

Call for Evidence: Human Rights Ombudsperson

23 June 2022

1. About the Parliamentary and Health Service Ombudsman

- 1.1. The Parliamentary and Health Service Ombudsman (PHSO) provides an independent and impartial complaint handling service for complaints that have not been resolved by the NHS in England and UK Government departments.
- 1.2. We look into complaints where someone believes there has been injustice or hardship because an organisation has not acted properly or has given a poor service and not put things right. We share findings from our casework to help Parliament scrutinise public services, and to help drive improvements in public services and complaint handling. We investigate complaints fairly and independently, and our service is free to use.
- 1.3. When we look into complaints about the NHS in England, we do so under powers granted by the Health Service Commissioner Act (HSCA) 1993, which allows a member of the public to bring a complaint to PHSO directly if they are not satisfied with the final response they receive from the organisation they are complaining about. When we look into complaints about Government departments and their agencies, we do so under powers granted by the Parliamentary Commissioner Act (PSC) 1967, which requires complaints to be referred by an MP.
- 1.4. In the context of our operations, and minded of human rights issues, the Committee will be aware that the term ‘Ombudsman’ while enshrined in UK legislation, is increasingly criticised as not being a gender-neutral term.¹ This is currently the subject of International Ombudsman Institute debates. Alternatives include Ombuds, Ombudsperson, Defender of Rights and Public Protector. This submission uses both the legal title ‘Ombudsman’, but also ‘Ombuds’.

2. Introduction

- 2.1. Thank you for the opportunity to respond to this call for evidence. We agree with the Committee’s view that more can be done to improve how human rights can be enforced without the need to take legal action. However, setting up another new Ombudsman scheme is not the most effective means to achieve this.
- 2.2. While neither of the Acts establishing our service specifically mandate the investigation of human rights abuses, human rights are an integral part of the relationship between citizen and state and are therefore necessarily

¹ <http://www.enohe.net/wp-content/uploads/2017/06/Being-an-ombudsman.pdf>

within our remit. We currently treat human rights failings as part of our consideration of maladministration. And in our new *Corporate Strategy 2022-2025* launched in April 2022, we have committed to taking a more active role in explicitly naming fundamental human rights breaches in public services.

- 2.3. It is already the case that many of our peers in the Ombudsman community consider human rights abuses to be a key part of their mandate. In *The Art of the Ombudsman: leadership through international crisis*,² a PHSO-led survey of 53 International Ombudsman Institute members, research showed that nearly 20 per cent consider human rights abuses to be the first or second greatest challenge they face in their work. It is clear therefore that although not all Ombudsman schemes are established with a specific human rights mandate, many consider this work inextricably linked to their purpose.
- 2.4. The guiding principles here are set out in the Venice Commission's *Principles on the Protection and Promotion of the Ombudsman Institution (the Venice Principles, 2019)*, a Council of Europe directive which makes clear that a core function of the Ombudsman institution is to uphold human rights.³ The Principles do not consider that this is necessarily the function of a separate human rights ombudsman.
- 2.5. The UK Government co-sponsored a United Nations General Assembly Resolution in December 2020 to endorse and adopt the Venice Principles.⁴

3. **Question One: Should there be a Human Rights Ombudsperson? If so, what powers and resources would the Ombudsperson need to address the challenges people face in enforcing their rights out of court?**

- 3.1. While we agree that access to justice on human rights issues could and should be improved, creating another new Ombuds institution is not the most effective way to achieve this.
- 3.2. The UK is at variance with OECD counterparts in having no integrated national Public Service Ombuds institution. This results from a failure by successive Governments to modernise arrangements established in 1967. This has been described as the UK being outdated and 'stuck in time'.⁵ Instead, a series of incremental changes, often following a public policy crisis, has led to the wide proliferation of territorial and functional Ombudsman schemes, making complaint resolution more complicated and arcane for many UK residents. Access to justice is now fragmented, confusing and overly complex, making it hard for people to know where to turn when they have been let down by public services. Introducing an additional Ombudsman to focus on human rights will further complicate and confuse the justice landscape in the UK for residents.

² https://www.ombudsman.org.uk/sites/default/files/Art_of_the_Ombudsman_WEB.pdf

³ [https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD\(2019\)005-e&lang=EN](https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD(2019)005-e&lang=EN)

⁴ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/373/10/PDF/N2037310.pdf?OpenElement>

⁵ Jim Martin quoted in Richard Kirkham and Chris Gill (Eds) *A Manifesto for Ombudsman Reform* Palgrave Macmillan, 2020, p.5.

- 3.3. We believe that the most appropriate way forward is often-promised and much-needed strategic Ombudsman reform legislation. This is a view consistently supported by the Public Administration and Constitutional Affairs Committee of the House of Commons.⁶ This would give a human rights mandate to a new national Public Service Ombuds. In the absence of such an initiative, better outcomes can be achieved by promoting human rights awareness and enhanced interventions among existing Ombudsman schemes. This is the settled view of most public service Ombuds practitioners across the United Kingdom and is why acting on flagrant human rights breaches is a part of our corporate strategy for 2022-25.
- 3.4. In the interim, Government should take opportunities to reduce the number of existing Ombudsman schemes and strengthen their remit to make access to justice less complicated for complainants. The focus should be on improving the current system by ensuring existing Ombudsman schemes address human rights effectively, rather than seeking to create an additional Ombudsman that would add further complexity, cost, and risk of duplication to an already fragmented system.
- 3.5. There is an urgent need for a new Public Service Ombudsman with an integrated jurisdiction over local public services in England and UK Government departments, including a role in investigating breaches of human rights by public bodies. This absence leaves England and the UK out of step with international benchmarks of good practice for Ombudsman institutions, as set out in the Venice Principles. However, the Government has made clear it has no intention to bring forward wholesale legislative reform of this nature during the current Parliamentary session.
- 3.6. A less satisfactory alternative is partial reform, which removes the barriers that people currently face in bringing complaints to PHSO, most importantly the ‘MP Filter’, which requires members of the public to refer their complaints via their MP rather than directly to PHSO.
- 3.7. The MP filter was introduced as a ‘temporary’ measure in 1967. It has been described by the Public Administration Select Committee as *“iniquitous...an anachronism which is at odds with the expectations of today’s citizens, obstructs access to their rights, and deters people from making complaints.”*⁷ It creates the unacceptable reality that some people’s ability to seek remedy for human rights violations is currently limited. This was certainly the case during the Windrush scandal. During Ombudsman investigations, we met a number of distressed complainants, who, having lost their citizenship rights, declined to approach their MP in fear that the MP held the same views as the Home Office on the administration of the ‘hostile environment’. As a result, far fewer complaints reached PHSO than should have been the case.

⁶ House of Commons Public Administration and Constitutional Affairs Committee, **Parliamentary and Health Service Ombudsman Scrutiny 2020-21**, First Report of Session 2022-3, HC 213, 20 May 2022

⁷ House of Commons Public Administration Select Committee (PASC), **Time for a People’s Ombudsman Service**, Fourteenth Report of Session 2013-14, HC 655, 28 April 2014, pp.3,21.

4. **Question Two: What powers would the Ombudsperson need to ensure they provide an effective remedy, as required by Article 13 of the European Convention on Human Rights, for individuals trying to enforce their rights?**
 - 4.1. By convention and law, Ombudsman schemes in the United Kingdom are granted powers to make recommendations which are non-binding. (The Pensions Ombudsman is an exception). While we rarely experience non-compliance with recommendations, the Committee may want to consider the extent to which non-binding recommendation powers are consistent with the intent of Article 13. However, the experience of the Public Protector in South Africa, who has binding powers under Constitutional rules, is that she has regularly failed to resist legal challenges to her decisions. This is not encouraging for a move towards binding powers.
 - 4.2. On the rare occasions where we experience significant non-compliance with recommendations, we are able to lay the case before Parliament for members to consider whether Parliamentary intervention is appropriate. However, one constitutional gap is that Select Committees, either in standing orders or by agreement at the start of each Parliamentary session, typically preclude themselves from considering the merits of individual cases. This rarely creates a challenge in practical terms. Prior to a case about the Environment Agency we laid in Parliament this year, the most recent instance was in 2014. However, it may be a relevant consideration for the Committee, as it means there are rare instances where people are not fully able to access an effective remedy through the Ombudsman.
5. **Question Three: How would the Human Rights Ombudsperson interact with existing mechanisms such as ombudspersons and Commissioners, including in the devolved nations?**
 - 5.1. In addition to our comments in response to question one, introducing a human rights Ombudsman would create a significant duplication of effort and resources in the Ombudsman community. This applies not only to duplicating casework and corporate functions resourcing, but also external facing activities, like the work we do with stakeholders to use the learning from complaints to drive improvement in public services.
 - 5.2. It would also exacerbate the overlap in Ombudsman jurisdictions. We regularly deal with situations where a complaint about a single incident requires coordination of multiple Ombudsman schemes to investigate various components. This is most common in continuing healthcare cases, where we have set up a joint working team with the Local Government and Social Care Ombudsman to manage cases in a coordinated way. Introducing an additional Ombudsman would complicate this interface even further.
 - 5.3. There is a related risk that complainants might “shop around” for an Ombudsman if there are not clear delineations in jurisdiction. They may also submit multiple claims to different Ombudsmen if they do not get the outcome they are first seeking. Consider for example a case where a complainant claims that some failure in their NHS medical treatment was linked to racial discrimination. That complainant could potentially bring

their complaint to PHSO or a hypothetical Human Rights Ombudsman, risking both duplication between Ombudsman schemes and confusion for complainants. This kind of jurisdictional overlap might also impact the ability of any single Ombudsman to identify systemic issues, as cases would be dispersed between various Ombudsman schemes.

6. **Question 4: How would the Human Rights Ombudsperson interact with other bodies tasked with upholding human rights, including the Equality and Human Rights Commission?**
 - 6.1. We have set out the key considerations regarding the interactions between PHSO and any Human Rights Ombuds in previous questions. We anticipate that, like PHSO, any Human Rights Ombudsman will need an engagement model with EHRC. Helpfully, the EHRC provides detailed advice for existing Ombuds on how to take a human rights based approach to their work. Many currently do this on both an individual case level and at a more systemic level. This advice will inform how PHSO develops a human rights focus in our casework to drive improvements in public services and raise accountability for human rights failures.
7. **Question 5: Are there other steps that should be taken alongside introducing a Human Rights Ombudsperson to ensure people can effectively enforce their rights out of court?**
 - 7.1. For reasons outlined above, a Human Rights Ombudsman is not the most effective approach to ensure people can enforce human rights. Instead, Government should look to, at a minimum, strengthen, but preferably reform, the current system of public service Ombuds for the UK. This should be focused to ensure that people who have experienced human rights breaches have better access to justice, via a modernised, integrated Public Service Ombudsman, in line with international standards of good practice as set out in the Venice Principles.
 - 7.2. Courts which are often inaccessible to people who have experienced human rights breaches, offer an inherently adversarial route to justice. Ombudsman schemes can provide a more restorative, less adversarial approach and one of the ways the PHSO and other Ombudsman schemes do this is through mediation, alongside more traditional investigation and adjudication approaches. Mediation can be a powerful tool in repairing the damaged relationship between complainants and organisations, and there is a strong trend within the Ombudsman community to offer this kind of approach.

Yours sincerely

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