



**Law
Commission**
Reforming the law

Public Services Ombudsmen



The Law Commission

(LAW COM No 329)

PUBLIC SERVICES OMBUDSMEN

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

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THE LAW COMMISSION

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THE LAW COMMISSION

PUBLIC SERVICES OMBUDSMEN

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THE LAW COMMISSION

PUBLIC SERVICES OMBUDSMEN

To the Right Honourable Kenneth Clarke QC, MP, Lord Chancellor and Secretary of State for Justice

PART 1 INTRODUCTION

ORIGINS OF THE PUBLIC SERVICES OMBUDSMEN PROJECT

- 1.1 This report arises from our earlier project on administrative redress. The redress project was included in our 2005 Ninth Programme of Law Reform. Following a scoping report in 2006, that project undertook to address the following question:

When and how should the individual be able to obtain redress against a public body that has acted wrongfully?¹

- 1.2 We published a consultation paper in July 2008 entitled *Administrative Redress: Public Bodies and the Citizen*.² The consultation paper considered three aspects of administrative redress: compensation and judicial review, private law actions against public bodies, and ombudsmen. In relation to ombudsmen the original consultation paper made four provisional proposals:

- (1) the creation of a specific power to stay an application for judicial review, so that suitable matters are handled by ombudsmen rather than the courts;
- (2) improved access to the ombudsmen by modifying the “statutory bar” – the rule that recourse may not be had to the ombudsmen if the complaint has or could be pursued in a court of law;
- (3) a power for the ombudsmen to refer a question on a point of law to the courts; and
- (4) the removal of the MP filter in relation to the Parliamentary Commissioner for Administration.

- 1.3 For reasons we explain in our report on administrative redress, published in May 2010,³ we discontinued the first two aspects of the original project, compensation on judicial review and private law actions against public bodies. However, the proposals in relation to ombudsmen met with a generally favourable response.

¹ Remedies Against Public Bodies: A Scoping Report (10 October 2006) para 5.1.

² Administrative Redress: Public Bodies and the Citizen (2008) Law Commission Consultation Paper No 187.

³ Administrative Redress: Public Bodies and the Citizen (2010) Law Com No 322.

We felt that these proposals could be developed, and as a result issued a further consultation paper on the public services ombudsmen on 2 September 2011.⁴

THE PUBLIC SERVICES OMBUDSMEN CONSULTATION PAPER

- 1.4 Our consultation paper focused on what we have termed the “public services ombudsmen”. By this, we meant the generalist statutory ombudsmen: the Parliamentary Commissioner for Administration; the Health Service Ombudsman (who has always been the same person as the Parliamentary Commissioner); the Local Government Ombudsman; and the Public Services Ombudsman for Wales.
- 1.5 On balance, we thought it right to include the Independent Housing Ombudsman, as it fulfils the role of a public services ombudsman in relation to social housing. That this decision was correct was underlined by the Government’s proposed expansion of the role of the Housing Ombudsman into matters currently within the jurisdiction of the Local Government Ombudsman.⁵
- 1.6 The Housing Ombudsman is, nevertheless, in a different position to the other public services ombudsmen, which means that not all of our proposals apply to the post. There are two principal differences. First, the relationship between social housing landlords and the Housing Ombudsman is governed by private law in that landlords are contractually obliged to implement the ombudsman’s recommendations. Second, unlike the other public services ombudsmen, the Housing Ombudsman scheme is approved by the Secretary of State under section 51 of the Housing Act 1996, rather than being set out in a statute.

CONSULTATION PROCESS

- 1.7 We set out the details of our consultation in relation to the administrative redress project in our final report on that project. In advance of publication of the consultation paper *Public Services Ombudsmen*,⁶ we took part in events organised by the Public Services Ombudsman for Wales, the British and Irish Ombudsman Association, the Socio-Legal Studies Association and the Society of Legal Scholars.
- 1.8 The formal consultation period for the ombudsmen project started on 2 September 2010 and ran until 3 December 2010. During that period, we were able to meet the public services ombudsmen, academics with a particular interest in the subject and practitioners. We addressed meetings of the Administrative Justice and Tribunals Council in London and its Welsh Committee in September and October 2010. We participated in two events organised for advice workers by the Public Law Project, in Manchester and London, in November 2010. Team members visited the Local Government Ombudsman’s Advice Team in Coventry on 22 November 2010. We are most grateful for the organisations and individuals who organised and took part in these valuable events.

⁴ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196.

⁵ The Localism Bill before Parliament at the time of writing (6 June 2011) transfers jurisdiction over local authority social housing from the Local Government Ombudsman to the Housing Ombudsman. See Localism Bill, cls 158 to 160.

⁶ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196.

- 1.9 We received fifty-seven formal responses. These came from a range of consultees, including the public services ombudsmen, other public bodies, non-governmental organisations, members of the legal profession and academics.

Response from the public services ombudsmen

- 1.10 The public services ombudsmen submitted a joint response setting out their views on 10 December 2010. The ombudsmen have helped us in numerous ways with particular questions throughout the currency of the project, and we have had the benefit of a number of meetings with them, both as a group and individually. We are grateful to them for their consistent collaboration.

Responses from government

- 1.11 The Cabinet Office acts as the main liaison department for the Parliamentary Ombudsman, and also advises departments on the establishment of ombudsman schemes. The Department for Communities and Local Government is the liaison department for the Local Government Ombudsman and the Housing Ombudsman, and the Department of Health is the liaison department for the Health Service Ombudsman. No government department submitted a response. We met with officials from the Cabinet Office and the Department for Communities and Local Government.

Responses from the Welsh Assembly Government

- 1.12 The Welsh Assembly Government submitted a written response, and we had a useful meeting with Welsh Assembly Government officials in October 2010.

Relationship between this report and our published analysis

- 1.13 A full analysis of the formal consultation responses has been published which can be read in conjunction with this report. Unlike the analysis, this report takes into account consultation events, recent academic writing and policy developments within Government subsequent to the publication of our consultation paper.

SCOPE OF OUR PROJECT

- 1.14 We set ourselves certain limits in the consultation paper on the proper scope of this project.
- 1.15 Our work on the public services ombudsmen was defined by our original work on the administrative redress project, which focused on remedies from public bodies. We wanted to develop our original work on the ombudsmen concerned with the provision of public services. In the context of this project we decided that it was not appropriate to consider other ombudsmen beyond those public services ombudsmen.
- 1.16 Having accepted the above as the subject of our review, we adopted two further limitations.

Fundamental institutional design

- 1.17 In the administrative redress project we put forward provisional proposals that sought to reform the existing law on redress from public bodies. In the provisional proposals that we put forward on the ombudsmen in that project, our aim was to “strengthen and clarify” the relationship between the ombudsmen and courts.⁷ This precluded provisionally proposing fundamental change to either the number of public services ombudsmen or their individual remits.
- 1.18 Whilst this project has widened the subject matter under consideration, to include such matters as reporting, this has been in the context of facilitating the work of the existing ombudsmen and developing further our original proposals. We thought that this was the same nature of enquiry as the original administrative redress project and, therefore, within the scope approved for that project.

Jurisdiction of the public services ombudsmen

- 1.19 In keeping with our decision not to alter the fundamental design of the ombudsmen, we considered the subject matter that they investigate as outside the scope of our project.
- 1.20 We decided that it was “inappropriate to attempt to pin down maladministration”.⁸ “Maladministration”, which broadly means considering whether the actions of the public body are of a standard which individual citizens should be able to expect from public service providers, was deliberately left undefined in all of the governing statutes for the public services ombudsmen. The lack of a definition has not proved problematic to date. We, therefore, could see no benefit in attempting a definition but a real danger that defining maladministration might unnecessarily restrict the operation of the ombudsmen in the future.

Consultation responses

- 1.21 The responses that we received on the broad issue of the scope of our project can be divided into two categories. The first asks whether we could have undertaken a wider, more comprehensive review.⁹ The second concerns whether we should have looked at wider jurisdictional issues, such as the ability of the public services ombudsmen to investigate service failure.
- 1.22 Some consultees thought that we had focused too narrowly on improving the statutory regime for the public services ombudsmen, rather than undertaking a more ambitious project on the ombudsmen’s position in the landscape for administrative justice as a whole.

⁷ Administrative Redress: Public Bodies and the Citizen (2008) Law Commission Consultation Paper No 187, para 5.1. The exception to this general approach was the proposed reform of the MP filter. That suggested reform, however, was not about the identity of the Parliamentary Commissioner but was, rather, a reform focused on removing a potential access barrier.

⁸ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 2.31 to 2.41.

⁹ This could be seen as akin to the Report of the Review of Tribunals (Leggatt Report), *Tribunals for Users – One System, One Service* (2001).

1.23 In their response, the public services ombudsmen stated that:

Whilst appreciating the reasons for [the restrictions on the Law Commission project], we conclude that the inability to consider both the “fundamental institutional design” of the ombudsman system and the impact of devolution denies the consultation the range that would enable it to address some very important issues.

1.24 Several consultees commented on the jurisdiction of the ombudsmen. For instance, the role of the ombudsmen in considering service failure¹⁰ was discussed at consultation events with the Local Government Ombudsman, the former Scottish Public Services Ombudsman¹¹ and Ian Wise QC.¹²

1.25 Ian Wise QC suggested that investigating service failure may be problematic for the ombudsmen, as it involves the detailed consideration of the legal obligations placed on public bodies. This, he submitted, is not a task for which the ombudsmen necessarily have sufficient legal expertise.

1.26 The Medical Defence Union, in its response, suggested that we had given insufficient consideration to the role of the Health Service Ombudsman and the Public Services Ombudsman for Wales in relation to the clinical judgment of individual doctors.¹³

1.27 The Medical Defence Union stated that because our primary focus was on areas where there is an overlap between the ombudsmen and the Administrative Court, we had failed to consider “an entirely different type of overlap”. Its concern was that we had failed to take into account the effect of the repeal of section 5 of the Health Service Commissioners Act 1993, which previously prohibited the ombudsman from considering questions of clinical judgment.

1.28 The Medical Defence Union raised another concern, relating to the ability of certain ombudsmen to make recommendations relating to the actions of individual doctors. This is the result of an alteration to the powers of the Health Service Ombudsman. As originally provided for in its governing legislation, the Health Service Ombudsman only investigated and made recommendations to remedy maladministration by public bodies.

Discussion

1.29 The administrative redress project, from which this project is descended and draws its remit, was contentious. In fact, the only part of the project that enjoyed any significant support was that on ombudsmen.

¹⁰ See: Local Government Act 1974, ss 26(1)(b) and (c); Public Services Ombudsman (Wales) Act 2005, ss 7(1)(b) and (c).

¹¹ Professor Alice Brown, who is also a member of the Administrative Justice and Tribunals Council.

¹² Doughty Street Chambers.

¹³ Though expressed in terms of our consultation questions on the statutory bar, we think that the concerns of the Medical Defence Union go properly to the scope of our project.

- 1.30 We are satisfied that our focus was correct. It would not have been appropriate for us to have taken on a wider investigation in a project that is essentially descended from our previous work on administrative redress.
- 1.31 This leaves a point put to us by the public services ombudsmen, the Administrative Justice and Tribunals Council, JUSTICE, Brian Thompson¹⁴ and others: that we should recommend that a wider review be undertaken. This we consider in detail in Part 2.
- 1.32 We also think that we were correct not to consider the jurisdiction of the ombudsmen. As with fundamental institutional design, this would properly belong to a wider project. This, also, is considered in greater detail in Part 2.

JURISDICTION OF THE LAW COMMISSION

- 1.33 The final matter with which we deal in this Part concerns the jurisdictional considerations that we need to bear in mind when making formal recommendations. Under the Law Commissions Act 1965, we can only promote reform to the law of England and Wales.
- 1.34 Most of the ombudsmen we deal with are English or Welsh institutions. The exception is the Parliamentary Commissioner. The Parliamentary Commissioner Act 1967 extends to the whole of the UK, and thus has effect in the separate jurisdictions of Scotland and Northern Ireland, where law reform is the responsibility of the Scottish Law Commission and the Northern Ireland Law Commission.
- 1.35 There is no sensible way that the jurisdictions can be disaggregated for the purposes of our recommendations in this report. For instance, it would be absurd if the MP filter were removed only in England and Wales.
- 1.36 Therefore, our recommendations, strictly speaking, attach only to the provisions of the Parliamentary Commissioner Act 1967 as it exists in the law of England and Wales. Nevertheless, we offer our recommendations in the hope that they will commend themselves to the authorities responsible for the law of Scotland and Northern Ireland in this context. We have, of course, discussed this approach with the Law Commissions in Scotland and Northern Ireland.

STRUCTURE OF THIS REPORT

- 1.37 Part 2 addresses one of the main issues raised in consultation: whether there should be a wider review of the public services ombudsmen and their place in the landscape for administrative justice.
- 1.38 Part 3 deals with access to the ombudsmen and matters such as the formal requirements for making a complaint, reform to the statutory bars, and the possibility of matters being transferred to an ombudsman from a court.

¹⁴ University of Liverpool.

- 1.39 Part 4 considers the nature of the ombudsman process – in particular, the extent to which it should be “closed” or “in private” – and our recommendation that there be a power enabling the ombudsmen to refer a question of law to the Administrative Court.
- 1.40 Part 5 outlines our recommendations relating to the use of alternative methods of dispute resolution and reporting on individual investigations. This Part also considers the issuance of general reports and guidance. Finally, this Part considers the ability of the ombudsmen to lay reports before Parliament.
- 1.41 Part 6 deals with independence and accountability, and recommends that the Parliamentary Commissioner be appointed on the nomination of Parliament. This Part also considers possible changes to the relationship that the other public services ombudsmen have with Parliament.
- 1.42 There are two appendices to this report:
- (1) Appendix A contains a consolidated list of our recommendations; and
 - (2) Appendix B contains flowcharts illustrating the current procedures for the Local Government Ombudsman and the Parliamentary Commissioner, in order to assist readers.

PART 2

A WIDER REVIEW OF THE PUBLIC SERVICES OMBUDSMEN

- 2.1 In this Part we discuss the historic development of the public services ombudsmen. We then move on to consider the desirability of a wider review of the public services ombudsmen, and their place in the landscape for administrative justice.

THE DEVELOPMENT OF THE PUBLIC SERVICES OMBUDSMEN

- 2.2 Though the first ombudsman, as a complaints handler, appeared in Sweden in 1809,¹ it was only after the publication of an influential report by JUSTICE in 1961 that the need for such an institution took hold within the UK.² The JUSTICE report led to the introduction into Parliament of the Parliamentary Commissioner Bill in 1966.
- 2.3 At the second reading of the Parliamentary Commissioner Bill in the House of Commons, Richard Crossman, the Minister in charge of its passage through the House, described the proposed Commissioner thus:

The office of Parliamentary Commissioner, which it is the object of this Bill to create, resembles the office of ombudsman in the one particular that it is designed to protect the individual citizen against bureaucratic maladministration.³

- 2.4 Explaining the need for the Parliamentary Commissioner, Crossman went on to say that:

What [the current system for redress] lacks is the cutting edge of a really impartial and really searching investigation into the workings of Whitehall – an investigation designed primarily to deal not with great scandals but with those secondary acts of injustice against the individual which, if permitted to fester, arouse what is often a grossly unfair prejudice against the Civil Service ... Indeed, the remarkable thing is that so long a time has elapsed between the first bruising of the idea that there was a need to strengthen our Parliamentary investigation of maladministration and the presentation of this Bill to this House.⁴

¹ M Seneviratne, *Ombudsmen: Public services and administrative justice* (2002) p 2.

² JUSTICE (Sir John Whyatt), *The Citizen and the Administration: the redress of grievances* (1961).

³ *Hansard* (HC), 18 October 1966, vol 734, col 42.

⁴ Above, vol 734, col 42.

- 2.5 The Act envisaged the Parliamentary Commissioner as a tool for Members of Parliament – one that would bolster the ability of Parliament and Parliamentarians to question the work of Government, and assist Members in obtaining redress for their constituents.⁵
- 2.6 The next two ombudsmen to be established were in Northern Ireland. The Parliamentary Commissioner Act (Northern Ireland) 1969 created an institution similar to the Parliamentary Commissioner for the then Northern Ireland Parliament. The other ombudsman created in 1969, the Northern Ireland Commissioner for Complaints, had a much broader remit, covering local authorities, the Northern Ireland Health Board, the Electricity Board and the Fire Authority.⁶ Since 1972, the same person has undertaken both roles.
- 2.7 In the rest of the UK, although the then Ministry of Health was within the jurisdiction of the Parliamentary Commissioner from the latter's inception,⁷ the administration of the National Health Service hospitals was specifically excluded.⁸ This amounted to the exclusion of a substantial portion of public service provision from the Parliamentary Commissioner's jurisdiction.
- 2.8 As early as 1968, the House of Commons Select Committee on the Parliamentary Commissioner reported that the Parliamentary Commissioner's jurisdiction should be amended so that it could consider complaints concerning hospitals.⁹
- 2.9 In order to meet this request, the Health Service Ombudsman was established under the National Health Service Reorganisation Act 1973, for England and Wales, and the National Health Service (Scotland) Act 1972, for Scotland. Though it was a separate institution to the Parliamentary Commissioner, the two offices were held by the same individual. The Health Service Ombudsman's jurisdiction in Scotland and Wales was transferred to the Scottish Public Services Ombudsman and the Public Services Ombudsman for Wales, on their establishment. The Health Service Ombudsman's jurisdiction in England is still held by the Parliamentary Commissioner.
- 2.10 The Health Service Ombudsman was constructed along similar lines to the Parliamentary Commissioner, and many of their governing statutory provisions were identical,¹⁰ though this has changed subsequently.
- 2.11 These ombudsmen were followed in England and Wales by the Local Government Ombudsman, established under the Local Government Act 1974. The link between the Parliamentary Commissioner and the Local Government

⁵ M Seneviratne, *Ombudsmen: Public services and administrative justice* (2002) p 101.

⁶ Commissioner for Complaints Act (Northern Ireland) 1969.

⁷ Parliamentary Commissioner Act 1967, sch 2 (as originally enacted).

⁸ Parliamentary Commissioner Act 1967, sch 3, para 8 (as originally enacted) excluded: "Action taken on behalf of the Minister of Health or the Secretary of State by a Regional Hospital Board, Board of Governors of a Teaching Hospital, Hospital Management Committee or Board of Management, or by the Public Health Laboratory Service Board".

⁹ Select Committee on the Parliamentary Commissioner for Administration, Second report of session 1967-68 (1967-68 HC 350), para 37.

¹⁰ National Health Service Reorganisation Act 1973, ss 31 to 39.

Ombudsman was explained by Geoffrey Rippon, when introducing the Local Government Bill 1973, thus:

What we are doing, essentially, is to provide for local government a system for the investigation of maladministration akin to that established for central government in the Parliamentary Commissioner Act 1967, but tailored to the specific needs of local government. It does not represent a new worry or concern about the standards of administration or conduct in local government ... Provision of the system represents a general appreciation of the need to strengthen local democracy by giving a means whereby local issues of concern can be looked at quickly and dispassionately, and the opportunity for things that have gone wrong to be put right.¹¹

- 2.12 In Scotland, a similar institution was established by the Local Government (Scotland) Act 1975.
- 2.13 The statutory basis for the Health Service Ombudsman in England and Wales was consolidated in 1993, with the Health Service Commissioners Act 1993. This, however, did not alter significantly the role of the Health Service Ombudsman.
- 2.14 At this point, the ombudsmen in existence were all based on the model first introduced in 1967 for the Parliamentary Commissioner.
- 2.15 Owing to a growing perception that something was amiss with complaints concerning the National Health Service, in 1993 the Government commissioned an independent investigation into the NHS complaints system.¹² The subsequent report, *Being Heard*, was critical of both the system and the organisational attitude that the National Health Service had to complaints.¹³
- 2.16 The Government accepted many of the recommendations and proposed a complete overhaul of the system for making complaints about services provided by the National Health Service.¹⁴
- 2.17 The reform sought to create a unified complaints system across the NHS based on two elements: local resolution and independent review. The Health Service Commissioner was then to be “the last post of call”, at the apex of the system.¹⁵
- 2.18 In order to fulfil the new role allocated to it, necessary reforms had to be made to the jurisdiction of the Health Service Ombudsman, so that it could examine the full range of activity undertaken by the National Health Service. This must

¹¹ *Hansard* (HC), 12 November 1973, vol 864, col 51.

¹² See D Longley, “Complaints after Wilson: Another Case of Too Little Too Late?” (1997) 5 *Medical Law Review* 172.

¹³ Wilson Committee, *Being Heard: The Report of a Review Committee on NHS Complaints Procedures* (1994).

¹⁴ Department of Health, *Acting on Complaints* (1995).

¹⁵ D Longley, “Complaints after Wilson; Another Case of Too Little Too Late?” (1997) 5 *Medical Law Review* 172 at 176.

necessarily include the investigation of clinical decisions and the actions of individual doctors.

- 2.19 In 1996, there was a fundamental change to the role of the Health Service Ombudsman with the enactment of the Health Service Commissioners (Amendment) Act 1996. Originally excluded from the Health Service Ombudsman's investigatory jurisdiction was action taken "solely in consequence of the exercise of clinical judgment" in connection with the diagnosis of illness or the care or treatment of a patient.¹⁶
- 2.20 The Health Service Commissioners (Amendment) Act 1996 repealed the bar on investigating action taken in the exercise of clinical judgment.¹⁷ The 1996 Act inserted two new provisions relating to individuals, allowing the Health Service Ombudsman to investigate independent providers where they are providing a service for the National Health Service.¹⁸
- 2.21 The effect of, and reasons behind, the 1996 Act were set out by Mr Justice Burnett in *R (Attwood) v Health Service Commissioner*, the only case that analyses the statutory provisions:

It can ... be seen that the amendments made in 1996 introduced a very significant change in the function of the ombudsman with far reaching potential consequences for clinicians. Prior to 1996 the ombudsman was limited to investigating matters such as the level of information given to patients, failings in internal complaints procedures, the quality of care on the ward, cleanliness, waiting lists, cancellations, record keeping, coordinated arrangements for discharge and the like. That continues to occupy much of the case load of the ombudsman but the consideration of criticisms that go directly to the clinical judgment of doctors and other health professionals now forms an important part of the ombudsman's work.

... Most complaints about clinical judgment would give rise to a theoretical claim for damages in negligence since almost all would have resulted in some loss, otherwise a complaint would be unlikely. Nonetheless, the ombudsman recognises that for many people compensation is not an issue at all. The reality is that it can be very difficult indeed to bring a claim for clinical negligence because of the costs involved and the difficulty in obtaining funding. Unless the likely damages are large, or the claim apparently clear cut, such claims are relatively uncommon.¹⁹

- 2.22 In the same period that the Health Service Ombudsman was being reformed, a completely different model to that used earlier was developed for the Housing Ombudsman. The other public services ombudsmen are purely creatures of statute, whose relationships with those they investigate are founded solely in

¹⁶ Health Service Commissioners Act 1993, s 5(1).

¹⁷ Health Service Commissioners (Amendment) Act 1996, s 6.

¹⁸ Health Service Commissioners Act 1993, ss 2A and 2B.

¹⁹ [2008] EWHC 2315, [2009] 1 All ER 415 at [15] and [16].

public law. The Housing Ombudsman, however, is a mixed scheme: its relationship with those landlords it regulates is primarily a private law one, albeit a private law relationship that in the case of social housing providers fulfils a public law statutory duty to sign up to the housing ombudsman scheme.²⁰ The Housing Ombudsman, as provided for in its foundational scheme, investigates complaints of “maladministration”.²¹

- 2.23 The Housing Ombudsman is overwhelmingly focused on social landlords,²² who are required to be members of the scheme,²³ although it has optional jurisdiction over private sector landlords. According to figures recently supplied by the Housing Ombudsman, there were some 5 million social housing tenants covered by its scheme but only 100,000 private tenants.²⁴
- 2.24 The model for the public services ombudsmen, however, remains that of an ombudsman established by statute and focused on the investigation of maladministration.
- 2.25 A more fundamental change to the general model for public services ombudsmen came with the establishment of the Scottish Public Services Ombudsman in 2002. The Scottish Public Services Ombudsman is an integral part of the devolution settlement created by the Scotland Act 1998. Section 91 of the Scotland Act 1998 required that the Scottish Parliament make provision for the investigation of maladministration by the Scottish Administration. The then Scottish Administration made use of this opportunity to conduct a far wider consultation and reform of public services ombudsmen in Scotland.²⁵
- 2.26 The creation of the Scottish Public Services Ombudsman placed in one institution the investigation of Scottish public services provision – including the Scottish Administration, health, social housing and prisons.²⁶ Whilst primarily focused on investigating complaints of maladministration, the ombudsman can also investigate “any failure in a service” provided by a public body²⁷ or that it was the function of such a public body to provide.²⁸ The service failure jurisdiction of the Scottish Public Services Ombudsman does not extend to “family health services” or registered social landlords.²⁹

²⁰ Housing Act 1996, s 51 and sch 2.

²¹ Independent Housing Ombudsman Scheme, para 14.

²² Social landlord is defined in Housing Act 1996, s 51. The definition does not include housing still in direct ownership by a local authority.

²³ Housing Act 1996, sch 2, para 1.

²⁴ Figures supplied by the Housing Ombudsman, January 2011. This does not cover social housing tenants where local government is the landlord.

²⁵ See Scottish Executive, *Modernising the Complaints System* (2000).

²⁶ Scottish Public Services Ombudsman Act 2002, schs 2 and 3.

²⁷ Where that body is listed in Scottish Public Services Ombudsman Act 2002, sch 2.

²⁸ Scottish Public Services Ombudsman Act 2002, ss 5(1)(c) and 5(2).

²⁹ Above, ss 5(1)(c), 5(1)(d) and 5(e).

- 2.27 In a similar move to the establishment of the Scottish Public Services Ombudsman, in 2005 provision was made for a single public services ombudsman in Wales with the Public Services Ombudsman (Wales) Act 2005. This has jurisdiction over general service provision by the devolved administration and local authorities, social landlords, and the National Health Service in Wales.
- 2.28 Uniquely, for an ombudsman, the Public Services Ombudsman for Wales has jurisdiction over the ethical conduct of local government members and employees.³⁰ In England, under the Local Government Act 2000, similar functions are currently handled by Standards for England.³¹
- 2.29 After devolution and earlier reforms, the Parliamentary Commissioner still retains jurisdiction over the activities of UK bodies, for instance HM Treasury, in Scotland, Wales and Northern Ireland.
- 2.30 There have not been equivalent changes in England. However, substantial reforms to the Local Government Ombudsman were made in 2007, by the Local Government and Public Involvement in Health Act 2007. This allowed the Local Government Ombudsman to also investigate service failure,³² in a similar fashion to the Public Services Ombudsman for Wales and the Scottish Public Services Ombudsman. However, it did not seek to change the fundamental organisational makeup of the public services ombudsmen in England. Therefore, there continue to be separate institutions of Housing Ombudsman, Local Government Ombudsman and Health Service Ombudsman.
- 2.31 Subsequent to the 2007 reforms, the remit of the Local Government Ombudsman has continued to expand. The Health Act 2009 gave the Local Government Ombudsman the power to investigate complaints relating to privately arranged or funded adult social care.³³
- 2.32 The Apprenticeships, Skills, Children and Learning Act 2009 envisaged an expanded role for the Local Government Ombudsman concerning complaints about school governors.³⁴ This is being piloted in 2010-11. However, the Education Bill currently before Parliament will remove this jurisdiction if enacted in its current form.³⁵
- 2.33 Further changes to the Health Service Ombudsman in England are envisaged in the NHS Redress Act 2006, though this is not yet in force. The policy behind the NHS Redress Act 2006 is to make it possible for aggrieved citizens to be awarded small amounts of compensation through complaints schemes rather than having recourse to courts.

³⁰ See: Public Services Ombudsman (Wales) Act 2005, sch 4.

³¹ Local Government Act 2000, s 49 (as amended). Standards for England will be abolished if cl 15 and sch 4 of the Localism Bill as currently before Parliament are enacted (6 June 2011).

³² Local Government Act 1974, ss 26(1)(b) and (c) (as amended).

³³ Health Act 2009, s 35 and sch 5.

³⁴ Apprenticeships, Skills, Children and Learning Act 2009, ss 206 to 228.

³⁵ Education Bill, cl 44 as currently before Parliament (6 June 2011).

- 2.34 The process of change is not showing any signs of abating; the Localism Bill currently before Parliament contains provisions that would alter significantly the jurisdiction of the Housing Ombudsman, essentially giving it jurisdiction over social landlords where a local authority in England is the landlord.³⁶ This jurisdiction lies currently with the Local Government Ombudsman.
- 2.35 In 2010, the Northern Ireland Assembly Committee of the Office of the First Minister and deputy First Minister consulted on fundamental reform to the ombudsman regime for Northern Ireland.³⁷ This included the potential unification of the existing institutions, the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints.³⁸
- 2.36 There has never been a general, UK-wide review focused on the public services ombudsmen. The Cabinet Office's Collcutt review,³⁹ which recommended the establishment of a single ombudsman service in England but which has not been taken forward, was limited by jurisdiction. The reviews in Scotland,⁴⁰ Wales⁴¹ and Northern Ireland⁴² were similarly limited.
- 2.37 Finally, whilst the first ombudsman in the UK sense was a public sector ombudsman, the model has proliferated in the private sector. This can be seen by the ever expanding membership of the British and Irish Ombudsman Association.

Conclusions

- 2.38 Without drawing any conclusions as to the merits of the reforms and changes outlined above, it is clear that the development of the public services ombudsmen has been focused primarily on specific sets of complaints or, when considering the investigation of public services provision more generally, has been geographically limited.
- 2.39 The result is that there is no single model, or jurisdiction, across the territories that comprise the UK. This is true even where there is theoretically a single UK institution. The Parliamentary Commissioner's jurisdiction is different in Scotland, England, Wales and Northern Ireland, owing to the asymmetrical nature of UK devolution.

³⁶ See Localism Bill, cls 158 to 160 as currently before Parliament (6 June 2011).

³⁷ *Legislation to Update and Reform the Office of the Northern Ireland Ombudsman*, http://www.niassembly.gov.uk/centre/2007mandate/centre_ni_ombudsman.htm (last visited 6 June 2011). Consultation closed on 17 December 2010.

³⁸ Northern Ireland Assembly Committee of the Office of the First Minister and deputy First Minister, *Proposals to update legislation to reform the office of the Northern Ireland Ombudsman* (2010) paras 2.1 to 2.3.

³⁹ Cabinet Office (P Collcutt and M Hourihan) *Review of the Public Sector Ombudsmen in England* (2000).

⁴⁰ Scottish Executive, *Modernising the Complaints System* (2002).

⁴¹ Wales Office and Welsh Assembly Government, *Ombudsmen's Services in Wales: Time for Change?* (2002).

⁴² Northern Ireland Assembly Committee of the Office of the First Minister and deputy First Minister, *Proposals to update legislation to reform the office of the Northern Ireland Ombudsman* (2010).

CALLS FOR A WIDER REVIEW

- 2.40 In their joint response to our consultation paper, the public services ombudsmen stated that there should be a wider review, and set out its suggested purpose as follows:

First, to consolidate the ombudsman system as a distinctive system of administrative justice in its own right; secondly, to position the ombudsman system coherently within the broader system of administrative justice so that its relationship with the courts, tribunals and other “scrutiny institutions” is clear and constructive; and thirdly to refine the operation of the ombudsman system so that it can work to its full potential in the public interest.

- 2.41 Other consultees also suggested that there should be a wider, Leggatt-type review of the ombudsmen’s role as a mature mechanism for administrative justice. This was included in the responses of the public services ombudsmen, the Administrative Justice and Tribunals Council, JUSTICE, and academics such as Brian Thompson and Richard Kirkham.⁴³
- 2.42 By a Leggatt-type review, consultees were referring to the Leggatt Review of Tribunals, established by the then Lord Chancellor, Lord Irvine of Lairg, on 18 May 2000 to:

Review the delivery of justice through tribunals other than ordinary courts of law, constituted under an Act of Parliament by a Minister of the Crown or for purposes of a Minister's functions; in resolving disputes, whether between citizens and the state, or between other parties...⁴⁴

- 2.43 The Leggatt Review reported in March 2001,⁴⁵ making 361 recommendations that led directly to the Tribunals, Courts and Enforcement Act 2007 and the establishment of a single Tribunals Service. Leggatt was the most recent of the long line of administrative and civil justice reviews that have included Franks⁴⁶ and Woolf.⁴⁷
- 2.44 Ann Abraham, the current Parliamentary Commissioner and Health Service Ombudsman, has repeatedly called for a wider review of the ombudsmen and their role.⁴⁸

⁴³ University of Sheffield.

⁴⁴ *Terms of Reference*, <http://www.tribunals-review.org.uk> (last visited 6 June 2011).

⁴⁵ Report of the Review of Tribunals (Leggatt Report), *Tribunals for users – one system, one service* (2001).

⁴⁶ Report of the Committee on Administrative Tribunals and Enquiries (1957) Cmnd 218.

⁴⁷ Lord Chancellor’s Department, *Access to justice – final report* (1996).

⁴⁸ See: A Abraham, “The ombudsman and ‘paths to justice’: A just alternative or just an alternative?” [2008] *Public Law* 1.

- 2.45 Buck, Kirkham and Thompson have also appealed for a “Leggatt-style review of ombudsmen services” in a recent book.⁴⁹ They advance the argument, which the authors have also put forward in other individual and joint works,⁵⁰ that such a review is necessary in order to establish a balanced and appropriate system for administrative justice that properly accommodates the ombudsmen. In their view, the current arrangements do not reflect what they see as the proper allocation of matters between the different providers of administrative justice, be these internal complaints mechanisms, mechanisms for proportionate dispute resolution, courts, tribunals, or ombudsmen.
- 2.46 Whilst in consultation the majority of those who commented on this issue thought that a wider review would be desirable, this position was not supported unanimously. The Northern Ireland Ombudsman, for instance, stated that it would not like to be included in any Leggatt-type review, as it is currently undertaking reform of its governing legislation.
- 2.47 Other consultees, particularly the Medical Defence Union and Ian Wise QC, queried our decision not to consider the expanded jurisdiction of the ombudsmen. In the case of the Medical Defence Union, it thought that we should have considered the jurisdiction of the Health Service Ombudsman and Public Services Ombudsman for Wales in relation to complaints against individual doctors or matters of clinical judgment. Ian Wise QC thought that we should consider in greater depth the jurisdiction of the Local Government Ombudsman over questions of service failure.

Discussion

- 2.48 In our view, the development of the ombudsmen as outlined above has left the UK with competing models for the public services ombudsmen: the original Parliamentary Commissioner; the radically different model of the Housing Ombudsman; and the generalist public services ombudsmen.
- 2.49 The adoption of differing models and approaches can be seen in the way that certain jurisdictions have been bolted onto available ombudsmen, as with the Public Services Ombudsman for Wales in relation to councillor code of conduct complaints.
- 2.50 Moreover, the general remit of particular ombudsmen has changed over time. This is particularly clear when considering the Health Service Ombudsman. It is apparent to us that Parliament envisaged a radical change in the nature of the Health Service Ombudsman with the Health Service Commissioners (Amendment) Act 1996. Giving the ombudsman jurisdiction over complaints against individual doctors and matters of clinical judgment was the result of a settled policy choice to place the Health Service Ombudsman at the pinnacle of the National Health Service complaints system.

⁴⁹ T Buck, R Kirkham and B Thompson, *The Ombudsman Enterprise and Administrative Justice* (2011) p 232.

⁵⁰ See T Buck, R Kirkham and B Thompson, “Time for a ‘Leggatt-style’ review of the ombudsman system?” [2011] *Public Law* 20; R Kirkham, B Thompson and T Buck, “Putting the ombudsman into constitutional context” (2009) 62 *Parliamentary Affairs* 600.

- 2.51 The ombudsmen can be seen as having been subject to a process of continual, but not systemic, renewal. Service failure provisions have now been carried over from their inception in Scotland to the Public Services Ombudsman for Wales and the Local Government Ombudsman. It is slightly anomalous that similar provisions on service failure have not been enacted for the Parliamentary Commissioner.
- 2.52 This is not to say that there should be a single model. There may be good reasons why it is appropriate to adopt one ombudsman model for some areas of public service delivery, for instance social housing, but use another ombudsman model in a different area, such as health care.
- 2.53 Our point is simply that the development of the public services ombudsmen has reached the stage where we think it is appropriate to step back and consider what role, or roles, the public services ombudsmen fulfil and how best they should be constructed in order to fulfil that role, or those roles.
- 2.54 The ombudsmen are no longer a novel import about which Parliament needs to be reassured, but constitute an accepted part of our constitutional order. Given that they have now developed to the stage where their presence in any system for administrative justice is accepted, even required, then it would be sensible to accept this and review their place in a holistic fashion.

Conclusions and recommendation

- 2.55 Our experience has led us to believe that the time has come for a more fundamental review of the public services ombudsmen and their place in the landscape for administrative justice. Therefore, we make the following recommendation.

<p>Recommendation 1: We recommend that the Government establish a wide-ranging review of the public services ombudsmen's role as institutions for administrative justice.</p>
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PART 3

ACCESS TO THE OMBUDSMEN

- 3.1 This is the first of four Parts containing our detailed substantive recommendations. This Part deals with those mechanisms which either facilitate or restrict access to the ombudsmen.
- 3.2 Our treatment is split into four sections:
- (1) First, we consider the requirement that a complaint must be made in writing for some of the public services ombudsmen.
 - (2) Then we turn to what have become known as the “statutory bars”. These are the statutory provisions which mean that the public services ombudsmen should not open an investigation where the complainant has or had the possibility of recourse to a court, tribunal or other mechanism for review.
 - (3) Next, we examine whether there should be an express power for the Administrative Court to stay an action before it, allowing an ombudsman the opportunity to investigate or otherwise dispose of the matter, where it sees this as beneficial.
 - (4) Finally, we look at what is termed the MP filter. This is the requirement that a complaint to the Parliamentary Commissioner must be made via a Member of the House of Commons.

WRITTEN REQUIREMENTS

Consultation paper proposals

- 3.3 The governing statutes for the public services ombudsmen contain a variety of approaches to whether a complaint should be written. For the Parliamentary Commissioner and the Health Service Ombudsman, there are strict requirements that complaints are made in writing.¹ The statutory provisions for the Public Services Ombudsman for Wales and the Local Government Ombudsman both allow the ombudsmen to dispense with the written requirement, though there are slight differences between the powers.² There are currently no statutory requirements that a complaint be made in writing to the Housing Ombudsman in the Housing Act 1996. The only formal requirement is that a complaint should be “duly made”.³
- 3.4 Having considered the existing provisions in our consultation paper, we provisionally proposed that the Parliamentary Commissioner and the Health Service Ombudsman should have the power to disapply the requirement that a complaint be in writing, in a manner similar to the current position of the Local

¹ Parliamentary Commissioner Act 1967, s 5(1)(a); Health Service Commissioners Act 1993, s 9(2).

² Public Services Ombudsman (Wales) Act 2005, ss 2(4) and 5(1)(a); Local Government Act 1974, ss 26B(1)(a) and 26B(3).

³ Housing Act 1996, sch 2, para 7(1).

Government Ombudsman.⁴

- 3.5 The current practice of the Local Government Ombudsman is to exercise its discretion to dispense with the written requirement as a matter of course. This allows the Local Government Ombudsman Advice Team in Coventry to function effectively as a point of first contact to the Local Government Ombudsman. The Local Government Ombudsman now receives a large portion of its complaints over the telephone.⁵
- 3.6 There seemed no reason to alter the current position of either the Housing Ombudsman or the Public Services Ombudsman for Wales. The result of our provisional proposals would be that all of the public services ombudsmen could accept a complaint by means other than in writing.⁶

Consultation responses

- 3.7 Twenty-six consultation responses addressed this issue; 24 of those agreed with the proposal and two disagreed with it.
- 3.8 The public services ombudsmen acknowledged the benefit of an explicit power to dispense with the requirement that complaints be made in writing, though they noted that “in practice the current constraints, where they exist, have not proved insurmountable”.
- 3.9 JUSTICE agreed with the provisional proposal and highlighted that there may be merit in considering how other ombudsmen receive complaints. The Administrative Justice and Tribunals Council also agreed with our provisional proposal.
- 3.10 At a consultation event, the Public Services Ombudsman for Wales questioned whether there was any need for formal requirements at all.
- 3.11 Dispensing with the written requirement was not supported by all consultees, with the Law Reform Committee of the Bar Council suggesting that any discretion to dispense with written requirements be drawn narrowly. Oxfordshire County Council disagreed completely. Some, such as Luton Borough Council, made the point that eventually complaints had to become written in order to be processed.

Recent developments

- 3.12 The Localism Bill is currently before Parliament. If enacted in its present form then the resulting Localism Act will, amongst many other things, transfer jurisdiction over local authority provided social housing from the Local

⁴ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 4.91. The relevant provisions allowing the Local Government Ombudsman to disapply the written requirement are in ss 26B(1) and 26B(3) of the Local Government Act 1974.

⁵ In 2010-2011 the Local Government Ombudsman received 43,000 calls but with written and email correspondence it was 95,000 contacts. Information supplied by the Local Government Ombudsman.

⁶ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 4.91.

Government Ombudsman to the Housing Ombudsman.⁷

- 3.13 The Localism Bill, if enacted as currently before Parliament, will insert new paragraphs (7A to 7C) into schedule 2 to the Housing Act 1996.⁸ Under the proposed new paragraph 7A(1) in schedule 2 to the Housing Act 1996, a complaint to the Housing Ombudsman against a social landlord would not be “duly made” unless “submitted in writing to a designated person”. There is no discretion in the proposed new paragraphs to waive this requirement and it would apply to complaints against all social landlords, including those currently within the jurisdiction of the Housing Ombudsman.
- 3.14 Therefore, the effects of the proposed reforms would be twofold:
- (1) to create a formal requirement that a complaint be made in writing for those social housing tenants currently under the jurisdiction of the Housing Ombudsman, where there are currently no formal requirements that a complaint be written; and
 - (2) to create a formal requirement that a complaint be made in writing for those social housing tenants currently under the jurisdiction of the Local Government Ombudsman, where the discretion to waive formal requirements means that complaints can be initiated over the telephone via the Local Government Ombudsman Advice Team.
- 3.15 Later in this Part, we consider the separate issue of the need to submit the complaint to a designated person, thereby removing direct access to the Housing Ombudsman for tenants in social housing.

Discussion

- 3.16 Consultation showed us that reform of existing formal requirements is broadly supported. In fact, there was a willingness to go further than we provisionally proposed and dispense with those existing requirements outright.
- 3.17 We suggest that defining in a statute how complaints should be made can become problematic as the methodology for communication changes (for example, with developments in technology).
- 3.18 It is clear that complaints must eventually become recorded; we do not, however, think that this requires the complaint process to commence in writing.
- 3.19 Given responses received to consultation, we now think that there is no need for statutory requirements as to the form in which complaints are made. This would allow the public services ombudsmen to react to technological developments and the changing preferences of service users, without the need to either reform the governing Acts or routinely exercise discretion so as to keep pace with such developments or other changes.

⁷ Localism Bill, cls 159 to 160 as currently before Parliament (6 June 2011).

⁸ Localism Bill, cl 158 as currently before Parliament (6 June 2011). Sch 2 to the Housing Act 1996 details the requirements for an approved ombudsman scheme under the Housing Act 1996, s 51.

- 3.20 However, we also think that any system should be open and transparent. Therefore, we believe that it is necessary that the public services ombudsmen publish and update regularly guidance as to how complaints can be made.
- 3.21 We considered whether there should be a specific duty on the public services ombudsmen to publish such guidance. However, an overarching theme of this report is to ensure that the ombudsmen retain a reasonably high degree of discretion in relation to how they operate, this discretion being balanced by greater transparency. A statutory requirement to produce such guidance would be contrary to our general approach. Therefore, we decided not to recommend the creation of one.

Recommendation 2: We recommend that all formal, statutory requirements that complaints submitted to the public services ombudsmen be written are repealed, even where there is presently discretion to waive the requirement.

We recommend that the public services ombudsmen publish, and update regularly, guidance as to how complaints can be made.

- 3.22 We are concerned by the moves in the Localism Bill to create a formal requirement that complaints be made in writing to the Housing Ombudsman, with no discretion to waive this requirement. We regard the proposed reform as an unfortunate and retrograde step which would limit access to the ombudsman at the expense of vulnerable members of the community.

STATUTORY BARS

Consultation paper proposals

- 3.23 By “statutory bars”, we mean the statutory provisions, based on section 5(2) of the Parliamentary Commissioner Act 1967, whereby a public services ombudsman cannot open an investigation where the complainant has or had the possibility of recourse to a court, tribunal or other mechanism for review, unless it was not reasonable to expect the complainant to resort or to have resorted to it.⁹
- 3.24 Such a statutory provision does not exist for the Housing Ombudsman; consequently, the discussion following does not affect it.
- 3.25 The first statutory bar was enacted in the Parliamentary Commissioner Act 1967, its purpose being to prevent an overlap between the jurisdiction of the courts and that of the ombudsmen.
- 3.26 Since then, however, there has been a considerable expansion in the ambit of judicial review, such that there is now a clear overlap between the jurisdiction of the ombudsmen and the courts. However, the approach adopted in each of the public services ombudsmen’s current statutory bars is identical to that adopted originally in 1967. The effect of this is to create a preference in favour of the Administrative Court, where (but for the existence of the statutory bar) both the Administrative Court and the ombudsman could potentially consider a particular

⁹ Other “statutory bars” are contained in: Local Government Act 1974, s 26(6); Health Service Commissioners Act 1993, s 4(1); and Public Services Ombudsman (Wales) Act 2005, s 9.

matter.¹⁰

- 3.27 Provisional proposals to reform the statutory bars formed part of our consultation paper on administrative redress. There we provisionally proposed a structured discretion to disapply the existing bars.¹¹ When we revisited the subject in our recent consultation paper, we decided that more fundamental reform was appropriate, given the development of the public services ombudsmen and our wish to simplify and facilitate access to the ombudsmen. Rather than provisionally proposing a structured discretion, we provisionally proposed the removal of the bars completely, thereby allowing the public services ombudsmen to accept complaints where they thought this appropriate.¹²
- 3.28 Specifically, we made three provisional proposals in relation to the statutory bars:
- (1) We provisionally proposed that the existing statutory bars be reformed, creating a general presumption in favour of a public services ombudsman being able to open an investigation.
 - (2) We provisionally proposed that this should be coupled with a broad discretion allowing the public services ombudsmen to decline to open an investigation.
 - (3) We provisionally proposed that in deciding whether to exercise that discretion the public services ombudsmen should ask themselves whether the complainant has already had or should have had recourse to a court or tribunal.¹³

Consultation responses

- 3.29 Twenty-seven consultees expressed a view on the first of our provisional proposals. Nineteen of those agreed with the provisional proposal, three were equivocal and five disagreed.
- 3.30 On the second provisional proposal, 22 consultation responses were received. Fifteen of those agreed that there should be a general presumption in favour of the ombudsman being able to investigate a complaint coupled with a broad discretion to decline to open an investigation, and two disagreed. Five responses were opposed to, or expressed equivocal views on, the general presumption in favour of the ombudsman investigating. However, if the presumption were in place, these consultees would support a broad discretion to decline to investigate.
- 3.31 Concerning the third provisional proposal, 19 consultees expressed a view; 17 of those agreed with the proposal and two disagreed.

¹⁰ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 4.46.

¹¹ Administrative Redress: Public Bodies and the Citizen (2008) Law Commission Consultation Paper No 187, paras 5.55 to 5.75.

¹² Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 4.38 to 4.47.

¹³ Above, paras 4.42 and 4.47.

- 3.32 In their response, the public services ombudsmen agreed with our proposals, stating that:

Although we have, in our different ways, found it possible to operate effectively within our respective statutory frameworks, we do consider that a general presumption as proposed would be constructive.

- 3.33 Concerning whether they should ask themselves whether the complainant has already had or should have had recourse to a court or tribunal, the public services ombudsmen in their joint response commented:

Yes, but this is only one consideration amongst others and should not be identified separately as obligatory in legislation.

- 3.34 The Law Reform Committee of the Bar Council drew a distinction between statutory routes to an appeal before a specialist tribunal, and court-based forms of administrative redress. In the former case, it was of the opinion that there should not be a presumption in favour of the ombudsmen being able to open an investigation. However, on the latter it took a different view, stating that:

Here the balance lies in favour of greater access to the ombudsmen. The expansion of judicial review to cover virtually all errors of law by public decision-makers means that the ombudsmen's jurisdiction will continue to be significantly reduced unless there is a presumption that an investigation may be opened.

- 3.35 It noted also that "discretion would go some way towards mitigating the adverse effects of overlapping jurisdiction".

- 3.36 The Administrative Justice and Tribunals Council supported fully our proposals on the removal of the statutory bar and the general presumption in favour of the ombudsmen being able to open an investigation. However, it took the opposite line to many on the need to identify when complaints should not be opened, stating:

The Council does not believe that any further legislation is needed to direct ombudsmen in the exercise of discretion. The Council would be concerned if complainants' actions or inactions with regard to courts and tribunals were automatically considered as there are many reasons why complainants do or do not seek legal recourse, with financial means being a significant and growing factor.

- 3.37 Some consultees pointed out that in many ways our provisional proposals would merely put on a statutory basis the current practice of the public services ombudsmen.

- 3.38 Of those who disagreed with our provisional proposals, some expressed concerns that our provisionally proposed reforms would lead to an increase in complaints made to the public services ombudsmen. Others suggested that the existence of discretion may result in individuals not pursuing complaints, because they are not being directed towards a particular institution.

Discussion

- 3.39 The provisionally proposed reforms of the statutory bar, as they related to court-based mechanisms for administrative redress, met with substantial approval.
- 3.40 We are, therefore, recommending that the statutory bars as they relate to courts be repealed and replaced with the discretion for the ombudsmen to open an investigation, or otherwise dispose of a matter (for instance by referring it to mediation). This would give complainants greater freedom of choice over the institution, and related procedure, for administrative redress they can use.
- 3.41 In relation to statutory appeals and the issue raised by the Law Reform Committee of the Bar Council, we have not been persuaded that this argument should alter our stated position.
- 3.42 We think the appropriate way of considering a statutory appeal is in the context of the statute within which it is situated. At one level the creation of a statutory appeal can be taken as the drafting expression of an appeal preference, or the granting of a defined route for appeals, which need not exclude other methods of redress or dispute resolution.
- 3.43 A statutory appeal allows individuals to challenge the legality of a decision made concerning them. The core of this is, therefore, different to the primary role of the ombudsmen in investigating injustice caused to an individual as a result of maladministration.
- 3.44 Our reform would not alter statutory appeals or the possibility of recourse to them. Our recommended reform offers complainants a wider choice of options where previously there was a restriction on the use of ombudsmen.
- 3.45 Our recommended reform in no way reduces the discretion that the ombudsmen have to refuse to take a complaint where there is an alternative mechanism for administrative redress, which could be a statutory appeal, that it sees as more appropriate.
- 3.46 Following consultation, we do not think that it is necessary to define in statute the discretion available to the public services ombudsmen when deciding not to investigate a complaint. Whilst we are recommending a broad discretion, decisions would be susceptible to challenge on normal public law grounds. We think that this would provide sufficient protection from irrational decision-making.
- 3.47 In responses to our consultation paper, concerns were raised that individuals may not know which redress mechanism to use. By submitting an inappropriate complaint to an ombudsman, an individual may lose the opportunity to use a court or tribunal owing to the limitation periods of those institutions. Given the fact that many individuals will seek legal advice on important matters, we do not think that this is a significant problem. However, we accept that there is the potential for a limited number of individuals to be affected.
- 3.48 In order to reduce the chance of an individual being detrimentally affected by the removal of the statutory bars, we recommend that the ombudsmen publish guidance as to whether they are the appropriate mechanism for particular classes or sorts of complaint or whether it would be advisable for complainants to use other institutions. We think that the ombudsmen are ideally placed to publish

such guidance. We appreciate that this happens already, but the situation will be different without the statutory bars and new guidance should reflect this.

- 3.49 Where the public services ombudsmen decide not to open an investigation, if our proposals in Part 5 are adopted, they should communicate a statement of reasons to the complainant directly.

Recommendation 3: We recommend that the statutory bars be replaced with the discretion for the ombudsmen to take a claim unless they decide it is not appropriate.

We recommend that the public services ombudsmen publish guidance detailing where it is appropriate to make a complaint to them, and where it would be more appropriate to make use of a court or other mechanism for administrative justice.

STAY PROVISIONS

Consultation paper proposals

- 3.50 The creation of an express power to stay proceedings in the Administrative Court, thereby allowing an individual to make a complaint to the ombudsman, was provisionally proposed in our consultation paper on administrative redress.¹⁴
- 3.51 We saw the justification for such a mechanism in the idea that it is possible for a matter to come before the Administrative Court, at the permission stage, where it is clear that there is a sufficiently arguable case on administrative law illegality for permission to be granted, but it is apparent to the court that the true nature of the matter (be it categorised as a dispute or not) concerns maladministration.
- 3.52 In such a situation, we thought that the appropriate institution to deal with the matter, and the dissatisfaction suffered by any aggrieved party, would be one of the public services ombudsmen.
- 3.53 In our recent consultation paper, we provisionally proposed that a matter be stayed and then “transferred” to the ombudsmen from the Administrative Court, when the court thought this suitable.¹⁵ This would not be an actual transfer in the strict legal sense, as the court would not be moving the case before it to the ombudsmen. However, we thought the term useful in emphasising the change in the institution that would consider the dispute.
- 3.54 More specifically, in our consultation paper on the public services ombudsmen we made one provisional proposal and asked three consultation questions.

¹⁴ Administrative Redress: Public Bodies and the Citizen (2008) Law Commission Consultation Paper No 187, paras 5.27 to 5.38.

¹⁵ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 4.48 to 4.75.

- 3.55 We provisionally proposed that there should be a stay and transfer power allowing matters to be transferred from the courts to the public services ombudsmen.¹⁶
- 3.56 The three consultation questions were as follows:
- (1) We asked whether consultees agreed that the court should invite submissions from the original parties before transferring the matter.
 - (2) We asked whether, in the event of such a transfer, the ombudsman should be obliged to open an investigation.
 - (3) We asked whether the ombudsman should also be able to abandon the investigation should it – in his or her opinion – not disclose maladministration.¹⁷

Consultation responses

- 3.57 Twenty-five responses addressed our broad provisional proposal. Sixteen of those agreed with the proposal, seven disagreed, and two were equivocal.
- 3.58 On the first consultation question, 24 consultees expressed views; 21 agreed and three disagreed.
- 3.59 In response to the second consultation question, 20 consultees expressed views; 10 consultees agreed, nine disagreed, and one was equivocal.
- 3.60 Finally, in relation to the third question, 22 responses were received; 18 consultees agreed and four disagreed.
- 3.61 The public services ombudsmen were in favour of the creation of such a mechanism, provided it was limited to the Administrative Court. However, they were opposed to the idea that they should be obliged to open an investigation, even if they then had the discretion to close it:

We regard it as a fundamental principle that the ombudsman has discretion whether or not to open an investigation. Creating an obligation for an ombudsman to open an investigation in such circumstances would infringe the ombudsman's independence.

Since we regard it as especially important that the ombudsman system of justice be widely recognised as distinctive and different from the courts and tribunals, we consider that the reinforcement of any appearance to the contrary would be a regressive step.

- 3.62 JUSTICE agreed with our proposals, though it expressed worries about the possible delay that such a mechanism may create and suggested "that the ombudsman's consent should be required to open an investigation". The Administrative Justice and Tribunals Council similarly agreed with our proposals

¹⁶ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 4.76.

¹⁷ Above, paras 4.77 to 4.79.

excepting the obligation on the ombudsmen to open an investigation.

3.63 Brian Thompson, though agreeing with the first two proposals, felt that obliging the ombudsmen to accept a transfer:

... seems at odds with the overall scheme of the ombudsman jurisdiction which confers substantial discretion on the ombudsman. It is certainly right that the ombudsman should be able to “close” the complaint if there is no evidence of maladministration. It is likely that a protocol would have to be created to guide this development.

3.64 Richard Kirkham suggested as an alternative that “perhaps the ombudsman should be required to consider the referral and give reasons should it decide not to investigate”.

3.65 The Law Reform Committee of the Bar Council was opposed to our provisional proposals for the following reasons.

- (1) They risked imbuing the ombudsman’s essentially informal procedure with elements of a formal, adversarial procedure which may undermine the purpose of the ombudsman.
- (2) They carried the risk that, in the case of the Parliamentary Commissioner, the role of the ombudsman as the officer of Parliament would be attenuated. A transferred case would have its origins in the legal process rather than being an extension of Parliamentary scrutiny.
- (3) There is a risk of additional costs and delay, especially if there are procedural or other disputes about how or when a case is to go from one forum to the other.
- (4) The ombudsmen should not become a substitute for the vindication of individual rights which litigation alone provides.
- (5) It is presently confusing as to whether a complaint is best ventilated by commencing legal proceedings in a court or launching a complaint to the ombudsman. It may be even more confusing if individuals and their lawyers, when planning in advance the progress of the case, have to anticipate whether it may end up in the other forum.
- (6) It is unattractive to compel a person to depart from the procedure he or she has selected and enter a different kind of procedure.

3.66 The Council of Her Majesty’s Circuit Judges, however, supported the proposals.

Further consideration of the stay provisions

3.67 We have decided that the term “stay and transfer” did cause confusion. Therefore, we are reverting to our original formulation of referring to our recommended provisions as stay provisions.

3.68 The basic proposal to create stay provisions seemed acceptable to consultees. The requirement that the parties be invited to make submissions before a matter is stayed was also acceptable. However, there was considerable opposition to

the proposal that the ombudsmen should be obliged to open an investigation, even if they could close it subsequently.

- 3.69 In light of the consultation responses, we took the opportunity to reassess our provisional proposals.
- 3.70 We considered that the mechanism would normally be used at the permission stage. What we did not explore in the consultation paper was whether the stay would occur with the granting of permission or whether the court would stay the matter at the permission stage prior to the granting of permission.
- 3.71 Our view, having considered the practical mechanics in greater detail, is that it would be best if the matter were stayed before the granting of permission. The advantage of this is considered below. However, we do not think that a stay need be granted before permission and therefore we suggest creating a general power to allow an action to be stayed either before or after permission.
- 3.72 We think that the parties, and by this we really mean the defendant, should be able to request that a matter is stayed. If this happens, it would seem sensible that the applicant is able to make submissions (usually in writing) to the court on this specific point – which may raise issues different to those considered in their original application.
- 3.73 Where the court, of its own volition, is minded to make an order to stay an action before it, it should seek written representations from the parties to the action before making such an order.
- 3.74 We think that the mechanism should be built on comity between the Administrative Court and the public services ombudsmen. In consultation, we realised that we were overly prescriptive in the model we adopted in our consultation paper. We provisionally proposed that the transfer of a matter should force the ombudsman to open an investigation. We think that the better approach is that the stay power should allow an ombudsman to dispose of the matter as it sees fit. It should not require an ombudsman to open an investigation.
- 3.75 The next issue to be considered is what happens after the public services ombudsman has disposed of the matter. There is still a stay in existence. Where permission has not been granted, the findings of the public services ombudsman, or their refusal to investigate, could be considered at the permission stage. This would allow the court to see whether there is still any issue of administrative illegality that needs to be considered by the Administrative Court and decide at this preliminary and normally paper-based stage accordingly. If permission were to be granted, the court could then issue case management directions based on the remaining matters.
- 3.76 Where permission has already been granted, but the matter is subsequently stayed, the court would consider the ombudsmen's findings, or decision not to investigate, at any application to set aside the stay. At that stage, the Court could set aside the stay, either with or without further case management directions.

- 3.77 After consultation, we have concluded that establishing our recommended mechanism would require an express power in the Senior Courts Act 1981 and an amendment to the provisions of the Civil Procedure Rules, probably in Part 54.
- 3.78 The final point to be considered here is how the Administrative Court should deal with actions that come before it on issues that have, in another case, been stayed so that the matter can be investigated by an ombudsman. If actions concern the same defendant, then this should be picked up by the Court's centralised computer system, known as COINS. This should mean that all actions are transferred to be heard at the same court. If they do proceed elsewhere it will be with the full knowledge of how the related proceedings are progressing. Consequently, a decision should be made with full information concerning other actions. If problems concerning related actions do manifest themselves, we suggest that this could be dealt with by an appropriate Practice Direction or an amendment to the Civil Procedure Rules.

Discussion

- 3.79 In response to the concerns raised by the Law Reform Committee of the Bar Council, we make the following points.
- 3.80 We do not think that the change in the principal forum for a matter, which is properly categorised as a dispute in the context of a court, to an ombudsman would lead to the latter process becoming adversarial. The ombudsmen's processes are investigatory and the parties have to respond to that investigation rather than acting as they do in a court case. Given the discretion accorded to the ombudsmen by their governing statutes, it is hard to see how the parties to the original case could upset the freedom of an ombudsman to dispose of a matter as it sees fit.
- 3.81 The Law Reform Committee of the Bar Council suggested that as the Parliamentary Commissioner is an element of Parliament's scrutiny function, its role would be attenuated if complaints came to it from courts. This fails to take into account the development of the Parliamentary Commissioner as a distinct institution for administrative justice. This role is one which we want to emphasise with our recommended reforms to the MP filter. This is so even though the Parliamentary Commissioner has a special relationship with Parliament. In Part 6 of this report, we propose reform to the relationships the public services ombudsmen have with Parliament, or the National Assembly for Wales, with the intention of strengthening the relationships that the ombudsmen have with democratic bodies.
- 3.82 We accept that the courts are the primary forum within which to vindicate rights. We see the public services ombudsmen primarily as institutions for administrative justice rather than as human rights defenders. We suggest that this would be a factor that would guide a court's decision whether or not to stay. After the ombudsman has (or has not) conducted an investigation, it would be possible for either party to return to the Administrative Court and ask the court to lift the stay, grant permission (if the stay were granted before permission granted) and allow the application to proceed to a hearing in order to deal with any administrative illegality.

- 3.83 We suggest that it is precisely due to the confusion caused by the complexity of redress mechanisms that our suggested stay procedure should exist. The stay procedure proposed would allow matters to be re-allocated, where it appears to the Administrative Court that a public services ombudsman is the more appropriate forum.
- 3.84 Compelling an individual to move to a different forum would be an extreme measure. However, we perceive that there may be situations where to compel a complainant to move forum would be in the overall interests of justice.
- 3.85 If an ombudsman were to refuse to open an investigation, the complainant would be able to return to the court with the refusal from the ombudsman and use that when arguing that the court should lift the stay, grant permission (if not already granted) and allow the matter to proceed to a hearing. However, we would only expect compulsion to occur in exceptional cases and for the ombudsmen subsequently to refuse to open an investigation to be rare.
- 3.86 We do not think that this procedure would impose a significant burden on the public services ombudsmen.
- 3.87 We think that the proposal suggested by Richard Kirkham would be acceptable in isolation, and accords with our general approach of preserving flexibility and improving transparency. Kirkham suggested that the stay and transfer procedure should not compel an ombudsman to accept a complaint but that the ombudsman should give reasons when not doing so. However, later in this report, we recommend that those who are affected by a decision to not investigate should receive such statements in all cases. This is to be coupled with a recommendation that the public services ombudsmen move to publishing these statements as resources and changing procedures allow. We do not think it necessary to provide for that specifically.
- 3.88 Given the above, we make the following recommendation.

Recommendation 4: We recommend that the Administrative Court should have an express power to stay an action before it, in order to allow a public services ombudsman to investigate or otherwise dispose of the matter.

We recommend that the stay of an action should not force a public services ombudsman to accept a complaint.

MP FILTER

- 3.89 The final matter to consider on access is the continuing existence of the MP filter. The MP filter is the popular term used for the requirement, in section 5(1) of the Parliamentary Commissioner Act 1967, that a complaint made to the Parliamentary Commissioner must be submitted to a Member of Parliament and forwarded, at their discretion, to the Parliamentary Commissioner.
- 3.90 The MP filter was an integral part of the Parliamentary Commissioner as originally envisaged: a tool for Members of Parliament, assisting their constituency work. However, the Parliamentary Commissioner has developed substantially since then and many have called for the reform of the MP filter (which in many cases meant its abolition), including the Parliamentary

Commissioner, JUSTICE,¹⁸ the Public Administration Select Committee¹⁹ and the Cabinet Office review of the public sector ombudsmen.²⁰ The current Parliamentary Commissioner referred to potential reform of the MP filter in the following terms:

I suggest that the Government should accept the recommendations of successive Parliamentary Committees and more recently of the Law Commission that the MP filter should now be removed. This need not, indeed must not, in any way detract from the central relationship between my office and Parliament but it will, I believe, signal the importance of direct citizen access for any modern ombudsman institution, both as an instrument of transparent accountability and as a sign of commitment to equal and unfettered entitlement.²¹

3.91 We first provisionally proposed reform to the MP filter in our consultation paper on administrative redress.²² In that paper, having suggested that reform was necessary, we asked consultees whether outright abolition should be adopted or whether a “dual-track” mechanism was preferred. By “dual-track” we meant that the MP filter would no longer be a requirement. However, there would still be a procedure allowing for a Member of Parliament to receive a complaint and then forward it to the Parliamentary Commissioner.

3.92 After consultation on the administrative redress consultation paper, and having discussed the matter further with the Parliamentary Commissioner, we decided in our latest consultation paper to provisionally propose only the “dual-track” approach.²³ We were persuaded that there was benefit in leaving a formal link between the Parliamentary Commissioner and individual Members of Parliament.

Consultation responses

3.93 Fifteen consultees addressed our provisional proposals. Consultees either agreed with our proposals or, in the case of JUSTICE, wanted us to go further and abolish the MP filter outright.

3.94 The public services ombudsmen agreed with our proposals, stating:

The MP filter has long been the subject of debate. We recognise the considerable importance of the Parliamentary Ombudsman’s relationship with Parliament and the important role that MPs can play in resolving citizens’ grievance.

¹⁸ See: JUSTICE, *Our fettered ombudsman* (1977); JUSTICE/All Souls, *Administrative Justice: Some necessary reforms* (1988).

¹⁹ Public Administration Select Committee, *Annual Report of the Parliamentary Ombudsman* (1999-2000) HC 106.

²⁰ Cabinet Office (P Collcutt and M Hourihan), *Review of the Public Sector Ombudsmen in England* (2000) para 3.43.

²¹ Gabrielle Ganz Lecture at Southampton University in October 2009.

²² *Administrative Redress: Public Bodies and the Citizen* (2008) Law Commission Consultation Paper No 187, para 5.88.

²³ *Public Services Ombudsmen* (2010) Law Commission Consultation Paper No 196, para 4.106.

We are satisfied, however, that, notwithstanding the constitutional considerations that led to its introduction and the residual support for it in some quarters, the interests of citizen access will be greatly served by the removal of the MP filter.

The dual track approach will nevertheless preserve the option of involving an MP for those who want it. We consider this to be an acceptable compromise. Its successful implementation will, however, entail the active raising of awareness of the new framework and its operation on the part of the MPs and citizens.

Recent developments

- 3.95 As we mentioned earlier in this Part, the Localism Bill is currently before Parliament. Though not directly impacting on the MP filter, if enacted in its present form, the resulting Localism Act would create a “democratic filter” for the Housing Ombudsman.²⁴
- 3.96 Under the proposed reform, complaints to the Housing Ombudsman concerning social landlords would have to be made via a “designated person”.²⁵ A “designated person” is a member of the House of Commons, a member of the local housing authority for the district in which the property concerned is located or “a designated tenant panel”.²⁶
- 3.97 This mechanism would, if the clauses are enacted as currently formulated, be similar to the MP filter or the now abolished “councillor filter” for the Local Government Ombudsman.

Discussion

- 3.98 We can see no reason to alter our position from that stated in the consultation paper. Therefore, we recommend reform of the MP filter so as to allow complaints to be made directly to the Parliamentary Commissioner or via a Member of Parliament. The proposed development of the democratic filter for the Housing Ombudsman should not dissuade us from adopting this position.

Recommendation 5: We recommend that the MP filter be repealed in its current form and replaced by the “dual track” system, so that an individual would be able to submit a complaint directly to the Parliamentary Commissioner.

- 3.99 In relation to the democratic filter, we think it is worthwhile to outline certain concerns raised by both ourselves and those concerned directly with its imposition. Following the publication of the Localism Bill, we discussed the democratic filter with both the Housing Ombudsman and the British and Irish Ombudsman Association. In response to our request for a public statement, the

²⁴ Localism Bill, cl 158, as currently before Parliament (6 June 2011), if enacted will insert new paras (7A to 7C) into sch 2 of the Housing Act 1996.

²⁵ Housing Act 1996, sch 2, para 7A(1) (as proposed).

²⁶ Housing Act 1996, sch 2, para 7A(2) (as proposed). A “designated tenant panel” is defined in proposed Housing Act 1996, sch 2, para 7B(1) as: “a group of tenants recognised by a social landlord for the purpose of referring complaints against the social landlord”.

Housing Ombudsman supplied the following text:

I have always supported the resolution of disputes locally as a significant means of sustaining positive relations between landlords and tenants. The Secretary of State is my most important stakeholder and I am committed to doing all I can to help him and his ministers achieve their objectives. Many of the details concerning the way in which the democratic filter will operate have yet to be worked out. I am working with the Department of Communities and Local Government to ensure that the expertise and experience of my Service will be available to assist the democratic filter to function effectively. It is generally accepted that one of the principal conditions for being an ombudsman is that citizen consumers should be entitled to access directly his or her services. In that connection, the democratic filter does cause me some concern. I note the Law Commission's proposal for the abolition of the MP filter for the Parliamentary Commissioner for Administration in its current form, and its replacement by a "dual track" alternative. If this model were applied to complaints from social tenants to the Housing Ombudsman it would encourage local settlement of disputes, allow direct access to the ombudsman, and empower citizens through greater choice of options.

- 3.100 The sentiments in this quotation were echoed by the current Chair of the British and Irish Ombudsman Association, when consulted on this issue on 14 January 2010.
- 3.101 We understand that the policy behind the democratic filter is to correct a perceived "democratic deficit" at the local level by encouraging local settlement. The democratic filter seeks to achieve this by ensuring that complainants make use of elected representatives.
- 3.102 It is outside our remit to question the wider reasons for seeking to create the democratic filter, or the efficacy of the model adopted. Such policy decisions are properly those for the Secretary of State for Communities and Local Government; Cabinet and Parliament are the proper place for their debate.
- 3.103 However, from the perspective of our project, there seems to be no plausible way we can say that one type of filter is an "exclusionary bar to the opening of an investigation"²⁷ by an ombudsman and the other is not.

²⁷ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 4.102.

PART 4

THE PUBLIC SERVICES OMBUDSMAN PROCESS

- 4.1 This Part considers the nature of the process that the public services ombudsmen adopt. We also consider our proposed power allowing the public services ombudsmen to refer a question on a point of law to a court.

NATURE OF THE OMBUDSMAN PROCESS

Consultation paper proposals

- 4.2 In our consultation paper, we termed the ombudsman process “closed”.¹ In coming to that conclusion, we focused on the provisions within their governing statutes that require the ombudsmen, other than the Housing Ombudsman, to conduct their investigations “in private”² and the limited provisions allowing the ombudsmen to share information obtained in the course of their investigations.
- 4.3 In examining whether this should continue to be the case, we acknowledged that there were arguments in favour of maintaining the current approach. The current nature of an ombudsman’s investigation allows for flexibility, reduces reputational risk to public bodies from unmeritorious claims and, possibly, increases the level of cooperation between the ombudsmen and public bodies subject to investigations. We also thought that there may be advantages to anonymity for individual complainants.³
- 4.4 Conversely, we suggested that the current nature of ombudsman investigations does not necessarily fit with modern requirements for public administration, particularly the need for transparency. Open justice is, of course, fundamental to the courts and many tribunals.
- 4.5 In coming to our provisional view, we accepted that the need for transparency is not absolute and that there are possible benefits to the current process. We suggested that a balance should be struck between promoting transparency and respecting the efficient, informal operation of ombudsman investigations.⁴
- 4.6 In order to achieve this balance, we provisionally proposed that there should be statutory discretion for the public services ombudsmen to dispense with the requirement that an investigation be conducted in private in situations where they

¹ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 5.4 to 5.12.

² See: Public Services Ombudsman (Wales) Act, s 13(2); Parliamentary Commissioner Act 1967, s 7(2); Health Service Commissioners Act 1993, s 11(2); Local Government Act 1974, s 28(2). There are no similar provisions in the Housing Act 1996.

³ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 5.13 to 5.15.

⁴ Above, paras 5.16 to 5.21.

saw this as appropriate.⁵

- 4.7 We were mindful that any alteration to the governing statutes of the ombudsmen would also have an effect on their position under the Freedom of Information Act 2000.

Freedom of Information Act 2000

- 4.8 The public services ombudsmen, except the Housing Ombudsman, are bodies listed in schedule 1 to the Freedom of Information Act 2000. The Housing Ombudsman has pledged to follow the Freedom of Information Act 2000 provisions as a matter of policy.⁶
- 4.9 Section 1(1)(b) of the Freedom of Information Act 2000 gives individuals the general right to have information requested from public bodies listed in the Act communicated to them. The right conferred in section 1(1)(b) of the Freedom of Information Act 2000 is subject to absolute and partial exemptions, as set out in the Act.
- 4.10 An absolute exemption means that, provided the information requested is within the statutory exemption, there is no obligation to release the information to the person seeking it. Where information is covered by a partial exemption then the public body has to consider whether “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.⁷
- 4.11 For our purposes, the absolute exemption in section 44(1)(a) is the most important. It provides that information is exempt where its disclosure “is prohibited by or under any enactment”. In the ombudsmen context this means, owing to the statutory provisions we set out below, that the public services ombudsmen cannot disclose materials to an individual under a freedom of information request that they could not otherwise publish or share with them.
- 4.12 Our proposals would affect the operation of section 44(1)(a) in that the public services ombudsmen would lose an absolute exemption. If discretion to disclose information is created then this also creates an exception to the operation of section 44(1)(a) of the Freedom of Information Act 2000, as the ombudsmen would no longer be prohibited from disclosing the information.
- 4.13 The effect of losing the absolute exemption would be that the public services ombudsmen would have to consider whether the information requested was covered by another absolute exemption or, if the information was covered by a partial exemption, to balance the public interest in disclosure against maintaining the exemption. This could impose additional burdens on the ombudsmen.

⁵ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 5.33.

⁶ Housing Ombudsman Service, *Our publication scheme*, <http://www.housing-ombudsman.org.uk/foi.aspx> (last visited 6 June 2011).

⁷ Freedom of Information Act 2000, s 2(2)(b).

- 4.14 We asked two consultation questions on this issue. First, we asked whether the public services ombudsmen should be protected from additional burdens. Second, we asked whether they should retain an absolute exemption from the duty to disclose information or a more limited one.⁸

Consultation responses

- 4.15 Twenty-nine consultation responses addressed our broad provisional proposal that there should be statutory discretion allowing the public services ombudsmen to dispense with the requirement that an investigation be conducted in private when appropriate. Thirteen of those agreed with the proposal, 13 disagreed and three were equivocal.
- 4.16 Nineteen consultation responses addressed the consultation question on whether the public services ombudsmen should be protected from additional burdens. Sixteen agreed that they should, whilst three disagreed.
- 4.17 Twenty consultees addressed the specific consultation question on the Freedom of Information Act 2000. Thirteen of those preferred a more general exemption, as is currently the case, while five preferred a more limited exemption modelled on section 36(5)(ka) of the Freedom of Information Act 2000. Two consultees were not in favour of adopting either of the two exemptions.
- 4.18 Our provisional proposals received a mixed response. What soon became apparent was that they caused considerable concern amongst the public services ombudsmen. As they expressed in their joint response:

It is fundamental to the ombudsman system of justice that investigations should be conducted in private. Indeed we find it hard to see how they could be conducted otherwise unless there were to be a public hearing, which would undermine the inquisitorial process so fundamental to the ombudsman way of proceeding.

To dispense with the requirement that an investigation be conducted in private would seriously risk deterring complainants, many of whom very much value the privacy of the ombudsman's investigation.

We believe, furthermore, that the interests of transparency are already well served by the methods we variously deploy to publicise our processes and to report our findings.

- 4.19 The Law Reform Committee of the Bar Council took the view, "on balance", that ombudsman investigations should remain closed. It did not think that we had made a convincing case for change.
- 4.20 Brian Thompson thought that our provisional proposals were a "retrograde step" and "an example of a court oriented approach". He noted that whilst "it is open justice in the courts ... in other methods of disputes resolution, confidentiality prevails", and stated that "no convincing reason for change [had] been presented".

⁸ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 5.34 and 5.35.

4.21 Similarly, Richard Kirkham noted 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.

4.22 Lancashire County Council did not agree with our specific provisional proposals, suggesting that our aims could “be realised in closed investigations, for the duration of the investigation, with public scrutiny after publication”. Other local authorities supported transparency but with reservations, including the cost implications of any change.

4.23 The Administrative Justice and Tribunals Council suggested that:

A general preference for transparency in public administration is correct, and in line with the Administrative Justice and Tribunals Council’s own principles. However, there is significant risk in changing a system that works well in practice. Privacy is essential to many complainants and any proposal that presents the perception of risk to it may deter them from referring complaints. Having said this, if the purpose of the reform is purely to extend ombudsman discretion and absolute safeguards against new and potentially unforeseen burdens are implemented then the Council would have less cause for concern about the proposal.

4.24 JUSTICE agreed with our provisional proposals as did several complainant groups, such as the Advice Services Alliance.

4.25 Some consultees suggested that our provisional proposals did not go far enough. The Newspaper Society, which represents provincial newspapers, agreed that the current approach was “unsustainable” but did not agree with the “limited nature” of our provisional proposals.

4.26 LGO Watch and the Public Services Ombudsman Watchers, two interest groups of dissatisfied ombudsmen users, went further, suggesting that:

All investigations should be conducted in public unless the public service ombudsman involved can provide a compelling reason not to do so or the complainant requests it.

Statutory provisions

Relationship between “in private” and provisions on disclosure of information

4.27 There is one preliminary point to consider before moving on to specifics. In our consultation paper, we made much of the requirement that an ombudsman’s investigation should be conducted “in private”.⁹

⁹ See, for instance, Parliamentary Commissioner Act 1967, s 7(2).

- 4.28 In consultation it became clear that we had focussed overly on “in private”, which really concerns whether there should be hearings, rather than the detailed provisions relating to disclosure. The dissemination of information generated in the course of individual investigations does not turn on the requirement that an investigation be conducted “in private”.

Statutory provisions on disclosure of information by the public services ombudsmen

- 4.29 The provisions for disclosure in the governing statutes of the public services ombudsmen must be considered in conjunction with the limitations on disclosure contained in the Data Protection Act 1998, with general duties of confidence, and with the rules for responding to freedom of information requests under the Freedom of Information Act 2000.
- 4.30 The general approach, which is mirrored in the statutory provisions for all the public services ombudsmen except the Housing Ombudsman, is that information obtained by an ombudsman in the course of or for the purposes of an investigation cannot be disclosed except for the purposes of the investigation or any report.¹⁰
- 4.31 The statutes also provide gateways allowing for information-sharing with specified bodies, including between the ombudsmen themselves where a joint investigation is being conducted. The widest information-sharing provisions are those for the Health Service Ombudsman and the Public Services Ombudsman for Wales. The Health Service Ombudsman can share information in the interests of the health and safety of patients.¹¹ The Public Services Ombudsman for Wales can share information where “a person is likely to constitute a threat to the health and safety of one or more persons”, and it is in the public interest to do so.¹²
- 4.32 The effect of the provisions is that there is no power to disseminate information generated by or provided for an investigation except in the following circumstances:
- (1) for the purposes of conducting that investigation;
 - (2) for the purposes of a report;
 - (3) to specific bodies, as listed in the governing statutes;
 - (4) in the interests of the health and safety of patients (Health Service Ombudsman); and
 - (5) where a person is likely to constitute a threat to the health and safety of one or more persons, and it is in the public interest to do so (Public Services Ombudsman for Wales).

¹⁰ See: Parliamentary Commissioner Act 1967, s 11; Health Service Commissioners Act 1993, s 15; Local Government Act 1974, s 32; Public Services Ombudsman (Wales) Act 2005, s 26.

¹¹ Health Service Commissioners Act 1993, ss 15(1)(e) and 15(1B).

¹² Public Services Ombudsman (Wales) Act 2005, s 26(2)(i).

Conclusions

- 4.33 During an ombudsman's investigation, information generated by the investigation cannot be disclosed, except as is necessary for the conduct of the investigation or where there is a statutory provision allowing for information to be shared with others.
- 4.34 Subsequent to an investigation, where a report (or a statement of reasons for not proceeding with a complaint) is prepared, the governing statutes allow information to be shared in order to generate that report or statement using information which it would not otherwise be possible to disclose. This is considered in detail in the next Part.

Discussion

- 4.35 Our approach sought to increase the transparency and openness of the public services ombudsmen, and this remains our aim.
- 4.36 To us, the purpose of transparency for both the public and those involved in the ombudsmen process, whether they are public bodies or complainants, is to establish and retain confidence in that process.
- 4.37 We accept that provisions for ensuring transparency should not fundamentally hinder the ombudsmen in their work. There is no point, to our mind, in having a transparent but ineffective process which undermines confidence in a system that has worked well.
- 4.38 The investigative nature of the ombudsman process, which is conducted in private, is at the core of the ombudsmen's work. The closed nature of this process is vital to its continued success.
- 4.39 Complainants, who may not otherwise come forward due to concerns about the adverse effects that publicity might have on them, may derive some comfort from the closed nature of an ombudsman's investigation. Public bodies do not have to fear reputational risk during an ombudsman's investigation, which may encourage them to be more forthcoming and open towards an ombudsman's investigation than they would be in a court action where inevitably they would take a defensive stance.
- 4.40 We now think the better way to achieve our goal of transparency and openness is to focus on the end of the process – that is, reporting – rather than the conduct of the process. This should achieve our desired aim of a more transparent process, without negating some of the benefits that flow from the current nature of the ombudsmen process. We consider reporting in Part 5.
- 4.41 We conclude that the basic position should be that the public services ombudsmen do not and cannot disclose information publically relating to an investigation during the course of that investigation. This is the current position. Therefore, we do not need to recommend any change to the law.
- 4.42 If the current statutory provisions remain in place then the ombudsmen would continue to be protected from requirements of disclosure by the absolute bar contained in section 44(1)(a) of the Freedom of Information Act 2000. During an investigation, the ombudsmen would only have the power to share information

with those listed in their governing Acts. We see reporting as a completely different matter, which is discussed in Part 5.

- 4.43 The next question is whether there are arguments in favour of reforming the clearly defined situations where an ombudsman can depart from the general rule against disclosure, sharing information before or during an investigation and subsequent reporting. The governing statutes, as detailed above, already set out the specific situations where disclosure can take place. However, with the exception of the provisions for the Health Service Ombudsman or the Public Services Ombudsman for Wales, these involve disclosure to specified individuals or bodies.
- 4.44 We think that there is benefit in giving the public services ombudsmen an additional power to disclose information to individuals or the public as they see fit. This would accord with our policy of increasing the discretion available to the ombudsmen and providing them with the appropriate statutory regime to facilitate their work.
- 4.45 In particular, we envisage situations where a public services ombudsman is of the opinion that there is a wider group of citizens affected by a matter than is represented by the complaints before it, or where there is a systemic failure which a wider range of complaints would assist in illuminating. In these situations, publicising that a particular matter is before the ombudsman would reduce the potential for repeat complaints and separate investigations, which would be wasteful of limited resources.
- 4.46 Currently, the ombudsmen can share information “for the purposes of *the investigation*”.¹³ Therefore, an ombudsman has to decide on the facts of the complaint before it whether it is necessary for that investigation to publicise work it is undertaking. On a particular set of facts, it could be that publicising a complaint would show whether the subject matter of an investigation was the result of an individual mistake or the product of widespread maladministration.
- 4.47 However, this may not always be the case. We recommend, therefore, clarifying this position by giving the public services ombudsmen specific powers to publicise complaints made to them where this is necessary for the investigation of related complaints or systemic failure disclosed by individual complaints made to them.
- 4.48 If such a limited discretion were created then it is necessary to consider its effect on the release of personal details – including identity – and the operation of the Freedom of Information Act 2000.

Disclosure of personal details during investigations or before a decision not to open an investigation is made

- 4.49 Even where an ombudsman had the power to disclose certain details such as the general subject matter of an ongoing or proposed investigation, it would still be bound by the Data Protection Act 1998, particularly as to identity and other personal details.

¹³ See, for instance, Parliamentary Commissioner Act 1967, s 11(2)(a) (emphasis added).

- 4.50 The Data Protection Act 1998 controls the “processing” of data or information. Processing is defined broadly and includes disclosure “by transmission, dissemination or otherwise making available”.¹⁴
- 4.51 The Data Protection Act 1998 protects principally “personal data”, which is defined in section 1 of the Act to mean data relating to an individual “who can be identified”:
- (a) from those data; or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
- 4.52 The Data Protection Act 1998 also gives additional protection to “sensitive personal data”. This includes an individual’s “physical or mental health or condition” or “the commission or alleged commission ... of any offence”.¹⁵ The rules on processing “sensitive personal data” are contained in schedule 3 to the Act.
- 4.53 The Data Protection Act 1998 sets out eight principles for data protection. These are contained in part 1 of schedule 1 to the 1998 Act. Of fundamental importance to the operation of the Data Protection Act 1998 is the first principle, which provides that:
- Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless: (a) at least one of the conditions in Schedule 2 is met; and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
- 4.54 Of particular relevance to the discussion below is the second principle, which provides that:
- Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
- 4.55 Schedule 2 lists the situations where personal data can be processed. These are fairly widely drawn, and begin with consent. In addition, under paragraph 5 of schedule 2 data can be processed where it is necessary, amongst other listed reasons:
- (1) for the administration of justice; or
 - (2) for the exercise of any functions conferred on any person by or under any enactment.
- 4.56 Schedule 3 is more restrictively drawn to take into account the heightened protection afforded to “sensitive personal data”.

¹⁴ Data Protection Act 1998, s 1(1).

¹⁵ Above, s 2.

- 4.57 The second principle would have an impact on the release of data supplied by a complainant or public body to the ombudsmen. Where information is supplied for one reason, such as the investigation of a particular complaint, but disseminated for another, such as the investigation of systemic complaints or to attract others who may have suffered similar treatment, then the dissemination may breach the second principle.
- 4.58 Where information is going to be released, then the ombudsmen would additionally be bound by the Human Rights Act 1998 and general public law principles. Therefore, they could only release such information as is proportionate to the ends they are seeking to achieve. There may, occasionally, be instances where the disclosure of information would amount to an actionable breach of a duty of confidence due to the manner in which the information was supplied to the public services ombudsmen.
- 4.59 In our view, and as we stated above, the anonymity of individuals is vital to the proper functioning of the ombudsmen's investigatory process. If the protection of the identity of individuals before or during an investigation were left merely to the general law on data protection then this may not afford sufficient protection to individuals.
- 4.60 Our position is that the identity of individuals should not be disclosed before or during an investigation, except where their consent has been sought and obtained. Therefore, we are recommending the creation of specific provisions ensuring this in the governing statutes for the public services ombudsmen. This would apply both where the ombudsmen are releasing information to attract other potential complainants and where they are preparing to investigate a perceived instance of systemic failure.
- 4.61 This is slightly different to our position at the conclusion of an investigation, where the ombudsman is reporting on that investigation, which is discussed in Part 5.
- 4.62 Our prohibition would not affect the current information-sharing provisions in the governing statutes of the public services ombudsmen, such as those allowing the Public Services Ombudsman for Wales or the Health Service Ombudsman to share information to protect the health and safety of individuals.

Freedom of Information Act 2000

- 4.63 Our revised approach is for the default position to be the same as is currently the case. This would include being able to resist Freedom of Information requests. However, as we set out above, we recommend that the ombudsmen should have limited discretion allowing them to disclose information where it is necessary to conduct an investigation concerning a wider group of individuals or into systemic failure. Therefore, we have to consider whether the creation of such a limited discretion would take the public services ombudsmen outside the protection afforded by section 44(1)(a) of the Freedom of Information Act 2000.
- 4.64 Our view is that, provided that the discretion is expressed correctly, it would not. Our recommendation is that the ombudsmen are only able to release information where complaints before them mean that, in their opinion, such a release is necessary to conduct an investigation concerning a wider group of individuals or into systemic failure.

- 4.65 The ombudsmen, then, can *only* release information where it is necessary, in their opinion, for the following two reasons:
- (1) to conduct an investigation concerning a wider group of individuals; or
 - (2) to conduct an investigation into systemic failure.
- 4.66 Outside this, they have no wider power to release information as the governing statutes of the public services ombudsmen would not give them power. Therefore, we have concluded that they would retain the protection under section 44(1)(a) of the Freedom of Information Act 2000.
- 4.67 We contrast this with the situation where the ombudsmen were given a power to release information where they thought fit. As they would then have the power to supply information to the individual making the request – the power is only determined by whether they think it fit – there would be no protection afforded by section 44(1)(a) of the Freedom of Information Act 2000.
- 4.68 We suggest that this is the key difference between giving the public services ombudsmen the general discretion we originally provisionally proposed, whereby the ombudsmen could disclose information relating to an ongoing investigation where they felt it necessary, and our new recommendation.

Recommendation 6: The ombudsmen should have the ability to release details of a complaint submitted to the ombudsman concerned where, in its opinion, such release is necessary for the investigation of similar complaints or systemic failure.

Before the conclusion of an investigation, or before the decision not to investigate a complaint is made, the public services ombudsmen should only be able to disclose the identity of an individual or their personal details with their specific consent.

The requirement to seek consent should apply both where the ombudsmen are releasing information to attract other potential complainants and where they are preparing to investigate a perceived instance of systemic failure.

REFERENCE ON A POINT OF LAW

- 4.69 We thought that giving the public services ombudsmen the ability to ask a question of law at the Administrative Court would provide them with a useful tool which would facilitate their work.
- 4.70 We thought that there may be situations where the ombudsmen would be forced to abandon an investigation, which they would otherwise be able to conclude, due to a technical legal question that they are not necessarily equipped to resolve. In earlier meetings with the public services ombudsmen, it was also suggested that such a power would be useful to resolve occasional questions as to the jurisdiction of the public services ombudsmen.

Consultation paper proposals

- 4.71 The broad approach to this issue adopted in the consultation paper was the same as our earlier provisional proposals, in that we provisionally proposed a mechanism allowing the public services ombudsmen to ask a question of the Administrative Court. In a departure from the position taken in the consultation paper on administrative justice, we provisionally proposed that such a reference should bypass the permission stage. We also suggested that the public services ombudsmen should meet their own costs were they to avail themselves of such a mechanism.¹⁶
- 4.72 We provisionally proposed that before making a reference to a court on a point of law, there should be a requirement that the public services ombudsmen seek either the opinion of or arbitration by independent counsel, and that such fees occasioned should be met by the public services ombudsmen. This was referred to as a “QC clause”.
- 4.73 We provisionally proposed that the decision of the Administrative Court should be subject to appeal to the Court of Appeal.
- 4.74 We provisionally proposed that the public services ombudsmen should notify the complainant and the relevant public bodies before making a reference, inviting them to submit their views and/or to intervene before the court. When an intervention was made, the parties were to meet their own costs.
- 4.75 However, while we thought that it was necessary for the ombudsman to consult those involved in a complaint before making a reference, we wanted to protect the discretion available to ombudsmen. Consequently, we provisionally proposed that the final decision whether to refer a question to the court should be for the public services ombudsman alone.
- 4.76 We asked an open question as to whether the public services ombudsmen should instruct one or two counsel to put the question, or questions, to the court.¹⁷

Consultation responses

- 4.77 In general, this proposal was supported by most consultees who commented on it. On the creation of a power, 23 consultees expressed views. Eighteen of those agreed with the proposal, four disagreed and one was equivocal.
- 4.78 The public services ombudsmen, in their joint response, supported the creation of such a power. However, they did have concerns about certain aspects of this proposal. They were primarily concerned about the requirement to seek counsel’s advice:

Ombudsmen are accustomed to taking legal and other advice when necessary, whether from their own lawyers, external solicitors or

¹⁶ Administrative Redress: Public Bodies and the Citizen (2008) Law Commission Consultation Paper No 187, para 5.53. Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 5.53, 5.85 and 5.92.

¹⁷ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 5.83 to 5.90.

counsel. It is inconceivable that they would have recourse to the court without such advice. This is not a matter that warrants prescription in legislation.

- 4.79 Furthermore, they could not “foresee any circumstances in which arbitration by independent counsel would be desirable”.
- 4.80 The public services ombudsmen agreed with the rest of our provisional proposals in this area. On the open question of the number of counsel, they stated that “one counsel would be enough”.
- 4.81 The Administrative Justice and Tribunals Council did not feel it was appropriate to legislate on whether legal advice should be sought before making a reference. It also thought that the decision as to whether to make a reference and any associated decisions about instructing counsel, including the number, should be entirely at the discretion of the ombudsman. The Administrative Justice and Tribunals Council agreed that all parties or interveners should meet their own costs.
- 4.82 JUSTICE agreed with all of the proposals, including that an opinion from counsel would be prudent before making a reference. It was, however, silent as to whether the latter should be a formal requirement.
- 4.83 The Law Reform Committee of the Bar Council did not think that the public services ombudsmen should be compelled to seek the advice of counsel before making a reference; it was worried that this might “merely add to delay and cost”.
- 4.84 On the remainder of our proposals, the Law Reform Committee of the Bar Council highlighted the following concerns:
- (1) A closed investigation could be made open if transferred to a court.
 - (2) A reference procedure was susceptible to being hijacked by a disgruntled party keen to avoid an investigation or keen to delay an adverse conclusion from the ombudsman.
 - (3) Such a procedure risked imbuing an essentially informal procedure with elements of a formal, adversarial procedure. It thought that this would risk additional costs and delay and that it would be “unattractive to compel a person to depart from the procedure he or she has selected and enter a different kind of procedure”.
- 4.85 Otherwise, the Law Reform Committee of the Bar Council broadly supported our provisional proposals in this area. On the open question asked as to the number of counsel, it thought it “heterodox and inadvisable for one counsel to represent both sides of the argument”.
- 4.86 The Royal Borough of Kensington and Chelsea thought that the Local Government Ombudsman should be required to seek legal advice before making a reference. Warwickshire County Council, though broadly supportive, was worried about parties incurring extra costs. It suggested, therefore, that the ombudsmen should be required to seek counsel’s opinion first and meet the costs of all parties. Other local authorities were also broadly supportive of these

proposals. Some, such as Worcestershire County Council, took the opposing view of the QC clause, suggesting that it was unnecessary.

- 4.87 Some consultees thought that there should be a more formal reference procedure. For instance, LGO Watch and Public Service Ombudsman Watchers were of the opinion that where a legal issue was identified, the matter should be transferred to a court. They also thought that the ombudsmen should cover the costs incurred by such a transfer.

Discussion

- 4.88 In general, the provisional proposals were broadly supported by consultees. With the exception of resistance to a formal requirement to consult counsel before making a reference, such comments, concerns or criticisms as were made either – broadly – asked for clarification or were peripheral to the core of our provisional proposals.
- 4.89 The original intention behind the reference mechanism was to provide a tool which would allow the ombudsmen to settle a matter concerning their own jurisdiction or to dispose of a complaint that they would not otherwise have been able to deal with. It should, therefore, be conceptualised as a part of the ombudsman process, rather than as the transfer of the whole of a dispute to an alternative forum.
- 4.90 Given consultation responses, we no longer think that there should be a specific “QC clause”, requiring counsel to be instructed before making a reference. Consultation responses from the public services ombudsmen and others, including the Administrative Justice and Tribunals Council, were clear that it would be inappropriate to create such a requirement. We suggest now that imposing such a requirement would reduce flexibility without necessarily conferring a benefit.
- 4.91 The reference procedure we are recommending is an entirely new one. After consultation, we think that a reference should have a permission stage, as is the case with actions for judicial review. This is a change to our provisional proposal, where we suggested that a reference should bypass the permission stage. We now think that comity between the courts and the ombudsmen is best served by allowing each to retain control of their own processes, which in the case of the Administrative Court generally implies a permission process.
- 4.92 The Law Reform Committee of the Bar Council was concerned that the reference procedure might transform a closed investigation into an open one. We are not persuaded that this is an insurmountable obstacle. First, it is not the investigation as a whole that is being transferred, but a relevant legal question. Second, the courts already have mechanisms to deal with such issues, which they use as a matter of course in some actions – such as in certain cases involving children, where the parties are anonymised.
- 4.93 Several consultees raised the possibility of the reference procedure being misused by one side, either to cause additional delay or to impose extra costs on the other party. However, this misses the point that control of the mechanism still lies with the ombudsman, and the discretion as to whether to make a reference lies with it solely. Moreover, courts’ existing case management powers, including

the use of costs orders, are sufficient to prevent such misuse.

- 4.94 On the number of counsel, we are of the opinion that it is not necessary to specify this in legislation, and that it would in fact be unwise to do so. The court already has broad case management powers which would allow the number of counsel to be determined in light of any specific question asked of it.
- 4.95 Concerning costs, we remain of the opinion that the public services ombudsmen should meet their own costs. Where parties intervene, they should normally meet their own costs. This would still be subject to the court's power to order otherwise at the end of proceeding, where it sees fit.

Recommendation 7: We recommend that the public services ombudsmen be given a specific power to make a reference to the Administrative Court asking a question on a point of law.

We recommend that intervention by the parties to the original dispute should be allowed.

We recommend that the ombudsmen should be required to notify the parties before making a reference, inviting them to make representations and advising them of their ability to intervene should they want to.

We recommend that the decision to make a reference should be that of the relevant public services ombudsman alone.

We recommend that reference should have to pass the permission stage.

We recommend that the opinion of the Administrative Court should be considered a judgment of the Court for the purposes of section 16 of the Senior Courts Act 1981 and, therefore, potentially subject to appeal to the Court of Appeal.

We recommend that the public services ombudsmen should meet their own costs.

Where parties intervene, we recommend that they should normally meet their own costs.

PART 5

RESOLUTION, REPORTING AND SHARING EXPERIENCE

- 5.1 In this Part we consider the ways that the public services ombudsmen can dispose of complaints submitted to them and share the experience that they have gained through their work.
- 5.2 There are three principal ways that the ombudsmen can dispose of matters: alternative dispute resolution; reporting the results of an investigation; and dismissing a complaint.
- 5.3 The first item in this Part is the use of alternative dispute resolution. This can include mediation, or methods employed by the ombudsman to encourage “local settlement”. We then turn to consider the outcomes of individual complaints handled through the primary mechanism envisaged by the ombudsmen’s governing statutes: the investigation, or not, of individual complaints.
- 5.4 We consider in depth the production and publication of a report as a result of the investigation, or a statement of reasons where the ombudsman decides not to open an investigation (and alternative dispute resolution is not seen as appropriate).
- 5.5 It is then necessary to consider the status of the findings and recommendations made by the public services ombudsmen in a report on the complaint made to them.
- 5.6 Following our consideration of reporting on individual complaints, we consider next the dissemination, or publication, of reports on systemic failure. We also look at the powers that the public services ombudsmen have to issue guidance.

ALTERNATIVE DISPUTE RESOLUTION

Consultation paper proposals

- 5.7 By alternative dispute resolution we mean using mechanisms other than formal investigations to dispose of complaints. This happens already, and the ombudsmen have developed sophisticated mechanisms allowing them to encourage “local settlement”, or similar, of complaints.
- 5.8 In the majority of cases the appropriate mechanism for alternative dispute resolution is that an ombudsman informs the public body of the complaint made to the ombudsman and encourages the public body to resolve the matter. In other situations recourse to mechanisms such as mediation may be appropriate.
- 5.9 Of the existing statutory provisions allowing for alternative dispute resolution, we concluded that “best practice” was contained in section 3 of the Public Services Ombudsman (Wales) Act 2005.¹

¹ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 4.80 to 4.84.

- 5.10 Adopting the Welsh provision as a potential model, we provisionally proposed that the Parliamentary Commissioner, the Local Government Ombudsman and the Health Service Ombudsman be given specific powers to allow them to dispose of complaints in ways other than by conducting an investigation.²

Consultation responses

- 5.11 We received 29 responses in relation to alternative dispute resolution. Twenty-one of those agreed with the proposal, four were equivocal, and four disagreed.
- 5.12 The public services ombudsmen agreed with this proposal, although they did not “consider that there is any pressing need for change”. They noted that they had “developed various ways of disposing of complaints in discharge of [their] power of ‘investigation’”.
- 5.13 The Administrative Justice and Tribunals Council supported fully our provisional proposal, stating that “this would give statutory recognition to existing practice”. The Council of Her Majesty’s Circuit Judges also “support[ed] strongly” our provisional proposal.
- 5.14 In general, local authorities were supportive of the provisional proposals though some expressed slight reservations. For example, Warwickshire County Council highlighted that mediation is not necessarily a cheap alternative, and that therefore the public services ombudsmen should undertake an initial scoping exercise before opting for it.
- 5.15 Lancashire County Council and the National Complaints Managers Group (Social Care Services), though supporting the use of mediation in general, expressed some concerns about its use by the public services ombudsmen, as this might alter the function of the ombudsmen away from the investigation of maladministration.
- 5.16 Oxfordshire County Council explained that it had used mediation successfully, with the option of going to the Local Government Ombudsman if that did not prove successful.
- 5.17 Health Care Resolutions, also supportive of mediation, worried about how this proposal would work in practice on the basis that the ombudsmen were not a party to the dispute. It expressed particular concern as to how information may be shared between the ombudsmen and parties to the dispute following the use of mediation.
- 5.18 The Advice Services Alliance was concerned that the use of alternatives to investigation may reduce the transparency of the public services ombudsmen’s work. It conceded, though, that it was “arguable that the proposal for enhanced powers to use alternatives to investigation is welcome if it delivers fair outcomes for complainants more promptly”. It pointed to two key principles to ensure fair and prompt outcomes: that there be transparency of outcomes, and that there be a right for a complainant to request an investigation.

² Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 4.85.

- 5.19 The Law Reform Committee of the Bar Council, which supported the provisional proposal, was similarly worried about the effect that it might have on reporting requirements, and reporting by the Parliamentary Commissioner in particular.
- 5.20 Conversely, LGO Watch and the Public Service Ombudsman Watchers expressed their concern that such a formal mechanism may allow the public services ombudsmen “to dispose of the majority of complaints in ways other than by conducting a proper investigation”.

Discussion

- 5.21 That there should be specific powers to use alternative methods of investigation, along the lines we suggested, seems acceptable to almost all consultees. This is not surprising, as section 3 of the Public Services Ombudsman (Wales) Act 2005 represents the codification of practice that had been adopted by the existing public services ombudsmen.
- 5.22 We think that a sound point was raised in the consultation responses concerning the effect that alternative dispute resolution may have on transparency. At the core of the mediation process is confidentiality. Confidentiality extends not just to the anonymity of individuals or bodies subject to a complaint but also to the results of mediation. Increasing the use of this mechanism, without qualification, would not accord with our general approach, which is to increase transparency and openness.
- 5.23 We accepted in the previous Part that the requirements of transparency and openness are not absolute. There is a balance that needs to be struck. As a starting position, we would not suggest that it would be desirable to remove the anonymity given to participants, as it is a core part of mediation.
- 5.24 However, we think that certain steps could be taken to allow for a reasonable amount of transparency in the process, while still ensuring that the public services ombudsmen can use alternative methods of dispute resolution in an effective manner.
- 5.25 We think that the first suggestion of the Advice Services Alliance, that anonymised digests be published of complaints disposed of by alternative dispute resolution, would be a workable solution.
- 5.26 In order to facilitate the use of alternative dispute resolution, we think that all parties to the dispute resolution procedure should be anonymised. This would protect the identity of the complainant, other individuals and the public body complained of.
- 5.27 We also suggest that the use of generalised digests, rather than reports on individual settlements, would protect those involved in the process. By generalised digests we envisage publications that give an overview of the nature of the ombudsmen’s work without giving the results of identifiable complaints. This would still allow observers to see the types of cases that are resolved by mediation, or other methods of alternative dispute resolution.

- 5.28 We do not, however, think it should be a statutory requirement that such digests are published. The approach to reporting that we set out in the next sections is less prescriptive than that. In general, we seek to create appropriate powers allowing the public services ombudsmen to achieve our aims, and then recommend that they adopt a strategy to achieve those aims, if they do not do so already.
- 5.29 We are, therefore, recommending the same reform as provisionally proposed in our consultation paper, that there should be specific statutory powers to allow the public services ombudsmen to dispose of complaints by such alternative means as they see fit. The suggested new statutory provisions should be based on section 3 of the Public Services Ombudsman (Wales) Act 2005. This would give the public services ombudsmen sufficient flexibility to conduct their work as they see fit.
- 5.30 We also recommend that the public services ombudsmen publish digests of complaints disposed of by means of alternative dispute resolution. These digests should protect the identity of the complainant, other individuals and the public body complained of.
- 5.31 At present there are no specific powers allowing for the publication of such digests. We address this issue below, in the context of reporting.

Recommendation 8: We recommend that provisions based on section 3 of the Public Services Ombudsman (Wales) Act 2005 be included in the governing legislation of the Parliamentary Commissioner, the Local Government Ombudsman, and the Health Service Ombudsman.

We recommend that the public services ombudsmen adopt a publication policy whereby digests of complaints disposed of by alternative dispute resolution are published. These digests should protect the identity of the complainant, other individuals and the public body complained of.

REPORTING

- 5.32 The next four sections in this Part consider the future shape of ombudsmen reports on individual complaints. We have altered our approach considerably from the provisional proposals in our consultation paper. This is in order to reflect our intention to create sufficient discretion for the ombudsmen, coupled with increased transparency. The following sections set out in detail the alternative approach we are now recommending.
- 5.33 There are three key questions that need to be answered on reporting.
- (1) What type of report should be issued?
 - (2) To which individuals or public bodies should the report, or statement of reasons, be distributed?
 - (3) Should the report, or statement of reasons, be published?

- 5.34 The Housing Ombudsman is very different to the others in relation to the outcomes of individual complaints. Therefore, the proposals relating to reporting on individual complaints are not intended to apply to the Housing Ombudsman. This is due to the private law relationship between the Housing Ombudsman and members of an approved scheme. We explain the reasons for this in greater detail below.

TYPES OF REPORT

Consultation paper proposals

- 5.35 In our consultation paper, we discussed the statutory provisions concerning the types of report that the different public services ombudsmen can issue. We concluded that these provisions should be harmonised in order to increase the transparency of the public services ombudsmen.³ In coming to this conclusion we took as our archetype the model for reporting contained in the Public Services Ombudsman (Wales) Act 2005.
- 5.36 More specifically, we asked consultees whether adopting a graduated approach to reporting with three different types of report, based on that already in place for the Public Services Ombudsman for Wales, would be desirable for each of the public services ombudsmen except the Housing Ombudsman. We provisionally proposed that these should be known as the “short-form report”, “report” and “special report”.⁴
- 5.37 We provisionally proposed that the Housing Ombudsman’s determinations should be recast as reports where they relate to social housing.
- 5.38 Furthermore, we provisionally proposed that where the public services ombudsmen decline to commence an investigation, or decide to abandon an existing investigation, there should be a statutory requirement to publish a “statement of reasons”, setting out clearly the reasons for their decision.⁵

Consultation responses

- 5.39 Twenty-two consultees responded on the general question of whether a standardised system for reports should be adopted. Seventeen of those agreed with the proposal, four disagreed, and one was equivocal.
- 5.40 Concerning the provisional proposal to adopt the terms “short-form report”, “report” and “special report”, 17 responses addressed this. Eleven agreed with the proposal, whilst six disagreed.

³ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 6.3 to 6.34 and 6.73 to 6.81.

⁴ Above, paras 6.82 to 6.83. We excluded the Housing Ombudsman due to the nature of its jurisdiction.

⁵ Above, paras 6.84 to 6.85.

- 5.41 However, the public services ombudsmen were forcefully opposed to these proposals. In their joint response they stated:

Although we understand the reasons for this proposal and recognise the successful operation of this practice in Wales, we do not consider that there is any compelling case for legislative prescription across all the public services ombudsman schemes.

In fact, we all in various ways already adopt a graduated process of the sort described. To that extent, we consider that there is in place a common approach, albeit the terminology used has developed differently in each case.

We certainly do not consider that the imposition of common terminology is necessary. Moreover, we consider that any attempt to rationalise current practice in legislation is unnecessary.

We accept that the rather different nature of the Housing Ombudsman justifies the continuation of his current and distinctive reporting arrangements.

- 5.42 The public services ombudsmen were also opposed to the proposals concerning statements of reasons. Their joint response explained that the Parliamentary Commissioner does not have the power to inform parties of a decision not to investigate, and that releasing the details of complaints that are not investigated might detrimentally affect the relations between landlords and tenants in the context of the Housing Ombudsman's jurisdiction. The public services ombudsmen expressed themselves thus:

We do fully understand the general principle in public law that ordinarily reasons for decisions should be given to those affected by them. However, this proposal seeks to extend that principle to placing those reasons in the public domain and we have reservations about that.

We can see that there is scope for harmonisation of practice in this area in the interests of fairness and transparency, and especially in the interests of disseminating learning from decisions not to investigate.

There is, however, a need to recognise that there is an administrative overhead to publishing statements of reasons, even on websites; and that in many cases ombudsmen do not investigate complaints because they are out of remit, or because they have not exhausted the local complaints procedure. To publish a statement of reasons in all cases where the ombudsmen decline to commence an investigation, or discontinue an existing investigation, would impose a disproportionate burden upon ombudsmen in return for a limited public benefit. It would also limit the ombudsmen's flexibility to make the most effective use of the resources available to them.

In any event, we consider that this issue should be addressed in the context of a wider debate about how transparent ombudsmen

processes should be and where the balance between competing demands should lie.

- 5.43 The public services ombudsmen also expressed their opposition to these proposals in consultation meetings and at other events.
- 5.44 The Administrative Justice and Tribunals Council, though supportive of transparency in public administration, was worried that the provisional proposals might “generate a significant workload in return for very little public benefit”. Other consultees also expressed concerns over the imposition of additional burdens.

Discussion

- 5.45 When we first approached reporting, we saw harmonisation as a clear transparency and openness issue. We believed that it could be very difficult for the public to understand the results of individual decisions, even for an informed individual, when the results are published.
- 5.46 During the consultation period, we became convinced that our original approach would be unnecessarily prescriptive and would not necessarily achieve our goal.
- 5.47 Even if harmonisation of the terminology for reporting were to take place, there are certain differences in the reporting processes of the ombudsmen which would continue irrespective of any changes – and which we did not wish to change.
- 5.48 For instance, the Local Government Ombudsman and the Public Services Ombudsman for Wales have specific powers relating to the publication of disagreements with bodies investigated in the local press. The Health Service Ombudsman and the Public Services Ombudsmen for Wales have to take into account both the public body investigated, where this is for instance a general practitioner, and the body that contracted for the service provided, which would currently be the Primary Care Trust. The Health Service Ombudsman has no general power to publish or distribute reports. At present only the Parliamentary Commissioner and the Health Service Ombudsman can lay reports before Parliament.
- 5.49 Therefore, we have amended our approach. We do not think it is necessary to alter the general reporting provisions of the ombudsmen; neither do we think that the terminology of the reports issued by the public services ombudsmen should be harmonised.
- 5.50 However, we do still believe that there is benefit in increasing the transparency of the ombudsman process, allowing the public to gain a better understanding of their work.
- 5.51 In our discussions with the public services ombudsmen, in particular the Local Government Ombudsman and the Parliamentary Commissioner, it was communicated to us that the public services ombudsmen adopt internal practices whereby different complaints upon receipt are allocated to “tracks” (or similar). Allocation depends on, amongst other things, the complexity of the issues raised in the complaint. These “tracks” roughly approximate the different categories of reports produced by, for example, the Public Services Ombudsman for Wales.

- 5.52 We think that the details of the ombudsmen’s internal processes, whereby the ombudsmen allocate different complaints to internal “tracks”, should be publicised. We accept, of course, that each ombudsman adopts different allocation procedures. Our recommendation would not dictate harmonisation of those procedures but would simply provide for increased transparency.

Recommendation 9: We recommend that the ombudsmen should publicise their internal processes, for instance whether they adopt different “tracks” for different complaints and what factors they take into consideration when deciding to allocate a complaint to a particular “track”.

IDENTIFYING INDIVIDUALS IN REPORTS OR STATEMENTS OF REASONS

Consultation paper proposals

- 5.53 We made two specific provisional proposals on the naming of individuals in reports or statements of reasons. This, it is important to remember, is different from the ability to share information with others considered in the context of the closed nature of ombudsmen investigations in Part 4. First, we provisionally proposed that ombudsmen should routinely ask complainants whether they want to be anonymous. Second, we provisionally proposed that the ombudsmen should not be able to identify a complainant or other individual without their consent.⁶ By the latter we mean both individuals who are the subject of the complaint directly, for instance in the health care jurisdiction where a complaint can be made of an individual general practitioner, and members, officers or employees of a public body subject to the jurisdiction of the public services ombudsmen.

Consultation responses

- 5.54 Twenty-four consultees expressed views on the proposal that ombudsmen should routinely ask complainants whether they want to be anonymous. Twenty agreed with the proposal, three disagreed and one was equivocal.
- 5.55 Twenty-five responses addressed the provisional proposal that the ombudsmen should not be able to identify a complainant or other individual without their consent. Twenty-one of those agreed with our provisional proposal, whilst four disagreed.
- 5.56 Though most consultation responses were supportive, many did not think that it was necessary to make any changes to the current provisions or to adopt the specific legislative interventions we suggested.
- 5.57 On the second of the provisional proposals, the Local Government Ombudsman, in a consultation meeting on 22 November 2010, suggested that it may be beneficial to occasionally reveal the identity of an individual even without their consent. This would be the case where the behaviour revealed by the investigation of the public services ombudsman was such as to warrant “naming and shaming”. The Local Government Ombudsman would not like to be deprived

⁶ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 6.86.

of this option due to the lack of consent from the individual complained of.⁷

- 5.58 Moreover, in the case of certain individuals, for instance the relevant Minister, it would be impractical and undesirable to make it a requirement that their consent be sought before they are identified.

Discussion

- 5.59 We asked the consultation questions in the context of the harmonised forms of reporting that we originally provisionally proposed.
- 5.60 However, as set out above, we are not now seeking to standardise the system of reporting. Those ombudsmen who already have powers to publish – or otherwise disseminate – reports, are also subject to detailed provisions relating to revealing the identity of individuals. Moreover, this issue sits in the context of the overarching provisions in the Data Protection Act 1998.
- 5.61 In general, we think that the general law on data protection is sufficiently robust to cope with any changes that we are recommending. We, therefore, deal with these issues only where a proposed reform necessitates a specific recommendation.

COMMUNICATION OF REPORTS TO INDIVIDUALS AND PUBLIC BODIES

- 5.62 The governing statutes of all of the ombudsmen list the individuals to whom and public bodies to which a completed report must be communicated. They also provide the powers that allow the public services ombudsmen to communicate reports to others. The governing statutes provide similarly for statements of reasons, where an ombudsman has taken a decision not to open an investigation.

General approach

- 5.63 In relation to the communication of reports and statements of reasons to individuals, the correct approach is that the public services ombudsmen should be under a duty to communicate reports and statements of reasons directly to the complainant in all cases.
- 5.64 The public services ombudsmen should have the power to communicate their reports to those other individuals and bodies that they see as appropriate in the circumstances of a particular investigation.

Current law and proposed changes before Parliament

- 5.65 Currently, the Public Services Ombudsman for Wales can send its reports to such individuals as it sees appropriate.⁸
- 5.66 The Health Service Ombudsman began by having a duty to notify, but currently has a prohibition on notifying, the body complained of when it declines to open an investigation. If provisions currently before Parliament are passed then it will

⁷ See, for instance, Local Government Ombudsman, *Report on an investigation into complaint no 06/C04993 against Cheshire County Council*.

⁸ Public Services Ombudsman (Wales) Act 2005, s 16(3).

shortly have a power to send its reports to those individuals or bodies as it sees fit.

5.67 Presently, the Health Service Commissioners Act 1993 requires the Health Service Ombudsman to send a statement of reasons where it decides not to open an investigation to the complainant and to any Member of Parliament who assisted in making the complaint.⁹

5.68 However, the Health Service Ombudsman cannot send such a statement to the public body or the individual complained of. This is the result of an amendment in the Health Service Commissioners (Amendment) Act 1996,¹⁰ at the request of the then Health Service Ombudsman and the Select Committee on the Parliamentary Commissioner for Administration.¹¹ When originally enacted, section 14(2)(c) of the Health Service Commissioners Act 1993 required that such a statement of reasons be sent to “the health service body concerned”. However, the Health Service Ombudsman in office from 1993 to 1996 saw the requirement in section 14(2)(c) as:

... both onerous and unexpected by the complainant. It could be potentially prejudicial to the complainant, and against natural justice, to let the body he or she is complaining about know that [the Health Service Ombudsman] is not taking up the complaint because, for example, a legal remedy is available. Further, disclosure to the relevant body of the reasons for not conducting an investigation and thus disclosure of the nature of the complaint itself could breach confidence, for example where the complainant is a nurse with a complaint about the actions of his or her own health authority.¹²

5.69 Therefore, the legal position changed from the Health Service Ombudsman having to send a report to the relevant health service body to it not being able to, even if that was wanted. If clause 198 of the Health and Social Care Bill, currently before Parliament, is enacted as presently drafted, the position will change again.¹³ Clause 198 of this Bill seeks to amend section 14 of the Health Service Commissioners Act 1993 to allow the Health Service Ombudsman to send statements of reasons to “such other persons as the Commissioner thinks appropriate”.¹⁴

⁹ Health Service Commissioners Act 1993, ss 14(2)(a) and (b).

¹⁰ Health Service Commissioners (Amendment) Act 1996, sch 2, para 1.

¹¹ Health Service Commissioner, *Background to the policy and practice of the Health Service Ombudsman for England on sharing and publishing information about NHS complaints* (2010), para 5.2.

¹² Submitted as evidence to the inquiry leading to the *The Powers, Work and Jurisdiction of the Ombudsman*, First Report of the Select Committee on the Parliamentary Commissioner for Administration (1993-94, HC 33).

¹³ Health and Social Care Bill (6 June 2011).

¹⁴ This amendment was designed to resolve certain anomalies that had occurred due to changes in the organisation of the National Health Service. Health Service Commissioner, *Background to the policy and practice of the Health Service Ombudsman for England on sharing and publishing information about NHS complaints* (2010), para 5.2.

- 5.70 In the case of the Parliamentary Commissioner, where the Parliamentary Commissioner conducts an investigation into maladministration it must then send a copy of any report to the Member of Parliament who requested the investigation¹⁵ and to the principal officer of the department or authority investigated.¹⁶ As above, the Parliamentary Commissioner is not under any duty, and probably does not have the power, to send the report to the original complainant.
- 5.71 Where the Parliamentary Commissioner decides not to investigate a complaint then the Parliamentary Commissioner must send a copy of that statement to the Member of Parliament who requested the investigation.¹⁷ The Parliamentary Commissioner is under no duty, and probably does not have the power, to send a copy of the statement to either the original complainant or to the body complained of.
- 5.72 Similarly, the Local Government Act 1974 specifies individuals and bodies to whom the report shall be supplied. The Local Government Ombudsman has the power to communicate a report or statement of reasons to any person who requests one.¹⁸ It does not have the discretion to communicate reports or statements of reasons to such persons as it sees fit.

Discussion

- 5.73 Our overarching principle here is that the ombudsmen should be given the discretion to communicate reports, or statements of reasons, directly to any individual or body, where the ombudsmen think it beneficial for that individual or body to receive the report or statement of reasons.
- 5.74 Given the current provisions, and taking into account the approach set out above coupled with the proposed reforms before Parliament, we think that there are good reasons to reconsider the communication of reports and statements of reasons to individuals and public bodies by the public services ombudsmen.
- 5.75 The inability of the Parliamentary Commissioner to send its report to the complainant directly is clearly problematic, the more so when considering that we will be recommending the removal of the requirement that a complaint be made via a Member of Parliament.
- 5.76 Though we have normally suggested the creation of discretion in this paper, here we feel there are good reasons of natural justice to impose a duty. We recommend that the Parliamentary Commissioner should send the original complainant the report where an investigation is conducted, or a statement of reasons if one is not.

¹⁵ Parliamentary Commissioner Act 1967, s 10(1).

¹⁶ Above, s 10(2).

¹⁷ Above, s 10(1).

¹⁸ Local Government Act 1974, s 31B(2)(a).

- 5.77 Concerning the public body complained of and others such as individuals involved or interested parties, we recommend that the public services ombudsmen should have the power to send their reports and statements of reasons to any individual or public body as they see fit.

Recommendation 10: We recommend that a duty be placed on the Parliamentary Commissioner to send a copy of a report to the complainant who submitted the original complaint.

We recommend that a duty be imposed on the Parliamentary Commissioner to send a statement of reasons for not opening an investigation to the complainant who submitted the original complaint.

We recommend that the Parliamentary Commissioner, the Health Service Ombudsman and the Local Government Ombudsman be given powers to communicate their reports and statements of reasons for not opening an investigation to any individual or public body as they see fit.

PUBLICATION

- 5.78 Here we focus on ensuring that the ombudsmen share the contents of their reports and statements of reasons with the general public to such an extent as is possible. We appreciate that there will be instances where sensitivities in an individual case require that this should not occur. We think that individuals should not, in general, be identified.
- 5.79 However, we do think that there should be greater transparency in the processes adopted by the individual ombudsmen in relation to both reports resulting from individual investigations and the reasons for deciding not to open investigations.

Statutory provisions on reporting and the release of individual reports to the general public

- 5.80 The Parliamentary Commissioner and the Health Service Ombudsman do not have specific powers allowing them to publish their reports resulting from individual investigations. They do, however, have powers to lay special reports before Parliament.¹⁹ This has been taken by the Parliamentary Commissioner and the Health Service Ombudsman as giving the ombudsmen the power to publish such reports.
- 5.81 The position is different for the Local Government Ombudsman and the Public Services Ombudsman for Wales. Section 31B(1)(a) of the Local Government Act 1974 gives the Local Government Ombudsman the power to “publish all or part of a report or statement under section 30”. Section 30 governs reports drawn up as a result of investigations or statements explaining that an investigation is not going to be conducted.
- 5.82 Under section 16(4) of the Public Services Ombudsman (Wales) Act 2005, the Public Services Ombudsman for Wales may publish a report “if, after taking account of the interests of the person aggrieved and any other persons he thinks

¹⁹ Parliamentary Commissioner Act 1967, 10(3); Health Service Commissioners Act 1993, s 14(3).

appropriate, he considers it to be in the public interest to do so". Similarly, a statement not to investigate may be published under section 12(4) of the Public Services Ombudsman (Wales) Act 2005.

- 5.83 The Freedom of Information Act 2000 requires that public bodies draw up and review publication schemes. Model schemes can be set out by the Information Commissioner.²⁰ The Information Commissioner also publishes guidance on publication schemes.²¹
- 5.84 The publication schemes for the Local Government Ombudsman and the Public Services Ombudsman for Wales allow individuals to access reports either through the ombudsmen's websites or by application to the ombudsmen.²² Statements of reasons are not published as a matter of course and are not referred to in the publication schemes.
- 5.85 Within the governing statutes for both the Local Government Ombudsman and the Public Services Ombudsman for Wales, there are further provisions prohibiting the inclusion of certain information in a report.²³ These provisions differ in their approach. The provisions for the Local Government Ombudsman prohibit, with discretion for the ombudsman, the inclusion of certain information in any report. The provisions for the Public Services Ombudsman for Wales require certain information to be taken out if the report is to be published.

Discussion

- 5.86 We now consider what powers of publication the ombudsmen should have, and whether they should be subject to a duty to publish. We also make recommendations directed at the ombudsmen, where we think that as a matter of policy they should have discretion, but where we recommend that they exercise their discretion in a particular way.

Publication powers

- 5.87 We do not think it is necessary to alter the powers governing publication for either the Public Services Ombudsman for Wales or the Local Government Ombudsman. These ombudsmen have an existing power to publish.
- 5.88 Our position with regard to the Parliamentary Commissioner and the Health Service Ombudsman is different. We acknowledge the considerable benefits of transparency. However, requiring every report to be laid before Parliament in order to be published would be overly burdensome. Therefore, a provision allowing for more general dissemination of individual reports should be inserted into the governing statutes for both the Parliamentary Commissioner and the

²⁰ Freedom of Information Act 2000, ss 19 and 20.

²¹ http://www.ico.gov.uk/for_organisations/freedom_of_information/publication_scheme.aspx (last visited 6 June 2011).

²² Local Government Ombudsman, <http://www.lgo.org.uk/publications/publication-scheme> (last visited 6 June 2011); Public Services Ombudsman for Wales, *Freedom of Information/Data Protection Policy*, <http://www.ombudsman-wales.org.uk/uploads/publications/354.doc> (last visited 6 June 2011).

²³ Local Government Act 1974, s 30(3); Public Services Ombudsman (Wales) Act 2005, s 16(7).

Health Service Ombudsman. There is a benefit to allowing the results of their investigations to be distributed more widely in the interests of transparency and openness. It is important that people are able to determine how and why the ombudsmen came to the conclusion they did.

- 5.89 Similarly, we think that it would be desirable, in general, for statements of reasons to be published by the public services ombudsmen. This would also serve the interests of transparency and openness.
- 5.90 The Local Government Ombudsman and the Public Services Ombudsman for Wales currently have the power to publish statements of reasons relating to individual complaints. The governing statutes of the Parliamentary Commissioner and the Health Service Ombudsman should be amended to provide them with this power.
- 5.91 In relation to identifying complainants, and given consultation responses, where we are recommending the creation of a new duty to publish, this should only allow the identity of an individual complainant to be revealed where their specific consent is given.
- 5.92 In relation to other individuals, the position is more nuanced. In some cases the person is a public figure whose consent it would be impractical and unnecessary to seek. This could include, for instance, the relevant Minister. Also, as suggested in consultation, there may on rare occasions be significant public benefit in an individual complained of being “named and shamed”. Here consent is unlikely to be forthcoming from the individual concerned.
- 5.93 We suggest that, in general, it is better not to identify individuals. However, on balance, we think that the Data Protection Act 1998 is sufficient to cover the more general naming of individuals. Therefore, we are not making specific law reform recommendations in relation to identifying individuals generally.

Publication duties

- 5.94 The next question is whether specific publication duties, as opposed to powers, should be imposed on the public services ombudsmen.
- 5.95 At present the Local Government Ombudsman publishes the reports of individual investigations, in anonymised form. The Public Services Ombudsman for Wales publishes the reports of all those investigations where a public interest is involved, also in anonymised form. The exception to this is where publication may reveal the identity of a vulnerable individual such as a minor. Reports of investigations not involving a public interest are not published, but their summaries are issued in the form of published case digests, with copies of the full reports being available on request. There are no duties on either the Local Government Ombudsman or the Public Services Ombudsman for Wales to publish their individual reports.
- 5.96 The question is whether a duty to publish should be imposed on the ombudsmen alongside the creation of a power to publish generally for the Parliamentary Commissioner and the Health Service Ombudsman.

- 5.97 We do not think that imposing a specific publication duty would be advisable. Our policy is to create the powers but to leave it to the ombudsmen to adopt appropriate measures for exercising those powers.
- 5.98 We accept that publication creates additional burdens. The ombudsmen may have to issue fuller documents where these are intended for an audience unconnected with the dispute. There are also practical burdens involved in publication, such as having to upload documents onto the internet.
- 5.99 We can see that there is also a difference between reports and statements of reasons. The publication of statements of reasons would be a more substantial change than releasing reports, if only due to volume. Therefore, we accept that the process of moving towards the full dissemination of statements of reasons has to be more gradual.
- 5.100 We suggest that the Parliamentary Commissioner, the Health Service Ombudsman and the Public Services Ombudsman for Wales draw up publication strategies which would lead them towards the goal of publishing all reports, unless there were compelling reasons not to do so. We also recommend that the public services ombudsmen draw up strategies that would lead them to publishing statements of reasons in all cases, unless there are compelling reasons for not doing so. We accept that such strategies would have a longer lead in time than those relating to reports.
- 5.101 These strategies should lead to a publication scheme in accordance with the requirements of the Freedom of Information Act 2000 and any guidance or model schemes issued by the Information Commissioner.

Digests of matters disposed of by alternative dispute resolution

- 5.102 As we explained above, there are not at present specific powers allowing the ombudsmen to publish digests of cases disposed of by alternative dispute resolution. Therefore, this also needs to be dealt with, in order to give the public services ombudsmen the specific powers necessary to fulfil the tasks we are recommending to them.
- 5.103 Here we make recommendations directly to the ombudsmen to adopt publication strategies. We suggest that these should be published managerial documents setting out how they would adopt future publication policies.

Recommendation 11: We recommend that the Parliamentary Commissioner and the Health Service Ombudsman be given specific powers to publish their reports on individual investigations.

We recommend that the Parliamentary Commissioner and the Health Service Ombudsman be given specific powers to publish statements of reasons when they have decided not to open an investigation.

We recommend that the statutory powers for the Parliamentary Commissioner and the Health Service Ombudsman to publish reports or statements of reasons only allow them to identify the complainant with the consent of the complainant.

We recommend that the Parliamentary Commissioner and the Health Service Ombudsman should not normally identify other individuals in their reports or statements of reasons where these are published.

We recommend that the Parliamentary Commissioner, the Health Service Ombudsman and the Public Services Ombudsman for Wales draw up strategies detailing how they will move towards the publication of all reports into individual investigations, unless there are compelling reasons for not doing so.

We recommend that all the public services ombudsmen draw up strategies detailing how they will move toward the publication of statements of reasons as a matter of course, unless there are compelling reasons for not doing so.

We recommend that the public services ombudsmen be given specific powers allowing them to publish digests of cases disposed of by alternative dispute resolution.

ADOPTION OF FINDINGS AND RECOMMENDATIONS TERMINOLOGY

- 5.104 In our consultation paper we concluded that the emerging distinction in case law and in the reports of the ombudsmen between findings and recommendations should be adopted across the board and that there would be benefit in defining the term “findings” statutorily.
- 5.105 On this basis, we asked two consultation questions. First, we asked whether the governing statutes should draw a distinction between findings and recommendations and should use those terms. Second, we provisionally proposed that there should be a statutory definition for findings. We provisionally proposed that this should include findings of fact and whether there was maladministration and injustice.²⁴

Consultation responses

- 5.106 Twenty-three consultees addressed the provisional proposals to adopt the distinction between findings and recommendations and to use those terms in statute, with unanimous support for them.
- 5.107 Twenty-seven responses addressed the provisional proposal that there should be a statutory definition for findings. Twenty-one agreed with the provisional proposal, four disagreed, and two were equivocal.
- 5.108 In their joint response, the public services ombudsmen agreed with the first of these provisional proposals in the main but disagreed with the second, stating:

We can see merit in the governing statutes drawing a distinction between findings and recommendations and using those terms.

However, we do not think it necessary to go further and define those

²⁴ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 6.87 to 6.90.

terms in the legislation.

In the case of the Housing Ombudsman, the language of “findings” and “recommendations” is in any event absent from the legislation and governing constitution, which instead speak of orders. We are not convinced that any useful purpose would be served by overhauling the terminology.

5.109 Brian Thompson stated:

I am not persuaded that there is a need for findings and recommendations to be statutorily defined. It goes against the grain of the legislation since the key terms maladministration and injustice are undefined.

5.110 Similarly, the Administrative Justice and Tribunals Council was not convinced of the “necessity to define ‘findings’ in governing statutes, but has no objection to the proposals presented”.

5.111 Other consultation responses and events also highlighted that the Housing Ombudsman’s jurisdiction may not lend itself to harmonisation with the other public services ombudsmen.

Discussion

5.112 We now think it was unhelpful to have asked as a stand-alone question whether the two terms should be defined. As we explain below, we want to recommend that the legal significance of “findings”, currently a matter of case law, should become statutory, and changed in respect of some ombudsmen. That conceptually requires us to explain our understanding of “findings”. By “findings”, we mean both findings of fact and an assessment that the facts did or did not constitute “maladministration” and “injustice”.

5.113 But whether, and how, the concepts should be defined should be a matter for Parliamentary Counsel drafting the legislation to decide.

5.114 These are to be distinguished from “recommendations”, that which the ombudsman proposed that the public body should do, as a result of its findings.

STATUS OF FINDINGS AND RECOMMENDATIONS

Consultation paper proposals

5.115 In our consultation paper, we discussed the development of the practice of the public services ombudsmen and the case law in this area.²⁵ The current case law draws a distinction between the status of findings for the Parliamentary Commissioner and for the Local Government Ombudsman. In *R (Bradley) v Secretary of State for Work and Pensions*, the Court of Appeal held that the Parliamentary Commissioner’s findings can be rejected where there are “cogent

²⁵ See cases cited at Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 6.35 to 6.66.

reasons” for doing so.²⁶ However, in reaching its decision the Court endorsed *R v Local Commissioner for Administration ex parte Eastleigh Borough Council*, which treated the findings of the Local Government Ombudsman as effectively binding, subject to rejection only after they have been successfully judicially reviewed.²⁷ The court, in both cases, proceeded on the basis that recommendations were not binding.

- 5.116 There is no case law on these issues concerning either the Health Service Ombudsman or the Public Services Ombudsman for Wales.
- 5.117 Our approach to the public services ombudsmen recognises that they are not courts and we do not think that they should be made into court substitutes. Given this, and the way that ombudsmen seek to influence public bodies through repeated interactions, we did not think that there would be benefit in changing the current approach to recommendations – that they are not binding on public bodies. We, therefore, provisionally concluded that the enforcement of recommendations should remain as part of the political process.²⁸
- 5.118 However, we took a different line when it came to findings. We provisionally proposed that a public body should only be able to reject the findings in a report of a public services ombudsman following the successful judicial review of that report. This would in effect standardise the status of findings along the lines of the current position adopted towards the Local Government Ombudsman.²⁹

Consultation responses

- 5.119 Twenty consultees responded to our provisional conclusion concerning the status of recommendations, that they are part of the political process. Eighteen agreed, whilst two disagreed.
- 5.120 Twenty-five responses were received on the provisional proposal that a public body should only be able to reject the findings of an ombudsman following the successful judicial review of the report containing them. Seventeen agreed with the provisional proposal, seven disagreed, and one was equivocal
- 5.121 In their joint response, the public services ombudsmen highlighted that:

The public services ombudsmen’s mandate is one of influence not sanction. Much of the distinctive character of the ombudsman process flows from that principle. To deviate from it so that recommendations became enforceable would potentially undermine that distinctive character. The response to recommendations should remain part of the political process.

²⁶ [2008] EWCA Civ 36, [2009] QB 114 at [72].

²⁷ *R v Local Commissioner for Administration for the South, the West Midlands, Leicestershire, Lincolnshire and Cambridgeshire ex parte Eastleigh Borough Council* [1988] QB 855.

²⁸ Above, para 6.95.

²⁹ Above, paras 6.91 to 6.107.

5.122 On the status of findings, the public services ombudsmen stated that:

It is within an ombudsman's competence to make such findings. It should not be open to a body within jurisdiction unilaterally to reject them, even if it purports to have reason for doing so.

We consider that the proposed approach, which is consistent with a mandate of influence, should be adopted in respect of all the public services ombudsmen.

5.123 Similarly, the Association of Council Secretaries and Solicitors opined that:

Binding decisions will change the fundamental basis of the relationship between the Local Government Ombudsman and local government, which is one of trust and involvement with local authority standards. We would anticipate a far greater hands on legal involvement in the handling of complaints being investigated by the Local Government Ombudsman, and more challenges to politically unacceptable findings. The process will become divisive as between the Local Government Ombudsman and local authorities and this will lead to the complainant being no longer the party for whom the service exists.

5.124 JUSTICE suggested that there should be a convention that recommendations are accepted, but that this should not be a statutory obligation.

5.125 Both Brian Thompson and Richard Kirkham disagreed with our provisional proposals, preferring the approach they adopted in their book with Trevor Buck.³⁰ Their argument has also been made in a forthcoming article by Richard Kirkham,³¹ and an earlier article by all three authors.³² Essentially, they favour a far more discursive approach to the relationship between the ombudsmen and public bodies. They suggest that the decision in *ex parte Eastleigh*³³ went too far and created an unwelcome dependency on judicial review. Ombudsmen, in their view, should be equivalent to other mechanisms for administrative justice. Therefore, they do not think that the proper arena for the discussion of the validity of their findings is judicial review. In consequence, they favour the position taken in *Bradley*,³⁴ and would favour reform in the opposite direction to our proposals. This would mean that the findings of all of the public services ombudsmen could be rejected where the public body had "cogent reasons" for doing so and the location for the discussion of their findings would be the political arena.

³⁰ T Buck, B Thompson and R Kirkham, *The Ombudsman Enterprise and Administrative Justice* (2011).

³¹ R Kirkham, "Implementing the Recommendations of an Ombudsman... Again" (2011) *Journal of Social Welfare and Family Law* (forthcoming).

³² T Buck, R Kirkham and B Thompson, "When Putting Things Right Goes Wrong: Enforcing the Recommendations of the Ombudsmen" [2008] *Public Law* 510.

³³ *R v Local Commissioner for Administration for the South, the West Midlands, Leicestershire, Lincolnshire and Cambridgeshire ex parte Eastleigh Borough Council* [1988] QB 855.

³⁴ *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114.

- 5.126 LGO Watch and Public Service Ombudsmen Watchers took a strong view on the status of recommendations:

We strongly disagree. To allow a body to excuse themselves from the repercussions of their wrongdoings because they are controlled by elected representatives is patently wrong. If we are forced to have public service ombudsmen at all, then at least make their recommendations mandatory.

- 5.127 The other issue arising in consultation responses was whether the Housing Ombudsman, because of the nature of its jurisdiction, should be treated separately to the other ombudsmen.

Discussion

- 5.128 We think that the position in *ex parte Eastleigh* is to be preferred to the alternative in *Bradley* and should be the position for all of the public services ombudsmen, except the Housing Ombudsman.
- 5.129 The collaborative relationship that the public services ombudsmen enjoy with public bodies in their jurisdiction is dependent on the nature of the ombudsman's findings and recommendations.
- 5.130 Recommendations allow the ombudsmen to make suggestions as to the manner in which a particular instance of injustice could be remedied and also to suggest improvements that could be undertaken to improve the administration of the public body subject to investigation. Such recommendations may have wide ranging implications, which could be outside the knowledge of the ombudsmen – given their primary focus on the complaints made to them. It is correct, therefore, for recommendations to remain non-binding and questions as to their implementation to remain in the political domain.
- 5.131 We are reinforced in the position we have adopted by the judgment of Mr Justice Parker in *R (Gallagher) v Basildon District Council*.³⁵ This judgment reiterates the approach we took on the status of recommendations as part of the political process, quoting paragraphs 6.91 to 6.95 of our consultation paper in support of the court's conclusion. The Court found that it was not appropriate to impose the requirement of giving "cogent reasons" on a local authority dismissing the Local Government Ombudsman's recommendations.³⁶
- 5.132 Findings, we suggest, are of a very different nature to recommendations. Findings are findings of fact and maladministration on complaints made to the ombudsmen and are the result of their investigatory procedure. The ombudsmen's schemes, including the closed nature of their investigations, were designed specifically to facilitate processes leading to such findings. We think, therefore, that it would weaken unnecessarily the ombudsmen's processes if their findings could be dismissed with a mere statement of "cogent reasons", and that it would undermine an individual's decision to opt for an ombudsman rather than

³⁵ [2010] EWHC 2824 (Admin), [2011] BLGR 227.

³⁶ *R (Gallagher) v Basildon District Council* [2010] EWHC 2824 (Admin), [2011] LGR 227 at [29].

an alternative mechanism for administrative justice.

5.133 We, therefore, make the following recommendation.

Recommendation 12: We recommend that recommendations of the public services ombudsmen continue to be part of the political process.

We recommend that findings of the public services ombudsmen be binding unless successfully challenged by way of judicial review.

Issues particular to the Housing Ombudsman

5.134 We believe that the issues raised in the preceding analysis do not apply to the Housing Ombudsman. We agree with the comments received on consultation that there is no need to alter the status of the Housing Ombudsman's recommendations and that to do so would be unduly prescriptive and unnecessary.

5.135 However, the remit of the Housing Ombudsman is subject to being expanded by clause 158 of the Localism Bill.³⁷ This clause would transfer the functions of the Local Government Ombudsman as they relate to the provision of social housing by local authorities to the Housing Ombudsman. If the Bill is enacted, then complaints relating to local authority housing would fall to be investigated by the Housing Ombudsman, thus bringing local authorities within a new and different ombudsman scheme.

5.136 At present, bodies subject to the jurisdiction of the Housing Ombudsman are obliged to follow the ombudsman's determinations.³⁸ Local authorities will therefore be bound by the ombudsman's determinations in the particular context of social housing. This would represent a move beyond *ex parte Eastleigh* and one step closer to binding recommendations.

POWERS TO ISSUE GENERAL REPORTS AND GUIDANCE

5.137 Having considered the harmonisation of reports resulting from individual investigations in our consultation paper, we turned to more general reports and guidance. By this, we meant reports relating to systemic issues or the publication of guidance such as the Parliamentary Commissioner and Health Service Ombudsman's *Principles of Good Administration*.³⁹

5.138 We suggest that systemic issues may emerge in two principal ways. First, it could become apparent as the result of a number of complaints in a particular area of service provision that there is a system failure that needs addressing. The publication of a report, then, could be seen as the collected result of those investigations.⁴⁰ Secondly, it may be that investigations into a range of administrative activity disclose behaviour that warrants reporting in a manner

³⁷ As currently before Parliament (6 June 2011).

³⁸ Housing Act 1996, sch 2, para 7.

³⁹ Parliamentary and Health Service Ombudsman, *Principles of good administration* (2007).

⁴⁰ See, for example, Parliamentary and Health Service Ombudsman, *Care and compassion?* (2010-2011) HC 778.

having general application.⁴¹

- 5.139 We also saw benefit in giving the public services ombudsmen specific powers to issue guidance, even if they already do so under implied powers, as it clarifies the statutory powers of the public services ombudsmen.⁴²
- 5.140 On this basis, we asked whether there should be a specific statutory power for each of the public services ombudsmen to publish guidance, principles of good administration and codes of practice.⁴³

Consultation responses

- 5.141 We received 27 responses addressing the provisional proposal that there should be a specific statutory power for the public services ombudsmen to publish guidance, principles of good administration and codes of practice. Twenty-three agreed with the provisional proposal, three disagreed, and one was equivocal.
- 5.142 Some, including the public services ombudsmen, noted that this practice already happens. However, these consultees could see the benefit in formalising the matter.
- 5.143 The public services ombudsmen suggested we consider the range of “products” that should be included in the general power.

Discussion

- 5.144 Unlike the other ombudsmen, the Public Services Ombudsman for Wales does have a specific power to issue “guidance about good administrative practice”.⁴⁴ However, even in the absence of specific powers, all of the ombudsmen do issue guidance and other similar documents.
- 5.145 Given the differences in the legislative schemes, it is worth considering whether a power to disseminate to the wider public can be implied into the governing statutes for the Parliamentary Commissioner, the Health Service Ombudsman and the Local Government Ombudsman.
- 5.146 The general rule is that where a statutory function is given to a body, then such powers as are necessary to perform that function can be implied.⁴⁵ However:

Where Parliament has made detailed provisions as to how certain statutory functions are to be carried out there is no scope for implying the existence of additional powers which lie wholly outside the

⁴¹ See: Local Government Ombudsman, *Special Report, Local partnerships and citizen redress* (2007); Parliamentary Commissioner and Health Service Ombudsman, *Improving public services: a matter of principle* (2008-09) HC 9.

⁴² Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 6.108 to 6.114.

⁴³ Above, para 6.115.

⁴⁴ Public Services Ombudsman (Wales) Act 2005, s 31(1).

⁴⁵ *Craies on Legislation* (9th ed 2009) para 12.2.8.

statutory code.⁴⁶

5.147 In considering this matter, we take the Parliamentary Commissioner as our example. In implying a more general power to disseminate a report, there are three considerations.

- (1) What are the functions of the Parliamentary Commissioner?
- (2) Is the public dissemination of reports necessary to the performance of those functions?
- (3) Do the other existing provisions for dissemination exclude the imposition of a power to disseminate reports publically?

5.148 The stated statutory purpose of the Parliamentary Commissioner Act 1967 is:

To make provision for the appointment and functions of a Parliamentary Commissioner for the investigation of administrative action taken on behalf of the Crown, and for purposes connected therewith.

5.149 It is clear from the Act that the primary function of the Parliamentary Commissioner is to investigate matters referred to it. One interpretation of the statute would be that the functions of the Parliamentary Commissioner should be limited to: the investigation of complaints; the drawing up of reports and their dissemination to the specific individuals listed in sections 10(1) and 10(2) of the Parliamentary Commissioner Act 1967; and the laying of special reports where individuals in particular complaints referred to the Parliamentary Commissioner continue to suffer injustice.

5.150 This does not fit with how those proposing the scheme originally saw the functions of the Parliamentary Commissioner, nor did any of the current or former Parliamentary Commissioners see the office as limited in such a manner. In Cecil Clothier's words,⁴⁷ an "ombudsman's mission has better and more far reaching consequences than the mere correction of other people's mistakes".⁴⁸ Moreover, the original White Paper stated that the Parliamentary Commissioner's work "should also result, as has proved to be the case in other countries, in the further improvement of administrative standards and efficiency".⁴⁹

5.151 We suggest that the specific provisions on the publication of reports and special reports do not necessarily mean that other documents or guidance cannot be disseminated to others.

⁴⁶ *Credit Suisse v Waltham Forest London Borough Council* [1997] QB 363 at 374 (per Neill LJ).

⁴⁷ Parliamentary Commissioner for Administration, 1979 to 1984.

⁴⁸ C Clothier, "The value of an ombudsman" [1986] *Public Law* 204, 206.

⁴⁹ White Paper, *The Parliamentary Commissioner for Administration* (1965) Cmnd 2767, para 15.

- 5.152 Consequently, we incline to the view that there is an implied general power to disseminate information. Furthermore, we think that similar powers could be read into the governing statutes for both the Health Service Ombudsman and the Local Government Ombudsman. This would reflect longstanding and unchallenged practice by the ombudsmen.
- 5.153 However, it is not a clear implication and one could plausibly argue the other way. It would, therefore, be sensible and safe to grant express powers to issue general reports and guidance. This would clarify the statutory position of the Parliamentary Commissioner, the Local Government Ombudsman, and the Health Service Ombudsman.
- 5.154 We accept, as suggested by the public services ombudsmen, that the range of report types that could be published should be non-exhaustive, and suggest that the publishing power should include such other material as the public services ombudsmen see fit.

Recommendation 13: We recommend that all the public services ombudsmen should have the power to publish such general reports, guidance or other documents as they see fit.

POWERS TO LAY REPORTS BEFORE PARLIAMENT

- 5.155 We see publicity as a key to the work of the ombudsmen. Their recommendations and much of their other work are part of the political process. Therefore, giving the ombudsmen access to the primary arena for such activity in the UK is of considerable value.
- 5.156 We saw benefit, and still do, in widening and deepening the relationships between the public services ombudsmen and Parliament beyond the particular relationship that the Parliamentary Commissioner and Health Service Ombudsman enjoy.
- 5.157 On this basis, we provisionally proposed that the governing statutes for the Local Government Ombudsman and the Housing Ombudsman be amended to allow them to lay the full range of their reports resulting from investigations before Parliament, in a similar manner to the Parliamentary Commissioner and the Health Service Ombudsman.⁵⁰

Consultation responses

- 5.158 This provisional proposal was accepted by all 20 consultees that commented on it. In particular, the public services ombudsmen agreed in their joint response, stating that:

We are conscious of the distinctive relationship between Parliament and the Parliamentary Ombudsman, and also the Health Service Ombudsman. Notwithstanding that distinction and the spirit of “localism” within which much of the Local Government Ombudsman’s work and that of the Housing Ombudsman is conducted, we consider

⁵⁰ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 7.36.

that it would be a valuable indication of public accountability and in the public interest if the relationship between these ombudsmen and Parliament were to be strengthened.

Discussion

- 5.159 There seems to be little disagreement as to providing all of the public services ombudsmen with powers to lay reports before Parliament; we think that such powers would only be used rarely.
- 5.160 We recommend our provisional proposal in unaltered form.

Recommendation 14: We recommend that the governing statutes for the Local Government Ombudsman and the Housing Ombudsman be amended to allow them to lay the full range of their reports resulting from investigations before Parliament, in a similar manner to the Parliamentary Commissioner or the Health Service Ombudsman.

PART 6

INDEPENDENCE AND ACCOUNTABILITY

- 6.1 This final Part builds on Part 5 and considers other mechanisms for ensuring independence and accountability through Parliament. In particular, it deals with provisional proposals made on the appointment of the Parliamentary Commissioner by Parliament and the laying of annual reports before Parliament by the Housing Ombudsman.

APPOINTMENT OF THE PARLIAMENTARY COMMISSIONER

- 6.2 The Parliamentary Commissioner is at present appointed by the Queen on the nomination of the Prime Minister. Though there has never been a complaint that the current process has been abused, we thought that a more obviously independent appointment system for the government's watchdog would be beneficial.
- 6.3 We thought the appropriate place to locate the appointment process was Parliament, making it the pivotal institution.
- 6.4 We, therefore, provisionally proposed that Parliament nominate to the Queen a candidate for the post of Parliamentary Commissioner for Administration.¹

Consultation responses

- 6.5 This provisional proposal received support from almost all those who commented on it, including the public services ombudsmen who agreed that it is "particularly appropriate to make Parliament the pivotal institution in the appointment of the Parliamentary Commissioner for Administration". Some consultees did express concern that such a mechanism may become politicised and also suggested models already in existence that may assist in avoiding undue politicisation.
- 6.6 The response from JUSTICE highlighted the appointment of the Electoral Commission as a possible model. Others, including Brian Thompson and Richard Kirkham, drew our attention to the appointment process of the Scottish Public Services Ombudsman. These models are addressed further below.
- 6.7 The public services ombudsmen raised the issue that the same person has traditionally held the posts of both the Parliamentary Commissioner and the Health Service Ombudsman, and that they should be appointed in the same way.
- 6.8 The only consultees to disagree were LGO Watch and the Public Services Ombudsman Watchers, who suggested that the Parliamentary Commissioner should be elected and serve a maximum term of five years.

¹ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 3.34.

Discussion

- 6.9 There are two routes that could be taken in attempting to ensure a greater role for Parliament in the appointment of the Parliamentary Commissioner. The first would be for the appointment process to remain with the executive, but with a greater role in that process being given to Parliamentarians. Therefore, a selection panel could be created to report to the Prime Minister including, for instance, the Chairman of the Public Administration Select Committee of the House of Commons.
- 6.10 The alternative is for the appointment of the Parliamentary Commissioner to be a matter for Parliament solely. This is the option we would suggest, as it goes the furthest in ensuring the independence of the Parliamentary Commissioner from the bodies that it investigates. Appointment by Parliament has important symbolic significance, both for the independence of the ombudsman from the executive and to underline the post's relationship with Parliament. The sort of hybrid system we refer to above does not accomplish this objective so clearly.
- 6.11 If this preferred option were adopted then we think it useful to outline some potential models. We, therefore, outline below the processes for the appointment of Electoral Commissioners, the Scottish Public Services Ombudsman and the Public Services Ombudsman for Wales.

Electoral Commission

- 6.12 Appointment to the Electoral Commission is governed by sections 2 and 3 of the Political Parties, Elections and Referendums Act 2000. Section 2 provides for the setting up of a "Speaker's Committee", to be composed of:
- (1) the Speaker (as Chair);
 - (2) the Member of the House of Commons who is for the time being the Chairman of the Home Affairs Select Committee of the House of Commons;
 - (3) the Lord President of the Council;
 - (4) a Member of the House of Commons who is a Minister of the Crown with responsibilities in relation to local government; and
 - (5) five Members of the House of Commons who are not Ministers of the Crown.
- 6.13 Under section 3(1) of the Political Parties, Elections and Referendums Act 2000, appointment to the Electoral Commission is made by the Queen on an Address from the House of Commons. Such an Address may be made only if:
- (1) the Speaker of the House of Commons agrees that the motion may be made (section 3(2)(a));
 - (2) the motion has been the subject of consultation with the registered leader of each registered party to which two or more Members of the House of Commons then belong (section 3(2)(b)); and

- (3) each person whose appointment is proposed in the motion has been selected in accordance with a procedure put in place and overseen by the Speaker's Committee (section 3(2)(c)).

Scottish Public Services Ombudsman

- 6.14 Section 1(1) of the Scottish Public Services Ombudsman Act 2002 provides that the Scottish Public Services Ombudsman "is to be an individual appointed by Her Majesty on the nomination of the Scottish Parliament". The Act does not specify any particular process to be undertaken by the Scottish Parliament when deciding who to nominate.
- 6.15 The first ombudsman, Professor Alice Brown, was nominated to the Queen on a motion of the Scottish Parliament.² The Standing Orders of the Scottish Parliament have specific provisions governing appointments made by the Queen on the nomination of the Scottish Parliament. The determination of candidates within the process is by a selection panel consisting of:
 - (1) the Presiding Officer;
 - (2) the convener of the relevant committee, or, in a case where the subject matter of the relevant enactment or provision falls within the remit of more than one committee, the convener of the committee that is determined for this purpose by the Parliamentary Bureau; and
 - (3) at least four but not more than seven other members appointed by the Presiding Officer.³

Public Services Ombudsman for Wales

- 6.16 Paragraph 1 of schedule 1 to the Public Services Ombudsman (Wales) Act 2005 provides that the Public Services Ombudsman for Wales is appointed by the Queen on the nomination of the National Assembly for Wales. Unlike in Scotland, the Standing Orders for the National Assembly do not contain any provisions governing the appointment of the ombudsman.
- 6.17 The National Assembly for Wales nominated Peter Tyndall to be the Public Services Ombudsman for Wales in 2008. This was on the basis of an *ad hoc* selection process by a panel including the presiding officer of the National Assembly and the current Parliamentary Commissioner, Ann Abraham. This was administered by officials within the Welsh Assembly Government.

Conclusion

- 6.18 We remain of the opinion that the pivotal institution in appointing the Parliamentary Commissioner should be Parliament, and we make the recommendation below to facilitate this.

² S1M-3244 of 27 June 2002.

³ Standing Orders for the Scottish Parliament, r 3.11(3).

- 6.19 We do not think it is our place to recommend a particular process that Parliament should adopt in its selection process. The models above show that there is a range of options available to Parliament to ensure a transparent process in which the public can have confidence.

Recommendation 15: We recommend that the Parliamentary Commissioner should be appointed by Her Majesty on the nomination of Parliament.

- 6.20 The office of Health Service Ombudsman is currently held by the same person as the Parliamentary Commissioner. In their response to the consultation paper, the public services ombudsmen considered that the same appointment process should be adopted for the Health Service Ombudsman.
- 6.21 Our view is that the Health Service Ombudsman has a very different role to that of the Parliamentary Commissioner and that the fact that the same person currently holds both positions does not, of itself, justify the same appointment process. Our provisional proposal was conceived in order to show the special relationship between Parliament and its Parliamentary Commissioner.
- 6.22 One potential model, which the government may wish to adopt, is to recommend the same person for the role of Health Service Ombudsman to the Queen as Parliament nominates as Parliamentary Commissioner.⁴

RELATIONSHIP WITH PARLIAMENTARY SELECT COMMITTEES

- 6.23 We did not make specific provisional proposals in our consultation paper on this. However, it was discussed in consultation responses. In particular, the public services ombudsmen stated that:

We also consider that the establishment of a relationship between each of the public services ombudsmen, including the Public Services Ombudsman for Wales, and a select committee of their respective national legislatures would be constructive and in the public interest. This would extend to other ombudsmen the benefits currently afforded to the Parliamentary Ombudsman by her relationship with the Public Administration Select Committee.

- 6.24 We do not feel in a position to recommend a legal change, given that this matter is solely internal to Parliament and the National Assembly for Wales. However, we think that Parliament and the National Assembly for Wales should consider formalising the relationships between themselves and the public services ombudsmen. Therefore, we make the following recommendation.

Recommendation 16: We recommend that Parliament and the National Assembly for Wales consider establishing formal relationships between select committees and the public services ombudsmen, other than the Parliamentary Commissioner and the Health Service Ombudsman who already benefit from such relationships.

⁴ The Health Service Ombudsman is appointed by Her Majesty under the Health Service Commissioners Act 1993, sch 1, para 1.

ANNUAL REPORTS OF THE HOUSING OMBUDSMAN

- 6.25 In our consultation paper we explained that all of the public services ombudsmen, except the Housing Ombudsman, have a statutory duty to lay their annual reports before either Parliament or, in the case of the Public Services Ombudsman for Wales, the National Assembly for Wales. Consequently, we provisionally proposed that a duty be placed on the Housing Ombudsman to lay its annual reports before Parliament.⁵

Discussion

- 6.26 To the extent that this was commented on, all agreed. The joint response of the public services ombudsmen did suggest that any alteration should be conducted in the context of a wider review of the governance regime for the Housing Ombudsman. Whilst we can see benefit to that, we also think that this proposal is a useful reform that can stand on its own.
- 6.27 Therefore, we are recommending our provisional proposal in its original form.

Recommendation 17: We recommend that the Housing Ombudsman be required to lay its annual reports before Parliament.

(Signed) JAMES MUNBY, *Chairman*
ELIZABETH COOKE
DAVID HERTZELL
DAVID ORMEROD
FRANCES PATTERSON

MARK ORMEROD, *Chief Executive*
8 June 2011

⁵ Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 7.33.

APPENDIX A

CONSOLIDATED LIST OF RECOMMENDATIONS

RECOMMENDATION 1

- A.1 We recommend that the Government establish a wide-ranging review of the public services ombudsmen's role as institutions for administrative justice.

RECOMMENDATION 2

- A.2 We recommend that all formal, statutory requirements that complaints submitted to the public services ombudsmen be written are repealed, even where there is presently discretion to waive the requirement.
- A.3 We recommend that the public services ombudsmen publish, and update regularly, guidance as to how complaints can be made.

RECOMMENDATION 3

- A.4 We recommend that the statutory bars be replaced with the discretion for the ombudsmen to take a claim unless they decide it is not appropriate.
- A.5 We recommend that the public services ombudsmen publish guidance detailing where it is appropriate to make a complaint to them, and where it would be more appropriate to make use of a court or other mechanism for administrative justice.

RECOMMENDATION 4

- A.6 We recommend that the Administrative Court should have an express power to stay an action before it, in order to allow a public services ombudsman to investigate or otherwise dispose of the matter.
- A.7 We recommend that the stay of an action should not force a public services ombudsman to accept a complaint.

RECOMMENDATION 5

- A.8 We recommend that the MP filter be repealed in its current form and replaced by the "dual track" system, so that an individual would be able to submit a complaint directly to the Parliamentary Commissioner.

RECOMMENDATION 6

- A.9 The ombudsmen should have the ability to release details of a complaint submitted to the ombudsman concerned where, in its opinion, such release is necessary for the investigation of similar complaints or systemic failure.
- A.10 Before the conclusion of an investigation, or before the decision not to investigate a complaint is made, the public services ombudsmen should only be able to disclose the identity of an individual or their personal details with their specific consent.

- A.11 The requirement to seek consent should apply both where the ombudsmen are releasing information to attract other potential complainants and where they are preparing to investigate a perceived instance of systemic failure.

RECOMMENDATION 7

- A.12 We recommend that the public services ombudsmen be given a specific power to make a reference to the Administrative Court asking a question on a point of law.
- A.13 We recommend that intervention by the parties to the original dispute should be allowed.
- A.14 We recommend that the ombudsmen should be required to notify the parties before making a reference, inviting them to make representations and advising them of their ability to intervene should they want to.
- A.15 We recommend that the decision to make a reference should be that of the relevant public services ombudsman alone.
- A.16 We recommend that reference should have to pass the permission stage.
- A.17 We recommend that the opinion of the Administrative Court should be considered a judgment of the Court for the purposes of section 16 of the Senior Courts Act 1981 and, therefore, potentially subject to appeal to the Court of Appeal.
- A.18 We recommend that the public services ombudsmen should meet their own costs.
- A.19 Where parties intervene, we recommend that they should normally meet their own costs.

RECOMMENDATION 8

- A.20 We recommend that provisions based on section 3 of the Public Services Ombudsman (Wales) Act 2005 be included in the governing legislation of the Parliamentary Commissioner, the Local Government Ombudsman, and the Health Service Ombudsman.
- A.21 We recommend that the public services ombudsmen adopt a publication policy whereby digests of complaints disposed of by alternative dispute resolution are published. These digests should protect the identity of the complainant, other individuals and the public body complained of.

RECOMMENDATION 9

- A.22 We recommend that the ombudsmen should publicise their internal processes, for instance whether they adopt different “tracks” for different complaints and what factors they take into consideration when deciding to allocate a complaint to a particular “track”.

RECOMMENDATION 10

- A.23 We recommend that a duty be placed on the Parliamentary Commissioner to send a copy of a report to the complainant who submitted the original complaint.

- A.24 We recommend that a duty be imposed on the Parliamentary Commissioner to send a statement of reasons for not opening an investigation to the complainant who submitted the original complaint.
- A.25 We recommend that the Parliamentary Commissioner, the Health Service Ombudsman and the Local Government Ombudsman be given the power to communicate their reports and statements of reasons for not opening an investigation to any individual or public body as they see fit.

RECOMMENDATION 11

- A.26 We recommend that the Parliamentary Commissioner and the Health Service Ombudsman be given specific powers to publish their reports on individual investigations.
- A.27 We recommend that the Parliamentary Commissioner and the Health Service Ombudsman be given specific powers to publish statements of reasons when they have decided not to open an investigation.
- A.28 We recommend that the statutory powers for the Parliamentary Commissioner and the Health Service Ombudsman to publish reports or statements of reasons only allow them to identify the complainant with the consent of the complainant.
- A.29 We recommend that the Parliamentary Commissioner and the Health Service Ombudsman should not normally identify other individuals in their reports or statements of reasons where these are published.
- A.30 We recommend that the Parliamentary Commissioner, the Health Service Ombudsman and the Public Services Ombudsman for Wales draw up strategies detailing how they will move towards the publication of all reports into individual investigations, unless there are compelling reasons for not doing so.
- A.31 We recommend that all the public services ombudsmen draw up strategies detailing how they will move toward the publication of statements of reasons as a matter of course, unless there are compelling reasons for not doing so.
- A.32 We recommend that the public services ombudsmen be given specific powers allowing them to publish digests of cases disposed of by alternative dispute resolution.

RECOMMENDATION 12

- A.33 We recommend that recommendations of the public services ombudsmen continue to be part of the political process.
- A.34 We recommend that findings of the public services ombudsmen be binding unless successfully challenged by way of judicial review.

RECOMMENDATION 13

- A.35 We recommend that all the public services ombudsmen should have the power to publish such general reports, guidance or other documents as they see fit.

RECOMMENDATION 14

- A.36 We recommend that the governing statutes for the Local Government Ombudsman and the Housing Ombudsman be amended to allow them to lay the full range of their reports resulting from investigations before Parliament, in a similar manner to the Parliamentary Commissioner or the Health Service Ombudsman.

RECOMMENDATION 15

- A.37 We recommend that the Parliamentary Commissioner should be appointed by Her Majesty on the nomination of Parliament.

RECOMMENDATION 16

- A.38 We recommend that Parliament and the National Assembly for Wales consider establishing formal relationships between select committees and the public services ombudsmen, other than the Parliamentary Commissioner and the Health Service Ombudsman who already benefit from such relationships.

RECOMMENDATION 17

- A.39 We recommend that the Housing Ombudsman be required to lay its annual reports before Parliament.

APPENDIX B

THE OMBUDSMAN PROCESS

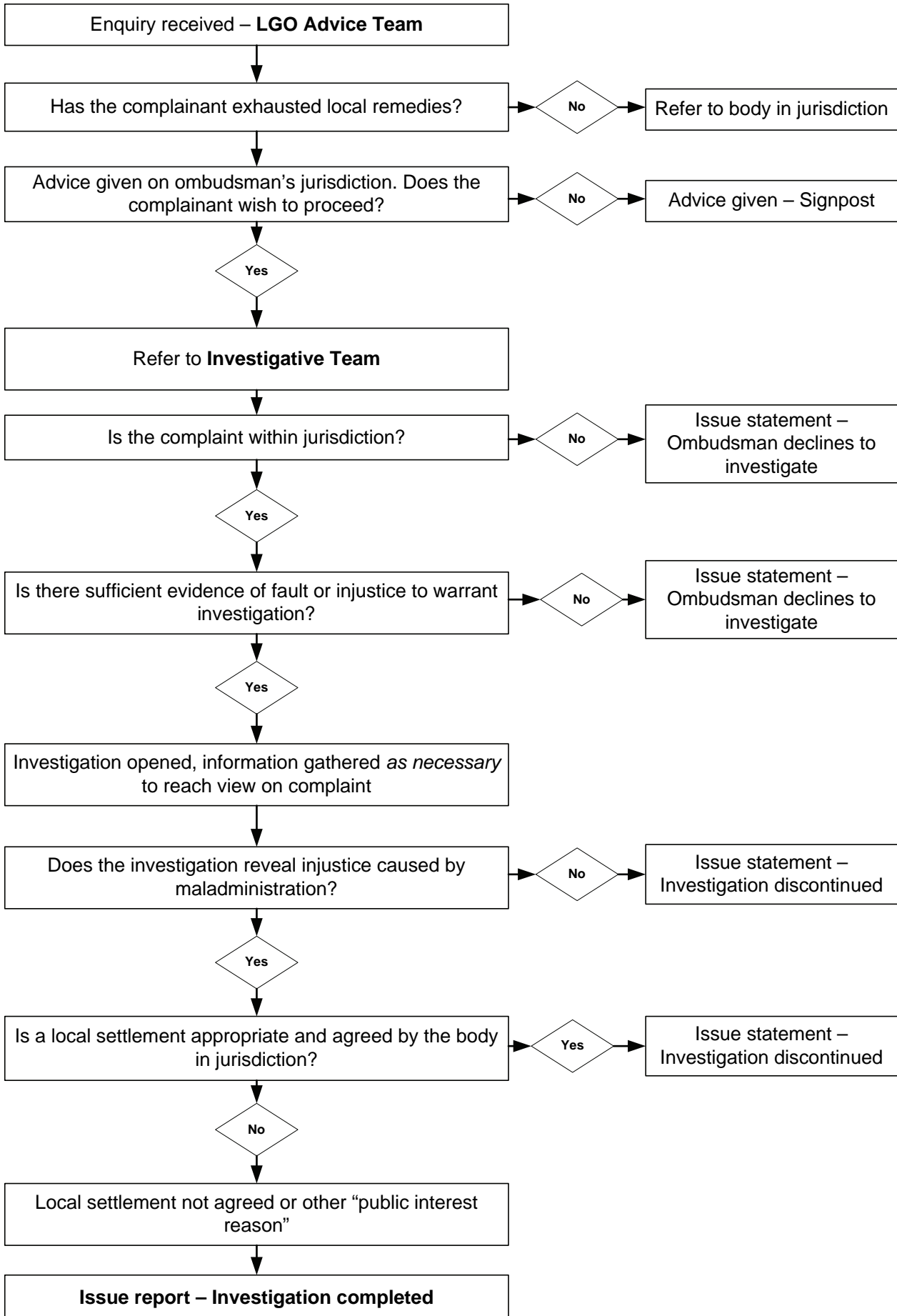
INTRODUCTION

- B.1 This part sets out in diagrammatic form the process that a complaint is subject to for the Local Government Ombudsman and the Parliamentary Commissioner.¹
- B.2 The other public services ombudsmen have similar processes. We decided to illustrate the process for these two ombudsmen in particular as the Parliamentary Commissioner published a version of the diagram used in its annual report for 2009-10,² and because the existence of the Local Government Ombudsman Advice Team makes the Local Government Ombudsman's process slightly different.

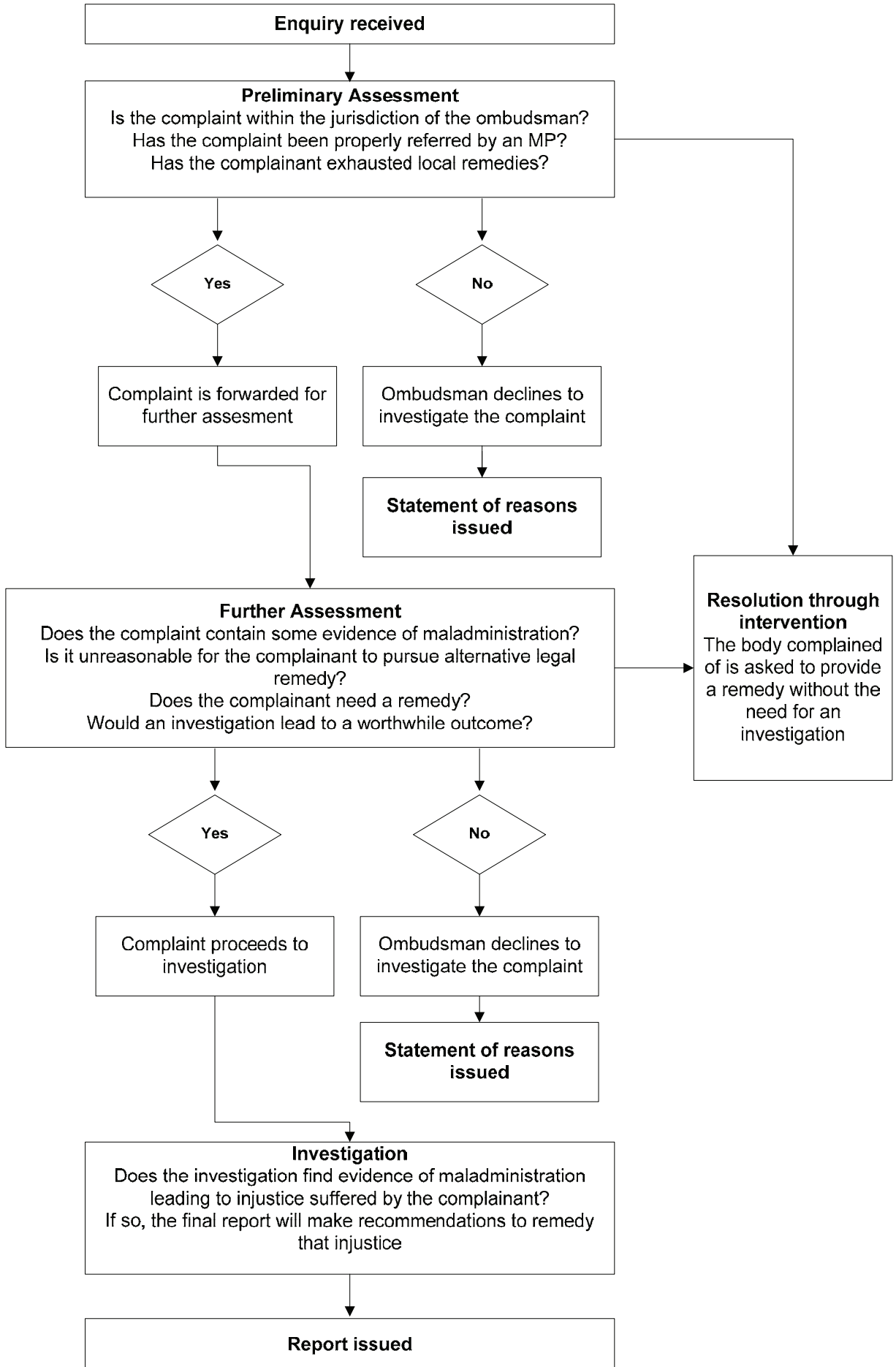
¹ These diagrams were discussed with the offices of both the Local Government Ombudsman and the Parliamentary Commissioner.

² Parliamentary and Health Service Ombudsman, *Annual Report 2009-10* (2010), p 11.

LOCAL GOVERNMENT OMBUDSMAN



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