynnwys Archwilydd Cyffredinol Cymru, y comisiynwyr, a nifer o gyrrff rheoleiddio ac arolygu. Er bod hyn yn cael ei gydnabod yn y ddeddfwriaeth i raddau, bydd yn peri heriau i'w weithredu, a bydd rhaid rheoli hynny'n ofalus.
21. Mae Cymru'n wlad fach gyda thirwedd cymharol gymhleth a gorlawn o gyrrff rheoleiddiol, craffu a goruchwylio. Mae'n hanfodol bod yr holl bartïon yn deall eu rhan yn y system ac yn gweithio'n gydweithredol ac effeithiol gydag eraill, os yw'r system i weithio'n effeithiol er budd pennaf y cyhoedd.

## **Arolygiaeth Gofal Iechyd Cymru (AGIC) yw'r corff annibynnol sy'n arolygu ac yn rheoleiddio gofal iechyd yng Nghymru**

### **Ein diben**

Gwirio bod pobl Cymru yn derbyn gofal da.

### **Ein blaenoriaethau**

Ein nod trwy ein gwaith yw:

#### ***Rhoi sicrwydd:***

Cynnig safbwynt annibynnol ar ansawdd y gofal.

#### ***Hybu gwelliant:***

Annog gwelliant trwy adrodd a rhannu arfer da.

#### ***Dylanwadu ar bolisiau a safonau:***

Defnyddio'r hyn a welwn i ddylanwadu ar bolisiau, safonau ac arferion.

### **Ein cyfrifoldebau**

Mae ein gwaith yn cynnwys gweithgareddau mewn tri maes allweddol:

- rheoleiddio gofal iechyd annibynnol
- arolygu'r GIG
- iechyd meddwl

#### **Rheoleiddio gofal iechyd annibynnol**

Cofrestru, arolygu a chymryd camau gorfodi yw'r dulliau mae AGIC yn eu defnyddio i reoleiddio'r sector iechyd annibynnol yng Nghymru yn unol â Deddf Safonau Gofal 2000, Rheoliadau Gofal Iechyd Annibynnol (Cymru) 2011, Rheoliadau Gofal Iechyd Annibynnol (Ffioedd) (Cymru) 2011, a deddfwriaeth arall (gweler Atodiad B).

Rydym yn rheoleiddio ac yn arolygu amrywiaeth eang o ddarparwyr gofal iechyd annibynnol, sy'n amrywio o'r rhai sy'n defnyddio laserau i ysbytai preifat llawn. Mae ein gweithgareddau craidd yn cael eu rhestru isod.

- Cofrestru ac arolygu clinigau, ysbytai ac asiantaethau meddygol annibynnol.
- Cofrestru sefydliadau iechyd meddwl ac anableddau dysgu annibynnol.

- Cofrestru ac arolygu lleoliadau sy'n defnyddio laser dosbarth 3B neu 4 neu beiriannau golau pwls dwys.
- Cymryd camau gorfodi pan nodir diffygion rheoleiddiol mewn lleoliadau cofrestredig.
- Nodi a delio gyda darparwyr sydd heb eu cofrestru o bosibl.

### **Arolygu'r GIG**

Mae AGIC yn arolygu gwasanaethau a ddarperir gan y GIG ledled Cymru i brofi a yw'r gofal a ddarperir yn bodloni'r Safonau Iechyd a Gofal. Mae nifer o arolygiadau AGIC yn rhai dirybudd, er nad yw hynny'n ymarferol bosibl bob amser. Rydym wedi cyhoeddi datganiad yn amlinellu'r rhesymeg ar gyfer p'un ai a yw ein harolygiadau yn rhai dirybudd neu gyda rhybudd. Rydym hefyd yn ymgymryd â chyfran o'n hymweliadau y tu allan i oriau swyddfa.

Mae'r arolygiadau yn profi yn erbyn tri maes penodol:

- ansawdd profiad y claf
- cyflenwi gofal diogel ac effeithiol
- ansawdd arweinyddiaeth a rheolaeth

### **Iechyd meddwl**

Canolbwynt y gwaith hwn yw sicrhau bod rhai o'r unigolion mwyaf agored i niwed mewn cymdeithas yn cael eu hamddiffyn, yn derbyn gofal, ac yn cael eu trin yn briodol mewn amgylcheddau sy'n hwyluso eu gwellhad. Mae AGIC yn ymweld ag ysbytai yn y GIG a'r sector annibynnol fel rhan o'n rhaglen waith. Rydym hefyd yn ymweld â gwasanaethau a ddarperir yn y gymuned i adolygu Gorchmynion Triniaeth Gymunedol.

Mae ein gweithgareddau craidd yn cael eu rhestru isod.

- Arolygu sefydliadau iechyd meddwl ac anabledau dysgu y GIG ac annibynnol gyda gweithgarwch dilynol priodol.
- Darparu'r Gwasanaeth Adolygu Iechyd Meddwl a phrosesu ceisiadau am Feddygon a Benodwyd i Roi Ail Farn (SOAD).
- Monitro gweithrediad y Mesur Iechyd Meddwl.
- Monitro gweithrediad y Trefniadau Diogelu rhag Colli Rhyddid.
- Monitro'r defnydd o'r Ddeddf Iechyd Meddwl.

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Dyddiad: 4 Rhagfyr 2017  
Ein cyf: HVT2773/SD  
Tudalen: 1 o 7

Mr John Griffiths, AC  
Cadeirydd, Pwyllgor Cymunedau, Cydraddoldeb a Llywodraeth Leol  
Cynulliad Cenedlaethol Cymru  
Bae Caerdydd  
Caerdydd  
CF99 1NA

Annwyl John,

### Cam 1 Ystyried Bil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru)

Diolch i chi am eich gwahoddiad i gyfrannu i'ch ystyriaeth o Fil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru). Mae'n ddrwg gennyf na allaf fod yn bresennol yn y Pwyllgor ar 13 Rhagfyr 2017. Mae'n dda gennyf, fodd bynnag, allu trefnu i Kevin Thomas (Cyfarwyddwr Gwasanaethau Corfforaethol Swyddfa Archwilio Cymru (SAC)) a Martin Peters (Pennaeth y Gyfraith a Moeseg SAC) roi tystiolaeth ar fy rhan. Rwyf hefyd yn cyflwyno'r dystiolaeth ysgrifenedig ganlynol. Mae peth o'r deunydd isod yn ailadrodd y pwyntiau a wneuthum mewn ymateb i ymchwiliad Pwyllgor Cyllid y Pedwerydd Cynulliad i ystyriaeth o bwerau Ombwdsmon Gwasanaethau Cyhoeddus Cymru (OGCC), y Bil drafft a baratowyd gan y Pwyllgor Cyllid tua diwedd 2016 ac, yn fwyaf diweddar, ynghylch y Bil presennol, yn fy llythyr dyddiedig 16 Hydref 2017 at Gadeirydd Pwyllgor Cyllid y Cynulliad presennol.

*Egwyddorion cyffredinol y Bil a'r angen am ddeddfwriaeth i gyflawni'r bwriad polisi sydd wedi ei ddatgan*

1. Fel yr wyf yn deall, mae'r brif egwyddor gyffredinol sydd wrth wraidd y Bil wedi ei hegluro ym mharagraff 3.27 o'r Memorandwm Esboniadol, sef sicrhau bod pwerau'r OGCC yn adlewyrchu arfer gorau. Ystyriaeth fod hon yn egwyddor gyffredinol gadarn.
2. Ar y cyfan, mae'r pedwar prif estyniad o bwerau'r Ombwdsmon (fel y'u rhestrwyd ym mharagraff 5.2 o'r Memorandwm Esboniadol) yn ymddangos yn cyd-fynd â'r egwyddor arfer gorau am y rhesymau a eglurwyd yn fy nghyflwyniad i'r Pwyllgor Cyllid ar 19 Chwefror 2015. I grynhoi yn fyr, rwyf yn ystyried:
  - i. y dylai ymchwiliadau ar ei liwt ei hun ei gwneud yn bosibl mynd i'r afael â phroblemau systemig ehangach mewn ffordd gydlynol;

- ii. efallai y bydd manteision gwirioneddol yn deillio i bobl sy'n agored i niwed o'i gwneud yn haws cyflwyno cwynion ar lafar;
  - iii. ei bod yn werth ystyried gofal iechyd yn gydlynol pan fo'r mater yn cynnwys gofal a gafwyd yn breifat a gofal a ddarparwyd yn gyhoeddus;
  - iv. bod lle i wneud gwelliannau mewn ymarfer a gwneud arbedion drwy fodelau o weithdrefnau ymdrin â chwynion a chanllawiau ar draws cyrff cyhoeddus.
3. Er bod gennyf rai amheuon ynghylch gwir angen am newid deddfwriaethol o ran cwynion llafar, rwyf yn gweld y ddarpariaeth newydd yn hyrwyddo'r polisi. Gyda golwg ar y tri maes arall, ymddengys i mi fod angen deddfwriaeth i gwrdd ag amcanion y polisi.
  4. Yn ychwanegol at y pedwar maes newydd o ddarpariaeth, mae'r Bil hefyd yn adran 66 yn cynnwys gofyniad newydd i'r Ombwdsmon, lle mae ef neu hi yn ystyried hynny'n briodol, ymgynghori â'r Archwilydd Cyffredinol ynghylch ymchwiliadau arfaethedig yr Ombwdsmon. Credaf fod y ddarpariaeth hon yn briodol, yn enwedig fel dull o sicrhau nad yw ymchwiliadau yn gorgyffwrdd mewn ffordd anefnyddiol ag archwiliadau'r Archwilydd Cyffredinol ac i'r gwrthwyneb.
  5. Rwyf yn meddwl hefyd bod y pŵer newydd yn adran 67 i'r Ombwdsmon a'r Archwilydd Cyffredinol gydweithio gyda'i gilydd ac i ymgymryd ag ymchwiliadau ar y cyd yn briodol ar y cyfan. Rwyf yn ystyried, serch hynny, y dylid amddiffyn yr Archwilydd Cyffredinol yn glir rhag achosion o ddifenwi gyda golwg ar gyfathrebiadau ac adroddiadau ymchwiliad ar y cyd, a chredaf y gellid ymdrin â hyn drwy ddiwygio adran 70 er mwyn ymestyn ei hamddiffyniad i gynnwys yr Archwilydd Cyffredinol o ran ymchwiliadau ar y cyd.
  6. Efallai y dylwn nodi nad yw paragraff 12.39 o'r Memorandwm Esboniadol yn hollol gywir wrth ddatgan bod y Bil yn ei gwneud *yn ofynnol* i'r Ombwdsmon a'r Archwilydd Cyffredinol gydweithio. Er nad yw hyn yn broblem o ran y Bil ei hun, byddai'n fwy cywir i ddweud bod y Bil yn galluogi'r Ombwdsmon a'r Archwilydd Cyffredinol i gynnal ymchwiliadau ar y cyd - mae grymuso o'r fath yn fwy priodol na gofyniad.

*Rhwysrau posibl i weithredu darpariaethau'r Bil ac a yw'r Bil yn eu cymryd i ystyriaeth neu beidio*

7. Mae adran 68 yn gwahardd datgelu gwybodaeth sy'n cynnwys, ymhlith pethau eraill, wybodaeth a roddwyd gan yr Archwilydd Cyffredinol wrth gydweithredu dan adran 67. Rwyf yn deall mai estyniad yw'r gwaharddiad yn ei hanfod ar y gwaharddiad presennol, sydd wedi ei gynnwys yn adran 34X o Ddeddf 2005. Nid yw estyniad o'r fath, fodd bynnag, yn ystyried yn ddigonol ystod lawn swyddogaethau'r Archwilydd Cyffredinol, nad ydynt wedi eu cyfyngu i

archwiliadau. Byddai'n gymorth felly pe câi adran 68 ei diwygio i sicrhau nad yw hyn yn cyfyngu ar yr Archwilydd Cyffredinol wrth ddatgelu gwybodaeth a roddir gan yr Archwilydd Cyffredinol dan adran 67 lle mae datgeliad o'r fath yn rhan o waith yr Archwilydd Cyffredinol wrth arfer unrhyw rai o'i swyddogaethau.

8. Dylwn efallai grybwyll bod "ymchwiliad" yn eithriad i'r gwaharddiad yn adran 68(2)(b), ac o dan ddarpariaethau dehongli'r Bil (adran 76—gweler yn benodol linellau 1 i 5 ar dudalen 51) byddai hyn i'w weld yn cynnwys archwiliad gan yr Archwilydd Cyffredinol. Fodd bynnag, mae rhai o swyddogaethau'r Archwilydd Cyffredinol, megis y grym i roi hysbysiadau cynghori o dan adran 33 o Ddeddf Archwilio Cyhoeddus (Cymru) 2004, yn dal fel pe baent yn cael eu dal gan y gwaharddiad. (Cyhoeddir hysbysiadau cynghori gan yr Archwilydd Cyffredinol pan fydd yn ymddangos iddo fod corff llywodraeth leol yn cychwyn ar wariant anghyfreithlon. Nid archwiliadau yw hysbysiadau o'r fath ac nid ydynt i'w gweld yn syrthio o fewn diffiniad o "ymchwiliad"). Gallai adran 68, fel y mae wedi ei drafftio ar hyn o bryd, felly annog rhai i beidio â chydweithredu dan adran 67, ac mae hyn yn rhwystr posibl rhag gweithredu'r Bil yn llwyddiannus.

#### *Priodoldeb y pwerau yn y Bil i Weinidogion Cymru wneud is-ddeddfwriaeth*

9. Ystyriaf fod y pwerau yn y Bil i Weinidogion Cymru wneud is-ddeddfwriaeth yn briodol. Gydag adran 75 (cychwyn) yn eithriad priodol, mae'r holl bwerau yn ddarostyngedig i'r weithdrefn gadarnhaol. Dylai hyn fod o gymorth i sicrhau bod yr is-ddeddfwriaeth yn derbyn ystyriaeth addas gan y Cynulliad. Yn yr un modd, mae'r gofyniad i Weinidogion Cymru ymgynghori â'r Ombwdsmon gyda golwg ar ddeddfwriaeth eilaidd ynghylch, er enghraifft, meini prawf ar gyfer ymchwiliadau ar ei liwt ei hun, hefyd yn ymddangos yn briodol.

#### *Goblygiadau ariannol y Bil*

##### *Cost a budd*

10. Mae'n ymddangos bod goblygiadau ariannol y Bil wedi cael eu hystyried yn ofalus, a chredaf fod y costau a nodwyd yn y Memorandwm Esboniadol ar y cyfan yn realistig. Rwyf yn meddwl, serch hynny, bod y niferoedd o gwynion llafar ac ymchwiliadau a ddisgwyllir yn ymddangos braidd yn isel (paragraff 11.36 o'r Memorandwm) yn dibynnu ar faint o gyhoeddusrwydd a gaiff y ffaith fod cwynion llafar yn cael eu derbyn.
11. Er bod tabl cryno wedi ei roi ar dudalen 45, credaf y gallai'r crynodeb o oblygiadau'r Bil fod yn gliriach. Fel gyda llawer o Filiau, caiff y costau a'r arbedion (neu osgoi costau) eu crynhoi mewn cyfanswm dros bum mlynedd. Rhoddir y rhesymeg dros hynny ym mharagraff 11.24 o'r Memorandwm Esboniadol: “[cost] estimates can be calculated for this period with reasonable certainty.” Dywed paragraff 11.24 hefyd (heb fod yn afresymol yn fy marn i), “the Ombudsman



*expects a 'steady state' will be reached on costs and benefits relating to the new powers after three years" ac y bydd "ongoing (or recurrent) costs will continue beyond the five year period."* Rwyf yn meddwl y byddai wedi bod yn briodol gwneud y datganiadau allweddol hyn yn amlwg yn y crynodeb ar dudalen 45.

12. Nid yw'n glir i mi pam y mae amcangyfrifon yr arbedion yn seiliedig ar yr amcangyfrifon uwch o dwf beichiau achosion (yr arbedion fydd yn cronni o lefel uwch o osgoi costau), tra y rhoddir yr amcangyfrifon o'r costau fel amrediad. Efallai fy mod wedi camddechongli'r cyflwyniad, ond mae'n fy nharo i y byddai wedi bod yn briodol bod wedi rhoi ffigur osgoi costau hefyd yn seiliedig ar y rhagfynegiad twf beichiau achosion is o 5 y cant.
13. Credaf hefyd y dylai'r Memorandwm Esboniadol fod yn fwy eglur ynghylch lefel yr ansicrwydd ynglŷn ag arbedion. Mae'r Memorandwm yn cyfeirio at adroddiad y Distain a'r Archwilydd Cyffredinol, *Department of Work and Pensions: Handling Customer Complaints*, sy'n dangos y gall arbedion sylweddol fod yn bosibl drwy ymdrin â chwynion yn well. Fodd bynnag, byddwn yn awgrymu bod rhagfynegi arbedion o'r fath yn dueddol i fod yn ansicr iawn, ac nid wyf yn meddwl bod yr ansicrwydd hwnnw yn cael ei gydnabod yn ddigonol yn y Memorandwm.

#### *Cronfa Gyfunol Cymru*

14. Dywed Atodiad B y Memorandwm Esboniadol (gweler tudalen 144) nad yw'r Bil yn achosi gwariant i Gronfa Gyfunol Cymru (WCF). Nid yw hynny'n gywir. Yn wir, mae paragraffau 9 a 10 o Atodlen 1 i'r Bil yn cynnwys darpariaethau ar gyfer costau uniongyrchol i WCF. Felly, o dan Orchymyn Sefydlog 26.6(xi), dylai'r Memorandwm Esboniadol ymgorffori adroddiad gan yr Archwilydd Cyffredinol yn egluro ei farn ef neu hi p'un a yw'r costau hynny yn briodol neu beidio.
15. Fel yr esboniais yn fy llythyr at Gadeirydd y Pwyllgor Cyllid ar 16 Hydref 2017, ymddengys bod yr esgeulustod hwn yn codi o gamddechongliad o'm llythyr at Gadeirydd Pwyllgor Cyllid y Pedwerydd Cynulliad, Jocelyn Davies AC, ar 19 Chwefror 2015, oedd yn egluro nad oedd y cynigion, oedd wedi cael eu rhoi gerbron gan yr Ombwdsmon ar y pryd, yn ymddangos yn debygol o fod angen darpariaethau costau uniongyrchol. Dywed Paragraff 7.3 y Memorandwm, "in line with the advice, this Explanatory Memorandum does not include a report of the Auditor General".
16. Mae'r Memorandwm yn colli'r pwynt braidd. Er fy mod efallai wedi rhoi barn nad oedd cynigion yr Ombwdsmon (oedd yn gynharach na'r Bil drafft) yn edrych yn debygol o fod angen darpariaethau costau uniongyrchol, nid yw hynny yr un peth â dweud nad oedd angen adroddiad ar unrhyw ddarpariaethau uniongyrchol oedd wedi eu cynnwys mewn Bil.



17. Rwyf yn hapus, fodd bynnag, i adrodd, ar ôl ystyried y Bil, fy mod o'r farn fod y darpariaethau costau uniongyrchol ym mharagraffau 9 a 10 o Atodlen 1 i'r Bil yn briodol. Mae paragraff 9 yn darparu ar gyfer codi tâl ar y WCF am gyflog a phensiwn yr Ombwdsmon. Mae hyn yn parhau'r mesur sydd wedi ei hen sefydlu i ddiogelu annibyniaeth deiliad y swydd drwy ei gwneud yn bosibl codi tâl am gydnabyddiaeth i ddeiliad y swydd ar y WCF, yn hytrach na'i wneud yn destun cymeradwyaeth flynyddol drwy gynnig cyllideb yn y Cynulliad. Mae paragraff 10 i bob pwrpas yn indennio'r Ombwdsmon a'i staff ef neu hi a'i gontractwyr o ran torri dyletswydd. Mae hwn yn hen ddull cost-ffeithiol a phriodol o ddarparu yswiriant indenniad proffesiynol.
18. Rwyf yn hapus i baragraff 17 uchod gael ei ymgorffori mewn Memorandwm Esboniadol diwygiedig er mwyn ei gwneud yn bosibl cwrdd â gofyniad Gorchymyn Sefydlog 26.6(xi).
19. Er bod darpariaethau costau uniongyrchol paragraff 9 o atodlen 1 i'r Bil yn briodol, dangosodd profiad y byddai o gymorth pe bai darpariaeth ddi-feth yn cyd-fynd â'r rhain. Byddai hynny'n atal codi cost dechnegol anghyfreithlon ar y WCF pe bai rhyw amryfusedd gweinyddol neu wallau yn digwydd wrth wneud trefniadau cyflog. Gallai gwall o'r fath achosi swm sylweddol o waith i Lywodraeth Cymru a staff Swyddfa Archwilio Cymru i ddim budd. Awgrymaf ddarpariaeth ychwanegol ym mharagraff 9 ar hyd y llinellau canlynol:

*I ddibenion bod symiau yn cael eu codi ar Gronfa Gyfunol Cymru, ac yn cael eu talu allan ohoni, nid effeithir ar ddilysrwydd taliadau o'r fath gan unrhyw ddiffyg yn nhelerau penodi'r Ombwdsmon.*

#### *Darpariaethau archwilio*

20. Er eu bod yn syrthio'n fyr o arfer gorau, mae'r darpariaethau ar gyfer archwilio cyfrifon yr Ombwdsmon ym mharagraff 17 o Atodlen 1 i'r Bil yn ymarferol ar y cyfan. Er mwyn cwrdd ag arfer gorau dylid diwygio'r Bil fel bod gofyn i'r Archwilydd Cyffredinol, wrth archwilio'r cyfrifon, fod yn fodlon bod yr Ombwdsmon wedi gwneud trefniadau ar gyfer sicrhau darbodaeth, effeithlonrwydd ac effeithiolrwydd. Byddai hyn yn dod â'r darpariaethau i fyny i safon darpariaethau archwilio'r GIG a llywodraeth leol (gweler adran 17(2)(d) ac adran 61(3)(b) o Ddeddf Archwilio Cyhoeddus (Cymru) 2004).
21. Byddai'n gymorth hefyd pe gellid dileu'r llinell derfyn o bedwar mis ym mharagraff 17(2)(b). Nid yw llinell derfyn o'r fath yn cyflawni unrhyw bwrpas defnyddiol ac mae mewn perygl o achosi dryswch os oes problemau sylweddol gyda'r cyfrifon. Digwyddodd esiampl o'r problemau sy'n codi o linell derfyn o'r fath gyda chyfrifon Cyfoeth Naturiol Cymru (CNC) am 2016-17, lle roedd y llinell derfyn, oherwydd problemau rheoleidd-dra, yn gwrthdaro yn erbyn gofynion cyfiawnder naturiol. Yn

- ogystal â Chyfoeth Naturiol Cymru ei hun, roedd angen i mi roi cyfle i gwmnïau oedd â chontractau gyda Chyfoeth Naturiol Cymru wneud sylwadau.
22. Byddai diwygiad o'r fath hefyd yn gwneud y darpariaethau cyfrifo yn debycach i gyfrifon llywodraeth leol a rhai cyrff eraill, megis Cyngor Gofal Cymru. Dewis arall fyddai peidio â gwneud y llinell derfyn yn berthnasol ond ar yr amod ei bod yn cwrdd â gofynion y Cod Ymarfer Archwilio a gyhoeddwyd dan adran 10 o Ddeddf Archwilio Cyhoeddus (Cymru) 2004 (mae'r Cod yn adlewyrchu gofynion cyfiawnder naturiol), neu ei gwneud yn hawdd ei newid drwy orchymyn, er ei bod yn anodd gweld sut y gallai hynny fod yn ymarferol.
23. Mater arall sy'n ymwneud ag archwilio, ac y mae profiad wedi dangos sydd braidd yn broblemus, yw'r ddarpariaeth ar gyfer adroddiadau blynyddol ym mharagraff 14 o Atodlen 1. Y broblem yw nad yw'r ddarpariaeth hon wedi ei chydgyssylltu â'r darpariaethau cyfrifon blynyddol. Mae'n arferiad normal a synhwyrol i'r Ombwdsmon, fel y rhan fwyaf o gyrff cyhoeddus, gynhyrchu un "adroddiad blynyddol a chyfrifon", yn hytrach nag adroddiad blynyddol ar gyflawni swyddogaethau ac adroddiad blynyddol arall gyda chyfrifon. Mae Llawlyfr Adrodd Ariannol y Trysorlys (y FReM) yn ei gwneud yn ofynnol i'r Ombwdsmon (a chyrrff cyhoeddus eraill) ddarparu adroddiad blynyddol am eu gweithgareddau i gyd-fynd â'r cyfrifon, ac mae safonau proffesiynol yn ei gwneud yn ofynnol i'r Archwilydd Cyffredinol (ac archwilwyr eraill) ystyried a yw'r adroddiad blynyddol yn gyson â'r cyfrifon.
24. Er ei fod yn arferiad normal a synhwyrol i gynhyrchu un adroddiad blynyddol, mae paragraff 14(3) a pharagraff 17(2) hefyd yn ei gwneud yn ofynnol i adroddiadau gael eu rhoi gerbron y Cynulliad. Fodd bynnag, yn achos paragraff 14(3), yr Ombwdsmon sydd i fod i osod yr adroddiad gerbron, ac yn achos paragraff 17(2), yr Archwilydd Cyffredinol sydd i osod copi ardystiedig o'r cyfrifon gerbron, ynghyd ag adroddiad yr Archwilydd Cyffredinol amdanynt (sy'n cynnwys ystyried yr adroddiad blynyddol). Mae'r gofyniad hwn, sydd o ran ei effaith yn dyblygu'r angen i osod gerbron, yn drefniant blêr, a byddai o gymorth pe bai paragraff 14 yn gallu darparu i'r adroddiad blynyddol ar swyddogaethau gael ei gynnwys yn nogfen yr adroddiad blynyddol gyda'r cyfrifon, ac y gallai'r Archwilydd Cyffredinol wedyn osod y ddogfen honno gerbron.
25. Er mai ailadrodd paragraff 14 o atodlen 1 i Ddeddf 2005 y mae paragraff 14, byddai'n briodol cymryd y cyfle i fynd i'r afael â'r broblem.
26. Yn olaf, gyda golwg ar ddarpariaethau archwilio, sylwaf fod paragraff 14.18 o'r Memorandwm Esboniadol yn crybwyll y gellid defnyddio archwiliadau Archwilydd Cyffredinol Cymru, i ddarbodaeth, effeithlonrwydd ac effeithiolrwydd defnydd yr Ombwdsmon o adnoddau, fel rhan o'r adolygiad yn dilyn gweithredu'r Bil. Er fy mod yn ystyried y gallai cynnal archwiliad, er mwyn cynorthwyo i hysbysu adolygiad y Cynulliad yn dilyn gweithredu (adran 72), fod yn ddefnyddiol iawn ac

yn ymarferiad diddorol, dylwn nodi na allaf rwymo fy olynydd i gynnal archwiliad o'r fath.

#### *Canlyniadau anfwriadol y Bil*

27. Mae Atodlen 3 i'r Bil yn rhestru "Swyddfa Archwilio Cymru", ac felly yn ei gwneud yn gorff a allai fod yn ddarostyngedig i ymchwiliadau'r Ombwdsmon. Fel yr eglurais yn fy llythyr at y Llywydd ar 8 Mehefin 2016, roeddwn wedi trafod a chytuno gyda'r Ombwdsmon o'r blaen fod hyn mewn perygl o greu dryswch fyddai'n difa amser ac yn achosi rhwystredigaeth, a fyddai mi gredaf yn ganlyniad anfwriadol. Mae llawer o bobl yn cymysgu Swyddfa Archwilio Cymru gyda'r Archwilydd Cyffredinol ac yn gwneud y camgymeriad o feddwl bod SAC yn cynnal archwiliadau ond, mewn gwirionedd, mae prif swyddogaethau SAC wedi eu cyfyngu i ddarparu adnoddau a monitro a chynghori'r Archwilydd Cyffredinol. Y perygl o gynnwys Swyddfa Archwilio Cymru o fewn maes gorchwyl yr Ombwdsmon fyddai peri i unigolion, a hoffai i'r Archwilydd Cyffredinol gyrraedd barn archwilio wahanol, dybio bod yr Ombwdsmon yn cynnig cyfrwng i farn o'r fath gael ei hadolygu.
28. Yn wir, gan nad yw swyddogaethau Swyddfa Archwilio Cymru yn cynnwys darparu gwasanaethau i unigolion (ar wahân i'r Archwilydd Cyffredinol) mae'r Ombwdsmon a minnau yn teimlo ei bod yn anodd gweld sut y gellid byth gyflwyno achos i'r Ombwdsmon fyddai'n galw'n gyfreithlon am adolygu gweithredoedd Swyddfa Archwilio Cymru. Byddai'n gymorth felly pe gellid cyflwyno gwelliant i ddileu Swyddfa Archwilio Cymru o Atodlen 3. Deallaf y bydd yr Ombwdsmon yn ysgrifennu at y Pwyllgor i'r un perwyl.

Gobeithiaf fod yr uchod o gymorth.

Yn gywir



**HUW VAUGHAN THOMAS**  
**Archwilydd Cyffredinol Cymru**

cc: Nick Bennett, Ombwdsmon Gwasanaethau Cyhoeddus Cymru

8 December 2017

Dear Llywydd

## Supplementary Legislative Consent Memorandum – The Financial Guidance and Claims Bill

Thank you for your letter dated 6 December in relation to the above LCM, which we discussed in our meeting on 7 December.

In reporting on the initial LCM in July 2017, we sought clarity from the Welsh Government on a number of issues including their analysis of how the provisions requiring the Assembly's consent related to devolved subject areas identified in its memorandum. In particular, how the provisions related to subject 4 Economic Development of Schedule 7 to the Government of Wales Act 2006. In replying (in a letter dated 23<sup>rd</sup> August 2017) the Government did not directly address this issue. In reporting on the LCM, we stated there was no reason why the Assembly should reject the LCM, but that Members may wish to seek clarity during the plenary debate on this outstanding issue. As the Plenary debate on the original LCM has not yet occurred, this clarification remains outstanding.


At our meeting on 7 December, we agreed to seek clarification from the Welsh Government on this outstanding issue as a matter of urgency. We will also schedule the LCM for consideration at our meeting next week, to ensure that if the LCM is referred to us for scrutiny, we are in a position to discuss it in more detail.

However, even taking this into account, as our first Committee meeting after the Christmas recess is 11 January, the current timetable would not allow us to report by 9 January. As your letter seems to indicate that it does not need to be considered by 9 January, we would suggest that the Plenary debate is moved back to 16 January, which would enable us to consider the supplementary LCM, seek



clarification from the Welsh Government and report. This would still ensure scrutiny was undertaken in less than six sitting weeks.

Yours sincerely

A handwritten signature in black ink that reads "John". The letters are cursive and connected.

John Griffiths AM  
Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



Rebecca Evans AM  
Minister for Housing and Regeneration

8 December 2017

Dear Rebecca

## Supplementary Legislative Consent Memorandum on the Financial Guidance and Claims Bill

You will be aware that on 11 July 2017, the Business Committee referred the Legislative Consent Memorandum on the Financial Guidance and Claims Bill to the Children, Young People and Education Committee for consideration. As elements of the LCM fall within the Equality, Local Government and Communities Committee's remit, the LCM was also considered by our Committee.

We wrote to the Welsh Government seeking clarification on a number of issues including the extent to which the provisions identified in the LCM under Education and Training; Social Welfare; and Economic development were within the Assembly's legislative competence. The response did not cover this clarification. (Copies of both letters are enclosed).

In reporting on the LCM we stated there was no reason why the Assembly should reject the LCM, but that Members may wish to seek clarity during the debate on this issue. As the debate on the LCM has not yet occurred, this clarification remains outstanding.



We received a letter from the Business Committee on 6 December asking if we could consider the supplementary LCM by 9 January. At our meeting on 7 December, we considered this request, and agreed to do our utmost to ensure swift consideration of the supplementary LCM. To this end, we will be tabling it for consideration at our meeting on 13 December, to ensure that if it is referred to us, we can consider it before Christmas. However because there is still an outstanding issue, we would ask that you could provide clarification on the outstanding matter in writing, as soon as possible, but no later than 2 January.

As the Llywydd's letter indicates that there will be time for committee scrutiny, we would suggest time is given to enable us to consider your response before reporting before the Plenary debate. We believe this could be done if the Plenary debate was moved back to 16 January. This would give us four sitting weeks to consider the LCM, which is still less than the six week period which the Welsh Government has previously committed to for scrutiny of LCMs.

Yours sincerely



John Griffiths AM  
Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



Mae cyfyngiadau ar y ddogfen hon