

Phil Hodgson
Law Commission
Steel House
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12 October 2011

Dear Mr Hodgson

**JOINT RESPONSE OF THE PUBLIC SECTOR OMBUDSMEN TO THE LAW
COMMISSION'S REPORT (LAW COM. NO. 329): *PUBLIC SERVICES
OMBUDSMEN***

1. Introduction

1.1 The Law Commission's report develops the proposals contained in its consultation paper, published on 2 September 2010.

1.2 We responded at some length to those proposals and had the opportunity to discuss them with the Law Commission.

1.3 We are pleased to note that nearly all our suggestions have been incorporated in the final report.

2. Wider review of the public services ombudsmen

2.1 We agree with the Law Commission and remain of the view that a wider review is necessary.

2.2 The Law Commission's project was necessarily limited. It was concerned with just the signatories to this statement listed below; it did not consider fundamental institutional design, including the creation of new ombudsmen or the amalgamation of the existing ombudsmen; and it did not consider the subject-matter of our work or the definition of 'maladministration'.



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2.3 The publication in July 2011 of the Cabinet Office White Paper on *Open Public Services*, including its suggestion of a new role for public services ombudsmen, makes that need more acute. It asks whether the right of choice for the recipients of public services could be brought within the definition of ‘maladministration’; it asks about the coverage of all services by ombudsmen and the possible need to fill any gaps; and it asks questions about access, process and ‘enforcement’ powers, some of which go to the heart of the established role of ombudsmen.

2.4 These questions can only be answered properly if there is a comprehensive review of the role of ombudsmen within the administrative justice system as a whole. Without such prior review, it is likely that any recommended changes will be fragmentary and short-lived.

3. Access to the ombudsmen

3.1 We welcome the proposals to increase access or clarify the existing legal position.

3.2 The removal of any requirement for complaints to be in writing, the repeal of the statutory bars, the creation of a stay provision and the adoption of a ‘dual track’ system of referral to the Parliamentary Ombudsman would be positive measures.

3.3 It is already common practice to publish, and update regularly, guidance as to how complaints can be made. We nevertheless accept the force of the recommendation not least to ensure that we regularly take account of technological changes that may open up new media of communication.

3.4 We also agree that it would be helpful for the public if we publish guidance detailing where it is appropriate to make a complaint to us and where it would be more appropriate to make use of a court or other mechanism for administrative justice.

3.5 We also collectively share the concern of the Housing Ombudsman, quoted in full by the Law Commission (at paragraph 3.99), about the provision in the Localism Bill that would create a ‘democratic filter’ of complaints to him about social housing. As the Housing Ombudsman said in commenting favourably on the proposed ‘dual track’ approach to access for the Parliamentary Ombudsman, ‘If this model were applied to complaints from social tenants...it would encourage local settlement of disputes, allow direct access to the ombudsman, and empower citizens through greater choice of options’.

4. The public services ombudsman process

4.1 We welcome the Law Commission’s acknowledgement that our distinctive process, including its confidentiality, is vital and should not be disturbed.

4.2 The two minor reforms enabling us to release information about complaints before us where we think 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 are acceptable. We note, and welcome, the Law Commission's careful regard to the implications of these changes for our position in relation to the exemption under section 44 (1) (a) of the Freedom of Information Act 2000.

4.3 The creation of a mechanism by which we can ask a question on a point of law of the Administrative Court, although not likely to be used very often, is a potentially useful addition to our powers, especially in respect of jurisdictional issues. We welcome the removal of some of the detailed points of process contained in the original proposal, such as the requirement to instruct counsel before making a reference. We accept, however, the need to submit to the permission stage.

5. Resolution, reporting and sharing experience

5.1 We agree that our role goes beyond the resolution of individual complaints and that we are well placed to share experience and good practice.

5.2 We would welcome clarification of our powers to dispose of complaints by whatever means we see as appropriate. We agree that section 3 of the Public Services Ombudsman (Wales) Act 2005 offers a suitable model in this regard.

5.3 We are pleased to see that the Law Commission does not propose any change to the 'private' nature of the ombudsman process, in the sense that it is not suggesting that investigations or hearings should be held in public: this is of fundamental importance.

5.4 We also note with approval that the Law Commission has considerably altered its approach to reporting from the provisional proposals in its consultation paper. (We acknowledge incidentally that there are good reasons for not applying to the Housing Ombudsman the proposals relating to reporting on individual complaints.)

5.5 We do, however, agree that there should be an appropriate level of transparency so that the public can gain a better understanding of our work.

5.6 We agree that the overarching principle is that we should be given discretion to communicate reports or statements of reasons directly to any individual or body, where we think it beneficial for that individual or body to receive the report or statement of reasons. Where such powers to publish all reports and statements of reasons do not already exist or are not explicit, or where there is no power to distribute copies of reports and statements of reasons as we see fit, such powers should be granted.

5.7 We therefore accept that, if the necessary powers to publish are granted in due course, we should adopt a publication policy whereby digests of complaints disposed of by ‘alternative dispute resolution’ (e.g. local resolution or mediation) are published, albeit with appropriate protection of the identities of the complainant, other individuals and the public body complained about.

5.8 We accept also the recommendation that we should publish our internal processes; and we agree that, if the necessary powers to publish are granted in due course, we should develop publication strategies (or, at least, produce policy statements) with a view over time to publishing all of our reports and statements of reasons for not investigating, unless there is good reason not to do so. In such circumstances, the appropriate protection of the complainant, other individuals and the public body complained of should also be ensured.

5.9 In particular, we agree that we should protect the identity of the complainant, or of other individuals, unless we have good reason not to do so.

5.10 Except in respect of the Housing Ombudsman, we accept that the status of our findings and recommendations should be codified, with the place of recommendations within the political process being enshrined in law and the rejection of a finding by a public body being possible only after successful challenge on judicial review.

5.11 We note the Law Commission’s comment on the expansion of the Housing Ombudsman’s role in clause 158 (now clause 167) of the Localism Bill and its implications for the status of future recommendations to local authorities about social housing. This is not a development that fits with the Law Commission’s preferred approach.

5.12 The issue of general reports, guidance or other documents is an important part of our role. We agree with the view that there is an implied general power to that effect. Nevertheless, for the avoidance of doubt, the creation of specific powers to issue such items would be welcome.

5.13 The power to lay individual reports before our respective legislatures in some cases is a way of highlighting their importance. The extension of such power to us all, insofar as it does not already exist, would be welcome.

6. Independence and accountability

6.1 We agree that the relationship between the Parliamentary Ombudsman and Parliament is of particular importance. The pivotal institution in appointing the Parliamentary Ombudsman should be Parliament. The proposal to increase the part played by Parliament in the process of appointment is therefore welcome and, in fact, reflects the practice adopted in recent months following Ann Abraham’s announcement of her imminent retirement.

6.2 The convention is that the same person holds office as Health Service Ombudsman as Parliamentary Ombudsman. The option for the government to recommend to the Queen for appointment as Health Service Ombudsman the same person recommended by Parliament for the role of Parliamentary Ombudsman makes possible the maintenance of that convention.

6.3 The suggestion that Parliament and the National Assembly for Wales should consider establishing formal relationships with select committees for those of us who do not already have them is a good one. We would encourage Parliament and the Welsh Assembly to take the further step of establishing such relationships once they have given the matter consideration.

6.4 We agree that laying annual reports before the legislature increases both our transparency and our accountability. Since the Housing Ombudsman is the only one of us not currently required to do so, we agree that this omission should be considered for rectification within the context of a wider review of the Housing Ombudsman's governance arrangements.

Yours sincerely



Ann Abraham
The Parliamentary and Health Service Ombudsman

Also on behalf of:

Anne Seex
The Local Government Ombudsman

Jane Martin
The Local Government Ombudsman & Acting Chair, Commission for Local Administration in England

Peter Tyndall
The Public Services Ombudsman for Wales

Mike Biles
The Independent Housing Ombudsman