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*Dear Ms Sutton*

**RESPONSE TO THE GOVERNMENT EQUALITIES OFFICE CONSULTATION  
PAPER: 'BUILDING A FAIRER BRITAIN: REFORM OF THE EQUALITY AND  
HUMAN RIGHTS COMMISSION'**

**Introduction**

I am responding in my capacity as UK Parliamentary Ombudsman and Health Service Ombudsman for England.

The function of Parliamentary Ombudsman was created by the Parliamentary Commissioner Act 1967. I have held that office, together with the separate role of Health Service Ombudsman for England, since 2002.

I do not propose to respond in detail or to answer the specific consultation questions summarised at Annex A of the consultation paper: the nature of the work conducted by my office does not provide an evidential base on which I could found an informed judgment on most of the detailed matters raised.

Instead I wish to comment on one aspect of the EHRC's remit and its relationship with the functions of my own office. I do so with particular regard to the Government's stated ambition, highlighted in the Ministerial Foreword to the consultation paper, of 'restoring the rights of individuals in the face of encroaching state power'.

For that reason, I am setting out my views in this letter rather than in the pro-forma provided. I trust that you will find this approach helpful.

## Role of the Ombudsman

It is the function of my Office to assist Parliament in holding to account central government departments and other central public authorities, including the National Health Service. I discharge that function by investigating complaints of maladministration brought by individual citizens. There is no statutory definition of 'maladministration' but in lay terms we describe it as public bodies not acting properly or fairly, or providing a poor service. The focus of my work, and that of my predecessors since 1967, has been very much that of promoting and protecting the rights of individuals in the face of encroaching state power as exercised by central government in Whitehall and Westminster.

To that extent my Office is the national ombudsman institution for the UK, with a remit that complements that of other domestic public sector ombudsmen, notably the Local Government Ombudsman for England, the Housing Ombudsman, the Scottish Public Services Ombudsman, the Public Services Ombudsman for Wales, and the Northern Ireland Ombudsman.

## Maladministration and human rights

Unlike some national ombudsman institutions in other parts of Europe and elsewhere, my remit does not extend explicitly to the investigation of alleged violations of human rights. It is in any event not my role to adjudicate on legal issues. The question of whether or not the behaviour of a public authority contravenes the Human Rights Act or other human rights instrument is not therefore one with which I can engage directly.

However, my office has developed, and published in 2009, my *Principles of Good Administration* which set out a clear framework within which public bodies should seek to work and clarify the expectations against which the Ombudsman will judge performance. These six principles and in particular those of:

- Getting it right
- Being customer focused
- Being open and accountable and
- Acting fairly and proportionately

provide a practical application of human rights principles based on the concept of fairness.

I have published significant reports in the last three years concerning the application of human rights within the National Health Service (*Six Lives* in March 2009 and *Care and Compassion* in February 2011) and my office continues to deal on a daily basis with complaints related to discrimination and human rights issues in the work of public bodies. My work thus provides a firm evidence base concerning the understanding and application of

human rights by these bodies and opportunities to influence them for the future.

Moreover, as the work of the Ministry of Justice with regulators, inspectorates and ombudsmen over several years testifies, there is a potentially close alliance between the work of public sector ombudsmen and other agencies concerned with the protection and promotion of human rights, including in particular the work of a national human rights institution, such as the EHRC. With that in mind my office has been represented since its inception at the regular forum for regulators, inspectorates and ombudsmen convened by the Ministry of Justice and the EHRC.

### **The Council of Europe's position on ombudsmen and human rights**

In recognition of that potential alliance, the Council of Europe's Human Rights Commissioner, Mr Thomas Hammarberg, proposed at an international roundtable of national ombudsmen institutions and national human rights institutions in Athens in April 2007 (i.e. before the EHRC came into existence in October that year) that such institutions should henceforth see themselves, and be treated by the Council of Europe, as comprising the '*national human rights structures*' of their respective States.

To that end, Mr Hammarberg renewed the initiatives being taken by his Office to encourage mutual communication and co-operation, and to cultivate a sense of joint endeavour between ombudsmen and human rights institutions in the task of promoting and protecting human rights at a domestic level.

This initiative was in large measure a response to the Report of Wise Persons published in November 2006 and commissioned by the Council of Europe to address the question of how human rights standards could be embedded more effectively at domestic level. The Report identified, for example, the need for better education about human rights at domestic level, for the use of mediation and conciliation techniques as an alternative to court processes, and for the better sharing of intelligence about domestic compliance with Strasbourg court rulings as a means of future prevention. Lord Woolf was a key member of the Group of Wise Persons appointed by the Council of Europe.

### **Lord Woolf's judgment in *Anufrijeva***

Lord Woolf had in fact already lent judicial weight to the view that ombudsmen have a potentially distinctive human rights role to play. In the leading judgment in the case of *Anufrijeva* heard by the Court of Appeal in 2003 (*Anufrijeva v Southwark LBC* ([2003] EWCA CIV 1406; [2004] Q.B. 1124), Lord Woolf recognised that 'maladministration' might indeed constitute an infringement of human rights (in the instant case, Article 8 of

the ECHR), depending upon the 'extent of the culpability of the failure to act and...the severity of the consequences' (paragraph 48). Moreover, any remedial proceedings should be 'proportionate' to the issues involved.

In the context of gauging proportionality, Lord Woolf offered a reminder that both the Parliamentary and Local Government Ombudsmen had been designed to deal 'economically and expeditiously' with claims for compensation arising from maladministration (paragraph 78). For that reason, it would be incumbent upon any applicant for judicial review to explain why an internal complaint procedure or ombudsman process was not a more 'appropriate' avenue of redress before obtaining permission for judicial review proceedings (paragraph 78).

### **The Ombudsman and the EHRC**

In recognition of the position taken by the Council of Europe and domestically by the Court of Appeal and Lord Woolf in particular, I approached the EHRC's then CEO, Ms Nicola Brewer, shortly after the EHRC opened in autumn 2007. I detected then, and in occasional subsequent communication with Ms Brewer, the willingness of the EHRC in principle to work with my office as an effective partner in the task of protecting and promoting human rights. Given that positive start, I am sorry that it has not been possible to establish more concrete structures of co-operation, including, for example, a formal memorandum of understanding between my office and the EHRC, either during Ms Brewer's tenure of office or that of her successors to date.


### **Concluding observations**

It is not my purpose to propose any changes to the EHRC's human rights remit as set out in Section 9 of the Equality Act 2006. It is, however, my conclusion from the experience outlined above that there remains considerable scope for a more structured alliance between the EHRC and my own Office, and no doubt other regulators, ombudsmen and inspectorates. The potential of ombudsmen identified by Lord Woolf and the role assigned to national ombudsman institutions by the Council of Europe make especially critical, I suggest, the value of recognising the EHRC as part of a wider network of 'human rights structures', and not just as a lone 'UN-accredited National Human Rights Institution'.

This observation goes, therefore, to Proposal Three in the consultation paper and to the issue of what further changes might help the EHRC fulfil its human rights remit. The changes that invite consideration in this respect are not for the most part jurisdictional or structural but more to do with the awareness of the EHRC of the potential for a wider human rights alliance and an operational approach that might bring such an alliance to life.

In the next phase of the EHRC's development it would do well to identify its institutional allies and work in partnership with them to achieve the ambition of discharging its human rights remit and of embedding a human rights culture within the domestic framework of public administration. It follows from what I have said that the office of UK Parliamentary Ombudsman should find a place in the front rank of that alliance.

I trust therefore that when my own successor takes up office later this year, he or she can look forward to a fruitful relationship with the EHRC in a renewed context of co-operation and partnership. In the meantime, my staff and I would of course be very happy to discuss further with you any of the matters referred to in this response.

*Yours sincerely*  


Ann Abraham  
**UK Parliamentary Ombudsman and Health Service Ombudsman for  
England**