



JUSTICE

**A Public Service Ombudsman – A Consultation
JUSTICE response**

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Introduction

1. Established in 1957, JUSTICE is an independent, all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. JUSTICE believes that providing meaningful redress for individuals with complaints against public bodies is a critical aspect of ensuring access to justice, the protection of individual rights and a fair relationship between the individual and the state. We have worked actively on issues of good administration, oversight and accountability since our inception.
2. The Cabinet Office published *A Public Service Ombudsman – A Consultation* ('the Consultation') in March 2015. At the same time the government also published the report of Robert Gordon CB, *Better to Serve the Public: Proposals to restructure, reform, renew and reinvigorate public service ombudsmen* ('the Gordon Review'), which was commissioned by the Minister for Government Policy. We note that the recommendations contained in the Gordon Review and Consultation follow on from *Time for a People's Ombudsman Service*, a report of the Public Administration Select Committee ('PASC') (now the Public Administration and Constitutional Affairs Committee).¹
3. We welcome the decision to reform and modernise the public service ombudsman system, which we have been advocating for over three decades. JUSTICE's influential report of 1961, *The Citizen and the Administration*, was credited as leading to the creation of the office of the Parliamentary Commissioner for Administration.² Only a few years later, in 1969, in *The Citizen and his Council*, JUSTICE recommended the creation of what is now the Local Government Ombudsman.³ In 1977, a JUSTICE report, *Our Fettered Ombudsman*, recommended a series of reforms designed to maximise access to redress for administrative grievances, including many of those advocated by the current proposals, such as removal of the 'MP filter' and expansion of the Parliamentary Commissioner's jurisdiction.⁴
4. In this response, we limit our comments to our areas of expertise. Silence on a specific Consultation question or on particular recommendations of the Gordon Review should not be read as approval.

Constitutional significance

5. In addition to the specific answers provided below, we wish to flag a number of overarching issues arising from the proposed recommendations.

¹ PASC, *Time for a People's Ombudsman Service* (2014) ('PASC report'), available online at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpublicadm/655/655.pdf>.

² JUSTICE (chaired by Sir John Whyatt), *The Citizen and the Administration: The Redress of Grievances* (1961).

³ JUSTICE (chaired by Professor J F Garner), *The Citizen and his Council: Ombudsman for Local Government?* (1969), available online at <http://2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/01/CitizenhisCouncil.pdf>.

⁴ JUSTICE (chaired by David Widdicombe QC), *Our Fettered Ombudsman* (1977), available online at <http://2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/01/OurFetteredOmbudsman.pdf>.

a. Integrated strategy for administrative justice reform

6. While JUSTICE welcomes the Government's effort to reform the public service ombudsman system, we hope this will form part of a wider strategy to review the current administrative justice landscape. We note the Gordon Review's comments on the ombudsman service as the "independent top tier of the complaints process providing the final point of redress for the public".⁵
7. JUSTICE is concerned that while a Public Service Ombudsman ('PSO') would sit at the apex of the administrative complaints system, it serves as one, albeit an important, element of the administrative justice landscape. The roles played by other pillars of the administrative justice system – including for example, the courts and tribunals and public inquiries – should not be overlooked.⁶
8. JUSTICE recommends that any reform of the public service ombudsman system must be taken forward with a view to ensuring comprehensive access to redress for public service complaints, as part of a wider commitment to the proper functioning of the administrative justice system as a whole. In order to do this, consideration must be given to the way in which the different pillars of administrative redress interact, and how that interaction can usefully be tailored to maximise access to redress overall. Such an integrated strategy to administrative justice reform is necessarily driven by the overriding consideration of maximising access to justice for ordinary people.

b. Political and financial commitment to principle-driven reform

9. The changes proposed in the Consultation and the Gordon Review are significant. If they are to improve the administrative redress landscape, the Government must demonstrate a political commitment to principle-driven reform. We welcome the Government's recognition of this approach in the Consultation, which starts by defining the founding principles and objectives of a unified public service ombudsman service.
10. However, the proposed change to a unified PSO will require substantial financial investment. Any new model will need to be adequately resourced to make a meaningful improvement on the current level of service provision. The creation of a unified public service ombudsman should not be seen primarily as a cost-cutting exercise. The reform programme must be driven by a commitment to increasing access to administrative redress, placing the user at the centre of the system.

⁵ Gordon Review, p.7.

⁶ Le Sueur and Bondy for the Public Law Project, *Designing Redress: a Study about Grievances against Public Bodies* (2012), available online at http://www.publiclawproject.org.uk/data/resources/123/PLP_2012_Designing_redress.pdf.

1. Do you agree that the following principles should underpin reform of the Ombudsman service?

11. JUSTICE regrets that **access to justice**, a principle of constitutional importance, is not highlighted in the Consultation as a specific principle underpinning reform. A fully functioning unified ombudsman system will play a central role in securing access to justice for service users affected by failures in administrative decision making and thus, will be key to the operation of the administrative justice system in the UK.
12. The role which the ombudsman service plays in the redress landscape is accepted by the Gordon Review.⁷ However, JUSTICE believes that the principle of access to justice should be central to the work of the new unified service. This is a particularly important consideration in light of the current access to justice challenges being faced by individuals, including limitations on the availability of legal aid, restrictions to judicial review and the introduction of court fees.
13. JUSTICE expresses cautious agreement with the principles identified in the Consultation and Gordon Review. However, the interpretation and application of those principles will be key. Little consideration of the scope and interpretation of any of the founding principles is evidenced in either document.
- **“Best for Citizens”**: JUSTICE broadly agrees with this principle, on the basis that the PSO should embody the constitutional norm of a fair relationship between the individual and the state.⁸ This can only be done when the redress mechanisms for holding the state to account are accessible, intelligible, transparent, trusted and effective. However, JUSTICE suggests that a preferable principle would be ‘Best for Service Users’ – in line with universal principles of the rule of law and access to justice, the work of the unified ombudsman service should not be limited to citizens but should extend to everyone who uses public services.
 - **“Best for Parliament”**: JUSTICE agrees that any effective ombudsman system must be independent from the institutions over which it is meant to exercise oversight.⁹ However, JUSTICE is concerned at the emphasis which the Consultation places on Parliament’s strict oversight of the PSO’s finances. Clearly, the PSO must be accountable to Parliament. However, accountability and oversight should not constitute the entirety of the PSO’s relationship with Parliament. There are other beneficial aspects to the relationship which should not be overlooked, including the potential for Parliament to make use of learning

⁷ Gordon Review, p.5.

⁸ Kirkham and Martin, *The Creation of an English Public Services Ombudsman* (2014) at p.13-14, available online at <http://www.democraticaudit.com/wp-content/uploads/2014/06/Democratic-Audit-Creation-of-a-Public-Services-Ombudsman.pdf>.

⁹ The Law Commission, *Public Services Ombudsmen* (2011) (‘Law Commission report’), Part 6, available online at http://lawcommission.justice.gov.uk/docs/lc329_ombudsmen.pdf.

from the PSO's investigations into failures which are systematic, and which Parliament may play a crucial role in remedying.¹⁰

- **“Value for Money”**: JUSTICE welcomes the opportunity to make efficiencies if they result in a better service and increased access for individuals. However, JUSTICE is concerned that the ombudsman system must remain properly resourced if it is to fulfil its function of providing administrative redress to individuals. In evidence to the PASC inquiry,¹¹ the Parliamentary and Health Service Ombudsman emphasised the importance of the ‘Value for Money’ principle in using efficiencies to secure better service delivery. We consider that this approach should inform any ‘Value for Money’ analysis underpinning the operation of a new unified service. Seen as an end in itself, JUSTICE is concerned that a ‘Value for Money’ principle, without further elaboration, could undermine the other principles key to the functioning of the reformed ombudsman service.
- **“Feasibility and Delivery”**: JUSTICE notes that this principle is referenced in the Gordon Review but that it is not listed as a core principle in the Consultation. JUSTICE agrees that any reform must be realistic in scope. However, any reform to the ombudsman system needs to be undertaken with the aim of getting it right, rather than getting it done quickly. If these reforms are to amount to more than a ‘sticking plaster solution’, the need to act quickly must not be allowed to undermine the longevity and effectiveness of the new service.

14. JUSTICE notes that these principles, along with access to justice, should underpin the entire process of ombudsman reform, including the assessment of their coherence, feasibility and resource implications by the recommended task group following consultation.¹²

2. Would you welcome the creation of a single PSO service and are these the right services to be included?

15. JUSTICE welcomes the creation of a single PSO for all English and UK public services accountable to the Westminster Parliament.

16. By the time individuals decide to complain to an ombudsman, they will already have exhausted internal complaints mechanisms. At present, they then face the further difficult task of choosing between multiple ombudsmen and external complaints schemes. A single PSO service, in offering a unified route to redress, should simplify access to a remedy for ordinary people. The ability of an individual to bring a complaint will no longer depend on them identifying the right organisation to fit their complaint. We endorse the ‘open door’ approach advocated by the

¹⁰ For example, in Scotland, these additional productive aspects of the relationship between the Scottish Public Services Ombudsman and Parliament have been overlooked. See Gill, *The Evolving Role of the Ombudsman: A Conceptual and Constitutional Analysis of the ‘Scottish Solution’ to Administrative Justice*, Public Law (2014) at p. 667.

¹¹ PASC report, see note 1 above. The PHSO's evidence can be accessed on p.52 of this report (document PHS57, at para. B(2)).

¹² Gordon Review, p53.

Gordon Review – whereby complaints are automatically re-routed – which would remove an unnecessary initial barrier to accessing redress.¹³ Importantly, a joined up service will also be better placed to respond to the multi-issue and multi-sectoral nature of many complaints. In this vein, the PSO’s jurisdiction should encompass private bodies delivering public services, enabling its investigations to follow the public pound regardless of the status of the body ultimately delivering the service. Finally, a single PSO also provides a more digestible ombudsman ‘offer’, which should result in an increase in its public profile, thereby enhancing its accessibility.

17. This single, ‘one-stop-shop’ model has been successfully employed in other jurisdictions in the UK (including in Northern Ireland, Scotland and Wales) and in Ireland. Its benefits have also been recognised by the PASC and those responding to the PASC inquiry.¹⁴ As the Consultation notes, reform leading to a single PSO will need to account for the devolution settlement. The options in this regard, as well as the concerns in relation to the scale of a unified PSO, have been addressed by the PASC report.¹⁵ Subject to what we have already said about access to justice and investment of adequate resources – and what we say below about retaining specialism and public confidence – JUSTICE believes a single PSO will offer a much-needed improvement to the administrative justice landscape.

18. JUSTICE is not in a position to comment on the proposed composition and remit of the PSO. However, we endorse the need to keep the remit of the PSO under continual review.¹⁶ Both the proposed scope, and future changes to the remit, should be subject to rigorous analysis. Maximising access to administrative redress should remain at the forefront of considerations driving proposals for reform, both now and in the future.

3. If so, do you agree that these are the right founding principles for such an organisation?
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19. In relation to the founding principles of the PSO - Best for Citizens, Best for Parliament, Value for Money, and Feasibility and Delivery, as well as the additional suggested principle of access to justice - we refer to our response to Q1.

20. The successful implementation of these founding principles is contingent on the PSO possessing a number of important operational characteristics. These include independence from institutions within its jurisdiction; effectiveness as a final tier of the redress process and; maintenance of the high level of expertise which exists in the current diverse ombudsman organisations. Whilst the need for these operational characteristics is noted in the Gordon Review and in the Consultation,¹⁷ JUSTICE stresses that a coherent approach to ombudsman reform should rank them alongside the founding principles as integral to the project. Without regard to the need for independence, expertise and effectiveness, the new unified ombudsman

¹³ Gordon Review, p.33-34.

¹⁴ PASC report, see note 1 above, at Chapter 7.

¹⁵ Ibid.

¹⁶ Gordon Review, pp.30-31.

¹⁷ Gordon Review, p.10.

would, in JUSTICE's view, be incapable of implementing the foundational principles outlined by both the Review and the Consultation.

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

21. If the single PSO is to provide individuals with an effective means of obtaining administrative redress, the unification of the ombudsman system must not compromise the quality of its decision making and investigations. Given the complex and technical remits of the bodies that will be integrated within the PSO, expert and specialist knowledge of the sector to which a particular complaint relates will clearly be crucial to achieving this aim. Public confidence in the single PSO will also largely depend on the extent to which it is seen to be able to respond in a nuanced and appropriate manner to a wide range of complaints. In addition, linking accountability and reporting obligations to specific sectors has the potential to facilitate heightened Parliamentary scrutiny of the PSO's activities, thereby increasing accountability overall. JUSTICE therefore agrees that a single PSO should retain specific sector facing services and staff.
22. The diversity of the jurisdictions which will be integrated within the single PSO lends further support to the retention of specific sector facing services. The successful incorporation of mixed public and private jurisdictions into the PSO will demand a staff and leadership that is familiar with this particular hybrid function. For example, the Housing Ombudsman regulates both social housing (on a mandatory basis) and private housing (on a voluntary one). Whilst its overwhelming focus on social landlords justifies its inclusion within the scope of the PSO,¹⁸ the existence of its private jurisdiction will require an additional level of specialist knowledge from its staff.
23. However, care should be taken that the need to retain sector specific expertise does not undermine the commitment to unification which underpins these proposals. In particular:
- A single PSO should be equipped to better facilitate the investigation of complaints in areas of public service provision which straddle current jurisdictions,¹⁹ rather than simply replicate the current arrangements for cross-jurisdictional investigations.
 - The need to retain sector specific expertise should not mean that the opportunity to remedy the gaps in the current ombudsman system is missed (for example, the comparative lack of dispute resolution provision in the education sector).²⁰ As a truly integrated service,

¹⁸ See the Law Commission report, p. 12, within which the inclusion of the Housing Ombudsman was also deemed justified on the same basis.

¹⁹ For example, it can be difficult to identify the correct recipient of a complaint relating to housing; the Local Government Ombudsman and the Housing Ombudsman have intricately related and sometimes seemingly overlapping jurisdictions.

²⁰ PASC report, p.38.

the PSO should provide 'blanket coverage' for public sector complaints, rather than functioning as several different offices operating under a single umbrella.

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

24. We refer to our response to Q4, and in particular the need to maintain sector specific expertise as long as the concerns detailed above are taken into account.

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

25. JUSTICE believes that reform of the public sector ombudsman service should be underpinned by a commitment to maximising access to justice for individuals in circumstances where public service providers fail to meet their obligations or service standards. To this end, we agree that there should be the widest possible routes of entry to a PSO. This can be achieved through several important changes:

(a) Abolishing the 'MP filter'

26. The PSO must be directly accessible by users. The current 'MP filter' that requires all complaints to the PHSO (except those relating to the NHS) to be channelled through a Member of Parliament should not be applied to the PSO. The filter effectively restricts access to redress, while simultaneously disempowering individuals.

27. The 1961 JUSTICE report recommended that the filter – a concession to practical considerations at the time – should be reconsidered after a period of five years. Our 1977 report recognised that those early considerations of relative lack of experience and polity no longer applied, and recommended that the filter be abolished. That call for abolition has since been echoed across the board, including by PASC²¹ and the Law Commission.²²

28. JUSTICE does not object to the so-called 'dual-track' system, under which users would still be allowed to enlist the help of their MP or other individuals in communicating with the PSO, so long as the option of direct access is not fettered in any way.²³

(b) Complaints should not be limited to those in writing

29. Currently, complaints to the PHSO can only be made in writing, with no power to waive that requirement. The writing requirement serves as an unnecessary barrier to accessing redress. The

²¹ PASC report, Chapter 4.

²² Law Commission report, p. 32.

²³ Ibid; see also Gordon Review, pp.10-11.

system needs to be urgently modernised and adapted for simple, accessible use in the digital age. Thus, the PSO should be able to hear complaints electronically, by telephone, in person or in writing. Limiting the form in which complaints may be received is out of step with other redress schemes (including other ombudsmen services), indefensible in light of technological developments, and has been universally criticised.²⁴

(c) Administrative Court referral power

30. Although not specifically mentioned in either the Gordon Review or the Consultation, JUSTICE supports the Law Commission's proposal that the Administrative Court should have an express power to stay an action before it and refer the case to an ombudsman when appropriate.²⁵ In allowing the PSO to investigate what are, at heart, issues of maladministration in respect of which a court action has been misguidedly commenced, this power allows the Administrative Court and PSO to work together to remedy complainant confusion about the appropriate mechanism for administrative redress. On a proper consideration of the PSO as an integrated part of the wider redress landscape, this power is a logical extension of the proposed 'open door' approach.
31. However, JUSTICE would emphasise the Law Commission's view that such a power would only be used extremely rarely, and that in such cases the PSO would not be under an obligation to open an investigation. Moreover, it is crucial to stress that the power should only extend to circumstances in which the complainant truly has chosen the incorrect forum to resolve the dispute; the lack of Article 6 protection for ombudsman procedures, the cost and disruption to the complainant of changing procedure, and the potential for delay all presage caution in the elaboration, development and use of this power.
32. JUSTICE recognises the PSO might require resolution of a legal question (for example, as to its jurisdiction) in order to proceed with its investigation. We also support the Law Commission's proposal that the PSO be given the power to make a reference to the Administrative Court asking a question on a point of law. This provision for two-way traffic between the PSO and the Court would support an integrated approach to administrative justice, maximising access to justice for individual service users.

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

33. We repeat our view, stated in response to Q1, that access to resolution and redress are not contingent on citizenship. We also reference our suggested reforms at Q7, above.
34. In addition to those proposed changes, we agree with the suggested 'open door' approach in the Gordon Review (see also paragraph 16, above). Individuals should not be unnecessarily impeded

²⁴ PASC report, Chapter 4; Law Commission report, p. 21.

²⁵ Law Commission report, p. 30.

in their attempt to seek redress simply owing to an inability to identify the current process or forum. An 'open door' approach can facilitate access, offer a more streamlined approach to the wider administrative justice landscape and increase public confidence in the justice system more generally.

35. Access can also be enhanced by a statutory duty on public service providers to signpost to the PSO (as well as advertising their own complaint handling process), as recommended by the Gordon Review.²⁶ This would reflect a healthy, joined-up, approach to the administrative justice landscape and, in raising the PSO's profile, would boost accessibility and confidence in the system.
36. We also endorse the proposals made by the PASC, particularly in relation to increased transparency in the Ombudsman's investigatory processes and clearer explanations of how decisions are reached.²⁷ We echo the recognition of the Law Commission that increased transparency should not fundamentally impair the PSO's ability to flexibly and effectively carry out its work.²⁸
37. While we accept that the non-adversarial and inquisitorial investigations undertaken under the ombudsman model are designed to avoid litigation, there will remain cases of unlawful conduct by public bodies for which court action is the most important, if not the only, remedy. JUSTICE therefore reiterates its position that adequate provision for legal aid and effective access to courts and tribunals remain paramount if individuals are to be able to access resolution and redress within the wider administrative justice system.

9. Would you support a wider role for a PSO as a champion of effective complaints handling across the public sector? / Q10. What range of investigative tools do you think the PSO might need?

38. JUSTICE reiterates the importance of ensuring that the reformed ombudsman system enhances access to administrative justice for individuals. We support a wider role for the PSO to the extent that such a role is consistent with this principle.
39. Training and monitoring public bodies in relation to best practice complaints handling would strengthen processes at the front lines, allowing for more complaints to be resolved locally and reducing the circumstances in which individuals require an ombudsman to receive redress. We support the PASC recommendation that the PSO have express powers to use its experience to inform, and lead on, improving complaints handling for all service users.²⁹ The Scottish Public Services Ombudsman provides an example of how an ombudsman service can usefully combine investigation of individual complaints with wider standard setting in complaints handling.³⁰

²⁶ Gordon Review, p.49.

²⁷ PASC report, Chapter 2.

²⁸ Law Commission report, p.39.

²⁹ PASC report, p.30.

³⁰ PASC report, p30.

40. We also support the introduction of ‘own initiative’ powers, which would allow the PSO to launch investigations in circumstances indicating systematic administrative failure without first having received a complaint. Own-initiative powers should result in an improvement in the overall quality of administrative decision making. The powers would provide a mechanism for extending access to justice to those least likely to make a complaint, including those most vulnerable and marginalised in society, and would allow the PSO to better respond to early signs of service failures.³¹ The results of own-initiative investigations should be made public. The comparative experience of overseas ombudsmen services with own-initiative powers show a relatively low frequency of use, albeit with high-impact.³²
41. Increasing the PSO’s remit to incorporate these additional ‘system-fixing’ or ‘fire-prevention’ elements will enable the PSO to proactively improve public administration.³³ JUSTICE’s support for the PSO’s enhanced toolkit is not limited to the powers specified here, on the condition that any additional powers are consonant with the fundamental principles which we have identified above as underpinning ombudsman reform. However, we emphasise that any newly created responsibilities should not detract from the PSO’s core function, which is to resolve individual complaints against administrative bodies. Care must also be taken to ensure that taking on a broader system-fixing remit does not compromise the PSO’s independence; in particular, it is critical that the PSO is not allowed to become integrated into the government’s machinery for self-scrutiny.³⁴

Conclusion

42. JUSTICE welcomes the opportunity provided by this reform agenda to effect meaningful improvement to the public service ombudsman system. We re-emphasize that achieving genuine reform will require a principle-driven approach, which we urge the Government to adopt across all stages of the process moving forward.

³¹ PASC report, p28.

³² PASC report, p.28.

³³ Gill, see note 10 above, p.668.

³⁴ Ibid, p.670.