

JERSEY LAW COMMISSION

4 October 2019

Ms Ruth Johnson
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Dear Ruth

Consultation on Jersey Public Services Ombudsman

This is a response from the Jersey Law Commission to the consultation paper on a Jersey Public Services Ombudsman (JPSO). We welcome publication of the consultation paper and progress in taking forward proposals for law reform we made in two reports – *Improving Administrative Redress in Jersey* (October 2015) and *Designing a Public Sector Ombudsman for Jersey* (November 2018). Work for both reports was led by Professor Andrew Le Sueur, a member of the Jersey Law Commission 2014-18; we are also grateful to him for assistance in preparing this response to consultation, which reflects the collective view of the Law Commissioners.

We give permission for our comments to be quoted and attributed. A copy of this letter will be published on the Jersey Law Commission website.

In our response to the consultation, we focus on aspects of the Chief Minister's proposals that differ from our recommendations or on questions not considered in detail in our November 2018 report. We do not comment on those aspects of the proposals that reflect our own recommendations.

We were pleased to see reference to the Public Sector Ombudsman project in the Independent Care Inquiry's Two-Year Review, including the statement at paragraph 32:

"We have referred above to the role of a Public Services Ombudsman and would reemphasise that we consider it to be essential that proposals currently under discussion are taken forward without delay. This role is a key element for further strengthening the rights of children and others to have their voices heard and their concerns and complaints dealt with effectively. Properly constituted, the operation of the role will go some way to resolve deficiencies in complaints processes and to dispel public perceptions of lack of transparency and of partiality in decision-making."

We note, in particular, the words "properly constituted". As we explain below, we have concerns about some of the governance arrangements proposed in the consultation paper.

Section 1 – Assumptions underpinning proposals

We agree that the JPSO should "be established in such a way as to ensure it meets the membership criteria of the Ombudsman Association". We are therefore concerned that later in the consultation paper (p.46), an "Option 2" on governance arrangements is proposed that would not meet the Ombudsman Association's *Criteria for Recognition of Ombudsman Offices*. We are puzzled at the contradiction between the two proposals. It would, in our view, be wholly unsatisfactory for the JPSO to be set up in a way that fails to meet basic and internationally recognised principles of good governance for public sector Ombudsman schemes. If Option 2 is taken forward by Ministers and the States Assembly, the new scheme should not be called an

Ombudsman (because it would not meet the basic criteria) and should instead continue to be called the States of Jersey Complaints Panel. We make further comments on Option 2 below.

Section 2 – Functions of the JPSO

Q6 – We do not agree that non-residents should pay to use the Ombudsman service (Q6). It goes to the heart of the ethos of public sector ombudsman schemes that the dispute resolution service they provide is free at the point of use. The number of non-residents seeking to use the service is likely to be tiny with little, if any, revenue generated from any fees they would be required to pay. Any non-residents seeking to use the JPSO are likely to have connections with the Island, as former or would-be residents, or family members of residents. In assessing the pros and cons of setting a fee, it needs to be recognised that the use of an ombudsman service has public as well as private benefit, because all complaints provide opportunities for lesson-learning for the public body that is challenged.

Q7 – The statement that the JPSO should “only investigate a complaint where the complainant has exhausted the internal complaints process of the entity about which they have a complaint” in our view requires some qualification. Our November 2018 report stated, “People with grievances against a public body will **normally** be required to go through the body’s internal complaints process before taking their case to the Ombudsman (though the Ombudsman may have **discretion** to look into a case where this has not been done)’. It is important that the Ombudsman should, in exceptional circumstances, be able to investigate even if a person has not concluded internal complaints processes. For example, it may be clear to the Ombudsman that a public body’s complaints handling process is ineffective or unfair.

Section 3 – Findings, recommendations and remedy

In Section 3, a variety of options are set out as to whether the outcome of an investigation by the JPSO should be binding on the public body. In our November 2018 report, we concluded after careful analysis that Ombudsman outcomes in Jersey should be binding and if a Minister or other public body fails to follow a recommendation aimed at providing redress for injustice in an individual case, the aggrieved person should be able to go to court to enforce that recommendation. We proposed the Petty Debts Court as the appropriate forum, and that the public body should not in that hearing be permitted to open up questions about the validity of the Ombudsman’s findings and recommendations. This remains the kernel of our advice to the Chief Minister.

We explained in our November 2018 report that in the past an expert group (the JUSTICE-All Souls Committee) had in the past recommended enforceable remedies for the English Local Government Ombudsman and we pointed out that the new Northern Ireland Public Services Ombudsman scheme has a court-based enforcement procedure (p.121).

We understand that most ombudsman schemes do not have enforceable remedies but in developing a blueprint for a scheme to meet the specific needs of Jersey, we recognised that a pressing problem in recent years has been the disinclination of ministers to adhere to the findings and recommendations of the States of Jersey Complaints Panel. In our October 2017 report we noted that in five of the 11 cases (46%) determined in 2013-17, ministers had refused to follow the Complaint Panel’s reports; and our November 2018 report highlighted a further two cases where this had happened in 2017-18. We said, “In the opinion of Jersey Law Commission, the pattern of frequent rejection of States of Jersey Complaint Panel decision reports would, if carried over to the new Ombudsman scheme, call into question the value of creating an Ombudsman”.

For the reasons set out in our November 2018 report, we do not regard the distinction between “findings” and “recommendations” as helpful in this context. It is a distinction that has emerged from English case law as the courts have attempted to introduce more “bindingness” into pre-existing Ombudsman schemes.

Our advice to the Chief Minister in terms of the different options set out in the consultation paper is that the best option is Option 3 – JPSO findings and recommendations are binding and enforceable. This means that the findings have to be accepted by the public body and the complainant and that the public body must act on the recommendations. Of the variants set out,

we prefer Option 3A (the findings and recommendations should be binding between the public body and the complaint but only in relation to the specific complaint investigated by the JPSO).

The JPSO will use investigatory methods to get to the bottom of what happened and – if injustice has been caused by maladministration or service failure – to decide how this should be remedied. As part of this approach, we would expect the Ombudsman to share a draft report with the parties before it is finalised. This is a common step in many Ombudsman schemes, even if not expressly required by law. The aim of draft sharing is to ensure fairness (if a person is being criticised in a report, they should be able to respond to that criticism) and accuracy and effectiveness (factual accuracy can be checked, and the practicality of any remedies can be commented on). If a minister or other public body has concerns about a proposed remedy, they would be able to raise them at this step of the process, if not before. An Ombudsman will always seek a remedy that is proportionate and can be implemented practically by the public body found to have caused injustice.

If a public body is sure that the JPSO has made an error reaching its findings and recommendations of such seriousness that the JPSO's determination is unlawful, the public body should be able to seek judicial review against the JPSO in the Royal Court. This should be an extremely rare occurrence. It is not clear to us that the individual complainant would need to be separately represented – the role of the JPSO's advocate would be to explain to the court why the decision in favour of the individual was correctly made. The grounds of challenge by the public body should be the standard judicial review grounds – the decision was unlawful (the JPSO did not correctly understand and apply the law), procedurally improper (the JPSO used a procedure that was unfair) or legally unreasonable. We do not think that the Royal Court should have powers to substitute its decision on the merits of the case for that of the JPSO (which is the expert body in this context).

In our view, the worst-case scenario would be for the new scheme to be based on "Option 2" (a lay executive board directing case workers) making recommendations that were not binding on ministers and other public bodies. This would hardly be a change from the current arrangements. If the Chief Minister decides that this is the preferred way forward, there would be a responsibility to explain how the new system would lead to a higher level of compliance with recommendations. We draw to your attention what we said in our October 2015 report at p.98, where we set out a range of reforms that could be introduced to improve outcomes from the States of Jersey Complaints Panel: "The Chief Minister should prepare a report to the States Assembly reviewing responses to the Complaints Panel's findings and recommendations since October 2011 and making proposals for the Government of Jersey's future working relationship with the Complaints Panel".

Q17 – In addition to remedies of apology, compensation, and a report giving recommendations for improvement, the Ombudsman scheme should use mediation and 'restorative justice' (also known as 'restorative practice') as a central part of its work. As the consultation paper recognises in Q2, informal resolution should be a key way in which the Ombudsman scheme operates.

Section 4 – Jurisdiction and design principles

We have no comments on Section 4 – Jurisdiction and design principles.

Section 5 – Healthcare providers

In relation to **Section 5 – Healthcare providers**, we agree with the proposal that these should be included in the remit of the JPSO at a later date (Q24, p.40). Our research showed that healthcare complaints are often the largest category of case coming to public sector ombudsman schemes if they are within jurisdiction. It would be a prudent measure to allow the JPSO to have a set-up phase before extending its remit to healthcare, and equally for health care providers to have time to plan for new complaints processes. That said, we do not favour a "wait and see" approach. In our view, the "later date" should be agreed at the outset and specified in legislation.

In our November 2018 report we recommended that the remit of the JPSO should not extend to clinical judgements of medical, nursing and dental practitioners. This remains our view.

Section 6 – Other watchdogs and regulators

We agree in general terms with the proposals in Section 6 – Other watchdogs and regulators, which are based on our November 2018 report.

We see value in the proposal for joint working powers, to enable the Ombudsman to investigate maladministration and service failure relating to matters that also fall within the remit of the Children’s Commissioner, Commissioner of Standards, or Comptroller & Auditor General so that a complex complaint or systemic problem receives the benefit of review from two expert watchdogs. Even when embarked on a piece of joint working, it would be important for the Ombudsman and other watchdog to maintain operational independence. A power to collaborate through joint working should not preclude separate reports being made by each organisation.

Section 7 – Structure and governance arrangements

In Section 7, two options are presented. Option 1 is based on the proposals set out in detail in our November 2018 report (for a non-executive board, Ombudsman, and case workers).

Option 2 proposes to have an executive board of lay people, serving on an honorary basis like the current States of Jersey Complaints Panel, assisted by caseworkers who would undertake investigations.

We are surprised and disappointed that Model 2 is presented in the way that it is in the consultation paper. In the *Chief Executive’s second six-month report to the States Assembly* (24 January 2019), it was stated that the new Department for Strategic Policy, Performance and Population “brings together policy professionals from across government, to deliver co-ordinated, evidence-based policy options for Ministers, with a focus on improvements for customers and islanders”. We are unable to discern an evidence-base for Model 2 or an explanation of how Model 2 would deliver improvements for Islanders that are better, different from or additional to those of Model 1. Model 2 would be a major departure from blueprint for a Jersey ombudsman scheme we presented in our November 2018 report. Model 1 was developed on the basis of comprehensive and detailed research. In our view, Model 2 has not been sufficiently worked up to provide a solid basis on which Ministers and members of the States Assembly could safely proceed.

A significant disadvantage of Model 2 (as noted above) is that it would not be accepted outside the Island as a proper Ombudsman scheme. The consultation paper (p.46) acknowledges that Option 2 would not meet the basic criteria to be recognised by an Ombudsman by the Ombudsman Association. One basic criterion is that “The Ombudsman alone (or someone acting on his or her authority) must have the power to decide whether or not a complaint is within the Ombudsman’s jurisdiction. If it is, the Ombudsman (or someone acting on his or her authority) must have the power to determine it. The Ombudsman’s determination should be final and should not be able to be overturned other than by the courts or an appeal route provided for by law”. The “principal caseworker” would not have operational independence and would therefore not be an Ombudsman – he or she would be subject to control and direction by a panel of lay people.

The Ombudsman Association states in its *Criteria for the Recognition of Ombudsman Offices* that “The title of ‘Ombudsman’ should not be used unless the Association’s Criteria for Recognition of Ombudsman’s Offices are met. The Association will not admit to Membership in any category organisations or individuals which use the title of ‘Ombudsman’ but do not meet the Association’s Criteria”. If Ministers and the States Assembly decide to pursue Option 2, it would therefore be important for the scheme not to be called an Ombudsman. As we say above, the new scheme should continue to be called the States of Jersey Complaints Panel.

An implicit advantage of Model 2 could be thought to be the financial costs saving, as the estimated annual running costs would be £303,000 compared to £381,000 for Model 1. We assume that the difference would be largely based on the Model 2 “principal case worker” being a civil servant on a salary grade considerably lower than that paid to an Ombudsman (who would be a senior and experienced person appointed to an independent public office). We fully understand the need for taxpayers’ money to be spent wisely but we are not confident that Model 2 would deliver value for money.

Effective delivery of the range of functions to be carried out by the JPSO (listed in Q2) would require a person of seniority, experience and independence (an Ombudsman) to be in the lead. If a principal case worker is put in place of an Ombudsman, realism would require a much more limited range of functions. If one of the policy goals of creating an Ombudsman scheme is to bring about significant cultural change (within the public sector and among Islanders in relation to being willing and able to make legitimate complaints), we doubt that this will be achieved by Model 2.

We are concerned about the efficiency of Model 2. Creating an Ombudsman can be expected to have the consequence of increasing the number of complaints coming forward compared to the relatively small number handled by the current States of Jersey Complaints Panel. The responsibilities of the lay board members in Model 2, will require a step change in demands on the time of members if delays in progressing cases are to be avoided.

We are unpersuaded that Model 2 would provide a good structure for future development of the Ombudsman scheme to cover the Bailiwick of Guernsey.

In our view, Option 2 would not significantly enhance public trust and confidence in the system or bring to the Island the benefits of having an Ombudsman able to drive service improvement. We note that the Two-Year Review by the Independent Jersey Care Inquiry recently stated that they “believe the appointment of an independent Public Services Ombudsman is an essential component of the strategy for addressing a poor tradition of complaints handling and for dispelling perceptions of collusion and lack of transparency in public services”. In our judgement, Model 2 will not address the scale of the challenge identified there.

Yours sincerely

[C.A. CHAPLIN]

Clive Chaplin
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Jersey Law Commission