

A PUBLIC SERVICE OMBUDSMAN: Consultation

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Some introductory comments

1. I am an academic researcher working at the University of Sheffield with a long-standing interest in the field of administrative justice. As well as writing extensively on the ombudsman enterprise, I was a member of an independent evaluation panel for the Local Government Ombudsman in England in 2013 ([External Evaluation of the LGO](#)). In 2007 I was employed by the Parliamentary Ombudsman's office to write a Parliamentary Paper on the scheme's 40th Anniversary, "[The Parliamentary Ombudsman: Withstanding the test of time](#)" (Fourth Report of the Parliamentary Commissioner for Administration, HC 421 (2006-07)). In that report, amongst other things, I noted that there were strong arguments for merging aspects of the office with other ombudsman schemes.
2. The administrative justice system, and indeed the civil justice system, is an evolving network of processes and institutions. It is also one in which less and less reliance can be placed on the courts and the structures and processes that support them to deliver universal 'justice'.
3. Ombudsman schemes, and ADR more generally, have been exposed to criticism, and some aspects of that criticism are justified. But the potential benefits of this model of dispute resolution are significant and, as the EU Directive on ADR emphasises, the trend towards ADR in our systems of justice looks set to continue.
4. The ombudsman enterprise remains relatively young and the processes employed are still being refined. In particular, there is still work to do to raise the profile and robustness of ombudsman schemes. Additionally, the landscape within which the ombudsman operates is changing rapidly due to developments in information technology, the merging of the public and private sectors and the pressures of austerity politics.
5. With all these factors in mind, this consultation process is very timely and hopefully will lead to proposals that will help to strengthen the potential of the ombudsman to both resolve complaints and increase administrative justice.
6. If it helps, I have also copied with this response to your consultation process a report, [The creation of an English Public Services Ombudsman: mapping a way forward](#), that I wrote with Jane Martin (the current Local Government Ombudsman) in 2014 which outlined the factors which I understand should underpin the harmonisation of ombudsman schemes in England.

Response to Consultation Questions

Q1. Do you agree that these principles should underpin reform of the Ombudsman service?

1.1 The four principles put forward by the Gordon report provide a strong starting point from which to design the new ombudsman service, but care will need to be taken to ensure that these principles are fully and consistently unpacked when the new scheme is designed.

1.2 Already in the Consultation Paper there is an element of watering down of the principles, which is concerning and might lead to interpretations of the principles that could lead to restrictions being placed on the potential of the office. Noticeably, the Consultation Paper has dropped Gordon's fourth principle 'Feasibility and delivery' that included the idea that flexibility should be built into the design of the new Ombudsman scheme. Is this a worrying hint that the Government might seek to place unnecessary restrictions on the powers of the new office? What is needed is an ombudsman scheme capable of flexing to respond to future developments in the provision of public services, not a scheme rooted only in the 2015/16 administrative model.

1.3 If the Government wants to reduce the core design of the new Ombudsman to four principles I would suggest rephrasing and unpacking them as follows:

Best for Citizens

1.4 Gordon's first principle specifically refers to 'Best for Citizens – accessibility and effectiveness', making it clear that the ombudsman service should be designed to promote what is best for citizens and not just be a complaint handler of citizen grievances.

1.5 Finding the design that best facilitates this central aspect of the new Ombudsman's work is going to be the key challenge in drafting new legislation and should comprise a number of discrete functions. I would suggest that all of the following functions are necessary if the interests of the citizen are to be realised through the new Ombudsman scheme:

- Ensuring public awareness of the office.
- Facilitating access to the office.
- Promoting individual and public understanding of the office.
- Taking responsibility for promoting the coherence of the wider complaints landscape.
- Maintaining the capacity to offer a quality complaints service. (The Ombudsman should not seek to become a mass complaint handler, as that service is best retained at the local level)
- Possessing the capacity and the networks to share knowledge with and to influence policy-makers and service providers, including private sector providers of public services.
- Flexibility in operation to accommodate future innovations in public service delivery and technology.

Accountability and Parliament

1.6 It is not entirely clear from the Consultation Paper why ‘Parliament’ should be considered a principle underpinning the design of the new Ombudsman. Instead, it would be better to view Parliament as a key vehicle through which **accountability** of the office is delivered. The Consultation Paper’s recognition of the importance of establishing the independence of the Ombudsman from the Government is very welcome and labelling the office a Parliamentary office is an important tool in achieving that status. Establishing the accountability of the office though is a bigger issue than Parliament alone, and should be secured through carefully designed internal and external mechanisms in addition to Parliament.

1.7 Further, it is vital that accountability should be considered as a two-way process. Thus the Ombudsman must have appropriate opportunity and capacity to inform and support the democratic scrutiny of public services, including local councils as well as Parliament and any local participatory elements to other public services, such as Health or Education. Similarly, if accountability of public services is to be fully realised, there must be clear channels of communication in place between the Ombudsman and other watchdogs to reduce duplication and enhance the learning messages that scrutiny create. Thought also needs to be put into ensuring that the Ombudsman has sufficient powers to investigate and influence private sector providers of public services

1.8 Applying this broader conception of accountability, Parliament’s accountability role can be considered to be a fourfold one.

- I. Guarantor of independence
- II. Scrutineer of performance
- III. Supporter of the Ombudsman
- IV. User of the Ombudsman’s intelligence.

Value for Money

1.9 Careful and ongoing consideration will need to be put into applying the principle of value for money, as if it is interpreted as a requirement that the office makes short-term savings in expenditure then the much more exciting potential for the office to encourage long-term improvements in public service delivery, including savings in expenditure, will be compromised. Thus an overriding concern here must be that the Value for Money principle allows sufficient room for the interests of the citizen to be promoted by the new institution. The new Ombudsman will need to demonstrate:

- The capacity to operate within budget and relevant financial standards.
- The relevance of its ongoing operations.
- Evidence of the cost effectiveness of its strategy.
- The capacity to operate a free complaints service.
- A commitment to using technological solutions.

Q2. Would you welcome the creation of a single Public Service Ombudsman service and are these the right services to be included?

2.1 Yes.

2.2 The arguments in favour of a single Public Service Ombudsman for England have been much rehearsed over the years and are largely based on the need to reduce confusion to the citizen, avoid unnecessary overlaps in jurisdiction, improve the capacity of the ombudsman office and reduce costs. The work of the Scottish and Welsh public service ombudsman schemes have also helped to demonstrate the potential benefits of an integrated service.

2.3 Given the importance of offering a clear service to the citizen which avoids confronting potential aggrieved citizens with a complex choice of potential redress routes, the logical approach is to start from the premise that all public services should be capable of complaint through one ombudsman scheme – and then only exclude or separate out particular public services from that scheme should there be a very clear rationale for doing so.

2.4 However, merging ombudsman schemes is going to be a complicated and drawn out process and it would probably be advisable to take a staged approach to the enterprise. In recent years, a clear need has been identified to bring together the work of the Local Government Ombudsman and the Health Service Ombudsman due to the evident cross-overs in jurisdictions, in particular around social care services. The integration of the Housing Ombudsman functions will be more complicated, but in principle is a step in the right direction.

2.5 Beyond these mergers, for the short to medium term legislation should be put in place that will allow other schemes to be integrated into the new merged office at a later date once the benefits of the new office have been successfully realised.

Q3 If so, do you agree that these are the right founding principles for such organisation?

3.1 As discussed above, the principles outlined under Q1 properly interpreted could provide a good starting point for designing the new institution. Here though I would emphasise that establishing the right governance structure for the new ombudsman scheme will be crucial. Reliance cannot be placed on Parliament alone to establish robust oversight of the Ombudsman. For instance, in built into the new Ombudsman scheme should the provision for a Board internal to the organisation which would have responsibility for supporting and scrutinising the work of the Ombudsman. Membership of the Board should be at the discretion of the Ombudsman but might include a place for prescribed individuals, such as a representative of the National Audit Office.

Q4 Should a single public service ombudsman organisation also retain specific sector facing services and staff in eg. Health or Housing?

4.1 The new ombudsman scheme will need to be designed to retain ongoing links with the sectors that it is responsible for. However, this should not be a matter for legislation but for sensibly designed corporate governance arrangements. The Ombudsman should retain

ultimate responsibility for the manner in which specific sector facing services are designed, albeit that those decisions will be subject to the scrutiny of Parliament.

Q5 Should each sector within the organisation be led by a senior Ombudsman (or someone of equivalent status) eg a Housing, Local Government or Health Ombudsman?

5.1 As above. In order to allow the new office the flexibility to respond to future developments in public services and in complaint handling, the Ombudsman should retain ultimate responsibility for the manner in which the staff structure is organised.

Q6 Is ‘Public Service Ombudsman’ the appropriate title for a new organisation?

6.1 No.

6.2 Public Service Ombudsman is a possible title but two overlapping issues need to be considered very carefully otherwise they will haunt the office for many years to come.

(a) ‘England’ or ‘English’ needs to be in the title

6.3 The jurisdiction of the current Parliamentary and Health Service Ombudsman (PHSO) scheme is complex and involves overlapping jurisdictions. Sometimes the office deals with England only complaints, sometimes England and Wales, sometimes England and Wales and Northern Ireland, and sometimes UK complaints.

6.4 The majority of complaints dealt with by the PHSO involve English public bodies dealing with complaints from individuals that reside in England. The most important arguments for a merged ombudsman scheme deal with the need to tackle the ad hoc system of ombudsman schemes that have evolved in England. Accordingly, there needs to be an English-only ombudsman scheme. For the public to understand this development most clearly the title of the new scheme must include the word ‘England’ or ‘English’. Any other solution will confuse on the purpose of the new office.

6.5 This leaves the problem as to how to process the residuary complaints that will in the future be submitted by citizens that do not reside in England, but who are aggrieved by the powers of pan-UK public bodies currently within the jurisdiction of the Parliamentary Ombudsman. Given the embedded importance of the devolution settlement and to ensure proper branding of the new English office, this set of complaints will have to be dealt with by a separate body.

6.6 A solution that requires the establishment of a Parliamentary Ombudsman-only office will probably not secure the support of a Government which is committed to a policy of reducing the cost of governance, but there are other potential options on offer. I list three here and would submit that all would be preferable to integrating the residuary ‘old’ jurisdiction of the Parliamentary Ombudsman into the new English Ombudsman scheme.

- *Devolved complaint-handling:* One option that has been suggested is that apan-UK body complaint should be resolved upon by the Scottish, Welsh, Northern Irish or English ombudsman scheme depending upon the residence of the complainant. This

solution is flawed in that it risks inconsistent decision-making and does not best allow for the central collation of the intelligence gained from complaints.

- *Merged Parliamentary Officers:* A second option is that the ‘old’ jurisdiction of the Parliamentary Ombudsman is merged with the jurisdiction of an existing Parliamentary Officer. The most obvious candidate would be the Parliamentary Commissioner for Standards (PCS). The main difficulty with this solution would be that the existing post of the PCS would as a consequence become a statutory post and this may meet resistance in the House.
- *Merged UK Ombudsman Schemes:* A third option would be for new ‘Parliamentary Ombudsman’ role to take on a wider role than the ‘old’ jurisdiction of the Parliamentary Ombudsman. For instance, the area of defence, which is a pan-UK matter, might come within the jurisdiction of the new ‘Parliamentary Ombudsman’. The Service Complaints Ombudsman for the armed forces has recently been established by Parliament and could be potentially merged with the new ‘Parliamentary Ombudsman’. The main difficulty with this solution would be ensuring that the mandates and organisation of the two functions do not conflict, in particular in terms of ensuring the independence of the office.

(b) *‘Ombudsman’ or ‘Commissioner’*

6.7 The strength of the title ‘public services ombudsman’ is that it appears to match the evolution of the ombudsman brand in recent years, in particular as developed in Scotland, Wales and Northern Ireland. Further, efforts to promote and inform understanding of the office would be made easier were public service ombudsman schemes to carry a title that uniformly connected to a standard model of complaint-handling, as defined by such groups as the Ombudsman Association. In this respect, other schemes (although not all) in the sector are labelled ‘ombudsman’ and any move towards a different title would reduce ongoing efforts to simplify the sector and clarify to the public the meaning of the brand. Much of the ombudsman community (eg see the Ombudsman Association) have fought a long campaign to preserve and protect the title ‘ombudsman’ for many years and can be expected to resist any change to the title.

6.8 Nevertheless, before deciding on the title, careful consideration should be given to two generic issues.

- *Gender:* The title ombudsman carries with it an implicit statement that the office holder is a man. Given the ongoing efforts of 21st century Britain this is an unfortunate linguistic hangover. In other countries schemes do exist that carry another title, such as ‘Ombud’. Given that the new English ombudsman scheme would be the largest in the UK, rebranding the office at this stage would carry much weight in English speaking countries and could have a sizeable impact.
- *Helping people understand the office:* It is clear that moving away from the title ‘ombudsman’ would upset some long-standing supporters of the ombudsman community. If such a move is to be contemplated it would be wise to move beyond the gender debate and start from the principle that what is required is a title that best captures the purpose of the office in the mind of all the stakeholders of the institution, in particular the citizen. Here the biggest challenge that the ombudsman community has historically faced is (i) raising the profile of the office in the minds of the general

public and (ii) explaining the powers and role of the office. In this respect there is a debate to be had as to whether the title ‘ombudsman’ is helpful because it is a well-known global brand or unhelpful because amongst the general public the word is unfamiliar.

6.9 If the basic goal of a title is to inform the general public as to the purpose of the office – then we should consider carefully whether ‘English Public Services Ombudsman’ or ‘English Public Services Ombud’ will be successful. By way of alternative, at this stage it is worth at least asking the question as to whether the title ‘English Public Services Complaints Commissioner’ or just ‘English Complaints Commissioner’ might succeed in getting the message across much more effectively.

6.10 The very legitimate objection might be raised that the brand ‘Commissioner’ is no more meaningful than ‘Ombudsman’ and might more readily attach to very different forms of public body. However, the relevant point about the proposed title is not really ‘commissioner’ but the fact that the title is accompanied by the word ‘complaints’. Further it will be argued that creating a new commissioner would confuse the landscape just at the point when we are trying to simplify it, which in the short term must be a correct argument. But in the wider watchdog landscape the title ‘Commissioner’ and ‘Commission’ already has power, as for instance with the Information Commissioner and the Electoral Commission. Increasingly, the title can be seen as a badge that indicates a powerful independent watchdog. Finally it might be argued that the ombudsman title is a well-respected international brand, whereas a complaints commissioner might be perceived as a weaker meaningless variant. There is merit to this point, but there are ombudsman schemes operating elsewhere in the world (and in the UK) which do not include the word ombudsman in their title and can claim influence as a complaints handler.

7. Do you agree that there should be the widest possible routes of entry to a Public Service Ombudsman?

7.1 Yes. The one danger to this approach is the possibility of the new scheme being overloaded by multiple forms of complaint (eg through the door, letters, online, social media, via MPs, bypassing internal complaints routes). However, the requirement for a single body within the administrative justice system to take responsibility for receiving the sheer mass of complaints and enquiries that citizens might have regarding their public services, including those which are misdirected, is essential. There is a growing body of knowledge and ideas within the ombudsman sector both in the UK and elsewhere as to how to deal with this challenge. Additionally, advances in website design make it possible to comprehend a one-stop complaint system being introduced which is capable of channelling enormous numbers of complaints and enquiries relatively efficiently. An excellent example is the exciting and pioneering introduction of the Resolver [website](http://www.resolver.co.uk/) (http://www.resolver.co.uk/) by a former aggrieved complainant.

8. In what ways could it be made easier for citizens to access resolution and redress?

8.1 Most of the key solutions are already out there, but they need to be implemented more coherently and without the inhibitions of the current legislative and governance regimes. Eg:

- Direct access to the Ombudsman must always be allowed.
- Complaints need to be submittable by a range of different means (ie not just in writing).
- The citizen needs to be better informed of the option(s) to complain. A clearer complaints brand will help with this objective, a cause that can in part be assisted by a unification of ombudsman services, better publicity and a meaningful title.
- Someone needs to be made responsible for offering a unified online public service complaints advisory service, along the lines already offered by Resolver in the private sector (although Resolver offers advice on some public bodies already).
- Someone needs to have overriding responsibility for overseeing the coherence of the administrative justice system. Within Government and Parliament there remains an excessive focus on particular discrete aspects of the system and not enough consideration of the system as a whole.

9 Would you support a wider role for a PSO as a champion of effective complaints handling across the public sector?

9.1 Yes.

9.2 The Ombudsman is an institution with significant knowledge, not just of complaint-handling but of the likely barriers to good complaint-handling, and with a permanent vested interest in promoting good complaint-handling. It is, therefore, a more viable location of responsibility for promoting good complaint-handling than other solutions, such as the various sector regulators or the Cabinet Office.

9.3 The model of the Complaints Standards Authority within the Scottish Public Services Ombudsman scheme is beginning to show evidence of securing real gains in complaint handling within public services. The Welsh Assembly has recently been looking at amending its legislation on the ombudsman and there is evidence within their review of the ombudsman's powers of the widespread agreement that championing complaint-handling is an appropriate role for an ombudsman to perform.

9.4 But to facilitate this role it is vital that the ombudsman is seen not just as a complaints-handler, but also as a promoter of best practice.

10 What range of investigative tools do you think the PSO might need?

10.1 Current ombudsman schemes already have the appropriate investigative tools to do their job, with one exception. Thus ombudsman schemes need:

- The legal power to select which complaints to investigate.
- The legal power to require information and witnesses to be made available.
- The legal power to report publically the findings and recommendations of their investigations.

- The legal power to raise concerns with Parliament about the failure of a public body to respond positively to their investigations and reports.

10.2 The one exception to the Ombudsman's powers which is not currently possessed by UK ombudsman schemes is the residuary power to launch an investigation of their own-initiative should the office deem it necessary. This is a power held by many ombudsman schemes around the world. The circumstances when such a power may be necessary will vary, but would most likely include a situation in which, for one reason or another, aggrieved citizens were unlikely to complain. The own-initiative investigation (OII) also offers the potential for an ombudsman to investigate systemic maladministration before it becomes a long-lasting and large scale problem.

10.3 The circumstances when an OII would be required would, I anticipate, be rare. Most forms of grievance come about as a result of highly individualised fact patterns. But the history of ombudsman work provides much evidence of systemic maladministration in the provision of public services which goes beyond the individual complaint. Currently, legislation makes it difficult for the ombudsman to investigate such wider maladministration, accept in confined circumstances. By contrast, the OII power would create the framework within which the ombudsman could provide a more powerful and relevant service.

10.4 There are potential risks in introducing such an OII power, but these can be managed through legislation and proper oversight. Eg:

Danger of overuse of the OII power to the detriment of complaint-handling

10.5 The power of OII could dominate the work of the Ombudsman to the detriment of its other roles, but it is highly unlikely. The EU Ombudsman, which is a relatively large scheme, and the Ontario Ombudsman in Canada have both made extensive use of the power. But these schemes are exceptions to the rule, and elsewhere the OII power appears to be used sparingly.

10.6 The scrutiny of Parliament should be adequate for gauging whether or not the Ombudsman is overusing or inappropriately implementing the OII power. Parliament should not have any power to intervene in an OII once an investigation has been commenced. But it should have a role in scrutinising the output of the Ombudsman. Given this, the Ombudsman will be wary of pursuing a strategy with regard to OIIs which it could not defend or gain the long-term support for from the Parliament. Should the process of scrutiny lead the Parliament to have concerns about the office's use of the power then it would be open to it to amend the Ombudsman's legislation in the future.

10.7 Further, the exercise of the OII power will come with financial and human resources/research costs. Given likely budget constraints, it is unlikely that an Ombudsman would choose to use this power other than as a reserve tool to be employed as and where necessary.

Might an Ombudsman inappropriately use the OII power?

10.8 The Ombudsman could take on inappropriate OIIs or be tempted into OIIs on the back of Government, political or media pressure, which in the long-term might raise a significant reputational risk. It might even lead to the loss of good will with the administration and/or the public and the Parliament. A linked concern is that the power of OII might lead to over-

scrutiny or duplication of efforts with regulatory bodies, or that ‘fishing expeditions’ might be initiated without clear evidence of administrative wrongdoing.

10.9 These are risks, but they are risks that already exist for standard large scale investigations that ombudsman schemes sometimes put in place following a series of similar complaints. See for instance the work of the UK Parliamentary Ombudsman into *Occupational Pensions* and *Equitable Life* during the 2000-2010 period.

10.10 Such concerns are not, therefore, strong arguments against the OII power, but they are reasons for ensuring that the power is accompanied by a robust and transparent process ie:

- The Ombudsman should be required to consult before commencing (or closing) an OII and give reasons. For instance, legislation might express the power as one to be used ‘where the Ombudsman is of the opinion that it is in the public interest to commence an OII having first consulted with relevant parties, including the Auditor-General and any relevant regulatory body’.
- On the conclusion of an OII, the Ombudsman should be required to submit a report direct to the Parliament, although it may also be required to send a copy to a Minister and any organisation impacted by the report.
- Within an appropriate time-frame, any relevant bodies the report has made recommendations about should be required to inform the Ombudsman of their response to the recommendations. Should the relevant bodies decline to implement the recommendations in whole or in part then they should be required to provide reasons.
- Should the relevant bodies decline to implement the recommendations then the Ombudsman should have a power to issue a further report.
- Finally, the Parliament should, as a matter of practice, dedicate a select committee to considering the report and, where necessary, hold an inquiry on the matter, including consideration of the effectiveness and appropriateness of the report.

Might the OII power interfere with the responsibility of providers?

10.11 In the past it has been argued that the OII power would curtail a public authority’s lawful discretionary power, or may lead to a prescriptive set of recommendations as to how a particular administrative process is managed, including on the policy behind that process.

10.12 Such a concern though misunderstands the work of the Ombudsman. The authority of the Ombudsman rests on the quality and accuracy of its findings, the appropriateness of its recommendations and its ability to retain support amongst key stakeholders, including the Parliament and the Government. Within this process, the public authority does retain the right to exercise its full discretionary power, the only restriction is that it must do so according to standard administrative law grounds (which include responding rationally to the Ombudsman report) and the political need to be able to defend its actions.

10.13 To conclude, therefore, use of the OII power would increase the burdens on a public authority subject to an OII, but it would not remove the responsibility to act from the authority concerned. Given the importance of the issues that would no doubt underpin an OII, within a constitution committed to accountable government and continual improvement in administration, this is an appropriate balance.

10.14 The benefits that may be gained through OIIs will be very hard to quantify, but will include: extended redress; improved access to administrative justice; more frequent systemic recommendations on improving administrative performance; and potential long-term financial savings from improved administrative performance.