

Local Government &  
Social Care  
**OMBUDSMAN**

19 July 2017

Clive Betts MP  
Chair, Communities and Local Government Committee  
House of Commons  
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London  
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Dear Mr Betts

**Communities and Local Government Committee inquiry into the Public Services  
Ombudsman Bill**

Congratulations you on your re-election and re-appointment as Chair of the Communities and Local Government Committee. I wish you and the Committee well in your work.

When I last appeared before the Committee I undertook to provide you with a copy of the joint response to the draft Public Services Ombudsman Bill that I and Rob Behrens, the new Parliamentary and Health Service Ombudsman, were sending to Chris Skidmore MP, Minister for the Constitution. That response was deferred due to the General Election, but was sent to the Minister this week. I have therefore attached a copy to that letter for the Committee's information.

Whilst welcoming the Bill, Rob Behrens and I have highlighted a number of areas where we feel that the scope of the proposals could be widened to provide a more joined-up service to the public – in particular by the inclusion of social housing and schools within the remit of the new body from the outset. We have also suggested opportunities to strengthen the powers of the new ombudsman to bring them into line with modern practice in the rest of the UK and Europe.

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I would be delighted to meet to discuss our response to the Bill, or the wider work of my office in relation to the areas within your Committee's remit. Over the coming months we anticipate publishing a number of thematic Focus Reports sharing learning from our investigations which may be of interest to the Committee - these include reports into homelessness and out of area placements, Education, Health and Care Plans, and domestic refuse and recycling.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. King', written in a cursive style.

**Michael King**  
Local Government and Social Care Ombudsman for England

Chris Skidmore MP  
Minister for the Constitution  
Cabinet Office  
70 Whitehall  
London, SW1A 2AS



17 July 2017

Dear Mr Skidmore,

#### **DRAFT PUBLIC SERVICE OMBUDSMAN BILL**

We would like to congratulate you on your reappointment in your role as Minister for the Constitution.

We are writing to comment on the Draft Public Service Ombudsman Bill which was published in December 2016. We had intended to submit our response in April but decided to wait until the appointment of the new Government.

As the Local Government and Social Care Ombudsman (LGO) and Parliamentary and Health Service Ombudsman (PHSO), we both welcome the draft legislation and would like to put on record our gratitude for the excellent work done by the Cabinet Office to date in getting us to this point.

We can confirm that, in our view, the Bill delivers the core principles necessary for a new Public Service Ombudsman to be successfully implemented and is ready for introduction if parliamentary time allows. We do, however, have some thoughts on how the Bill could be further improved before its introduction. These are attached in Annex A, along with some more technical issues to be discussed with your officials in Annex B.



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We understand the pressures on the parliamentary timetable in the coming sessions and recognise there is no immediate plan to put legislation through Parliament. Nevertheless, we would find it helpful to meet and discuss the Government's current thinking with regard to future legislation.

Yours sincerely,



**Mick King**  
**Ombudsman and Chair**  
**Local Government and Social Care**  
**Ombudsman**



**Rob Behrens CBE**  
**Ombudsman and Chair**  
**Parliamentary and Health Service**  
**Ombudsman**

#### **Enclosures**

- **Annex A: Joint submission by PHSO and LGO on key issues in the Draft Public Service Ombudsman Bill**
- **Annex B: Technical comments by PHSO and LGO on the Draft Public Service Ombudsman Bill**

## **Annex A - Joint submission by PHSO and LGO on key issues in the Draft Public Service Ombudsman Bill**

PHSO and LGO welcome the publication of the draft Public Service Ombudsman (PSO) Bill, which already reflects many of the essential changes that are needed to make the public service ombudsman landscape more navigable and effective for citizens. Our view is that the Bill is well drafted and is ready for introduction to Parliament. However, there are some key areas where we believe the Bill could be strengthened either before introduction should there be time, or that could be considered as it progresses through Parliament.

In addition to these points, we have prepared a short annex of technical changes that we would welcome being explored, while we have also been clear to Ministers that should the Bill receive Royal Assent, both PHSO and LGO's Boards believe that sufficient time will be required to ensure a smooth transition to the new organisation.

### **1. Status of PSO's findings and recommendations and process for non-compliance**

The Draft Bill (clause 14(8)) states that while authorities must have regard to the PSO's recommendations, there is not a requirement for them to carry out these recommendations. There is a separate power (clause 15(2)) for the Ombudsman to require information about the action proposed by the authority in relation to the PSO's *findings* of injustice or hardship, and the Draft Bill further provides for a process for publishing a statement where injustice is not remedied bringing this to the attention of Parliament and third parties including local councillors.

At present, an organisation within jurisdiction may seek to challenge one of our decisions by way of judicial review in the High Court on any public law ground including where our findings can be 'objectively shown to be flawed or irrational, or peripheral, or there is genuine fresh evidence to be considered'.

Our view is that **the provisions currently in the Bill have strengthened the current position on both findings and recommendations**. As a new policy consideration, we propose that Clause 14(8) is strengthened further so that if the authority decides not to comply with the PSO's recommendations, this should only be lawful where the authority has cogent reasons for doing so and where the authority has provided these reasons to the PSO. We would also like to suggest an escalation process through which the PSO can seek a response from the highest level of decision making within the authority. This would be the Permanent Secretary for complaints about central government departments and the Chief Executive for complaints about NDPBs, NHS trusts or local authorities. In respect of local authorities, we would expect either Full Council or Cabinet under delegated arrangements to consider the PSO's recommendations and provide a response. This arrangement would strengthen the power for the PSO's *recommendations*, while ensuring they continue to remain non-binding.

## **2. Jurisdiction over adult social care**

We are concerned there may be unintended restrictions on the PSO's jurisdiction in relation to adult social care. The PSO needs to be able to investigate all aspects of social care, as is the case for the LGO at present, including privately funded care. Some specific clauses (clause 1(4)(a) and clause 9) in the current Draft Bill could potentially curtail the PSO's remit in this area as they appear to link the concept of maladministration to the provision of adult social care but this concept is not applicable in privately funded care settings. We would welcome clarification of this point and for relevant amendments to be made to the Bill prior to its introduction if needed.

## **3. Housing complaints**

The Draft Bill includes provisions to move responsibility for housing complaints from the Housing Ombudsman (HO) to the PSO, but makes this reform subject to consultation with relevant parties and secondary legislation being laid before the House at a future date.

We believe that rather than considering these changes at a later stage, they should form part of the Bill from the start. This is an opportunity to address the challenge that some people face in the housing sector at the moment of having to deal with two different ombudsmen whose jurisdictions overlap in some areas. This situation is creating confusion about the appropriate route for complaints and also means a lack of accountability and organisations being able to shift the blame when things go wrong. In addition, there remain some barriers to accessing the HO and some areas of housing are no longer within the remit of an Ombudsman following the transfer of housing complaints from the LGO to the HO.

These challenges undermine the policy intentions of the Draft Bill of giving the PSO a broad reach, providing a seamless service to both complainants and the organisations complained about and of removing unnecessary barriers to making a complaint. We would therefore welcome the opportunity to explore with you the potential for including housing complaints in the jurisdiction of the PSO from the start.

## **4. Complaint Standards**

We welcome that the Draft Bill puts a duty on the PSO to promote best practice in complaint handling by providing information, advice and training to organisations in its jurisdiction. We believe that the PSO's role in this area could be strengthened further and would like to suggest more ambitious arrangements that mirror the role of the Scottish Public Services Ombudsman (SPSO) as Complaints Standards Authority. SPSO has been very effective in driving improvements in complaint handling, and we would be very happy to set out in more detail how such a role could work for the PSO.

## **5. Complaints about schools**

Schedule 4(1) of the Draft Bill seeks to preserve the current position in respect of complaints about schools that are maintained by their local authority - as the LGO at the moment, the PSO will be prevented from considering complaints about the internal management of schools, except in relation to Special Educational Needs.

The arrangements for handling parental and young people's complaints about schools have been the subject of debate for a number of years. The Apprenticeships, Skills, Children and Learning Act 2009 introduced a pilot scheme which saw the LGO handle complaints about schools from fourteen local authority areas from April 2010 to July 2012. The independent evaluation of the pilot commissioned by the Department for Education was overwhelmingly positive in its appraisal of the effectiveness of the pilot scheme in empowering schools to address complaints more rigorously and efficiently<sup>1</sup>.

The creation of the PSO affords a unique opportunity to provide the public with a mechanism for redress in respect of concerns about all aspects of education provision, from school admissions to pupil safety and wellbeing.

## **6. Powers of investigation**

We welcome the proposed powers enabling the PSO to widen an investigation under certain conditions, as set out in the Draft Bill. This will make it easier to address systemic failings earlier in the process than it is at present.

However, we continue to believe that the absence of full own-initiative powers will make it more difficult to achieve justice for the most vulnerable and marginalised parts of society that are least likely to complain. In a situation where the Ombudsman is aware of a problem, but a complainant is either unable or unwilling for any reason to come forward, including where they are worried about the personal impact of doing so, this power would still enable an investigation to take place. We do not believe such a power would require additional resource for the PSO as we anticipate that such cases will be rare, but it could be a critical gap in the PSO's powers were such a situation to arise.

In addition to the protections offered to the most vulnerable in society, we support full own-initiative powers as it would reflect the arrangements for the Northern Ireland Public Service Ombudsman and international best practice, where around 70% of Ombudsman worldwide also have such a power. We also note that own-initiative powers have been recommended by the Welsh Assembly for the Public Service Ombudsman for Wales and it looks increasingly odd that the same arrangements would not be available to the

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<sup>1</sup> See *Parents' and Young People's Complaints about Schools*, Department for Education Research Report 193, 23 February 2012

equivalent UK wide body. The UK Parliament's Public Administration and Constitutional Affairs Committee also support giving the PSO own-initiative powers.

We would welcome the opportunity to continue exploring with you how own-initiative powers could work in practice - including whether it would be possible to include provision for such powers in the Bill with a requirement for them to be 'switched on' via secondary legislation once the new PSO is in place and has demonstrated that the organisation is running effectively.

***Local Government and Social Care Ombudsman &  
Parliamentary and Health Service Ombudsman  
July 2017***



## Annex B: Technical comments by PHSO and LGO on the Draft Public Service Ombudsman Bill

Abbreviations used: PCA 1967 - Parliamentary Commissioner Act 1967, HSC 1993 - Health Service Commissioners Act 1993.

Part of the Bill	What it is about	Comment
Clause 5	Who can make a complaint, removes the MP filter and allows for a complaint to be made on behalf of someone, such as an MP or any kind of advocate.	<ul style="list-style-type: none"> <li>We would like the eligibility criteria currently included in section 6(4) and 6(5) of the PCA 1967 to be restated in the Draft Bill (as, for example, the change in the current draft coupled with the MP filter could see a significant increase in complaints from non-UK residents related to immigration issues), although it is important that this change is made in a way that does not impact on some of the services currently offered by the LGO.</li> </ul>
Clauses 6 & 9	Matters which may be investigated cover maladministration, failure of a service and failure to provide a service.	<ul style="list-style-type: none"> <li>We are content with the drafting of clause 6(1)(d) which is entirely consistent with the current position regarding the LGO.</li> <li>However, the LGO's position in respect of our ability to investigate all aspects of social care could potentially be curtailed by clause 1(4)(a) which describes the purposes of a PSO investigation as being to establish "whether the matter complained of involved maladministration or a failure on the part of the authority to which the complaint relates". The concept of maladministration is not applicable to private adult social care settings, so the PSO may have difficulties in investigating private care providers in the absence of further clarification in the Draft Bill.</li> <li>In addition, clause 9 appears to make an exception for questions of clinical judgment. We cannot see that this caveat would necessarily apply to care and treatment decisions which are often taken in multi-disciplinary settings. Given the increasing convergence of health and social care, it would seem sensible to bring both aspects together to ensure that the PSO may consider clinical judgment in all settings.</li> <li>These issues may simply be drafting oversight but we would like to seek clarification from the Cabinet Office.</li> </ul>
Clauses 10 & 16	Investigation procedures.	<ul style="list-style-type: none"> <li>Clauses 10(4) &amp; (5) - we are concerned that there remains some tension between the requirement for investigations to be conducted in private and the Ombudsman practice of sharing draft reports and recommendations. The lack of a definition of 'private' both in the current legislation as well as in the Draft Bill does not sit easily with the increased</li> </ul>

		<p>social expectation of public authority transparency. We would welcome clarification on this from the Cabinet Office. We would also welcome the requirement in 16(3)(a) to change to a 'may' from a 'must' with regard to laying these reports in Parliament to allow more flexibility on this where reports are less high profile and to enable publication at times when Parliament is not sitting where appropriate.</p>
Clause 24	<p>Approach to designations on enactment.</p>	<ul style="list-style-type: none"> <li>• We understand that the aim of clause 24 is to 'guarantee' that the jurisdictions of PCA, HSC and LGO as they will be immediately before the enactment of the Bill will be automatically and fully transferred to the PSO.</li> <li>• More specifically, clause 24(3) provides continuity where a function transfers from a designated authority to one that is not, with the effect that the new authority is regarded as a designated authority.</li> <li>• Our understanding is that clause 24(3) aims to ensure that responsibility for existing complaints is not lost when, for example, one adult social care provider is taken over by another one after the first one has gone out of business.</li> <li>• We would like to seek confirmation that this is indeed the intention behind the clause and the problem of legacy complaints in social care when a provider goes out of business has been addressed in the Draft Bill.</li> </ul>
Clause 27	<p>New duty on the PSO to promote best practice in complaint handling through provision of information, advice and training.</p>	<ul style="list-style-type: none"> <li>• Clause 27(1) - we are concerned about the use of 'must' in the current Draft Bill and would prefer the use of 'may'.</li> <li>• We have two specific concerns: <ul style="list-style-type: none"> <li>(1) There are significant resource requirements of developing and keeping up to date material and provide training for effectively almost the entire public sector, particularly if a high degree of variation were needed to reflect the different types of organisations covered and to make such material truly useful for its audience. We would want to seek assurance that - as is currently the case for the LGO - the PSO would be able to recover costs in respect of the training activities provided.</li> <li>(2) The requirement could be unhelpful alongside clause 27(4). In a case where PSO has not produced guidance or it is there but does not reflect a particular circumstance in relation to a specific case, it could become an unhelpful part of the dialogue with the organisation that the PSO is investigating. We agree that the PSO should provide training and guidance as appropriate and where the PSO does this, for organisations to have to follow it. But given the potential resource implications and</li> </ul> </li> </ul>

		scope of the new Ombudsman’s jurisdiction, we would prefer for this to be drafted that it is clear that training and guidance would be provided with an element of Ombudsman discretion (e.g. ‘must as appropriate’) rather than as a straightforward duty (‘must’), without this caveat. This would allow such material to be properly targeted and developed over an appropriate timeframe.
Schedule 1	Appointment, tenure and conditions of service of the Ombudsman.	<ul style="list-style-type: none"> <li>• See also schedule 2: <ul style="list-style-type: none"> <li>(1) We welcome the distinction drawn between the Ombudsman’s annual report in respect of complaints (schedule 1, para 6) and the Chief Executive’s annual report on the operation of the scheme (schedule 2, part 5, para 21) and the Ombudsman’s annual resource accounts (schedule 2, part 5, para 19).</li> <li>(2) We would welcome further distinction being drawn between the two reports in terms of their respective titles and content.</li> </ul> </li> </ul>
Schedule 2	Role and work of the Board.	<ul style="list-style-type: none"> <li>• See also schedule 1: <ul style="list-style-type: none"> <li>(1) We welcome the distinction drawn between the Ombudsman’s annual report in respect of complaints (schedule 1, para 6) and the Chief Executive’s annual report on the operation of the scheme (schedule 2, part 5, para 21) and the Ombudsman’s annual resource accounts (schedule 2, part 5, para 19).</li> <li>(2) We would welcome further distinction being drawn between the two reports in terms of their respective titles and content.</li> </ul> </li> <li>• Part 4, para 14(3) - This bans the PSO from employing anyone who is also employed by a designated authority.</li> <li>• While we understand and support the important intention behind this provision - the avoidance of any conflicts of interest - we are concerned this would prevent the PSO from employing clinical advisers.</li> <li>• PHSO currently employs clinical advisers who work part time in the NHS and provide caseworkers with essential advice on relevant NHS guidance, policies and processes. Their employment in the NHS is a prerequisite for their role as clinical advisers for PHSO.</li> <li>• We would like to seek an amendment to the Bill to ensure that the PSO will be able to employ clinical advisers who are also employed as medical practitioners by the NHS.</li> </ul>

Schedule 4	Excluded matters in relation to local authority services and housing, international matters etc.	<ul style="list-style-type: none"> <li data-bbox="779 236 1980 427">• The non-planning actions of the Homes &amp; Communities Agency appear to have been taken out of the PSO's jurisdiction inadvertently - the LGO part of the remit has been transferred to the PSO (schedule 4, para 4(2) of the Draft Bill), but not the parts which are currently in PHSO's jurisdiction (see schedule 2 of the PCA 1967). We suggest deleting this para 4 entirely, to ensure that the relevant parts of PHSO's jurisdiction regarding the Homes &amp; Communities Agency are transferred to the PSO's jurisdiction.</li> <li data-bbox="779 432 1980 703">• As currently drafted, schedule 4, para 9 of the Draft Bill will prevent the PSO from investigating certain legitimate complaints about the actions of Home Office staff when carrying out immigration/border/customs duties. Our understanding of the policy intent behind the provisions in the Draft Bill is that they aim to exempt from the PSO the criminal investigation functions of the Home Office. We agree with this intent but, in order for the PSO to continue to be able to investigate legitimate complaints, there should not be a restriction on all authorisations by the Secretary of State. We would be happy to suggest technical drafting changes to achieve this.</li> <li data-bbox="779 708 1980 831">• Schedule 4, para 15 - these provisions suggest that at least some actions of the NAO will be brought into jurisdiction of the PSO. We would welcome clarification what these actions may be.</li> </ul>
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