

Mae'r ymateb yma hefyd ar gael yn Gymraeg.

This response is also available in Welsh.



**Response by the Public Services Ombudsman for Wales to  
the Welsh Government's consultation 'The Duty of Candour'**

Thank you for the opportunity to respond to this consultation.

### **Our role**

As Public Services Ombudsman for Wales (PSOW), we investigate complaints made by members of the public who believe they have suffered hardship or injustice through maladministration or service failure on the part of a body in our jurisdiction, which essentially includes all organisations that deliver public services devolved to Wales. These include:

- local government (both county and community councils)
- the National Health Service (including GPs and dentists)
- registered social landlords (housing associations)
- the Welsh Government, together with its sponsored bodies.

We can consider complaints about privately arranged or funded social care and palliative care services and, in certain specific circumstances, aspects of privately funded healthcare.

We also investigate complaints that elected members of local authorities have breached their Codes of Conduct, which set out the recognised principles of behaviour that members should follow in public life.

The 'own initiative' powers we have been granted under the Public Services Ombudsman (Wales) Act 2019 (PSOW Act 2019) allow us to investigate where evidence suggests there may be systemic failings, even if service users themselves are not raising complaints. The Act also established the Complaints Standards Authority (CSA) to drive improvement in public services by supporting effective complaint handling through model procedures, training and collecting and publishing complaints data.

## Summary

We welcome the opportunity to comment on these proposals and the constructive discussions with Welsh Government Officials regarding our particular areas of concern.

Specifically, we want to comment on two aspects of the consultation. Firstly, relating to the introduction of the Duty of Candour and secondly, on the proposed changes to the Putting Things Right (PTR) Regulations.

- We wholeheartedly welcome the imminent introduction of the Duty of Candour. If successfully implemented, the Duty should support the move within the NHS towards more openness and transparency, ultimately improving patient experience and confidence in the service.
- However, we are conscious that successful implementation of this Duty will be a significant undertaking for the NHS in Wales and require additional resources. We would welcome more detail on what resources will be committed to support the successful implementation of this Duty.
- While this consultation necessarily deals with the processes and procedures that will be put in place to support the introduction of the Duty of Candour, we consider that these proposals will only be successful when organisations have the right culture in place to encourage openness and to give staff confidence that they can raise issues without fear of consequences to them personally.
- The introduction of the Duty of Candour may generate more complaints to our office. In order to prepare for that possible increase, we are keen to learn more about the anticipated volume of the Duty of Candour reviews and PTR responses.
- Following the introduction of the Duty of Candour, when investigating relevant healthcare complaints, we are likely to consider whether and how the Duty was discharged. We will issue further communication to health bodies to ensure that they and the Welsh Government are aware that we will begin to consider whether the requirements of the Duty of Candour have been met during our consideration of cases.
- **We would strongly oppose any changes to the PTR regulations and guidance scheme that would allow health bodies to re-consider complaints following our findings.** To avoid any misunderstanding that health bodies can re-consider a complaint already investigated by us, we suggest some amended wording in the relevant sections of the regulations

and guidance.

- For the avoidance of doubt, we want to ensure there is absolute clarity for the public that the PSOW's independence and impartiality when determining cases is maintained. We wish to emphasise that in our casework decisions we are not bound in any way by the terms of the PTR Regulations or any of the financial limits within the Scheme. The PSOW's powers are such that we have wide discretion to determine case and to make recommendations. The Ombudsman is not bound in any way by the terms of the PTR scheme or the financial redress limits within the scheme. In cases where serious injustice has arisen, recommendations for appropriate financial redress may be made by the Ombudsman within the terms of the Ombudsman's remit, having considered the circumstances of any particular case.
- We suggest an amendment to the Duty of Candour Statutory Guidance 2023 to the effect that the learning from cases considered by us should form a part of NHS bodies' assessments of how effectively they are complying with the Duty of Candour.

### **Duty of Candour**

We wholeheartedly welcome the imminent introduction of the Duty of Candour. As we stated in the past, we believe that, if successfully implemented, this statutory duty will make a substantial contribution to improving complaint handling and learning from complaints. However, most importantly, it should lead to a better patient experience. By removing the sole reliance on patients to come forward with complaints, this Duty should make the NHS more open and transparent, ultimately improving people's confidence in the service.

We want to underline that in our view the successful implementation of this Duty will require a significant adjustment of the current NHS practices.

- First, for this Duty to fulfil its potential, there must be a culture of openness and transparency in place to support its implementation. All too often, when we investigate healthcare cases, we encounter defensiveness, rather than a candid, open approach. We believe that if the right culture exists in the organisation then people within the NHS will have the confidence that they can raise issues and that there will be readiness to investigate such issues, acknowledge any mistakes, put things right and embed wider learning.
- Second, we are conscious that this Duty is likely to create new pressures on the NHS which is already facing significant pressures on its services and resources. The proactive approach central to the implementation of this Duty

is likely to call for process changes, more awareness raising and training and more resources to complaint handling teams.

We note that [the Regulatory Impact Assessment](#) (RIA) accompanying the Health and Social Care (Quality And Engagement) (Wales) Act (2020) stated that 'LHBS, Trusts and primary care providers should already have some arrangements in place in order to meet the existing requirements of Being Open principles within Putting Things Right' and that 'The resources required by a provider to implement the duty are therefore likely to vary depending on the maturity of their existing arrangements.'

We welcome the acknowledgment in the RIA that the introduction of the Duty will call for some additional resources. However, we note with some concern that the public awareness campaign is expected to call only for engagement of one part-time NHS employee. We also note that most of the anticipated training costs are opportunity costs. Although the RIA attends to opportunity costs of development of implementation plans to introduce the Duty of Candour, the time and cost envisaged appear to me very limited. There doesn't appear to be a reference in the RIA to resources to develop the staffing levels of existing complaints teams.

With that in mind, we would welcome more detail on what resources will be committed to support the successful implementation of this Duty.

### **Implications of the Duty of Candour for PSOW**

We want to take this opportunity to draw attention to how the introduction of this Duty may affect our service.

If the Duty of Candour is successfully implemented, it should lead to potential issues being proactively identified, investigated, and resolved by the NHS. Thus, if successful, this Duty should eventually lead to a reduction in the number of complaints about failings in care reaching our office. However, we expect that for the reasons already outlined above, such benefits will not materialise in the short term.

Rather, we expect that, at least initially, the introduction of the Duty has the potential to generate more complaints to our office.

- The intention of the Duty is that the NHS is open about its possible failings and seeks to proactively investigate them and put them right. Nevertheless, our understanding of the proposals is that if the Duty of Candour procedure triggers a review, the final stage of that review will be a response under the 'Putting Things Right' (PTR) process. As such, this final response will have to inform the individual of their right to complain to us. It is likely that not all

members of the public will be satisfied with the conclusions of the Duty of Candour procedure and will chose to approach our office as a result.

- It is also possible that we will begin to receive complaints about health bodies not complying with the Duty. Our colleagues at the Public Services Ombudsman office in Scotland (where the Duty of Candour was introduced in 2018) have advised us that they still see few such complaints. One of the main reasons for that may be a lack of awareness. We hope that the introduction of the Duty of Candour in Wales will be well-publicised and that patients will receive clear and proactive advice on their entitlements under the Duty every time they engage with the NHS in Wales. If so, we believe that it is possible that we will also begin to receive complaints specifically about how the Duty has been implemented by NHS bodies.

Further, following the introduction of the Duty of Candour, when investigating the relevant healthcare complaints<sup>1</sup> we are likely to consider whether and how the Duty was enacted even if that had not been raised as an issue by the complainant. If we find that the Duty had not been enacted appropriately, we may choose to reflect that in our recommendations. We believe that, through this, our office can support the NHS in Wales in a shift towards more openness and transparency. We are raising this at this stage and will issue further communication to NHS bodies to ensure that they and the Welsh Government are aware that we will adopt that approach.

It is currently difficult to predict more precisely what additional workload the Duty is likely to generate for our office. However,

- We note that the RIA referenced above adopts 7,341 as an estimate of the number of cases where the Duty of Candour may be triggered. However, the RIA acknowledges that there may be some under-reporting of such cases. In addition, the estimate is based on 2017/18 statistics which predate the COVID-19 public health emergency and its impact on the health service.
- Even if we were to assume that of that total, a conservative estimate of only 5% of cases will be referred on to us,<sup>2</sup> such referrals would generate over 360 additional complaints (for context, in 2021/22 we considered 913 complaints about health, and 824 complaints about Health Boards and Trusts). That

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<sup>1</sup> Those where service users suffered unexpected or unintended harm that is more than minimal.

<sup>2</sup> This is the current proportion of complaints handled by the Welsh Health Boards and Trusts that are referred to us (see [Complaints Standards statistical release 6 December 2022](#))

would be a significant number of additional cases and could have implications for the service that we are able to offer.

In order to prepare for the possible increase in our caseload, we are keen to learn more about the most recent estimations of the anticipated volume of the Duty of Candour reviews and PTR responses in the short, medium and long-term.

### **Putting Things Right scheme**

As part of the proposals, the Welsh Government is also proposing some changes to the PTR Regulations and guidance. We have some specific and general points in response to these proposals.

#### **Context: our service and the PTR scheme**

For context, it is useful to reiterate here how our service currently relates to the PTR scheme.

- The Ombudsman's powers are set out in primary legislation - Public Services Ombudsman (Wales) Act 2019 ('the Act'). Under the Act, we investigate complaints of injustice to a member of the public because of maladministration or service failure. At the end of an investigation, we may issue a report and make recommendations to remedy injustice caused to an individual.
- The Ombudsman has discretion on each case to decide what recommendations to make. We commonly recommend that the body apologises, reviews its processes, or offers training to staff. However, we may also recommend that the body pays the individual financial redress. When making that recommendation, we must be reasonably and rationally related to the injustice caused to the individual. The Act authorises service providers to spend public money on compensation for matters that are the subject of a complaint to the Ombudsman.
- The PTR scheme is a legislative mechanism introduced in 2011 via secondary legislation for the resolution of complaints made against health service bodies in Wales. The purpose of the scheme is to regularise and simplify the complaints process, on the one hand, and to provide a cheaper method of resolving allegations of clinical negligence in certain low-value cases (up to £25k), on the other.

- The 2011 PTR Regulations expressly state that a concern ‘*which is or has been investigated by the PSOW*’, cannot be considered under the PTR process. Conversely, however, a matter can be referred to us after it has been through a PTR investigation.

Our comments on the proposed changes to the PTR Regulations and Guidance

The proposed amendments to the PTR Regulations and Guidance state that health bodies can consider concerns following the conclusion of an investigation by PSOW.

**We would strongly oppose any changes to the PTR Regulations and guidance that would allow health bodies to re-consider or re-investigate complaints following our findings.** This is because we expect health bodies to undertake proper investigations of complaints made to them before preparing their final responses. In addition, such amendment would go against the aim of improving patient experience central to the Duty of Candour. Making a complaint under the PTR Regulations and then to the Ombudsman can take considerable time and we would also want to avoid any additional stages that delay resolution and conclusion for the complainant.

Our understanding based on the discussions with the Welsh Government officials, is that the intention behind the proposed amendments is not to provide a health body with the option of **re-investigating** a complaint after it has been investigated by us. Rather, the intention is to allow a health body to consider providing **redress** under the PTR scheme after we have investigated, if this is appropriate in the circumstances.

If so, to avoid any misunderstanding that health bodies can re-consider a complaint already investigated by us, we suggest that the proposals are amended as follows:

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| <b>2023 No. (W.) NATIONAL HEALTH SERVICE, WALES The National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) (Amendment) Regulations 2023</b> |  |
| Regulation 2(5) makes amendments to regulation 14 of the Principal Regulations (matters and concerns excluded from consideration under the arrangements) so that—    | <ul style="list-style-type: none"> <li>• responsible bodies can offer Redress only under Part 6</li> </ul> |

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|--|--|
| <ul style="list-style-type: none"> <li>responsible bodies can consider concerns following the conclusion of an investigation by the Public Services Ombudsman for Wales</li> </ul>   | <p>following the conclusion of an investigation by the Public Services Ombudsman for Wales;</p>  |
| <p><b>2 (5)</b> In regulation 14(1)—<br/> (a) in sub-paragraph (c), after “Wales” insert “, unless the responsible body considers it appropriate to consider the concern following the conclusion of the Ombudsman’s investigation;”</p>   | <p>(a) in sub-paragraph (c), after “Wales” insert “, unless the responsible body considers it appropriate to <b>offer a form of Redress only under Part 6 of these Regulations to a person</b> following the conclusion of the Ombudsman’s investigation;”</p> |
| <p><b>Putting Things Right Guidance 2023</b></p>   |  |
| <p>Section 5, Raising a Concern – Concerns – what people cannot raise as concerns under these arrangements, para 5.13, change third bullet to add the following after ‘Wales’:</p> <ul style="list-style-type: none"> <li>unless the responsible body considers it appropriate to consider the concern following the conclusion of the Ombudsman’s investigation.</li> </ul> | <ul style="list-style-type: none"> <li>unless the responsible body considers it appropriate <b>to offer Redress only under Part 6 of these Regulations to a person</b> following the conclusion of the Ombudsman’s investigation.</li> </ul>                   |

For the avoidance of doubt, we wish to emphasise that in our casework decisions we are not bound by the terms of the PTR Regulations or any of the financial limits within the scheme. In cases where we find serious injustice, we may make recommendations for appropriate financial redress in line with the requirements of our Act and in accordance with relevant case law on this issue. The limit of £25,000 set for financial compensation under the PTR Scheme would not be applicable where we recommend that a health body pays financial redress.

#### PTR updates in general

We would like to take this opportunity to emphasise that there is a broader opportunity for ‘Putting Things Right’ to be refreshed to support the cultural change



in the Welsh NHS and bring complaint handling standards in closer alignment to other parts of the Welsh public service. We were assured in the past by the First Minister that the Ombudsman would be involved in discussions on possible amendments of PTR Scheme. We reiterate our readiness to take part in such discussions also outside of the formal consultation process.

### **Other proposed amendments**


Finally, to support the learning from complaints involving Duty of Candour, we suggest that the following paragraph is added to The Duty of Candour Statutory Guidance 2023:

After 13.7, insert

13.8 Learning from cases considered by the Public Services Ombudsman for Wales ('PSOW') should also form part of NHS bodies' assessment of how effectively they are complying with the Duty of Candour. If, for example, the PSOW finds that an NHS body has not complied with the Duty of Candour in relation to any individual complaint, the learning from individual cases should form part of its monitoring and assurance processes.

### **Closing remarks**

We trust that you will find these comments useful. Should you wish to discuss any of my points further, please do not hesitate to contact Ania Rolewska, our Head of Policy ([ania.rolewska@ombudsman.wales](mailto:ania.rolewska@ombudsman.wales)).



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