

# The Annual Report 2012/13

of

The Public Services Ombudsman for Wales

Laid before the National Assembly for Wales  
under paragraph 14 of Schedule 1  
of the Public Services Ombudsman (Wales) Act 2005

# 1. Introduction

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I am pleased to introduce this, my fifth, annual report since taking up my post as Ombudsman. Its key theme is 'Putting Things Right, Driving Improvement', which mirrors the theme of my new three year strategic plan, which we began implementing at the start of 2012/13. As Ombudsman, I see two principal 'reasons for being': that is to put things right for users of public services when I find things have gone wrong, and then to drive improvement in the delivery of those public services using the learning from the complaints I consider. I also take the opportunity to discuss below some wider issues which have emerged in relation to the role of the Public Services Ombudsman for Wales (PSOW) which we will wish to pursue in the forthcoming year.

## **Public service delivery by private sector organisations**

In a public service landscape where the distinction in delivery between public and private sectors becomes increasingly blurred, it is important that people's access to redress is not inadvertently denied to them. I have therefore welcomed the Welsh Government's recognition of this in its provisions in the Social Services and Well-being (Wales) Bill and the proposals to extend the PSOW's jurisdiction so that I may consider complaints from those people who, for example, pay for their own social care in private care homes as well as those people who have their care paid for by the State.

I have over the past couple of years spoken widely, including internationally, on the issue of ensuring that people have access to redress in respect of public services delivered by private sector organisations. I have also written a number of articles on the subject. This is a matter which requires further attention in respect of the position in Wales. In England, for example, consideration is being given to bringing private healthcare into the Health Service Ombudsman's jurisdiction. I do not believe however that the taxpayer should bear the cost of redress arrangements for private sector complaints. One possibility would be to address this by a levy as operated by some private sector ombudsmen schemes, where all bodies in jurisdiction pay towards their running costs, often based on the size of the body concerned. The second option would be based on the number of complaints. This incorporates an element of the "polluter pays" principle, and is said to encourage bodies in jurisdiction to better address complaints internally to avoid the costs associated with complaints going to the Ombudsman. Some ombudsmen schemes incorporate an element of both funding arrangements. Schemes which rely heavily on a pay per complaint model can have great difficulties in workforce planning as income streams are not predictable, so I would be cautious in advocating this approach. I will in due course wish to pursue discussions with the National Assembly on these issues.

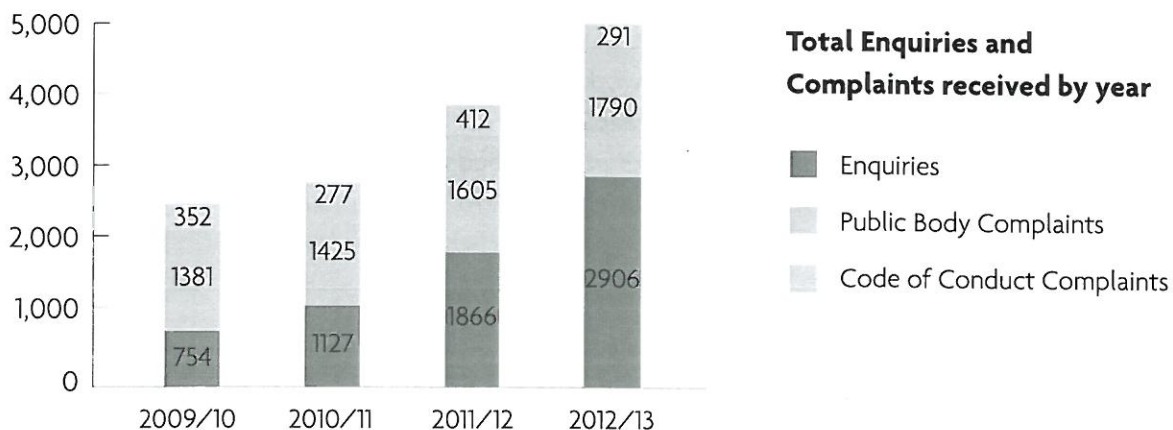
## The Public Services Ombudsman (Wales) 2005 Act

At the time of its introduction the Public Services Ombudsman (Wales) Act 2005 (PSOW Act) was considered to be at the cutting edge of ombudsman legislation and is still one of the most highly regarded in the UK and internationally. However, experience over the seven years of the office’s operation and changes in the external environment during that time has revealed areas of the legislation which could be strengthened, changed and developed. This includes the issue of private sector delivery referred to above, but also matters such as ‘own initiative powers’. Virtually without exception, public services ombudsmen throughout Europe, and indeed, internationally, have the power to undertake investigations on their own initiative. The Ombudsman in the Republic of Ireland already has such a power and it is proposed that it should be introduced in Northern Ireland also. I have, therefore, begun discussions with the National Assembly for Wales concerning a review of the legislation with a view to its amendment or replacement. I have received a positive initial response to my proposals and I look forward to future discussions on this matter.

## Three Year Strategic Plan

The past year saw the start of the implementation of the new three year Strategic Plan. Our revised vision, values, purposes and aims can be found at the end of this report. The plan builds on the previous three years, which had seen significant changes in the way we operate and innovations introduced. This included the introduction of the Complaints Advice Team, the frontline service of the office, which subsequently also became responsible for providing the Complaints Wales signposting service, and our new, innovative websites which supported these services. We also streamlined our investigation processes. This was particularly necessary in the climate of the financial constraints faced by the office, in line with all of the public sector, during this period whilst having to deal with an ever increasing caseload.

In taking stock of the past year against the three years of the previous Strategic Plan, it is worth commenting on that increase. Over this period, there has been a 100% increase in all contacts with the office from 2,487 in 2009/10 to 4,987 this past year. This is illustrated below. I will discuss the increase in the volume of work, and its impact, in more detail in following sections of this report.



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The continuing rise in health complaints has to be an area of considerable concern. Since the office came into existence in 2006/07, complaints about health bodies have increased by 257%. I have attributed past rises to a number of factors, such as an increase in the awareness of my office, the likelihood that members of the public are more prepared to complain in general and changes within the NHS's own complaints process over the past couple of years. But this continued significant increase has to lead to the conclusion that there is greater dissatisfaction with health service delivery. It is also noticeable that all of the public interest reports that I have issued during 2012/13 relate to health matters (see Annex A). There has been much media attention on this area of the public service with more and more health professionals speaking out about their own concerns and frustrations from within the service. No-one underestimates the difficulties in providing a service in a climate of limited resources with greater calls on those resources. It is clear that people's expectations are raised with continual news of new breakthroughs in medical science, with what was previously untreatable becoming treatable – at a cost. However, from the complaints I see, there is a suggestion that the NHS in Wales needs also to go back to basics when the fundamental aspects of care such as providing proper nutrition, proper consent for surgical procedures and end of life care pathways are not in place.

## **Governance**

During the course of the year I introduced a new Advisory Panel to strengthen governance and to be better able to demonstrate greater openness and transparency in the work of my office. I was fortunate in being able to form a diverse Panel of members bringing expertise and experience from a variety of relevant backgrounds. I discuss this further at Section 6 of this report. Although the Panel is still in its infancy, the wider perspective and experience that they bring to the work of my office is proving to be very helpful.

Last year I thanked Mr Laurie Pavelin for his excellent support as Chair of the Audit Committee over a period of six years. I take the opportunity in this report to record that I was delighted to be able to appoint Mr Ceri Stradling as his successor, and that he has already made an active and significant contribution.

In expressing thanks, I must of course recognise the work of my staff over the past year. With the growth in caseload and increase in other activities of the office I am grateful to them for their continued dedication and professionalism in the work delivered. In addition, it would be remiss of me if I did not give particular thanks to Mr Malcolm MacDonald, my Financial Adviser, as he retires. Mr MacDonald has been at the office of the Public Services Ombudsman for Wales since its inception. He has truly been a valuable member of staff and I wish him well for the future.

Finally, my Annual Report for 2011/12 was considered by a Committee of the National Assembly rather than during a Plenary Session. This was the first time for such an arrangement. I very much welcomed this development, and am grateful to the Presiding Officer, Rosemary Butler, for facilitating it. I was pleased to have the opportunity to be present to discuss the work of my office in person as opposed to having to watch the debate on my report from the sidelines. I understand that the members of the Communities, Equality and Local Government Committee also found it a positive development. I look forward to having a similar opportunity to discuss this report with the Committee during 2013.



Peter Tyndall  
Ombudsman

## 4. Code of Conduct Complaints

### Headline figures

- We received 291 new complaints, **down 29%** on 2011/12.
- We referred 20 investigation reports to either a standards committee or the Adjudication Panel for Wales, **up 5%** on 2011/12.
- We closed 371 cases, **up 8%** on 2011/12.
- We had no investigations older than 9 months old open at 31 March 2013.

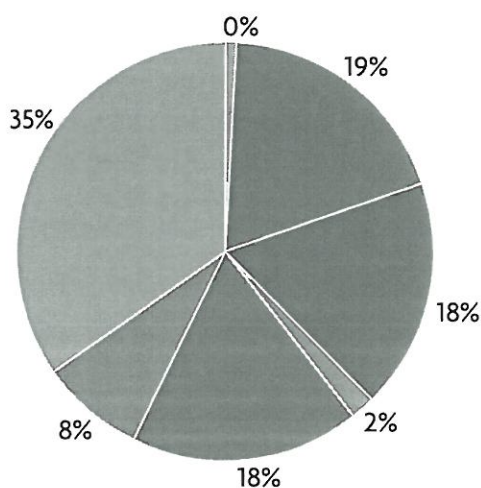
### Complaints received

The table below gives a breakdown of the code of conduct complaints received by type of authority. I am pleased that the number of code of conduct complaints received by my office decreased by 29% over the past year. This is largely due to the fact that 2011/12 was an election year and that the Code of Conduct complaints system was inappropriately used as a tool for political mischief making. However, I believe that the reduction can also to a degree be attributed to the success of new local resolution arrangements recently introduced, which I address later in this section.

	2012/13	2011/12
Community Council	140	205
County/County Borough Council	150	178
National Park	0	28
Police Authority	1	1
<b>Total</b>	<b>291</b>	<b>412</b>

### Nature of Code of Conduct complaints

As the chart below shows, the majority of complaints received during 2012/13 related to matters of 'equality and respect' (35% compared to 39% in 2011/12). The increase in the number of complaints relating to 'objectivity and propriety' seen during 2011/12 to 25% (from 10% in 2010/11) has during the past year returned to a lower level, comprising 8% of the Code of Conduct caseload.



- Accountability and openness
- Disclosure and registration of interests
- Duty to uphold the law
- Integrity
- Objectivity and propriety
- Promotion of equality and respect
- Selflessness and stewardship [Note: There was one complaint made in respect of selflessness and stewardship – the 0% shown is a 'rounding' issue.]

## Summary of Code of Conduct complaint outcomes

Of the Code of Conduct cases considered in 2012/13, the majority were closed under the category shown below as 'Closed after initial consideration'. This includes decisions such as:

- there was no 'prima facie' evidence of a breach of the Code
- the alleged breach was insufficiently serious to warrant an investigation (and unlikely to attract a sanction)
- the incident complained about happened before the member was elected (before they were bound by the Code)

The number of cases which I concluded should be referred to either an authority's standards committee or to the Adjudication Panel for Wales was 20 compared to 19 in 2011/12.

Complaint about a public body	2012/13	2011/12
Closed after initial consideration	283	280
Complaint withdrawn	12	0
Investigation discontinued	18	9
Investigation completed: No evidence of breach	23	7
Investigation completed: No action necessary	15	29
Investigation completed: Refer to Standards Committee	15	15
Investigation completed: Refer to Adjudication Panel	5	4
<b>Total Outcomes – Code of Conduct complaints</b>	<b>371</b>	<b>344</b>

(A detailed breakdown of the outcome of Code of Conduct complaints investigated, by local authority, during 2011/12 is set out at Annex C.).

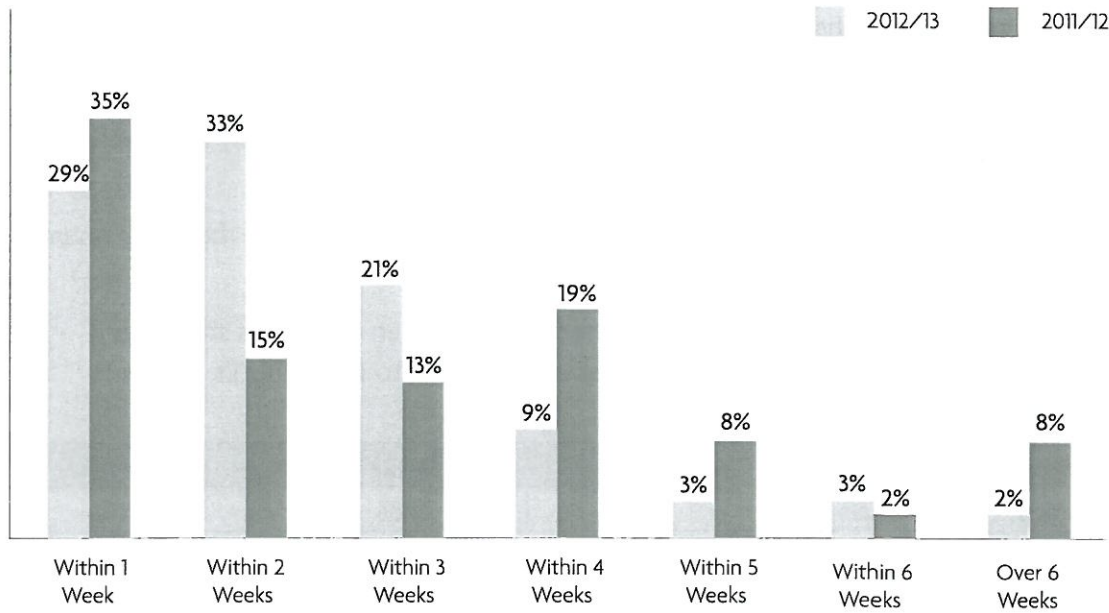
## Decision times

Below are the decision times for Code of Conduct complaints. The time targets set for code of conduct complaints are similar to those for complaints about public bodies, i.e.

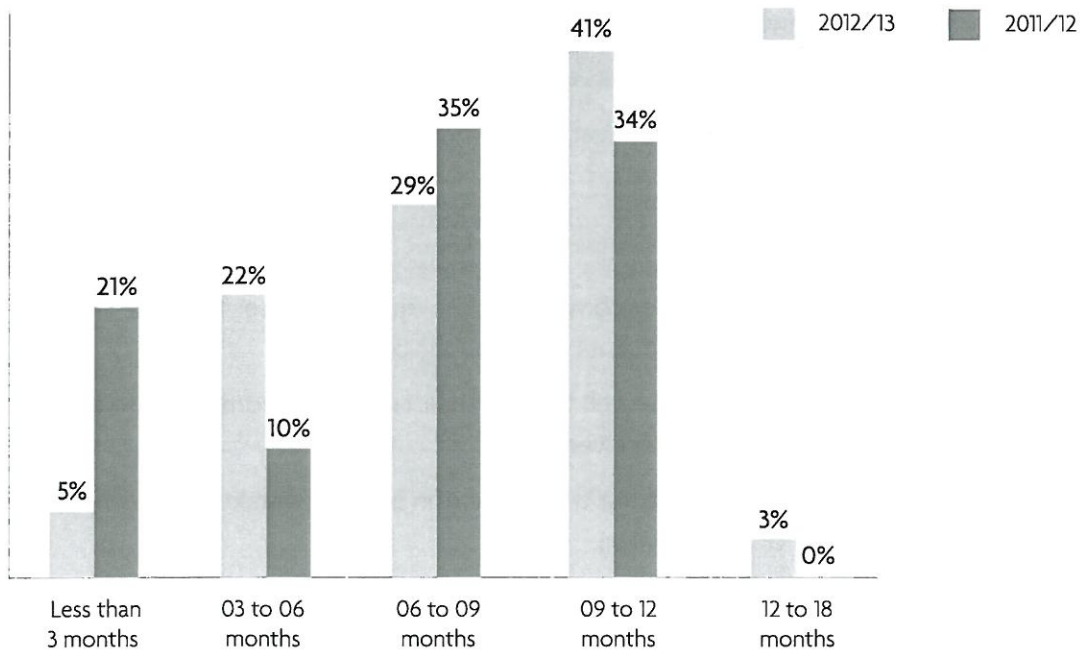
- to tell complainants within 4 weeks whether we will take up their complaint from the date that sufficient information about the complaint is received
- to conclude cases within 12 months from the point that a decision is made to take up a complaint (that is, to commence investigation of a complaint).

In respect of the first target, and similar to that for public body complaints, we set a more testing challenge for 2012/13, aiming to achieve this 90% of the time. We actually did so 92% of the time. This is particularly pleasing in view of the fact that we have to deal with Code of Conduct complaints in their initial stages in a different way from those in respect of public bodies and that the rate achieved in 2011/12 was 82%.

### Decision times for informing complainants we will take up their complaint



### Decision times for concluding Code of Conduct investigations





I have commented in previous Annual Reports about the steps we have taken to improve on the time that it takes us to complete Code of Conduct investigations and the fact that these are often affected by the consequences of members increasingly engaging legal representation. Whilst it is a little disappointing that we have not been able to sustain the investigation times achieved during 2011/12, we are nevertheless completing investigations in a far more timely manner than in the years previous to this (for example, in 2010/11 37% of code of conduct cases took over 12 months to complete). The 3% shown as taking over 12 months in 2011/12 actually equates to two cases. In the first case, a late request was made by the accused member for certain arrangements to be put in place in respect of his interview. This led to the target being missed by 12 days. In relation to the second, an internal review of a draft investigation report led to the provisional conclusion at draft report stage that the case should be referred to the Adjudication Panel for Wales rather than a Standards Committee. This necessitated some additional work, including conducting some further interviews (which then had to be postponed and rearranged because of adverse weather).

### **Code of Conduct for local authority members - changes to practice**

As I reported last year, because of concerns about certain aspects of the Code and the use of complaints for political purposes, I entered discussions with the Welsh Local Government Association (WLGA), the Association of Council Secretaries and Solicitors (ACSeS) and the Welsh Government on a range of measures designed to reform the current Code of Conduct system, which could be achieved without the need for legislation. The aim was that these measures would enable a local resolution process to be introduced across Wales which should greatly reduce the number of complaints brought by councillors against other councillors which need to be considered by my office.

Whilst an 'all-Wales' approach has yet to be adopted, some county councils have introduced such arrangements. Typically these complaints involve paragraph 4(b) of the Code concerning the requirement to show respect and consideration and 6(1)d which sets out the expectation that members will not make frivolous or malicious complaints. Where these arrangements are in place, I will refer appropriate complaints back for local resolution. Many of the issues giving rise to these complaints can best be dealt with locally, and this can help to stop matters from escalating and damaging working relationships. Anecdotal feedback from the councils who have introduced such arrangements are that they are a success and are having the intended effect. This seems to be borne out by the reduction in the number of complaints to my office (as illustrated at page 16), although I recognise that 2011/12 was an election year which would have had a bearing on the level of complaints received.

The other element of the new approach applies to members of county/county borough councils and community/town councils. When I am minded not to investigate a complaint or having commenced an investigation I am minded to close my investigation, I will write to the local Monitoring Officer. This will arise when I judge that even if the Standards Committee did find that there had been a breach of the Code, it would be unlikely to apply a sanction. It will then be for

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the Monitoring Officer to consider the matter. If they take a different view on the likelihood of the Standards Committee applying a sanction if they decide that there has been a breach of the Code then I will transfer the investigation to them for local consideration. The year 2012/13 was the first full year of operating this new approach. During the year I referred 37 such complaints to Monitoring Officers, 2 of which were called in for local investigation.

### **Guidance on the Code of Conduct for Local Authority Members**

I originally issued Guidance on the Code of Conduct in April 2010. It was always intended that the Guidance would be a living document, updated to reflect the impact of decisions made by standards committees and tribunals of the Adjudication for Panel for Wales. A significant revision was undertaken and published in September 2012, when I took the opportunity to produce separate versions to reflect the differing circumstances of members of principal councils and members of community councils. I have had very positive feedback on this development, and community councils in particular have appreciated a Guidance document tailored for their own circumstances.

One case during the year which in particular led me to amend the guidance was the Calver case. A High Court judgement on this case had impact on the application of paragraph 4(b) of the Code relating to treating others with respect and consideration. I had always taken the view that robust political debate is an essential part of the democratic process and the judgement helps to more clearly set out where the boundaries lie. Councillor Calver was accused of failing to show respect and consideration for others by posting comments online about other councillors and the way in which the Council was run. My investigation concluded that his conduct was likely to represent a breach of the Code. The Standards Committee agreed, and imposed a censure. Councillor Calver appealed this decision to a tribunal of the Adjudication Panel. This upheld the finding of the Standards Committee and Councillor Calver went on to seek a judicial review of this decision. The Court found that whilst the comments which were posted were sarcastic and mocking and the tone ridiculed his fellow members, because the majority of the comments related to the way in which the Council was run, how its decisions were recorded and the competence of the councillors, the comments were political expression. The ruling said no account had been taken of the need for politicians to have "thicker skins". In view of the Member's freedom of expression and the fact that the majority of comments were directed at fellow councillors, the finding of a breach in this case was a disproportionate interference with the Member's rights under Article 10 of the European Convention on Human Rights. The Standards Committee's decision to censure the Member was therefore set aside.

Mr Justice Beatson was very clear in stating that a member's freedom of expression attracts enhanced protection under the Human Rights legislation when his or her comments are political in nature. 'Political' comments are not confined to those made within the Council chamber and, include, for instance, comments members might make about their authority's policies or about their political opponents.

As a consequence of the judgement I have made clear that it is highly unlikely that I will investigate complaints made about members criticising the policies or performance of their council or indeed, their political opponents. Mr Justice Beatson made clear that councillors need a “thicker skin” in dealing with, and responding to, politically motivated comments.

I have also had to think carefully about what the implications are for comments about officers. When members raise issues which could be considered political with officers, particularly those holding senior positions, such as chief executives or strategic directors, then it is clear that some degree of protection is afforded to members. It is clearly the case that when responding to such issues senior officers will also need a “thicker skin” and should expect to engage in robust discussions with members. However, it is evidently the case that more junior officers will continue to need the protection of the Code and that even with senior officers, there must be a limit on the extent of the legal protection members enjoy. Accordingly, I will continue to consider each case on its merits. I should also say that what is legally permissible, and what is desirable, are not necessarily the same and would urge all members to conduct themselves in a way that continues to promote standards of behaviour, characterised by respect, and which reflect positively on local government.

### **Standards Committee and Adjudication Panel for Wales’s Hearings – Indemnity Cap**

I have previously made clear that I believed the situation in relation to the levels of indemnity enjoyed by members who are accused of a breach needed to be addressed. This is particularly current in the context of the very difficult financial climate in which we are all working. By having unlimited indemnity, it is possible for cases before tribunals to last for months or even longer, with counsel being engaged at very considerable cost. I strongly believe that members should be able to defend themselves, but that public expenditure on this must be proportionate. I proposed a maximum ceiling of £10,000, to reflect the costs ceiling in employment tribunals. In discussions with monitoring officers and the Welsh Local Government Association (WLGA), this ceiling was raised to £20,000, which I was prepared to support. However, while some councils already have such a ceiling in place, and some councils were prepared to introduce one, others have said that they do not intend to do so. In some instances, this is because the indemnity is backed by insurance. The former local government minister indicated that he would address the matter through legislation if voluntary agreement could not be secured. I note that the WLGA have reported that Council Leaders support the introduction of an indemnity cap and I hope that voluntary agreement will be forthcoming. However, I would support the use of legislation if it is not.

**Annex C**  
**Code of Conduct Complaints:**  
**Statistical Breakdown of Outcomes by Local Authority**

## COUNTY/COUNTY BOROUGH COUNCILS

County/County Borough Councils	Closed after initial consideration	Discontinued	No evidence of breach	No action necessary	Refer to Standards Committee	Refer to Adjudication Panel	Withdrawn	Total Cases Closed
Blaenau Gwent	4		1	1				6
Bridgend	2		1					3
Caerphilly	4		1				1	6
Cardiff	2		1					3
Cardiganshire	6	1	2	1				10
Ceredigion	1			2		1		4
Conwy	2							2
Denbighshire	4							4
Flintshire	4							4
Gwynedd	4	2			1			7
Isle of Anglesey	5						1	6
Merthyr Tydfil	7		2			1		10
Monmouthshire	2	1	1					5
Neath Port Talbot	2				1			3
Newport	1						1	2
Pembrokeshire	3				1			4
Powys	4				1			5
Rhondda Cynon Taf	11		1				2	14
The City and County of Swansea	34	1	6				2	43
The Vale of Glamorgan	1							1
Torfaen	4			3	1			8
Wrexham	11	1						12
<b>Total</b>	<b>118</b>	<b>6</b>	<b>16</b>	<b>7</b>	<b>6</b>	<b>2</b>	<b>7</b>	<b>162</b>

## COMMUNITY/ TOWN COUNCILS

Community/ Town Councils	Closed after initial consideration	Discontinued	No evidence of breach	No action necessary	Refer to Standards Committee	Refer to Adjudication Panel	Withdrawn	Total Cases Closed
Bangor City	1							1
Beguildy Community	18							18
Bodelwyddan Community	2							2
Brecon Town	1							1
Buckley Town	1							1
Caldicot Town	1	1						2
Carmarthen Town	2							2
Clydach Community	1	1						2
Coedpoeth Community						2		2
Crickhowell Town	2							2
Cwmbran Community							1	1
Disserth and Trecoed Community	2							2
Dyffryn Ardudwy a Thalybont Community	2			1				3
Gorseinon Town	2				1			3
Herbrandston Community	2							2
Johnston Community	1							1

## COMMUNITY/ TOWN COUNCILS

Community/ Town Councils	Closed after initial consideration	Discontinued	No evidence of breach	No action necessary	Refer to Standards Committee	Refer to Adjudication Panel	Withdrawn	Total Cases Closed
Kerry Community	4							4
Knighton Town	1							1
Llandegla Community		4						4
Llandoverly Town	2							2
Llandrindod Wells Town	2							2
Llandudho Town					1			1
Llanfair Mathafarn Eithaf Community	1							1
Llangan Community	2							2
Llangernyw Community	1							1
Llangoed a Penmon Community	1		1					2
Llangynwyd Lower Community	8	2						10
Llangynwyd Middle Community	1							1
Llantrisant Community						1		1
Llantwit Major Town	6							6
Maesteg Town	1				1			2
Monmouth Town	1							1
Mumbles Community	2						1	3

## COMMUNITY/ TOWN COUNCILS (CONTINUED)

Community/ Town Councils	Closed after initial consideration	Discontinued	No evidence of breach	No action necessary	Refer to Standards Committee	Refer to Adjudication Panel	Withdrawn	Total Cases Closed
Nantglo & Blaina Town	1							1
Old St. Mellons Community	1							1
Penmaenmawr Town				1			2	3
Penmynydd and Star Community					6			6
Pennard Community	6							6
Porthcawl Town	1		1					2
Prestatyn Town	68	2						70
Pyle Community	3						1	4
Resolven Community		1						1
Rogiet Community	5							5
Seven Sisters Community	1							1
St Donats Community	1							1
St Harmon Community	2			1				3
Trellech United Community	1	1						2
Tywyn Town	1		1					2
Van Community	1							1
Wick Community				1				1
Ystalyfera Community	1							1
<b>Total</b>	<b>164</b>	<b>12</b>	<b>3</b>	<b>4</b>	<b>9</b>	<b>3</b>	<b>5</b>	<b>200</b>



### NATIONAL PARK AUTHORITIES

National Park Authority	Closed after initial consideration	Discontinued	No evidence of breach	No action necessary	Refer to Standards Committee	Refer to Adjudication Panel	Withdrawn	Total Cases Closed
Brecon Beacons			3	4				7
<b>Total</b>			<b>3</b>	<b>4</b>				<b>7</b>

### POLICE AUTHORITIES

Police Authority	Closed after initial consideration	Discontinued	No evidence of breach	No action necessary	Refer to Standards Committee	Refer to Adjudication Panel	Withdrawn	Total Cases Closed
Gwent			1					1
North Wales	1							1
<b>Total</b>	<b>1</b>		<b>1</b>					<b>2</b>