NATIONAL ASSEMBLY FOR WALES FINANCE COMMITTEE

CONSIDERATION OF POWERS: PUBLIC SERVICES OMBUDSMAN FOR WALES

WRITTEN EVIDENCE SUBMITTED BY THE LAW COMMISSION OF ENGLAND AND WALES, FEBRUARY 2015

1.1 The Law Commission of England and Wales ("the Law Commission") welcomes the invitation to give evidence to the Finance Committee in relation to its consideration of powers held by the Public Services Ombudsman for Wales ('PSOW').

1.2 The PSOW has asked that his powers be reviewed and has submitted proposals to the Committee around five key areas of change:

1.2.1 Own initiative investigations

1.2.2 Access – oral complaints

1.2.3 Complaint Standards Authority

1.2.4 Extension and reform of jurisdiction - Healthcare

1.2.5 Links with the courts

1.3 The Law Commission has previously reviewed the legislation governing public services ombudsmen in England and Wales. We undertook a consultation between 2 September 2010 and 3 December 2010 ("the 2010 consultation").[1] A final report making recommendations was published 13 July 2011 ("the Report").[2] In the Report we made 17 recommendations for change. Those recommendations which relate to the areas of change identified by the PSOW, specifically access to the ombudsman and links with the courts, are discussed further below.

1.4 In producing this evidence, the Commission is able to draw on responses to our consultation and the recommendations in our Report. We are also able to update the Committee in respect of what has happened post publication of the Report.

[1] Public Services Ombudsman – A Consultation Paper Law Commission No 196

[2] Public Services Ombudsman Law Commission No 329 July 2011

1.5 We concluded our work on public services ombudsmen in 2011, since when we have undertaken other projects and have not done any further work on ombudsmen. The consultation responses which informed the Commission's views were received in 2010. We are constrained, in providing this evidence, to outlining the Commission's thinking at the time of preparing the Report and briefly describing what has happened subsequently within Government.

1.6 This note is divided into five sections:

(1) Background to the Law Commission;

(2) The Public Services Ombudsman project;

(3) Access – oral complaints;

(4) Links with the Courts; and

(5) Report update.

SECTION 1 - Background to the Law Commission

1.7 The Law Commission is an independent body created by Parliament by the Law Commissions Act 1965, as subsequently amended. The role of the Commission includes keeping all the law of England and Wales under review, providing advice and information to the English and Welsh Governments, and recommending reform where it is needed. The driving principle of all our law reform work is to ensure that the law is fair, modern, accessible and as cost-effective as possible.

1.8 The Commission is led by a Lord Justice of Appeal as Chairman. Five specialist teams of lawyers and researchers work under the supervision of the Chairman and 4 other full-time Law Commissioners.

1.9 Recommendations that the Commission should review an area of law are made by a wide variety of people, including the judiciary, Members of Parliament or the Welsh Assembly, Government Departments and other Government bodies in England and Wales, as well as by voluntary and private sector organisations and individuals. Periodically the Commission holds a consultation, calling for ideas for projects for the next 3 year programme of law reform.

1.10 The Commission is required to "prepare and submit to the Minister from time to time programmes for the examination of different branches of the law with a view to reform".[3] Under the terms of a Protocol agreed between the Lord Chancellor (on behalf of the United Kingdom Government) and the Law Commission,[4] only projects that are appropriate for the Commission and have a reasonable expectation of implementation are selected for a programme. The selection criteria include an examination of the extent to which the law is unsatisfactory (for example, unfair, unduly complex, inaccessible or outdated).

1.11 Amendments made to the Law Commissions Act by the Wales Act 2014 include the creation of a specific power of the Commission to provide advice and information to the Welsh Ministers[5] and to agree with the Welsh Ministers a separate protocol about the Law Commission's work relating to Welsh devolved matters.[6] The Law Commission is currently undertaking two projects, relating to the form and accessibility of the law in Wales and to planning and development control in Wales, that relate to devolved matters.

1.12 Consultation is key to law reform projects undertaken by the Commission. It allows the Commission to gain a thorough understanding of the operation of the area of law with which we are concerned, the problems that arise and how they are experienced by the public. Driven by the publication of a detailed consultation paper, the Commission's extensive consultation process informs and strengthens our final recommendations.

1.13 Consultees will normally include politicians, officials and legal advisers from Government departments, the judiciary, practising lawyers, legal academics, local government, trade and industry, consumer groups, representative and campaigning organisations in the business and voluntary sectors and the public at large.

1.14 Scrutiny of the Commission's work comes both internally and externally – internally through peer review by all Commissioners of each project and externally through consultation. Peer review takes place at each of the key stages in a project.

SECTION 2 – The Public Services Ombudsman project

[3] Section 3(1)(b) Law Commissions Act 1965

[4] Dated March 2010,

[5] Law Commissions Act 1965 (as amended) s 3(1)(ea).

[6] Law Commissions Act 1965 (as amended) s 3D.

1.15 The Commission originally published a consultation paper in July 2008 entitled *Administrative Redress: Public Bodies and the Citizen*.[7] That consultation paper considered three primary aspects of administrative redress: judicial review, private law actions against public bodies, and ombudsmen. The first two aspects of the project were discontinued for the reasons given in the Commission's report of May 2010,[8] but our work on public services ombudsmen continued.

1.16 In relation to ombudsmen the 2008 consultation paper had 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) that access to the ombudsmen could be improved by modifying the "statutory bar" – the rule that recourse may not be had to the ombudsmen if the complaint has been or could be pursued in a court of law;

(3) a power for the ombudsmen to refer a point of law to the courts; and

(4) the removal of the "MP filter" in relation to the Parliamentary Commissioner for Administration, to allow a complainant direct access to the ombudsman without having first to submit the complaint to a Member of Parliament.

1.17 These provisional proposals mostly met with favourable consultation responses; however, certain consultees thought that the proposals needed to be developed further. During the 2008 consultation other issues also came to light which we felt were worth investigation. In the report of May 2010, the Commission stated its intention undertake further work on the public services ombudsmen; we published a further consultation paper in 2010.[9]

1.18 The 2010 consultation focused on the Parliamentary Commissioner for Administration; the Health Service Ombudsman; the Local Government Ombudsman; the Housing Ombudsman (although not all proposals applied to this post); and the Public Services Ombudsman for Wales.

1.19 The Commission received fifty-seven formal responses to the 2010 consultation. 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.[10]

[7] Administrative Redress: Public Bodies and the Citizen (2008) Law Commission Consultation Paper No 187 (hereafter CP 187).

[8] Administrative Redress: Public Bodies and the Citizen (2010) Law Commission No 322.

[9] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196.

[10] A complete list of those who submitted responses can be found in Annex A to the Consultation Analysis, available to download from the Law Commission Website (http://lawcommission.justice.gov.uk/areas/public-services-ombudsmen.htm).

1.20 The Commission set certain limits to the project. In the original administrative redress project our aim in relation to the ombudsmen was to "strengthen and clarify"[11] the relationship between the ombudsmen and courts. This precluded proposing fundamental change to either the number of public services ombudsmen or their individual remits. The 2010 consultation did widen the subject matter to include such matters as reporting, but this was in the context of facilitating the work of the existing ombudsmen.

1.21 In keeping with the Commission's decision not to alter the fundamental design of the ombudsmen, we considered the subject-matter which they investigate as lying outside the scope of the project.

1.22 Following consultation between September and December 2010, the Commission published its final Report in July 2011. The Report contained 17 recommendations, of which the following five are relevant to the areas of possible change which are the focus of this inquiry:

1 That the government establish a wide-ranging review of the public services ombudsmen's role as institutions for administrative justice.

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

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

3 That the statutory bar[12] be replaced with the discretion for the ombudsman to take a claim unless they decide it is not appropriate.

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.

4 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.

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

5 That the ombudsmen be given a specific power to make a reference to the Administrative Court asking a question on a point of law.[13]

[11] Administrative Redress: Public Bodies and the Citizen (2008) Law Commission Consultation Paper No 187, para 5.1. An exception to this general approach was the proposed reform of the "MP filter" relating to the Parliamentary Commissioner.

[12] The rule that recourse may not be had to the ombudsmen if the complaint has been or could be pursued in a court of law.

[13] This was recommendation number '7' in the Report.

That intervention in the court proceedings by the parties to the original dispute should be allowed.

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.

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

That the reference should have to pass the permission stage.

That the opinion of the Administrative Court should be considered a judgment of the Court and, therefore, potentially subject to appeal to the Court of Appeal.

That the public services ombudsmen should meet their own costs.

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

SECTION 3 – Access – oral complaints

1.23 The governing statutes for the public services ombudsmen contain a variety of approaches to whether a complaint should be made in writing. The statutory provisions governing the Public Services Ombudsman for Wales allow the ombudsman to dispense with a written complaint.[14]

1.24 At the time of embarking upon the 2010 consultation, we considered there to be no reason to alter the current position of the Public Services Ombudsman for Wales in this respect. However, following receipt of all consultation responses, we concluded that there was no need for any statutory requirements as to the form in which complaints to ombudsmen were made. We thought that removing these would allow public services ombudsmen to react to technological developments and changing preferences of service users without the need either for reform of the governing legislation or routine exercises of discretion to waive the requirement of a complaint in writing so as to keep pace with such developments or other changes.

1.25 We were also concerned to ensure that the system was open and transparent. Therefore, we recommended that the public services ombudsmen publish and regularly update guidance as to how complaints can be made (although we did not recommend a statutory requirement to do this).

1.26 The Commission considered that there were advantages to reforming the formal requirements for making a complaint to the ombudsmen; we thought that our recommendation might have a particularly beneficial impact on individuals who have physical problems writing, who are illiterate or have reduced literacy, or who are not first language English or Welsh speakers.

[14] Public Services Ombudsman (Wales) Act 2005, ss 2(4) and 5(1)(a).

1.27 We also thought that there may be cost advantages to allowing non-written complaints. Users could save in postage costs. Ombudsmen could save processing time and postage.

SECTION 4 - Links with the Courts

Setting aside the statutory bars

1.28 By the "statutory bars", we meant the statutory provisions whereby a public services ombudsman cannot open an investigation if 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. The purpose of these provisions was to prevent an overlap between the jurisdiction of the courts and that of the ombudsmen. In the case of the PSOW the statutory bar is contained in the Public Services Ombudsman (Wales) Act 2005, s 9.

1.29 The Commission considered that there had been a considerable expansion in the scope of judicial review, such that there was a clear overlap between the jurisdiction of the ombudsmen and judicial review. However, the effect of the statutory bars was 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 matter.[15]

1.30 Proposals to reform the statutory bars were set out in the Commission's 2010 consultation paper where we proposed their complete removal to allow the public services ombudsmen to take complaints where they thought it appropriate.[16]

1.31 Specifically, the Commission made three provisional proposals in relation 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.[17]

(2) We provisionally proposed that this should be coupled with a broad discretion allowing the public services ombudsmen to decline to open an investigation.[18]

(3) We provisionally proposed that in deciding whether to exercise that discretion the public services ombudsmen should ask themselves

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

[16] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 4.38 to 4.46.

[17] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 4.42.

[18] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 4.47.

whether the complainant has already had or should have had recourse to a court or tribunal.[19]

1.32 These provisional proposals met with substantial approval.

1.33 The Commission therefore recommended that the statutory bars as they relate to courts be repealed and replaced with a 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 form of redress they use.

1.34 Following consultation, the Commission did not think it necessary to define in statute the discretion available to the public services ombudsmen when deciding not to investigate a complaint. Decisions would still be open to challenge on normal public law grounds, which we thought would provide sufficient protection from irrational decision-making.

1.35 In response to the consultation, 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 for bringing proceedings. Given the fact that many individuals seek legal advice on important matters, we did not think that this would be a significant problem. However, we accepted there was the potential for a limited number of individuals to be affected.

1.36 In order to reduce the chance of individuals being detrimentally affected by the removal of the statutory bars, the Commission 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 appreciated that this happens already, but thought that the situation would be different without the statutory bars and new guidance should reflect this.

Stay provisions

1.37 The Commission saw that it was possible for a matter to come before the Administrative Court, at the permission stage, where there was a sufficiently arguable case on administrative law illegality for permission to bring the proceedings to be granted, but where it was apparent to the court that the true nature of the matter (whether categorised as a dispute or not) concerned maladministration.

1.38 In such a situation, we thought that the appropriate institution to deal with the matter would be one of the public services ombudsmen.

[19] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 4.47.

1.39 In the 2010 consultation, the Commission provisionally proposed that a matter be stayed and then "transferred" to the ombudsmen from the Administrative Court, when the court thought this suitable.[20] 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, the term was used to emphasise a change in the institution that would consider the dispute.

1.40 We made one provisional proposal and asked three consultation questions.

1.41 First, 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.[21]

1.42 The three consultation questions were as follows:

(1) whether consultees agreed that the court should invite submissions from the original parties before transferring the matter;[22]

(2) whether, in the event of such a transfer, the ombudsman should be obliged to open an investigation;[23] and

(3) whether the ombudsman should also be able to abandon the investigation should it – in his or her opinion – not disclose maladministration.[24]

1.43 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.

1.44 Given the consultation responses, we considered our provisional proposals in further detail.

1.45 The Commission considered that the mechanism would normally be used at the permission stage; however, we did not think that a stay needed to be granted before permission. We therefore suggested creating a general power to allow an action to be stayed either before or after permission.

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

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

[22] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 4.77.

[23] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 4.78.

[24] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 4.79.

1.46 The Commission considered that parties should be able to request that a matter was stayed. If that happened, it seemed sensible that the applicant should be able to make submissions (usually in writing) to the court on the specific point – which may raise issues different to those considered in their original application.

1.47 The Commission considered that where the court was, of its own motion, considering making an order to stay an action before it, it should seek written representations from the parties to the action before making such an order.

1.48 Following consultation, we concluded that we had been overly prescriptive in our proposals. We had provisionally proposed that the transfer of a matter should oblige the ombudsman to open an investigation. This proposal was revised in the final Report, as we thought that the better approach was for the transfer power to allow ombudsmen to dispose of a matter as they saw fit. The power should not require them to open an investigation.

1.49 The final issue we considered was what happened after the public services ombudsman had disposed of the matter, as there would still be stayed proceedings in existence. Where permission had not been granted by the Administrative Court, 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 was still any issue of administrative illegality that it needed to consider. Where permission had already been granted, the Court could 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.

1.50 The Commission did not think that movement of a matter from a court to an ombudsman would necessarily lead to the ombudsman process becoming adversarial. We considered that the ombudsmen's processes were investigatory and the parties had to respond to that investigation rather than acting as they would in a court case. Given the discretion accorded to the ombudsmen by their governing statutes, we thought it hard to see how parties to the original case could upset the freedom of an ombudsman to dispose of a matter as the ombudsman saw fit.

1.51 We accepted that compelling an individual to move from the Administrative Court to a public services ombudsman would be an extreme measure. However, the Commission thought that there may be situations where compelling a complainant to move forum would be in the overall interests of justice.

1.52 If an ombudsman were to refuse to open an investigation, the complainant would be able 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.

Reference on a point of law

1.53 The Commission thought there could be situations where the ombudsmen would be forced to abandon an investigation which otherwise they would be able to conclude due to a technical legal question that they were not equipped to resolve. In meetings with the public services ombudsmen, it had been suggested that such a power would also be useful to resolve occasional questions about the jurisdiction of the public services ombudsmen. We therefore thought that giving the public services ombudsmen the ability to pose a question of law to the Administrative Court would provide them with a useful tool which could facilitate their work.

1.54 In the Consultation we provisionally proposed a mechanism allowing the public services ombudsmen to ask a question of the Administrative Court.[25] We provisionally proposed that such a reference should bypass the court's permission stage.[26] We also suggested that the public services ombudsmen should meet their own costs were they to use such a mechanism.[27]

1.55 The Commission provisionally proposed that the decision of the Administrative Court should be subject to appeal to the Court of Appeal.[28]

1.56 We also 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.[29] When an intervention was made, the parties were to meet their own costs.[30]

1.57 While we thought it necessary for the ombudsman to consult those involved in a complaint before making a reference, we wanted to protect the ombudsmen's discretion. Consequently, we provisionally proposed that the final decision whether to refer a question to the court should be for the public services ombudsman alone.[31]

1.58 In general, the provisional proposals were broadly supported by consultees.

1.59 Our original intention behind the reference mechanism was to provide a tool which would to allow the ombudsmen to settle a matter concerning their own jurisdiction or to allow them to process a complaint which they would not otherwise have been able to deal with.

[25] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 5.85.

[26] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 5.86.

[27] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 5.92.

[28] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 5.87.

[29] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, paras 5.88 and 5.91.

[30] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 5.92.

[31] Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196, para 5.89.

1.60 Certain consultees were concerned that the reference procedure might transform a closed investigation into an open one. We were not persuaded that this was an insurmountable obstacle. First, it was not the investigation as a whole that was being transferred, but a relevant legal question. Second, the courts already have mechanisms to deal with privacy – such as in certain cases involving children, where the parties are anonymised.

1.61 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. We considered that this missed the point that control of the mechanism remained with the ombudsman, and the discretion as to whether to make a reference lay with it solely.

1.62 We saw the key benefits as being the improvement of the quality of reports by increasing the ombudsmen's ability to report on technical legal matters, and preventing them from having to discontinue an investigation where a difficult legal issue arose. We thought that discontinuance of investigations could also have consequential costs for the parties involved, in that the issue may then have to go to court, with significant costs being incurred by both sides to the dispute.

SECTION 5 – Post-Report update

1.63 The Report was submitted to the Cabinet Office in 2011. In October 2013 the government established a wide-ranging review of the public services ombudsmen's role.

1.64 The review was led by Oliver Letwin, Minister for Government Policy, and a member of the Cabinet Office. This review looked at:

How to make it easier for the public to make a complaint, with a view to introducing a single ombudsman service, entered from one main portal.

How complaints are treated by civil servants, government departments, MPs and the NHS (this would include the ombudsman).

1.65 The Government is to publish the results of this review shortly, which will take the debate forward in terms of considering the role of the public services ombudsman. It is expected that the Commission's recommendations will feed into this wider review.