

## DRAFT COPY

### Consultation response to the Law Commission's *Public Services Ombudsmen* paper

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#### General Overview

In general I commend the Law Commission's work on public sector redress.<sup>1</sup> I understand that the previous series of papers failed to secure reform and there were no doubt difficulties in the proposals put forward. However, to my mind it was the substantial obstacle of trying to reform an extremely complex and interlinking system of redress (with significant knock-on impacts for Tort law) which represented the main reason for the end result, rather than the merits of the proposal itself. I was also very impressed with the Law Commission's efforts to attempt to map an administrative justice system, albeit I do not think the analysis put forward was entirely successful in capturing the operation of the system.

Likewise, the efforts of the Law Commission to consider the role of the ombudsman in a constructive and positive way, as opposed to the more limited manner in which it has been often viewed by the legal community in the past, is a welcome development. The implicit recognition that the ombudsman is not merely an additional form of dispute resolution mechanism operating in areas where the law does not offer a remedy but a genuine (and often preferable) alternative where a legal argument is available, is an important development within the modern administrative justice system.

My only qualification with the Law Commission's work on the ombudsman community is that it is incomplete and that a more thorough overarching and broad-ranging review of the entire complaints system is needed at this time, one that is more akin to the review work that has recently occurred in Scotland<sup>2</sup> and indeed was undertaken in the Leggatt Review of the Tribunals system.<sup>3</sup> In a forthcoming article in *Public Law*, in partnership with Trevor Buck and Brian Thompson, I make this argument in more depth. In a forthcoming book, also in

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<sup>1</sup> Eg *Administrative Redress: Public Bodies and the Citizen* (Law Com CP 187, 2008); *Administrative Redress: Public Bodies and the Citizen* (Law Com 322, 2010), para.5.90

<sup>2</sup> E.g. L. Crerar, *Report of the Independent Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland* (Edinburgh: Scottish Government, 2007); D. Sinclair, *Report To Ministers* (Edinburgh: Fit For Purpose Complaints System Action Group, 2008) at <http://www.scotland.gov.uk/Topics/Government/PublicServiceReform/IndependentReviewofReg/ActionGroups/ReporttoMinisters> (last visited 30 June 2010).

<sup>3</sup> Eg Leggatt, Sir Andrew. 2001. *Tribunals for Users – One System, One Service; Transforming Public Services: Complaints, Redress and Tribunals* Cm 6243 (Department for Constitutional Affairs, 2004).

partnership with Trevor Buck and Brian Thompson,<sup>4</sup> we lay out a series of recommendations that such an in-depth review may want to consider – some of which cross-over with the work of the Law Commission in its Consultation Paper, but many others of which go much further.

This is not a criticism of the Law Commission's work on the ombudsmen, more a comment that what is needed in the administrative justice system is a permanent holistic oversight of the system as a whole, supported by the occasional targeted in-depth review. In this respect, the ideal body to maintain a proper oversight of the system is the Administrative Justice and Tribunals Council, which is also the best placed body to commission relevant in-depth reviews. Furthermore, one of the most pressing issues in the administrative justice system is the increasing complexity, and arguably incoherence, of the complaints branch of that system, and the knock-on potential for user bewilderment in accessing that system and the possibility that, as a whole, the system delivers administrative justice imperfectly and inefficiently. This aspect of the administrative justice system is not picked up in the Law Commission's work, although commendably it does address another key issue – that is the crossover between the work of the ombudsmen and the courts.

My conclusion, therefore, is that the Law Commission is performing an extremely worthy function in plugging a hole in the system of oversight and review of the administrative justice system. With the extremely unfortunate decision to abolish the Administrative Justice and Tribunals Council this role will need to be recommenced in the future. It is a less than ideal situation, however, as the Law Commission's input into this area of law in the future will be intermittent at best and necessarily restricted to the remit and resources of the Law Commission itself.

## **Specific responses to the Consultation paper**

### *8.2 Appointment of Ombudsman*

In principle I agree that the nomination to the Queen for the post of ombudsman should come from Parliament rather than the Executive, given that it is the Executive that the Ombudsman is overseeing and it is independence from the Executive that needs to be secured in the appointments process. In this respect I disagree slightly with Para 3.30 where it is suggested that the appointment of the Health Service Ombudsman could be treated differently to the PO (although of course at present this is a moot point as the HSO has always also been the PO). I do agree though that there is no constitutional objection to central government (ie the PM) recommending the appointment of the LGO, as the LGO will not review decisions of central government. It may, however, be a neater solution for all public sector ombudsmen to be appointed through the same process.

The more important issue, however, is the process by which the appointments are considered – this should also be provided for in legislation. Here I would have concerns

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<sup>4</sup> Buck, T., Kirkham, R. and Thompson, B., *The Ombudsman Enterprise and Administrative Justice* (Ashgate, Jan 2011)

about leaving Parliament to manage the process as it saw fit, given the inherent potential for Parliament itself to enter into political horse-trading over appointments. The appointments process, therefore, is exactly the sort of issue that should be overseen by an autonomous body (autonomous from both Parliament and the Executive)<sup>5</sup> which could be responsible for other sponsoring issues, as well as appointments (this body could be responsible for sponsoring a series of key unelected institutions, not just the ombudsman). Such a body could be provided for in legislation. On appointments, recommendations could be made to a relevant Parliamentary select committee, in this case the Public Administration Select Committee.

I suspect this idea goes well beyond the brief of this present Consultation Paper and in an era when the Coalition Government seeks to cut unelected public bodies rather than promote them, this proposal would probably not be well received. Thus an alternative model of good practice is that adopted by the Speaker's Committee recently in its appointment of the Chair of the Electoral Commission.<sup>6</sup> Under this model the Select Committee might be charged with setting up an ad hoc panel made up of predominantly non-politicians which would be responsible for making an appointment recommendation to the Select Committee. Much the same approach appears to have been adopted in 2008 for the appointment of the Public Services Ombudsman for Wales. The difficulty, however, that the Law Commission may want to consider is that there is no guarantee that Parliament will adopt this model of good practice. Although the legal framework was different, when the Scottish Parliament recruited the Scottish Public Services Ombudsman in 2009 it appeared to do so after a selection panel made up entirely of MSPs, albeit that the process was overseen by an independent assessor. I would be concerned should this become the norm for selection of the Parliamentary Ombudsman.

Whatever selection process adopted it should, in my view, be completed before any consideration of a pre-appointment hearing in Parliament. Given that I would argue that all ombudsmen should be required to account to Parliament periodically, I would have no objection to a pre-appointment hearing for all ombudsmen.

### *8.3 – 8.5 Statutory Bar*

I agree with the bulk of the proposals of the Law Commission on this issue and have submitted comments to that effect previously. Your summary of the matter in para. 4.41

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<sup>5</sup> In a recent report PASC referred to the idea of a 'Public Standards Commission', see PASC (2007a), *Ethics and Standards: the regulation of conduct in public life*, Fourth report of session 2006-2007 (HC 121-I), (London: The Stationery Office). Available at: <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmpubadm/121/121i.pdf> (accessed 3 May 2010).

<sup>6</sup> Speaker's Committee, 2008, 'Appointment of the Chairman of the Electoral Commission' (2007-08) HC 961.

and your recommendations in 8.3 and 8.4 seem absolutely right and I would reject an attempt to try and define this matter in any more detail. This should be a matter of the sensible exercise of discretion on the part of the ombudsman. I suspect in practice that the position described is how the law has been interpreted under the existing terminology, through a liberal interpretation of when it is unreasonable to expect a complainant to pursue a legal remedy.

The one qualification I would have with the Law Commission's proposal would be the issue raised in para 8.5. There I would suggest that where there is a specific statutory right to appeal (as opposed to review) a decision to a tribunal then that statutorily established redress mechanism should be pursued in priority of the ombudsman, unless there are good reasons to the contrary (such as the complaint was at root really about maladministration). I have not done any specific research on this point, but I would be surprised if such a rule did not also reflect current practice.

#### *8.6-8.9 Stay of proceedings*

I do believe that the Law Commission's proposals are appropriate and would add some sensible flexibility into the system. It would also be one way of dealing with the issue of the time limit in judicial review proceedings that provides an incentive for complainants to pursue their case by way of judicial review rather than through the ombudsman. Although this process may add a degree of cost and delay in some instances, sensibly handled this discretionary power should avoid any excess and in many other instances will save time and money through resolution in the more appropriate forum of the ombudsman. On rare occasions it will be entirely right as a matter of justice that the individual should have access to both the courts and the ombudsman.

On para. 8.7, under the pre-action protocol should not the onus be already on the respective parties to present their arguments as to why alternative remedies are not appropriate to resolve this dispute ie will not the parties have already had an opportunity to address this issue? If I am correct in this, then requiring a further submission would seem to unnecessarily delay the issue and add cost without providing any extra meaningful information.

On para. 8.8, I am not sure on the wording here. I would have thought that the ombudsman should always have discretion as to whether or not to investigate. As an alternative, perhaps the ombudsman should be required to consider the referral and give reasons should it decide not to investigate.

Applying the same logic to para. 8.9, yes the ombudsman should be able to abandon an investigation.

#### *8.10 Alternative to investigations*

Again I fully support the Law Commission's proposals here although there should be a requirement to consult with the complainant before such an action is taken and give

reasons. The Local Government and Public Involvement in Health Act 2000 s.30(1)B applies to the Local Government Ombudsman and allows for the publication of a statement of reasons where the ombudsman does not believe it necessary to produce a report. Consideration should perhaps be given to whether this measure should be extended to other ombudsmen schemes.

#### *8.11-8.12 Formal requirements and MP filter*

I entirely agree with both of these proposals (see my former submissions).

#### *8.13-8.15 Closed nature of ombudsman investigations*

This is an extremely difficult question to which I have mixed views. Whilst I recognise the need to expose the ombudsman office to scrutiny, I am also worried about the reference to 'the quasi-judicial' nature of the ombudsman's work. There has been a past tendency in some quarters of the legal community to attempt to impose judicial procedures on the ombudsman process which undermine the core rationale of the methodology of the ombudsman technique. I worry that opening up the detail of an ombudsman investigation in this way might encourage (a) speculative fishing exercises for information to use against an ombudsman in judicial review and (b) a defensive response on the part of the ombudsman and public authorities during investigations, which in turn would undermine the ability of the office to operate effectively. These concerns may be unfounded, but I would prefer a more limited solution as in the Welsh ombudsman scheme (para. 5.30). I am not aware of the empirical detail of the results in Wales, but the response of the Public Services Ombudsman for Wales would be particularly interesting in order to gauge whether this arrangement had led to any problems from the ombudsman's perspective.

#### *8.16-8.25 Reference on a point of law*

The discretion for this process should be entirely the ombudsman's alone. Although reviewable, it would be unlikely that the ombudsman would choose this option very often, largely because of the various problems raised in the consultation paper – in particular the cost implications. It would therefore be a reserve power which would be used only in a few rare cases where (a) it transpires that the interpretation of a legal question is at the heart of the issue as to whether maladministration has occurred or not and (b) for a variety of reasons it would be inappropriate/unreasonable to terminate the investigation due to the existence of a theoretical (and possibly unlikely) legal remedy.

A case in point might have been the Scottish Public Services Ombudsman's 2006 investigation into the funding for personal care policy of one local authority. The SPSO's conclusion that the local authority involved had not met its obligations under section 1 of the Community Care and Health (Scotland) Act 2002 was an important part of its finding of maladministration. The interpretation of the law adopted by the SPSO was not approved by

the court.<sup>7</sup> In such a situation, had the power to refer a legal point to court been available to the ombudsman it may have considerably foreshortened the resolution of the dispute – and indeed saved some costs. In the more complex complaints which involve many hundreds and even thousands of complainants (potential or real), then this option may be an important discretionary reserve power which I would argue should be available to the ombudsman given the inherent overlap between so many legal grounds and the concept of maladministration. The consultation paper additionally refers to issues of jurisdiction which could also be resolved through this reserve power.

Para 5.83 and 5.84 do not seem entirely necessary to me as the ombudsman would be well-equipped to consider these matters very carefully in any event, presumably through the advice of a legal team.

I would agree with the solutions proposed from paras.5.85-5.89 and think that the ombudsman should be required to advise two opposing counsel in response to para.5.90. If nothing else, this rule would surely reduce the likelihood of this measure being used to the few instances in which it was really necessary.

I would also agree with the proposals in paras.5.91 and 5.92.

#### *8.26-8.31 Reporting*

I agree with the graduated approach to reporting (para.8.26),<sup>8</sup> I think it has much merit. In particular, I commend the idea (within the ‘report’) that public authorities should be obliged to notify the ombudsman of the measures that it proposes to adopt to implement recommendations and when it has implemented those measures. I would go further and make it a reporting requirement of ombudsman schemes that this information is collated on an annual basis – the idea being to substantiate the degree to which recommendations are actually implemented.

I also agree with the recommendations in paras 8.28, 8.30 and 8.31. I have no clear views with regard to para.8.29.

#### *8.32-8.35 Findings and recommendations*

I do not agree with your proposals with regard to findings and recommendations. I have attached a draft of an article that I am writing for the *Journal of Social Welfare and Family Law* which explains why I think these proposals, on balance, would not be helpful.

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<sup>7</sup> *Argyll and Bute Council, Re Judicial Review of a Decision of the Scottish Public Services Ombudsman* [2007] CSOH 168.

<sup>8</sup> I presume that para 6.80 should also refer to s.10(3) with regard to special reports.

### *8.36 Issuing general reports*

I agree with this proposal. It matches current practice and confirms the potential for the ombudsman to feedback positive messages on good administration.

### *8.37-8.38 Relationship with Elected Bodies*

I agree with both recommendations. It is essential that ombudsmen, as with all unelected bodies, are accountable for their decision making and actions. An important part of this process, although crucially not the only part, should be the oversight and scrutiny of Parliament. Calling the work of public bodies to account, particularly those such as the ombudsmen who need to remain independent of the government, should be a key responsibility of Parliament.

There is an argument that it would be constitutionally inappropriate for Parliament to be able to oversee the work of the LGO in that it would indirectly allow the centrally elected Parliament to interfere in the work of locally elected bodies. I believe that this argument has been much overstated in the past and that the minimal risk to local autonomy in such an arrangement is outweighed by the need for the LGO to be held to account for its action. Indeed, I would suggest that where a local authority refuses to comply in any way with the findings and recommendations of a public body (namely the LGO) established by Parliament for the purpose of promoting good administration, then Parliament should retain a strong legitimate interest in local authority decision-making. This should include inviting officials from local authorities into Parliament to defend their decision-making in response to an LGO investigation.

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