



Llywodraeth Cymru
Welsh Government

Justice System Impact Identification

Form

1. Policy lead contact details

1.1. Name / Job Title

1.2. Department / office /
business area

1.3. Telephone number

1.4. Email address

1.5. a) Date of submission of
this form

Date of Submission:	22.08.18
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1.6. b) When is a response
required?

2. Additional contact details

2.1. Legal Contact

2.2. Telephone number

2.3. Email address

3. General information

- 3.1. Please provide a) contact details of your lead official for the appraisal of costs or savings and;
b) the Justice Policy lead if known.

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- 3.2. In brief, what is your proposal? **(no more than half a page)** *(This information is provided to help MoJ officials understand the intent of the proposed change in order to be able to comment as fully as possible on its potential impacts).*

Local Government and Elections (Wales) Bill (JSII Form Ref: Batch 1, 2 of 3)

Public Services Ombudsman for Wales: Conduct of Investigations into Alleged Breaches of the Local Government Member Code of Conduct in Wales

1. The proposals will improve the accessibility of the law covering the conduct of investigations by the Public Services Ombudsman for Wales under section 69 of the Local Government Act 2000 (LGA 2000), into alleged breaches of the local government member code of conduct.
2. The provisions deal with practical matters such as conflicts of interest, powers to obtain and disclose information and protection from defamation. They replicate, with appropriate modifications, the existing law in Wales which is derived from sections 60-63 of the LGA 2000. These sections made similar provision for the conduct of investigations by an ethical standards officer in England and are applied to Wales, in modified form, through Welsh subordinate legislation made under section 70 of the Act, i.e. the 'Public Services Ombudsman for Wales (Standards Investigations) Order 2006 (SI 2006/949).
3. Sections 60-63 were repealed in England by the Localism Act 2011, but saved in their application to Wales. However, this means they no longer appear in legal databases. Combined with their application by way of the 2006 Order, this makes the law inaccessible to legal professionals and other interested parties. The Bill provisions will address this problem by placing equivalent provision for investigations in Wales on the face of the LGA 2000. This has been requested by the Ombudsman and other parties.
4. The main beneficiaries will be the Ombudsman and others with an interest in the exercise of these powers, including local authority monitoring officers, councillors and members of the legal profession.
5. The main positive effects are clarity and improved accessibility of the law relating to the Ombudsman's powers. There are no negative effects.
6. Primary legislation is required to give effect to this proposal.

- 3.3. Please specify the name of this (and any related) legislation. How do you expect the relevant provisions of this (new) legislation to be enacted?

Related legislation:

Part 3, Local Government Act 2000 – sections 60-63, 69 and 70.
Public Services Ombudsman for Wales (Standards Investigations) Order 2006 (SI 2006/949)

Proposed legislation:

Local Government and Elections (Wales) Bill – section [j114] and schedule 10 – the provisions will be implemented by commencement order and transitional provision in regulations on a date to be appointed by the Welsh Ministers. The Assembly negative procedure will apply to regulations containing transitional provision.

- 3.4. Please indicate the anticipated date when a) the legislative changes are expected to come into force and b) the date when the first anticipated impact on the justice system will arise.

a) 2020

b) 2020 (but no material impact is anticipated – see below)

- 3.5. If altering or introducing an offence, sanction or penalty, which of the following groups will the proposal affect and in what circumstances? (Tick all that apply)

- ☒ Individuals
☐ Private Institutions (e.g. Businesses)
☐ Public Institutions (e.g. Government Departments)

Obstruction and Contempt

1. It is proposed that where the Ombudsman considers a person has, without lawful excuse, obstructed an investigation or has acted in a way which could constitute contempt in the High Court, the Ombudsman may issue a certificate to that effect to the High Court. If the High Court is satisfied the conditions are met, it may deal with the person in the same manner as a person who has committed contempt in relation to the High Court.
2. This replaces existing provisions in section 62(10) of the LGA 2000, as applied by the 2006 Order. This provides that a person who, without reasonable excuse, fails to co-operate with an investigation, including withholding information or documents, is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.
3. For consistency, the new provision is modelled on more recent similar provisions in sections 15 and 34J of the Public Services Ombudsman (Wales) Act 2005 (PSOWA 2005), relating to the investigation by the Ombudsman of alleged maladministration or service failure by public bodies in Wales.

Disclosure of Information

4. Section 63(4) of the LGA 2000, as applied by the 2006 Order, provides that a person who inappropriately discloses information obtained by the Ombudsman during the course of an investigation is guilty of an offence and liable:
 - On summary conviction to imprisonment for a term not exceeding six months; or
 - On conviction or indictment, to imprisonment for a term not exceeding two years, or to a fine, or to both.

5. This offence is not replicated in the PSOWA 2005 and is being omitted from the proposed code of conduct legislation.

3.6. Does your legislation only have impact in Wales or are you working jointly with other administrations? Tick all that apply and provide brief details as appropriate, including whether your proposal will create different laws in Wales compared to England, Scotland and / or Northern Ireland.

Please note that, with the exception of the devolved tribunals, the MoJ administers the justice system in England and Wales only. Please talk directly to the MoJ devolution unit if you anticipate your proposal could have an impact on courts or prisons in Scotland or Northern Ireland.

- ☒ Wales only
- ☐ England
- ☐ Scotland
- ☐ Northern Ireland
- ☐ Other (Please Specify)

The ethical framework in Part 3 of the LGA 2000 has been in force in Wales since 2001. The equivalent provisions for England were repealed and replaced by a new legislative framework by the Localism Act 2011.

3.7. If your legislation could directly impact visitors to Wales or other people not normally resident in Wales, or if your legislation is significantly different from elsewhere in England, Scotland or Northern Ireland;-

- a) what arrangements have you made to ensure ongoing awareness raising of the different legislative approach on this issue in Wales?
- b) what will be the implications on the enforcement agencies of taking forward action against individuals not usually resident in Wales?

Not relevant

3.8. What are the options under consideration and how does this change the existing situation?

The options considered are:

1. **Do nothing** – this would perpetuate the inaccessibility of the current legislation. This would have no impact on the justice system.
2. **Replicate the legislation in its current form on the face of the LGA 2000** – this would address the inaccessibility of the current legislation. However, it would perpetuate inconsistencies in the legislation relating to ombudsman code of conduct investigations and the newer legislation in the 2005 Act relating to the investigation of alleged maladministration and service failure. This would have no impact on the justice system.
3. **Reproduce the current legislation, with appropriate modifications, on the face of the LGA 2000** – this would address the inaccessibility of the current legislation and inconsistencies between the two investigatory regimes. The changes in the enforcement provisions identified above are not expected to have a material impact on the justice system. To date, no cases have been pursued under the code of conduct legislation since it has been in force (source Public Services Ombudsman for Wales). The changes proposed are not expected to make it more likely that cases are brought to court. However, the availability of the existing powers has proved beneficial in persuading persons who are reluctant to do so to co-operate with an investigation..

3.9. If you are creating a new civil sanction or penalty which court or tribunal, in your opinion, should deal with it?

Not relevant.

Criminal Offences and Civil Penalties and Sanctions

3.10. Which of the following are you creating / amending? (Tick all that apply)

- ☐ Civil Sanctions
- ☐ Fixed Penalties
- ☐ Civil Orders
- ☐ Criminal Sanctions
- ☐ Criminal Offences
- ☒ Other (Please Specify)

The provisions will permit the Ombudsman, if obstructed during the course of exercising his or her functions, to issue a certificate to that effect to the High Court. This enables the High Court to treat the matter as a potential matter of contempt of court.

This approach will replace the criminal sanctions that currently apply by virtue of SI 2006/949 (which applies section 62(10) of the LGA 2000). It replicates the approach taken in sections 15 and 34J of the 2005 Act – see section 3.5 above.

3.11. If you are creating a criminal offence, is it:

- ☐ Summary Only (heard before a bench of lay magistrates / judge only)
- ☐ Triable Either Way
- ☐ Indictable Only (heard before a judge and jury)

3.12. Who will be responsible for the enforcement of your legislative proposal and how will they take this role forward? Will there be a reduced need for enforcement action?

The power to refer a person to the High Court for obstructing an investigation or for contempt relating to an investigation of alleged breaches of the local government member code of conduct will rest with the Public Services Ombudsman for Wales.

3.13. What is the anticipated number of cases per year? Please provide details of any evidence of assumptions on which estimates are based.

Less than one. There have been no previous cases under the current legislation.

3.14. Do you expect proceedings to be heard in the Magistrates' Court, the Crown Court, or a Civil Court? What will the proportions be?

High Court – see 3.5 above.

3.15. Please state the maximum associated fine and/or custodial penalties. In the case of offences involving penalties of a fine or custody, please indicate and explain the circumstances which would result in a custodial sentence upon conviction and the proportion of custodial penalties which will be at the maximum level.

The High Court will be able to deal with a person guilty of obstruction or contempt in the same manner as it may deal with a person who has committed contempt in relation to the High Court.

The Contempt of Court Act 1981 provides at section 14(1) that in any case where a court has power to commit a person to prison for contempt of court and no limitation applies to the period of committal, the committal shall be for a fixed term not exceeding two years in the case of a superior court. The High Court may also have powers to impose a fine, depending upon the nature of the contempt.

3.16. Please provide details of any proxy or current offences and / or penalties on which the proposed penalties are based.

Sections 15 and 34J of the PSOWA 2005, relating to the obstruction or contempt of investigations into maladministration or service failure by certain public bodies and care home, domiciliary and palliative care providers.

3.17. Please provide details of the relevant legislation (where appropriate) and confirm whether the creation or amendment of criminal offences and penalties has been agreed in line with the guidance available at <https://www.gov.uk/government/publications/making-new-criminal-offences>.

No new offences are being created (existing offences are being revoked and replaced with a power to refer to the High Court).

3.18. What will be the short, medium and lifelong implications for an individual found guilty of this offence, and how is this proportionate to the offence created?

The short term implications of being found in contempt of court could be imprisonment, a fine or both. Where the person is employed, they may lose their job. Longer term implications for a person's employability are likely to be dependant upon the nature of their employment or profession and the severity of any contempt that has been determined to have taken place by the High Court.

Where a person is a councillor, a term of imprisonment for a period of not less than 3 months (whether suspended or not) would disqualify them from holding office for a period of 5 years (s80, Local Government Act 1972).

It is thought that a ruling of contempt of court by the High Court is something that may appear on an enhanced security check but, if exercised as part of the High Court's inherent jurisdiction, would not appear as a criminal record.

The severity of the potential implications of being found in contempt of court and the possible consequences recognises the importance attached to ensuring that the administration of justice is not subject to unjustifiable interference. The Public Services Ombudsman for Wales is a creature of statute with important statutory functions enabling the investigation of complaints against public authorities and certain social care and independent healthcare providers in Wales. These powers could not be properly exercised if individuals chose to obstruct investigations.

- 3.19. Does this legislation impose any duty on the public sector? If so, please provide your assessment of the likelihood of individuals or businesses taking action against the public sector for non-compliance with this legislation.

As a public body, the exercise of functions by the Public Services Ombudsman for Wales is subject to judicial review by the courts. However, there are no additional implications arising from the proposal to improve the accessibility of the current legislation.

4. HM Courts & Tribunals Service and the Welsh Tribunals Service

Estimating the change to caseload of the Courts and Tribunals Service (including devolved tribunals)

- 4.1. Do you expect there to be a change in Court or Tribunals process or an increase / decrease in applications / cases to HM Courts and Tribunals Service and / or the Welsh Tribunals through the creation or amendment of this law? Please provide an estimate of the change to volumes of cases going through the court system as a whole, explain any changes in process and outline the evidence and sources that support these estimates.

Not relevant. There have been no referrals of alleged obstruction by the Ombudsman to the High Court since the PSOWA 2005 was enacted. It is not considered that there will be an increase in volumes as a result of the proposed legislative change which is simply about enhancing legal clarity.

- 4.2. Please confirm if the courts / tribunals would be under any duty to inform any regulatory authorities of any convictions made under this offence.

☒ No

☐ Yes (please provide details)

Appeal Rights

- 4.3. Does your proposal create a new right of appeal or expand an existing jurisdiction in the Unified Tribunals System or route to judicial review? If so, how do you expect these to be handled (i.e. administered by HM Courts & Tribunals Service or Welsh Tribunals)?

Not relevant.

- 4.4. Do you expect to establish a new tribunal jurisdiction? If so, has this been discussed with the Welsh Tribunals Unit / Ministry of Justice?

Not relevant.

Alternative Dispute Resolution

- 4.5. To what extent could the use of alternative dispute resolution (ADR) procedures (including mediation) be appropriate? How will success in ADR be measured?

Not relevant.

Prosecution and Enforcement

- 4.6. If the proposal is to add a new offence, will the Crown Prosecution Service act to prosecute defendants? If not, please identify who will prosecute.

No.

- 4.7. Will the proposal require enforcement mechanisms for civil debts, civil sanctions or criminal penalties? If yes, who do you expect to enforce these?

No new enforcement mechanisms are required.

HMCTS Procedural Rules, Sentencing and Penalty Guidelines

- 4.8. Do you anticipate that Court and/or Tribunal procedural rules will have to be amended? If so, when is the likely date for the changes?

No. The proposed enforcement proceedings for obstruction and contempt mirror existing provisions relating to the Ombudsman's function of investigating alleged maladministration and service failure (see 3.5 above).

- 4.9. Will the proposals require sentencing and / or penalty guidelines to be amended?

No (see 4.8 above).

5. Legal Aid and Court Fees

- 5.1. What evidence is there that individuals affected by your proposal will be able to afford:

- a) legal representation and legal advice in order to secure a fair hearing of their case
- b) associated court fees

What legal costs for a typical case could each party bear and what provisions exist for a party found innocent to recover all or any of their legal costs?

Unknown. There have been no cases to date relating to the Ombudsman's other functions.

- 5.2. Once implemented, is your proposal likely to require individuals to seek legal advice and to apply for legal aid in any of the following areas? In each case please provide supporting evidence.

- ☒ Criminal
- ☒ Civil (including Family)
- ☐ Asylum
- ☐ Legal aid not available (please provide supporting evidence)

Legal aid is potentially available for contempt of court due to the possibility of imprisonment (source: Gov.uk). However, as indicated above, it is anticipated that improving the accessibility of the current legislation will have a neutral impact.

5.3. If legal aid may be affected, would legal aid costs increase or be reduced (and by what margin)?

It is considered there would be a neutral impact on costs.

6. Prisons and Offender Management Services

Impact on HM Prison Services

6.1. Will the proposals result in a change in the number of offenders being committed to custody (including on remand) or probation (including community sentences)? If so, please provide an estimate and reasoning behind it, an estimated timeframe to reach this number of sentences, what evidence this is based on, and the source for your information.

It is considered any impact would be neutral. There have been no cases under the existing legislation and this is not expected to change simply as a result of improving the accessibility of the legislation.

6.2. Does the proposal create, remove or change an existing offence with a custodial or probationary sentence, or change the way offenders go through the prison / probation service? If so, please provide details, including the expected impact on probationary services.

The existing offence under section 63(4) of the LGA 2000 for inappropriate disclosure of information is to be omitted from the restated proposals (see 3.5 above). This existing offence is punishable by way of imprisonment, a fine or both. However, no cases have been pursued under this legislation to date.

7. Main Justice System Impacts Identified

7.1. Volumes and Costs or Savings (please lengthen if necessary):-

NB in all cases, assume an average annual figure or make clear if a different timespan is being considered. Where there may be significance variance from average in the first years of implementation, please add additional information in the notes below.

Identify the court or tribunal or MoJ service that will be affected by this proposal?	Volumes (please provide both numeric estimates and min-max ranges)	Type (e.g. prison place, tribunal hearing, fixed penalty, etc.)	Estimated recurring annual costs or savings (both numeric estimate and min-max range) (£)	Estimated initial set up costs (£)	Additional Information
Criminal Offences and Sanctions					
Civil Penalties					
HM Courts & Tribunals Services					
Welsh Tribunals					

Identify the court or tribunal or MoJ service that will be affected by this proposal?	Volumes (please provide both numeric estimates and min-max ranges)	Type (e.g. prison place, tribunal hearing, fixed penalty, etc.)	Estimated recurring annual costs or savings (both numeric estimate and min-max range) (£)	Estimated initial set up costs (£)	Additional Information
Legal Aid					
Notes:-					

7.2. Prisons and Offender Management Services (lengthen if necessary, only complete if maximum penalty is something other than a fine):

Offence	Maximum Penalty	No. of prosecutions brought per annum (numeric estimate and min-max range)	Likely proportion sentenced to immediate custody	Likely average custodial sentence length given	Estimated costs or savings p.a. (£) ¹ (please provide numeric estimate and min-max range)
Notes:					

Please be aware that any costs or savings identified as a result of any changes to the justice system /additional work must be factored in to the financial assessment of your legislation.

¹ The MoJ publish statistics on "Prison cost per place and cost per prisoner:" - see <https://www.gov.uk/government/statistics/announcements/prison-cost-per-place-and-cost-per-prisoner-2017-to-2018>