



Public Services Ombudsmen

The Advice Services Alliance's response to the Law
Commission's Consultation paper

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1 Advice Services Alliance

- 1.1 The Advice Services Alliance (ASA) is the umbrella organisation for independent advice networks in the U.K. Currently, our full members are:
- adviceUK
 - Age UK
 - Citizens Advice
 - DIAL UK, a division of SCOPE
 - Law Centres Federation
 - Shelter
 - Shelter Cymru
 - Youth Access
- 1.2 Between them, our members represent some 1,750 organisations which provide a range of advice, legal and other services to members of the public. We estimate that about 200 of these organisations employ solicitors.
- 1.3 Most advice agencies and Law Centres offer services within a local catchment area, but some are regional or national. They are largely funded through public sector grants or contracts and charitable fundraising. With some limited exceptions, services are offered to users free of charge and are focused on areas of law which mainly affect poorer people e.g. welfare benefits, debt, housing, employment, immigration, education and community care (now commonly referred to as "social welfare law").
- 1.4 Our members have been given the opportunity to comment on a draft of this response. However, we anticipate that some of our members will respond separately.

2 Introduction

- 2.1 ASA welcomes the opportunity to comment on this Consultation Paper. The Paper contains a large number of proposals and asks a similarly large number of questions. We regret that we no longer have a member of staff with specific responsibilities that cover policy issues in relation to alternative dispute resolution.
- 2.2 Many of the proposals seem to us to be eminently sensible. We propose therefore to limit our comments to a few major points that concern us.
- 2.3 We are generally in agreement with the proposals referred to in paragraphs 3.34, 4.42, 4.47, 4.91, 4.106, 5.33, 6.82-4, 6.89, 6.90, 6.95, 6.107, 6.115, 7.33 and 7.36.

3 Stay of proceedings – paragraphs 4.76 – 4.79

- 3.1 We are not convinced by these proposals. We can imagine in theory that some proceedings could be issued in the Administrative Court that might be better handled by the Ombudsmen. Such proceedings may perhaps be more likely to be issued by litigants in person rather than by those who are legally represented. We have difficulty in thinking

of examples of cases that might properly be issued in the Administrative Court, but which the Court might think should be referred to one of the Public Services Ombudsmen.

3.2 We have a number of practical concerns also:

- If the claimant had received legal aid to bring proceedings in the Administrative Court, he or she would be likely to lose their representation, as the legal aid certificate would not cover Ombudsman work.
- Approximately one third of cases settle between issue and the permission stage. This figure approaches two thirds in homelessness cases. Over 50% settle after permission is granted.¹ Diverting cases to the Ombudsmen at permission stage, as the paper proposes, could remove this incentive to settle.
- Different remedies are available in court from those that one can get from an Ombudsman, so there needs to be consideration of:
 - the complainant's right to have a say in agreeing to this transfer
 - what the complainant's objectives are
 - whether there is any right to return to court, if the Ombudsman is unable to resolve the matter to the claimant's satisfaction.

3.3 When a case is 'transferred' would the parties have the opportunity to 'reframe' or re-present the challenge as a complaint? Would a legal aid certificate cover this?

3.4 Where the complainant does not agree to the 'transfer' then they may not co-operate in the Ombudsman's investigation. If this results in the Ombudsman discontinuing the investigation, then the case would have to return to court. If the complainant is not in agreement with the transfer then it arguably serves no purpose and can only add to costs and delay.

4 Alternatives to investigation – paragraph 4.85

4.1 It seems that the Commission is essentially proposing an extension to all Ombudsmen of the power available to some of them to resolve disputes via ADR.

4.2 However, as our former colleague Val Reid recently pointed out, it is arguable that the use of ADR is already problematic:

“During the last eight years most ombudsmen have developed early resolution techniques. Guided mediation and telephone conciliation by ombudsman caseworkers are now the mechanisms by which the vast majority of disputes are resolved, in both public and private schemes. This is cheaper and quicker than lengthy in-depth investigations and published reports, and for that reason could benefit complainants. But

¹ Varda Bondy and Maurice Sunkin *The Dynamics of Judicial Review Litigation*, Public Law Project, 2009, Section 3, pp.33,37,38,39. Available at <http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf>

*last year, the Local Government Ombudsman only published a report in 1.37% of cases. Once again, ADR processes are doubly removed from public scrutiny.”*²

- 4.3 It is arguable that the proposal for enhanced powers to use alternatives to investigation is welcome if it delivers fair outcomes for complainants more promptly, but two key principles are
- Transparency of outcomes of informally resolved complaints. This could be achieved by publishing anonymised case digests on these or, for greater transparency, reporting on them and naming the public body involved
 - Where a complaint has been accepted as within jurisdiction, the complainant should retain the right to request an investigation if they choose that or if the matter is not successfully resolved informally.

5 Reference on a point of law – paragraphs 5.83 – 5.92

- 5.1 We can see that this proposal could be helpful, to determine questions of jurisdiction, although it is likely to be used rarely.
- 5.2 The consultation paper says that Ombudsmen should be **able** to seek counsel’s opinion before making a reference [para 5.74]. This seems to differ from the proposal that it should be a **requirement** [as set out in para 5.83]. The Ombudsmen would probably seek counsel’s opinion in practice, but should it not be a power, rather than a requirement?
- 5.3 There is a danger of inequality of arms if each side is expected to bear their own costs. We assume that, in principle at least, a claimant would be able to receive advice about a proposed referral under the legal aid scheme. If a referral is made, however, and the claimant wished to intervene, would full legal aid be available in a suitable case?
- 5.4 Although the power is likely to be used rarely, there is a danger that the fact that the Ombudsman has this power might lead to undesirable behaviours by parties (public bodies especially), e.g. by insisting that the point of law is essential to the Ombudsman’s investigation and forcing additional costs and delay. Another risk is that public bodies might challenge an Ombudsman’s decision to refer, or not to refer.
- 5.5 Subject to these provisos, we are in general agreement with the proposals referred to in paragraphs 5.84 – 5.89, 5.91 and 5.92.

6 Reporting issues – paragraphs 6.82 – 6.86

- 6.1 As indicated above, we are in agreement with the proposals referred to in paragraphs 6.82 – 6.84.
- 6.2 We believe that anonymity of complainants should be the default position. It could be made clear to complainants that where a report is being published and the public body is

² ADR Update No. 28, August 2009, p.5, available at <http://www.asauk.org.uk/fileLibrary/pdf/adr28001.pdf>

being named they can choose to be named, but there should be no pressure for them to agree.

6.3 However, we are not clear if the proposals would affect, for example, the Local Government Ombudsmen. In their last Annual Report they recorded the outcome of complaints in 2009/10 as follows:

Outcome	Number of complaints	Percentage of total (excluding those outside jurisdiction)
Local settlements	2,366	26.92
Maladministration causing injustice (issued report)	69	0.78
Maladministration, no injustice (issued report)	2	0.02
No maladministration (issued report)	3	0.03
No or insufficient evidence of maladministration (without report)	4,065	46.25
Ombudsman's discretion	2,284	26.00
Outside jurisdiction	1,520	
Total	10,309	

6.4 Ignoring the cases that are outside jurisdiction, it would appear that the most common outcomes do not presently lead to a report, i.e.

- Cases where there is held to be no or insufficient evidence of maladministration – 46% of cases
- Cases that result in local settlements – 27% of cases
- Cases where the Ombudsman decides not to pursue the complaint – 26% of cases.

6.5 The reporting provisions proposed could have the advantages of

- Transparency, if a tiered system of reporting allows for information to be published on all accepted complaints, in one form or another
- Consistency across the Ombudsmen, as it could make it easier to compare outcomes across the Ombudsmen.

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