



**Law
Commission**
Reforming the law

Public Services Ombudsmen Summary of Consultation Paper No 196

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PUBLIC SERVICES OMBUDSMEN

SUMMARY OF CONSULTATION PAPER

INTRODUCTION

- 1.1 This summary sets out the main points made in our consultation paper on the public services ombudsmen.¹ It includes all of our consultation questions and provisional proposals, with cross-references to the appropriate paragraphs of the consultation paper.

SCOPE OF THIS CONSULTATION PAPER

- 1.2 The term ombudsman has come to be applied to a large number of bodies. These range from those bodies that an observer would naturally consider to be ombudsmen, to others where the application of the term may be less appropriate. We suggest that there are four key features of ombudsmen which, taken together, help differentiate them from other mechanisms for dispute resolution.
- 1.3 First, the ombudsman process is *investigatory*. This, to us, is key to understanding ombudsmen. Their investigatory process allows for different practices to be put in place than those available to the courts.
- 1.4 Second, ombudsmen are *independent*. Ombudsmen need to be seen as independent arbiters of the complaints put to them. They should not be seen as beholden to the bodies over which they have jurisdiction.
- 1.5 Third, ombudsmen make *recommendations*. An ombudsman's report, or similar publication, does not have the force of law and does not coerce, at least in a strict legal sense, the body complained of into a particular course of action. This is not to say that the ombudsman approach is ineffective.
- 1.6 Fourth, and this is specific to ombudsmen investigating the activities of public bodies, the focus of an ombudsman's investigation is on *administrative processes*, the maladministration of which may have led to an individual suffering injustice.

The public services ombudsmen

- 1.7 Our consultation paper focuses on what we have termed the public services ombudsmen. This follows from our original focus on remedies from public bodies in our administrative redress project, of which this is the last remaining part.

¹ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196 (hereafter CP 196).

1.8 To us, the appropriate bodies to fall within the category of public services ombudsmen are:

- (1) the Parliamentary Commissioner for Administration (the Parliamentary Commissioner);
- (2) the Commissioners for Local Administration (the Local Government Ombudsman);
- (3) the Health Service Commissioners (the Health Service Ombudsman);
- (4) the Public Services Ombudsman for Wales; and
- (5) the Independent Housing Ombudsman Scheme (the Housing Ombudsman).

Further considerations

- 1.9 There were three further considerations which limited the general scope of the project.
- 1.10 We decided against considering fundamental changes to the institutional design or identity of the public services ombudsmen. Our consultation paper focuses instead on establishing what is at the core of the public services ombudsmen in our jurisdiction and what beneficial reforms could be made within that existing framework.
- 1.11 We can only recommend changes to the law of England and Wales. The Parliamentary Commissioner is a UK body. It follows that in relation to Scotland and Northern Ireland, such provisional proposals as we make in our consultation paper form a commentary, to be taken up if so desired by those who have responsibility for those jurisdictions.
- 1.12 Finally, increasingly intricate relationships are developing between the public services ombudsmen and elected bodies, specifically Parliament and the National Assembly for Wales. This is an area where we need to draw clear lines as to our responsibility. It is our role to propose reform of the law. How Parliament and the National Assembly would choose to administer a statutory function is, constitutionally, a matter for them.

THE STRUCTURE OF THE CONSULTATION PAPER

- 1.13 Our consultation paper is divided into eight Parts and one Appendix.
- (1) Part 1 introduces the ombudsmen and defines the scope of the project.
 - (2) Part 2 sets out what we see as the core features of the public services ombudsmen.
 - (3) Part 3 considers the regime for appointing the public services ombudsmen.
 - (4) Part 4 focuses on issues relating to the opening of an investigation by the public services ombudsmen.

- (5) Part 5 looks at the procedures available to the public services ombudsmen when conducting an investigation into an individual complaint.
- (6) Part 6 considers the results of investigations and the publication of individual and general reports by the public services ombudsmen.
- (7) Part 7 returns to the relationship that the public services ombudsmen have with elected bodies.
- (8) Part 8 collates the consultation questions asked in proceeding Parts.
- (9) Appendix A contains an impact assessment for our provisional proposals.

FUNCTIONS OF THE PUBLIC SERVICES OMBUDSMEN

- 1.14 We suggest that there are three primary functions of the public services ombudsmen. Our assessment of these as primary functions informed our choices as to suitable reforms that would improve the current legislative structure for the public services ombudsmen.
- 1.15 First, they *address individual complaints*. This was the reason for the establishment of the ombudsmen and will, rightly, always be at the core of their work. The public services ombudsmen can be viewed as meeting a demand for an independent review where internal mechanisms have not satisfied the parties. This includes bringing to a close unmeritorious claims.
- 1.16 Second, the public services ombudsmen are in a privileged position to *address systemic failures*. Repeat investigations into the behaviour of public bodies allow them to build up a good picture of that behaviour.
- 1.17 Third, the public services ombudsmen are in a position to *disseminate knowledge across governance networks*. This concerns the dissemination of good practice across the administrative landscape, through reporting on performance, setting out codes of practice, or the creation of principles to aid and inform administrative behaviour.

APPOINTMENT OF OMBUDSMEN

- 1.18 This is an area in which both the Liaison Committee and the Public Administration Select Committee of the House of Commons have been particularly active. We think that the recent development of pre-appointment hearings is a useful adjunct to the role of Parliament in relation to the public services ombudsmen.
- 1.19 It seems to us particularly important that Parliament is the pivotal institution in the appointment of the Parliamentary Commissioner. Our preliminary view is that the current role of Parliament should be strengthened. We do not think that the case for a strengthened role in the appointment of either the Health Service Ombudsman or the Local Government Ombudsman is as strong.

- 1.20 **We provisionally propose that Parliament nominate to the Queen a candidate for the post of Parliamentary Commissioner for Administration.**²
- 1.21 It would be for Parliament to adopt such rules and processes as it thinks fit to achieve the ends encapsulated in any legislative change to section 1 of the Parliamentary Commissioner Act 1967.
- 1.22 There are two further matters which we think it worth commenting on, though we do not see it as appropriate to make provisional proposals. The Housing Ombudsman is not on the list of appointments subject to pre-appointment hearings by select committees. This is despite the fact that it performs a function of comparable public importance to many on that list. Furthermore, the relationship which the Public Services Ombudsman for Wales enjoys with the National Assembly for Wales is one of the more legislatively developed among the public services ombudsmen. Where it departs from reforms currently underway in Parliament is in relation to pre-appointment hearings. We draw consultees' attention to this issue solely in order to raise the level of general discussion on what is an important area.

OPENING AN OMBUDSMAN INVESTIGATION

- 1.23 There are five issues that we considered here.

Statutory bar

- 1.24 In all of the governing statutes for the public services ombudsmen there are provisions which have the aim of preventing an ombudsman opening a complaint, where the complainant has previously had recourse to another institution for administrative justice. For instance, the relevant provision for the Parliamentary Commissioner is section 5(2)(b) of the Parliamentary Commissioner Act 1967. These are termed the "statutory bars".
- 1.25 In our consultation paper *Administrative Redress: Public Bodies and the Citizen*,³ we provisionally proposed their reform. Our original proposal required the public services ombudsmen to consider whether it was "in the interests of justice" to open an investigation. However, we now think that if an ombudsman has jurisdiction, then there is, on the face of it, a good argument for opening an investigation. This would, in effect, reverse the current legal presumption in the statutory bars.
- 1.26 **We provisionally propose that the existing statutory bars be reformed. We provisionally propose that there is a general presumption in favour of a public services ombudsman being able to open a complaint.**⁴
- 1.27 **Do consultees agree that there should be a general presumption in favour of the ombudsman being able to investigate a complaint coupled with a broad discretion to decline to open an investigation?**⁵

² CP 196, para 3.34.

³ *Administrative Redress: Public Bodies and the Citizen* (2008) Law Commission Consultation Paper No 187, paras 5.68 to 5.75.

⁴ CP 196, para 4.42.

- 1.28 **Do consultees agree that in deciding whether to exercise their discretion to decline to open an investigation ombudsmen should ask themselves whether the complainant has already had or should have had recourse to a court or tribunal?**⁶

Stay of proceedings

- 1.29 In our consultation paper we provisionally proposed a second mechanism to help the overall landscape of administrative justice work in an effective and efficient manner: a dedicated stay in favour of the ombudsmen available to the Administrative Court.
- 1.30 Our initial thinking was based around the idea that an action may come before the Administrative Court, where at the permission stage it can be seen that there is some underlying illegality such as to justify permission for judicial review. However, the true nature of the claim, taken as a whole, is one properly described as maladministration. Giving the Administrative Court a dedicated power to stay the proceedings would allow the core of the matter to be dealt with in the most appropriate way. If, after the ombudsman had considered the matter, it was still felt necessary to deal with the underlying illegality then the stay could be set aside and the claim's illegality tested in court.
- 1.31 Given consultation responses and a period of reflection, we now suggest that the proper relationship would be for a matter to be transferred to an ombudsman from a court.
- 1.32 The initial decision would be made at the permission stage. As any stay and transfer would be of importance to the parties, we suggest that they should have the opportunity to comment on this procedure. This could be dealt with by a suitable amendment to the Civil Procedure Rules or with a Practice Direction.
- 1.33 Subsequent to this, the public services ombudsman would be obliged to open an investigation. The procedure they adopted in doing so would remain theirs. It would, of course, still be possible for an ombudsman subsequently to abandon an investigation – or to resort to a reporting mechanism of a lesser nature than a full report.
- 1.34 **We provisionally propose that there should be a stay and transfer power allowing matters to be transferred from the courts to the public services ombudsmen.**⁷
- 1.35 **Do consultees agree that the court should invite submissions from the original parties before transferring the matter?**⁸
- 1.36 **Do consultees agree that, in the event of such a transfer, the ombudsman should be obliged to open an investigation?**⁹

⁵ CP 196, para 4.47.

⁶ CP 196, para 4.47.

⁷ CP 196, para 4.76.

⁸ CP 196, para 4.77.

- 1.37 **Do consultees agree that the ombudsman should also be able to abandon the investigation should it – in their opinion – not disclose maladministration?**¹⁰

Alternatives to investigation

- 1.38 We consider a power to use alternative dispute mechanisms to be useful and appropriate, especially considering the expanding role of alternative dispute resolution in other contexts. Though the ombudsmen do have recourse to alternative mechanisms, the powers are drawn differently as between the ombudsmen, with the most specific being that contained in section 3 of the Public Services Ombudsman (Wales) Act 2005. We suggest that all of the regimes would benefit from having specific powers allowing for recourse to such alternative mechanisms as the ombudsman thought appropriate.
- 1.39 **We provisionally propose that the Parliamentary Commissioner, the Local Government Ombudsman and the Health Service Ombudsman be given specific powers to allow them to dispose of complaints in ways other than by conducting an investigation.**¹¹

Requirement that a complaint be in writing

- 1.40 This is important as a requirement for a complaint to be written potentially disenfranchises certain individuals, particularly those who are uncomfortable with writing or whose first language is not English.
- 1.41 The governing statutes contain a variety of approaches to the requirement that a complaint be written. For both the Parliamentary Commissioner and the Health Service Ombudsman, a complaint must be in writing – there is no discretion. The Public Services Ombudsman for Wales has the power to investigate a matter even if the formal requirements are not met, if it thinks it reasonable to do so.
- 1.42 The most flexible of the statutory requirements is that in section 26B of the Local Government Act 1974 which provides a specific discretion to waive the formal requirements for particular complaints. There are no statutory requirements for the Housing Ombudsman.
- 1.43 We suggest that the provisions in the Parliamentary Commissioner Act 1967 and the Health Service Commissioners Act 1993 are unacceptable in modern terms.

⁹ CP 196, para 4.78.

¹⁰ CP 196, para 4.79.

¹¹ CP 196, para 4.85.

- 1.44 **We provisionally propose that a discretionary provision relating to formal requirements, similar to section 26B(3) of the Local Government Act 1974, be inserted into the governing statutes for the Parliamentary Commissioner and the Health Service Ombudsman, excluding the Housing Ombudsman. This would allow them to dispense with the requirement that a complaint be in writing.**¹²

MP filter

- 1.45 The MP filter is unique to the Parliamentary Commissioner. Section 5 of the Parliamentary Commissioner Act 1967 requires that a complaint should be “duly made to a Member of the House of Commons” who can then refer it to the Parliamentary Commissioner.
- 1.46 There seem to be two possible approaches to reform: outright abolition of the requirement or the “dual track” approach.¹³ By dual-track, we mean that individuals would have direct access to the Parliamentary Commissioner. However, it would still be possible for Members of Parliament to forward complaints to the Parliamentary Commissioner where they consider this appropriate.
- 1.47 There does not seem to us to be any valid argument in favour of retaining an exclusionary bar to the opening of an investigation by the Parliamentary Commissioner. However, we remain of the opinion that there is value in maintaining a direct link with individual Members of Parliament.
- 1.48 **Therefore, we provisionally propose that a dual-track approach to reform of the MP filter be adopted by Parliament.**¹⁴

OMBUDSMEN INVESTIGATIONS

Closed nature of ombudsmen investigations

- 1.49 One particular feature that we wish to explore is the closed, confidential nature of ongoing ombudsmen investigations. We are aware how important this issue is to the public services ombudsmen. There is an argument that the closed nature of the process protects the ombudsmen’s flexibility in choosing their investigatory technique. Also, the closed nature of investigations reduces the risks to the reputation of the public body in cases where the complaint is subsequently found to be unsubstantiated. Finally, it is arguably the case that the closed nature of the process makes it more likely that the public bodies being investigated will share documentation.
- 1.50 There are, however, countervailing public law requirements. We suggest that the default position is that an administrative process is conducted in as open and transparent a manner as possible. This acknowledges that the need for openness

¹² CP 196, para 4.91.

¹³ These were considered in our original consultation paper. See Administrative Redress: Public Bodies and the Citizen (2008) Law Commission Consultation Paper No 187, paras 5.76 to 5.88. There we favoured the dual-track approach.

¹⁴ CP 196, para 4.106.

and transparency is not absolute and that there are benefits to certain processes that mitigate against exposing them to public scrutiny in all circumstances.

- 1.51 There is also a significant issue in relation to the Freedom of Information Act 2000. Under their governing statutes, ombudsmen investigations are to be conducted in private. Consequently, such information as relates to the investigation falls within section 44(1) of the Freedom of Information Act 2000, which grants an absolute exemption to disclosure where publication is prohibited by statute. The creation of a more general power to release information during investigations would mean that the public services ombudsmen would lose the absolute exemption available to them.
- 1.52 Our general strategy is to allow the ombudsmen wider powers relating to disclosure, not to impose additional burdens on them. In order to avoid creating additional burdens, we suggest that it may be necessary for there to be specific exemptions from section 1 of the Freedom of Information Act 2000 for investigations by the public services ombudsmen.
- 1.53 Alternatively, all of the public services ombudsmen could be given a similar power to that held by the Public Services Ombudsman for Wales, who can decide that information should not be disclosed if such disclosure would “prejudice the effective conduct of public affairs”.¹⁵ This acts as a qualified exemption to the section 1 duty to disclose.
- 1.54 Given the quasi-judicial nature of the work of the ombudsmen, we suggest that of these two options, the creation of new absolute exemptions for information relating to investigations would be more appropriate. The effect of our provisional proposal would therefore be to encourage and allow for transparency during investigations without imposing it.
- 1.55 **We provisionally propose that there should be statutory discretion for the public services ombudsmen to dispense with the requirement that an investigation be conducted in private in situations where they see this as appropriate.**¹⁶
- 1.56 **Do consultees think that, if such discretion were created, the public services ombudsmen should be protected from additional burdens?**¹⁷
- 1.57 **If so, would consultees prefer a more general exemption from the duty contained in section 1 of Freedom of Information Act 2000 in relation to investigations, as is currently the case? Alternatively, would consultees prefer a more limited exemption modelled on section 36(5)(ka) of the Freedom of Information Act 2000?**¹⁸

¹⁵ Freedom of Information Act 2000, s 36(5)(ka).

¹⁶ CP 196, para 5.33.

¹⁷ CP 196, para 5.34.

¹⁸ CP 196, para 5.35.

Reference on a point of law

- 1.58 In our consultation paper *Administrative Redress: Public Bodies and the Citizen* we provisionally proposed that the public services ombudsmen be given a power to refer a question to a court on a point of law.¹⁹
- 1.59 In doing this, we suggested that the ombudsmen should consider the following factors before making a reference. First, the ombudsman must consider that the determination of the particular legal question is necessary for it to make a finding of maladministration. Second, the legal question should only be referred if it is contentious or unresolved. Third, a reference should not be made where it is more appropriate for the whole dispute to be dealt with by a court.²⁰
- 1.60 In response to our provisional proposals, certain consultees suggested that though the basic idea was sound, we had not considered the practicalities in sufficient detail. Given the opportunity afforded by the preparation of a second consultation paper, we have been able to develop our mechanism further.
- 1.61 There is a question as to whether a reference needs to be made. We suggest that the public services ombudsmen should be able to seek the opinion of counsel before making a reference to a court on a point of law. There seem to us two ways in which this could be carried out. First, the public services ombudsmen could be given the equivalent of a “QC clause” such as exists in certain insurance agreements. Alternatively, seeking the advice of a QC could be seen as a specific form of arbitration and be governed by the Arbitration Act 1996 and Part 62 of the Civil Procedure Rules. The second option has the significant disadvantage that it would be considerably more costly than the “QC clause” approach and may even cost the same as a reference to a court.
- 1.62 We are aware that the public services ombudsmen, and on occasions the complainant and public body complained against, already seek advice from counsel. Consequently it may be that an imperative to seek counsel’s advice before making a reference to the court is not necessary.
- 1.63 In relation to representation, we suggest that there are two options. The ombudsman could instruct a single counsel to put both sides of the question to the court. This has advantages in terms of efficiency and cost. The alternative would be for the ombudsman to instruct two counsel, with each representing different sides of the question. This would suit the adversarial nature of the courts in England and Wales. We also suggest that this would improve the quality of the decision, and be more acceptable to the judiciary. We can see benefits to both options, hence we have asked an open consultation question.
- 1.64 We think that it would be appropriate to allow intervention by interested parties subject to the normal case management powers of the court.
- 1.65 We suggest that costs in relation to instructing counsel either on the basis of a “QC clause” or as an arbitrator should be met by the public services ombudsmen.

¹⁹ *Administrative Redress: Public Bodies and the Citizen* (2008) Law Commission Consultation Paper No 187, paras 5.43 to 5.46.

²⁰ *Administrative Redress: Public Bodies and the Citizen* (2008) Law Commission Consultation Paper No 187, para 5.46.

- 1.66 Where a reference is made to a court then those counsel instructed by the public services ombudsmen should be paid for by the public services ombudsmen. Subject to costs orders by the court, where others chose to intervene then they should be responsible for their own costs.
- 1.67 **Before making a reference to a court on a point of law, should there be a requirement that the public services ombudsmen seek either the opinion of or arbitration by an independent counsel?**²¹
- 1.68 **We provisionally propose that the counsel's fees should be met by the public services ombudsmen.**²²
- 1.69 **We provisionally propose that there should be a mechanism allowing a public services ombudsman to ask a question of the Administrative Court.**²³
- 1.70 **We provisionally propose that such a reference should not require permission.**²⁴
- 1.71 **We provisionally propose that the decision of the Administrative Court on such a matter should be considered a judgment of the Court for the purposes of section 16 of the Senior Courts Act 1981 and, therefore, potentially subject to appeal to the Court of Appeal.**²⁵
- 1.72 **We provisionally propose that the public services ombudsmen should notify the complainant and the relevant public bodies of their intention to make a referral on a point of law, invite them to submit their views and/or to intervene before the court should they wish to.**²⁶
- 1.73 **We provisionally propose that the final decision whether to refer a question to the court should be solely that for the public services ombudsman.**²⁷
- 1.74 **Should the ombudsman routinely instruct one counsel to put both sides of the question or should two opposing counsel be instructed?**²⁸
- 1.75 **We provisionally propose that other interested parties may intervene, subject to case management decisions of the court.**²⁹

²¹ CP 196, para 5.83.

²² CP 196, para 5.84.

²³ CP 196, para 5.85.

²⁴ CP 196, para 5.86.

²⁵ CP 196, para 5.87.

²⁶ CP 196, para 5.88.

²⁷ CP 196, para 5.89.

²⁸ CP 196, para 5.90.

²⁹ CP 196, para 5.91.

- 1.76 **We provisionally propose that, subject to the use of costs orders for case management purposes, the default position should be all parties or interveners – including the public services ombudsmen – should meet their own costs.**³⁰

REPORTING

- 1.77 Here we consider the final stage of the ombudsman process, reporting the results of an investigation. This includes the communication of a decision not to open an investigation or to abandon an existing one. We also consider wider powers allowing the ombudsmen to issue reports on more general matters, such as principles of good administrative practice.

Types of report

- 1.78 There is no single approach to reporting across the public services ombudsmen. Whilst all of the statutory regimes, except that for the Housing Ombudsman, allow for issuing different types of report, these are also different and there is no common system of terminology. The most developed, we suggest, is that for the Public Services Ombudsman for Wales.
- 1.79 It is important to have a clear set of rules relating to the type of report issued, or a statement explaining the ombudsman's reasoning if the ombudsman is not opening an investigation. The decisions and reasoning of the public services ombudsmen should be available in an easily accessible manner to those affected by a complaint, interested in the workings of public bodies, or watching the ombudsmen.
- 1.80 Therefore, we suggest that for the Local Government Ombudsman there would be three types of report. The least intrusive approach would be to issue a simple "short-form report". The middle type would be the normal approach, and would be known as a "report". The final type would be reserved for failure by the public body to implement an original report. These would be known as "special reports".
- 1.81 This approach should also be adopted for the Parliamentary Commissioner and the Health Service Ombudsman, with three types of report being available. However, the ability to lay reports before each of the Houses of Parliament should be retained in relation to both "reports" and "special reports".
- 1.82 The position for the Public Services Ombudsman for Wales would remain as is currently the case, with a slight change in terminology. Reports issued under section 21 of the Public Services Ombudsman (Wales) Act 2005 would be recast as "short-form" reports.
- 1.83 In relation to the Housing Ombudsmen, given the specific relationship that the Housing Ombudsman enjoys with social housing providers, it only needs one type of report.
- 1.84 Whilst we suggest that greater transparency has value, we are mindful that this should not supersede the complainant's right to anonymity. Consequently, individual identities should only be revealed with specific consent.

³⁰ CP 196, para 5.92.

- 1.85 **Do consultees agree that adopting a graduated approach to three different types of report, based on that already in place for the Public Services Ombudsman for Wales, would be desirable for each of the public services ombudsmen except the Housing Ombudsman?**³¹
- 1.86 **Do consultees agree that these should be known as “short-form report”, “report” and “special report”?**³²
- 1.87 **We provisionally propose that in order to ensure greater transparency, where the public ombudsmen decline to commence an investigation, or decide to abandon an existing investigation, there should be a statutory requirement to publish a “statement of reasons”, setting out clearly the reasons for their decision.**³³
- 1.88 **We provisionally propose that the Housing Ombudsman’s determinations should be recast as reports where they relate to social housing.**³⁴
- 1.89 **We provisionally propose that ombudsmen should routinely ask complainants whether they want to be anonymous.**³⁵
- 1.90 **We provisionally propose that the ombudsmen should not be able to identify a complainant or other individual without their consent.**³⁶

Findings and recommendations

- 1.91 In recent case law, and in academic literature, a distinction has been drawn between the findings and the recommendations of an ombudsman. Findings, here, includes those of fact and whether maladministration or injustice had occurred. Recommendations are the steps suggested to remedy the injustice and, where this is felt necessary, to prevent the same occurring in the future.
- 1.92 We think that the distinction between findings and recommendations is a useful one. Therefore, we provisionally propose that subsequent amendments to the statutes use these terms.
- 1.93 **Do consultees agree that the governing statutes should draw a distinction between findings and recommendations and use those terms?**³⁷
- 1.94 **We provisionally propose that there should be a statutory definition for findings. This should include findings of fact and whether there was maladministration and injustice.**³⁸

³¹ CP 196, para 6.82.

³² CP 196, para 6.83.

³³ CP 196, para 6.84.

³⁴ CP 196, para 6.85.

³⁵ CP 196, para 6.86.

³⁶ CP 196, para 6.86.

³⁷ CP 196, para 6.89.

³⁸ CP 196, para 6.90.

Status of findings and recommendations

- 1.95 The statutory regimes which underpin the actions of the ombudsmen are similar in one particular way. They rely on publicity, whether in Parliament, the National Assembly for Wales or local press, as the primary mechanism with which to encourage the implementation of reports. Within the bare statutory schemes, the final weapon available to any of the ombudsmen is not a binding order or a declaration that the public authority had acted in an illegal manner. Rather, it is discussion of their reports in the public sphere.
- 1.96 Recent case law follows this basic principle and effectively leaves courts outside any debate on the merits of recommendations of the Parliamentary Commissioner. In relation to findings, the Government should only reject the Parliamentary Commissioner's findings when it gives "cogent reasons" for doing so.³⁹
- 1.97 The position in relation to the Local Government Ombudsman is very different. Here the findings of the Local Government Ombudsman are effectively binding unless successfully challenged by way of judicial review.⁴⁰
- 1.98 The implementation of any recommendation would almost always have an effect on the distribution of public resources. The proper place for such discussions is not in a court or similar body, which would be the ultimate effect of giving them a binding quality. To make recommendations binding would change the nature of the relationship between ombudsmen and those they oversee, removing the proper discussion and the collaborative approach that the original drafters saw as part of the ombudsman process.
- 1.99 Concerning findings, however, we think that the position is slightly different. The finding of maladministration should be, primarily, the role of ombudsmen and a judgment that Parliament has entrusted to them through their governing statutes. This is different from the current situation. The mere necessity to find "cogent reasons" before being able to reject the findings of the ombudsmen does not really protect the core competence of the Parliamentary Commissioner.
- 1.100 The argument put forward in recent case law is that the consideration of findings is located better in terms of the relationship that the Parliamentary Commissioner has with Parliament.⁴¹ However, past practice shows that it is in fact quite likely that the Government will be able to reject the Parliamentary Commissioner's finding of maladministration and that Parliament will be unable to force the Government, which through its majority effectively controls the House of Commons, to accept the ombudsman's view.

³⁹ *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin), (2009) 159 NLJ 1514.

⁴⁰ See: *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114 and *R v Local Commissioner for Administration for the South, the West Midlands, Leicestershire, Lincolnshire and Cambridgeshire, ex parte Eastleigh Borough Council* [1988] QB 855.

⁴¹ See: *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114; and, *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin), (2009) 159 NLJ 1514.

- 1.101 We prefer the position in *ex parte Eastleigh*,⁴² which concerned the Local Government Ombudsman. This, essentially, protects the ombudsman in relation to findings unless illegality in an administrative law sense can be shown – which would include coming to a conclusion that no rational ombudsman could come to.
- 1.102 In respect of the Housing Ombudsman, Health Service Ombudsman and the Public Services Ombudsman for Wales, there is no governing case law. Therefore, we suggest that the situation in relation to these public services ombudsmen should also be clarified in statutory provisions.
- 1.103 **We provisionally conclude that the proper approach to recommendations is as part of the political process.**⁴³
- 1.104 **We provisionally propose that a public body should only be able to reject the findings in a report of a public services ombudsman following the successful judicial review of that report.**⁴⁴

Issuing general reports

- 1.105 We think that recent developments, such as publishing general principles and examples of best practice, ought to be encouraged. As we stated above, the public services ombudsmen are in a unique position as an independent redress mechanism with the capacity to produce such material. This is something that a court could not do, nor could individual tribunals.
- 1.106 It is anomalous that some public services ombudsmen's statutes confer a specific power to publish such documents, while others do not. It may be that a specific statutory provision is strictly unnecessary – publication might properly be seen as incidental to an ombudsman's core statutory responsibilities. Nevertheless, we think it would be clearer and more satisfactory if all the statutes had similar provisions.
- 1.107 **Do consultees agree that there should be a specific statutory power for each of the public services ombudsmen to publish guidance, principles of good administration and codes of practice?**⁴⁵

RELATIONSHIP WITH ELECTED BODIES

- 1.108 Here we consider the ability of a public services ombudsman to lay reports before an appropriate elected body. It is not our place to make provisional proposals to reform the internal rules for elected bodies.
- 1.109 Following recent changes to the Local Government Act 1974, the current situation is that the Housing Ombudsman is now the only one of our public services ombudsmen that does not have to lay its annual report before an elected body. Given that the work of the Housing Ombudsman is likely to be of interest to

⁴² *R v Local Commissioner for Administration for the South, the West Midlands, Leicestershire, Lincolnshire and Cambridgeshire, ex parte Eastleigh Borough Council* [1988] QB 855.

⁴³ CP 196, para 6.95.

⁴⁴ CP 196, para 6.107.

⁴⁵ CP 196, para 6.115.

Members in their constituency work – or in general – then we suggest that this is, at best, anomalous.

- 1.110 **We provisionally propose that a duty is placed on the Housing Ombudsman to lay its annual reports before Parliament.**⁴⁶
- 1.111 Even where there is an existing relationship with an elected body, there is no consistency between those public services ombudsmen. The Local Government Ombudsman’s relationship with Parliament is of a very different nature to that of the Parliamentary Commissioner and the Health Service Ombudsman.
- 1.112 We accept that there may be valid reasons for this, such as the fact that the Parliamentary Commissioner – in particular – can be seen as a tool of Parliament. However, publicity is at the core of the work of all of the public services ombudsmen. It is undeniable that having access to elected bodies is one of the ways of achieving this. Therefore, we think that the position of the Local Government Ombudsman and the Housing Ombudsman should be strengthened, so as to give them similar access to this valuable resource as enjoyed by the other public services ombudsmen.
- 1.113 **We provisionally propose that the governing statutes for the Local Government Ombudsman and the Housing Ombudsman be amended to allow them to lay the full range of their reports resulting from investigations before Parliament, in a similar manner to the Parliamentary Commissioner or the Health Service Ombudsman.**⁴⁷

⁴⁶ CP 196, para 7.33.

⁴⁷ CP 196, para 7.36.

HOW TO RESPOND

The consultation paper may be found on our website at:

www.lawcom.gov.uk/ombudsmen.htm

The Law Commission would be grateful for comments on our provisional proposals by 3 December 2010.

Comments should be sent either –

By email to: ombudsmen@lawcommission.gsi.gov.uk

or

By post to: Keith Vincent
Law Commission
Steel House
11 Tothill Street
London SW1H 9LJ
Tel: 020 3334 0262/ Fax: 020 3334 0201

If you send comments by post, it would be helpful if you could also send them electronically.

We will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and we may attribute comments and include a list of all respondents' names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.