



**Law
Commission**
Reforming the law

Public Services Ombudsmen Summary

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SUMMARY

PUBLIC SERVICES OMBUDSMEN

INTRODUCTION

- 1.1 This is a summary of our report, *Public Services Ombudsmen*, published on 14 July 2011. The report develops provisional proposals contained in our consultation paper, published on 2 September 2010. It is accompanied by a full analysis of consultation responses and an impact assessment. All of these documents can be found on our website, at www.lawcom.gov.uk.
- 1.2 The public services ombudsmen provide a vital redress mechanism for aggrieved citizens; they are free for complainants, confidential and swift. The report deals with the five public services ombudsmen operating in England and Wales:
- (1) The Parliamentary Commissioner;
 - (2) The Local Government Ombudsman;
 - (3) The Health Service Ombudsman;
 - (4) The Public Services Ombudsman for Wales; and
 - (5) The Housing Ombudsman.

The posts of Parliamentary Commissioner and Health Service Ombudsman have always been held by the same person.

- 1.3 Our overarching aim is to recommend modernisation of the statutes for these ombudsmen: clarifying them where required; reforming them where we think this would facilitate the work of the ombudsmen; increasing transparency and accountability where necessary.
- 1.4 Consultation ran from 2 September 2010 until 3 December 2010. During that period we discussed our proposals with the public services ombudsmen, officials, academics, interest groups and lawyers. We received fifty-seven formal responses to our consultation paper.
- 1.5 The following is a summary of the main recommendations in the report.

WIDER REVIEW OF THE PUBLIC SERVICES OMBUDSMEN (PART 2)

- 1.6 Our project was necessarily limited. First, it only concerned the ombudsmen listed above. Secondly, we could not consider fundamental institutional design, so we did not look at the creation of new ombudsmen or the amalgamation of the existing ombudsmen. Finally, we did not consider the subject matter of the ombudsmen's work, or the definition of "maladministration".

- 1.7 A recurrent theme on consultation was the need for a wider stock-taking. The ombudsmen have developed from the original enactment for the Parliamentary Commissioner in 1967 in such a way that there is no single ombudsmen model, even where different ombudsmen are examining what are essentially the same administrative process, for instance social housing in England and social housing in Wales.
- 1.8 More importantly, possibly, the relationship between the ombudsmen and other mechanisms for administrative justice remain founded (at least formally) in the thinking of the late 1960s. Since then the ombudsmen have developed to become a mature institution for administrative justice. At the same time, administrative law has developed enormously over the same period.
- 1.9 Despite these developments, there has never been a general review of the role of the public services ombudsmen and their relationship with other institutions for administrative justice, such as judicial review or tribunals. We recommend that Government commission such a review.

ACCESS TO THE OMBUDSMEN (PART 3)

- 1.10 It is important that individual citizens should be able to avail themselves of the public services ombudsmen easily. In order to further this we have made four recommendations to increase access to the ombudsmen or clarify the existing legal position.

Written requirements

- 1.11 Complaints to two of the public services ombudsmen, the Parliamentary Commissioner and the Health Service Ombudsman, must, as a matter of law, be in writing. The statutes of two of the remaining ombudsmen, the Local Government Ombudsman and the Public Services Ombudsman for Wales, show a legal preference for a complaint to be made in writing, with a discretion available to the ombudsmen to dispense with that requirement. There are no statutory requirements as to the form of complaint for the Housing Ombudsman, as yet.
- 1.12 We think that it is inappropriate in the modern world for it to be a requirement that a complaint be made in writing. It creates a barrier to certain citizens and does not allow the ombudsmen to react appropriately to technological developments.
- 1.13 Initially, we thought that the appropriate reform would be to create discretion for all of the public services ombudsmen to dispense with requirements for writing. During consultation, we were persuaded otherwise.
- 1.14 We recommend the repeal of all requirements for complaints to be in writing in the statutes governing the public services ombudsmen. This would not prevent the public services ombudsmen publishing guidance advising citizens how best to make a complaint

Statutory bars

- 1.15 By “statutory bars” we mean provisions that the ombudsmen should not accept a complaint if the complainant has had, or could have, recourse to the courts, although there is a discretion to accept the complaint if it is reasonable to do so. Such provisions exist in the governing statutes of all the public services ombudsmen, except the Housing Ombudsman.
- 1.16 The statutory bars were a product of 1960s thinking, designed to preserve the supremacy of courts over strictly legal matters and to ensure that ombudsmen dealt only with what could be termed administrative complaints.
- 1.17 However, since then, the jurisdiction of the ombudsmen has expanded and the remit of judicial review has developed. There is now considerable overlap between the work of the ombudsmen and judicial review. The effect of the statutory bars is that where there is an overlap, so a court or an ombudsman could deal with the matter, there is a preference in favour of the court.
- 1.18 Such a preference removes choice from citizens. When opting for an administrative redress mechanism, citizens should be free to choose that which is most appropriate for their complaint. We, therefore, recommend the repeal of the statutory bars.

Stay provisions

- 1.19 Sometimes, a citizen may make an application for judicial review where there was an arguable administrative illegality, but the claim, considered in the round, was more about maladministration. In such circumstances, we suggested it would be useful for the Administrative Court to have a power to stay the judicial review proceedings to allow the matter to be considered by the ombudsman. If, after the ombudsman had considered the matter, the applicant still wanted to pursue an application in the Administrative Court, he or she could do so.
- 1.20 After consultation, we are still of the opinion that such a mechanism would be useful. We, therefore, recommend the creation of a stay provision to allow appropriate cases to go to a public services ombudsman.

MP filter

- 1.21 A complaint to the Parliamentary Commissioner has to be made first to a Member of Parliament, who (at their discretion) may forward the complaint to the Parliamentary Commissioner. There is no direct access to the Parliamentary Commissioner.
- 1.22 The MP filter is an unnecessary bar on access; it leads to complaints being lost by the Parliamentary Commissioner and reduces the sense of a direct link between the ombudsman and the citizens. It should, therefore, be possible for citizens to make direct complaints to the Parliamentary Commissioner. However, the relationship between Members of Parliament and the Parliamentary Commissioner is important.
- 1.23 To reflect both principles, we recommend the creation of a “dual track” system, whereby an individual can make a complaint either through a Member of Parliament or direct to the Parliamentary Commissioner.

THE PUBLIC SERVICES OMBUDSMAN PROCESS (PART 4)

- 1.24 The public services ombudsmen have a distinctive process, very different to that of a court or tribunal. A complaint, once accepted by the ombudsman, is handled in confidence.
- 1.25 This is seen as vital to the proper functioning of the process, and the ombudsmen have very limited powers for releasing details of ongoing investigations during the conduct of that investigation. The effect of the current legal regime is that they have an absolute exemption from the Freedom of Information Act 2000, during the course of an investigation.
- 1.26 We do not want to disturb that basic approach. However, after considerable discussion during consultation, we recommend two minor reforms to allow the ombudsmen greater flexibility in the conduct of their work.
- 1.27 We recommend that the ombudsmen should be able to release information about complaints before them where they feel it necessary to elicit complaints from other citizens similarly affected and where the release of information would facilitate the investigation of systemic service failure by public bodies.

Reference on a point of law

- 1.28 Finally in relation to process, we recommend the creation of a mechanism by which the public service ombudsmen can ask a question on a point of law of the Administrative Court. There are two situations where such a mechanism could be of use. First, there may be situations where, at present, the ombudsmen do not proceed owing to a technical legal question which they do not feel equipped to address, or such a question makes it harder to complete an investigation. Second, there may be complaints that come to them where the ombudsmen are unsure of their jurisdiction. In both cases the ability to ask a question of the Administrative Court may allow the ombudsmen to dispose of the complaint, rather than the complainant having instead to pursue a court-based action.

RESOLUTION, REPORTING AND SHARING EXPERIENCE (PART 5)

- 1.29 Flexibility in output is vitally important to the ombudsmen: sometimes a full investigation leading to a report needs to be undertaken, sometime alternative means of dispute resolution are more appropriate. Moreover, the ombudsmen's role goes much further than just resolving individual complaints made to them; the public services ombudsmen are ideally placed to share experience and good practice with public bodies.

Alternative dispute resolution

- 1.30 All of the public services ombudsmen have processes whereby they dispose of complaints by means other than investigations. This allows for simple complaints to be resolved in the most cost efficient and least intrusive manner. Unfortunately, the statutory provisions allowing them to do this vary in their clarity.
- 1.31 We, therefore, recommend that all of the public services ombudsmen have specific and clear powers allowing them to dispose of complaints by whatever means of alternative dispute resolution they see as appropriate.

Reporting

- 1.32 During an investigation the ombudsmen process is essentially conducted in private and the ombudsmen have very limited powers to disclose information to others. We do not propose change to the private nature of the ombudsmen process.
- 1.33 However, there should be an appropriate level of transparency in their work. Following consultation, we think that the proper way to address this is by focusing on the production and dissemination of reports and statements of reasons by the ombudsmen.
- 1.34 The statutory approaches to reporting by the ombudsmen are varied. The practice of the ombudsmen, therefore, in reporting and the dissemination of reports also differs considerably. Much of this is sensible. There is, for instance, no reason why reports issued by different ombudsmen should use the same terminology. However, in other ways, we think that there is need for reform to enhance transparency.
- 1.35 Some of our detailed recommendations do not require legislative reform but merely a change of policy. We recommend that the ombudsmen publish the criteria by which they allocate complaints made to them between different internal procedures, for instance whether a complaint should be seen as “fast track” or not. We also recommend that all the ombudsmen develop publication strategies that move them towards publishing all of their reports and statements of reasons, if they do not already do so.
- 1.36 One of our aims is to ensure that best practice is enshrined in law. Therefore, we recommend that the identity of the complainant should not be released unless their permission has been given. We also recommend that the identity of other individuals should not normally be released without permission, unless the ombudsman has good reason to do so.
- 1.37 There are a number of specific instances where the current regime restricts unnecessarily the ombudsmen’s work. We recommend that the Parliamentary Commissioner and the Health Service Ombudsman be given powers allowing them to publish all of their reports and statements of reasons. We also recommend that all of the ombudsmen should have the power to distribute copies of their reports and statements of reasons to any person as they see fit.

Findings and recommendations

- 1.38 The terms *findings* and *recommendations* did not appear in the original statutes for the ombudsmen. However, over time, the practice has developed whereby the ombudsmen make *findings* of fact, and as to the existence of maladministration causing injustice to individuals, and then *recommend* action that the public body should take to remedy the injustice. This is not the practice for the Housing Ombudsman, which operates in a different way.
- 1.39 We think that the status of findings and recommendations should be codified. We see recommendations as essentially part of the political process, especially as compliance with a recommendation may well require the reallocation of significant amounts of public funds. This is currently the accepted position; we recommend that this should be enshrined in law.

- 1.40 Findings, on the other hand, are properly the province of the ombudsmen. Currently there is a difference between the status of the findings of the Parliamentary Commissioner, whose findings can be rejected if the public body has “cogent reasons” to do so, and the Local Government Ombudsman, where the findings need to be challenged by way of judicial review. We prefer the latter. We, therefore, recommend that this approach be enshrined in statute for all of the public services ombudsmen, except the Housing Ombudsman.

Powers to issue general reports and guidance

- 1.41 Currently, all of the public services ombudsmen issue general reports and guidance. However, the statutory provisions allowing them to do this are, in some cases, unclear.
- 1.42 In line with our general approach, we recommend that there should be specific powers allowing all of the public services ombudsmen to issue general reports and guidance.

Powers to lay reports before Parliament

- 1.43 The Parliamentary Commissioner and the Health Service Ombudsman presently have the power to lay selected reports before Parliament, where they feel this is necessary to highlight the importance of a matter and any continuing injustice suffered by individuals concerned. This option is not available to the other public services ombudsmen.
- 1.44 All of the public services ombudsmen deal with matters of potentially high importance to members of the public. In strong cases, we can see the benefits in the other ombudsmen having similar powers to lay reports. In the case of the Public Services Ombudsman for Wales, this would be before the National Assembly for Wales rather than the UK Parliament.

INDEPENDENCE AND ACCOUNTABILITY (PART 6)

- 1.45 In line with current academic and Government thinking, we wish to strengthen the independence and accountability of the public services ombudsmen.

Appointment of the Parliamentary Commissioner by Parliament

- 1.46 We see the relationship between the Parliamentary Commissioner and Parliament as being of particular importance to both the ombudsman and Parliament.
- 1.47 Until recently, the practice was that the Prime Minister nominated to the Queen a candidate for Parliamentary Commissioner. Given that the purpose of the Parliamentary Commissioner is to investigate the working of Government, we think that the independence of the ombudsman from the Government should be emphasised. Therefore, we recommend that in future, Parliament should recommend a candidate to the Queen for the post of Parliamentary Commissioner.

Relationship with Select Committees

- 1.48 Both the Parliamentary Commissioner and the Health Service Ombudsman benefit from their relationship with the Select Committee on Public Administration of the House of Commons. Such a relationship increases the level of publicity afforded to the work of those ombudsmen, and provides an opportunity to hold them to account for their work. We, therefore, propose that this sort of relationship should be extended to the other public services ombudsmen.
- 1.49 We recommend that Parliament and the National Assembly for Wales should consider establishing similar formal relationships with select committees for the other public services ombudsmen.

Annual reports of the Housing Ombudsman

- 1.50 Finally, all of the public services ombudsmen, except the Housing Ombudsman, have to lay their annual reports before Parliament or, in the case of the Public Services Ombudsman for Wales, before the National Assembly. We think that laying annual reports before a representative body increases both the transparency and accountability of the ombudsmen. Therefore, we recommend that the Housing Ombudsman should be required to lay its annual reports before Parliament.