

Strategic Policy, Performance and Population
Government of Jersey
19-21 Broad Street
St Helier
JE2 3RR

Chair: Anthony Arter
Director: Donal Galligan

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Jersey Public Services Ombudsman

I am writing in response to the Government of Jersey's consultation on a proposed model for a Jersey Public Services Ombudsman (JPSO). We have restricted our comments to those areas of our expertise.

Summary

1. The Ombudsman Association welcomes the proposals to establish a Jersey Public Services Ombudsman in such a way that it meets our membership criteria.
2. It is a key aspect of the OA's criteria that an ombudsman is free to access for all those who have used a service that is within the ombudsman's jurisdiction.
3. The JPSO should have the freedom to determine the appropriate remedy in each circumstance and this should not be restricted in legislation.
4. Giving the JPSO the power to undertake own-initiative investigations and set complaints standards reflects modern best practice.
5. Including a power for the Chief Minister to request that the JPSO carry out an investigation is unnecessary and risks undermining the JPSO's independence.
6. We recommend that a timetable be set out as to when healthcare providers will come into the JPSO's jurisdiction.

Background

7. The Ombudsman Association (OA) was established in 1993 and includes as members all public and private sector Ombudsman schemes and major complaint handling bodies in the United Kingdom, the Republic of Ireland, the British Crown Dependencies and the British Overseas Territories.
8. The Vision of the Association is that throughout the public and private sectors:
 - It is straightforward and simple for people to complain.
 - People making a complaint are listened to and treated fairly.
 - A complaint is dealt with quickly, fairly and effectively at the earliest stage by suitably trained staff.
 - People have access to an ombudsman in all areas of consumer and public services.
 - The learning from a complaint is used to improve services.

9. An Ombudsman helps to underpin public confidence in the institutions that they cover; by providing accessible and effective redress, and by feeding back the lessons from their work in order to help improve service delivery and complaints-management for the future.
10. The Association's membership criteria are recognised internationally as representing best practice. This is reflected in the UK Cabinet Office's *Guidance for government departments on setting up Ombudsman schemes*¹, which addresses the point of when it is appropriate to use the title 'ombudsman', and in the criteria used by UK Companies House on when a company can use the protected term 'ombudsman'². Our criteria are aligned with the Council of Europe's Venice Principles.³

Section 2: Functions of the JPSO

Q2-Q5. Principal functions and role of JPSO

11. A modern, effective, ombudsman scheme should have all of the principal functions described in the consultation. As well as addressing individual disputes, an effective ombudsman should have the remit and powers to address systemic issues. It is now recognised as best practice across the British Isles that a public services ombudsman should have the powers to undertake an own-initiative investigation and a complaints standards role, as evidenced by the powers held by public services ombudsman in Wales, Scotland, the Republic of Ireland and Northern Ireland.
12. The JPSO should investigate maladministration and service failure and actively investigate the facts of a complaint. The OA's criteria specifically sets out that an ombudsman should investigate complaints about maladministration, unfair treatment, poor service and inequitable conduct, and should take an inquisitorial approach, assessing what evidence is needed and challenging that provided.
13. It is common practice internationally that an Ombudsman investigates complaints in private. This compliments the inquisitorial approach that an ombudsman takes, as opposed to the adversarial approach taken in the courts. Ombudsman schemes publish summaries of their reports, including their findings and recommendations, but carry out the investigation in private. This approach is popular with both citizens and officials, allowing for a less confrontational, consistent, assessment of the issues.

Q6. Do you agree that the JPSO should be free to residents but that non-residents should pay?

14. It is an international norm, and importantly a key principle of the OA's membership criteria, that an ombudsman scheme is free-of-charge to use. All users of public services, regardless of whether they have paid a fee to access that public service or whether they are a citizen of that country or not, should be able to take their complaint to the ombudsman and to do so free-of-charge. For example, a foreign national who had a complaint about the UK's immigration services would be able to complain to the UK's Parliamentary & Health Service Ombudsman free of charge despite not being a UK citizen.

Q7-Q10. Remit of the JPSO

15. It is common practice when a new ombudsman scheme is established for it not to have retrospective investigatory powers and for a time limit to be placed on how long after the maladministration occurred, or after an individual became aware of it, that someone can normally bring a complaint to the ombudsman. It is also normal practice that an ombudsman does not consider a complaint until the organisation complained about has completed their internal complaints process.

¹ www.gov.uk/government/publications/new-ombudsman-schemes-guidance

² www.gov.uk/government/publications/incorporation-and-names/annex-a-sensitive-words-and-expressions-or-words-that-could-imply-a-connection-with-government

³ [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)005-e)

16. We support the suggestion on p.14 of the consultation paper that those provisions for the JPSO are not overly proscriptive to allow the ombudsman to waive them in exceptional circumstances, for example if there is a mitigating factor as to why a complaint was not brought until after the 12 month deadline or if the service failure in question endangers the health or safety of someone and requires an immediate intervention by the ombudsman before internal procedures have been exhausted.
17. We are pleased to see that the proposed JPSO will have own initiative powers. It is common practice internationally for an ombudsman to have these powers and will mean the JPSO's powers are in line with public service ombudsman colleagues in Wales, Northern Ireland and the Republic of Ireland. Own initiative powers are particularly useful to enable an ombudsman to investigate in circumstances where an individual is potentially vulnerable or fearful of repercussions if they raise a complaint personally, for example if they are resident in a nursing or children's home or are detained in a state institution. We also note the importance that the follow up review to the Independent Jersey Care Inquiry puts on establishing a JPSO.
18. It therefore seems redundant and unnecessarily bureaucratic to restrict the ombudsman through legislation to only being able to investigate matters that have had a negative impact on the *complainant*, if the ombudsman can itself 'bypass' that restriction by using its own-initiative powers.
19. The independence of an ombudsman is a key principle of the institution and a key part of the OA's membership criteria; an ombudsman should be both visibly and demonstrably independent. It is unclear what benefit would be provided by including a power for the Chief Minister to 'request' the JPSO to carry out an investigation; the ombudsman will be able to carry out investigations on its own initiative anyway, in response to any scandal or general concerns raised, and in any case would not be required to agree to the Chief Minister's request. Whilst the benefits are not clear, the risk to the perception of the Ombudsman's independence is. It is possible that a request from the Chief Minister to investigate may be seen to have political motivations, especially if it relates to actions that occurred under a previous Chief Minister / Government. It may be useful for you to be aware that the OA has rejected applications for membership in the past because a similar power for the relevant Minister to 'request / direct' an investigation called into question the body's independence.
20. The proposals on what types of complaints should fall outside the JPSO's jurisdiction would appear to match common practice elsewhere.

Section 3: Findings, recommendations and remedy

Q11-Q16. Findings and recommendations

21. It is the OA's position that an ombudsman's *findings* of fact, maladministration or poor service, should be binding on the organisation complained about. However, it is not common practice for a public service ombudsman's *recommendations* to be binding. This is not the weakness that some outside the ombudsman sector sometimes perceive it to be. Public service ombudsman across the British Isles have over 99% of their recommendations accepted by their respective governments. A government is expected to provide a 'cogent' reason for not accepting an ombudsman's recommendation and the ombudsman should have a power for their report to be considered by parliament (in this case the States Assembly) if the Government rejects their recommendation. This allows the parliament to carry out their duty of scrutinising the government and holding them to account.
22. An Ombudsman is the final stage of the administrative complaints process. It is best practice for an Ombudsman to have internal quality control processes to consider any complaints that are made either about the service they provided, or if factual errors or a failure to consider certain evidence has impacted on the decision. All public service ombudsman should be subject to judicial review.

Q17. Remedies

23. An effective Ombudsman requires broad powers to provide effective remedies and should have the freedom not only to recommend all of those proposed on p.25 of the consultation paper but any others that it feels are appropriate. There should not be any need for compensation limits to be set in legislation as an ombudsman will not award more than is appropriate to do so. As any compensation should not be lower than the loss incurred, any attempt to identify the worst possible case scenario to include a figure in legislation will not be evidence based and runs the risk of unremedied injustice occurring.

Sections 4, 5 & 6: Jurisdiction, design principles, Healthcare Providers and Watchdogs and Regulators (Q18-Q26)

24. The OA agrees that all of the bodies proposed in Section 4 should be included in the JPSO's jurisdiction and that the 'follow the money' principles should be followed.
25. Complaints about health and social care make up the vast majority of complaints that other public services ombudsman in England, Scotland, Wales and Northern Ireland consider. It is essential that all healthcare providers, including GPs, dentists, pharmacists and complaints about clinical decisions, are included in the jurisdiction of the JPSO.
26. If, because of current circumstances, it is thought best to enact the JPSO's jurisdiction in a staged approach (as was done in Northern Ireland when the Northern Ireland Public Services Ombudsman came into existence) we would strongly recommend that a specific timetable is set out as to when this will happen, rather than just being left to regulations being enacted as and when, to avoid it potentially being put off in the face of other political priorities or pressures.
27. An ombudsman is just one piece of the puzzle. Ombudsman schemes are most effective in sectors where they work closely with a regulator and other accountability bodies. This can be seen for example in the health sector where ombudsman schemes share relevant information with the systems and professional regulators to inform their regulatory activities. In order to both improve services and hold organisations to account there needs to be effective relationships with regulators and other bodies in place to ensure enforcement.
28. However, regulators, like other public bodies, can make mistakes. A comparison is made in the consultation paper to the UK Parliamentary & Health Service Ombudsman's (PHSO) relationship with regulators and other watchdogs. In fact, the PHSO can look at the substance of a complaint about the regulators in their jurisdiction, for example the Information Commissioner and the Care Quality Commission (the Care Commission's sister organisation), and recently carried out two important investigations of the latter⁴. The principle of 'follow the money' applies equally to regulators and watchdogs, as set out in the Venice Principles⁵.

Section 7: Structure and Governance arrangements (Q27 & Q28)

29. As the consultation document sets out, Option 2 – a hybrid structure building on the current Complaints Board arrangements - would not meet our membership criteria. Several ombudsman schemes, particularly in the private sector, have a Board in place to provide oversight of the ombudsman's performance and to ensure its independence. Where a Board does exist, they explicitly have no role in the Ombudsman's casework.
30. It is common practice internationally, as set out in the Venice Principles and in our Strategic Position Statement⁶, that a public services ombudsman should be appointed by the democratically elected body (in this case the States Assembly), rather than by a minister,

⁴ www.ombudsman.org.uk/publications/second-phso-investigation-care-quality-commissions-regulation-fit-and-proper

⁵ [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)005-e)

⁶ www.ombudsmanassociation.org/association-guides.php

office-holder or official. It is unfortunate that the proposal for Option 1 would not meet this best practice criteria, and it is unclear in the consultation document whether the non-executive Board, who it is proposed would appoint the ombudsman, would themselves be appointed by the States Assembly or by a body / minister that would be within the JPSO's jurisdiction. It would be helpful to have this clarified.

31. The OA does not have a view as to whether the proposed resources would be adequate as it is difficult to forecast with accuracy what the JPSO's caseload might be. It has been the experience of other ombudsman schemes that as awareness of their office increases, so does the amount of casework. One of the OA's criteria is that an ombudsman should be sufficiently staffed and funded so that it can deliver its functions effectively. We would therefore expect the States Assembly to provide the necessary funding if it transpired that additional resources were required to provide an effective service, not just in dealing with individual casework but also in providing information to complainants, raising awareness amongst the public, and sharing learning and feedback with all stakeholders.

The Association would be happy to provide any further information or meet to discuss if you would find that helpful.

Yours sincerely

Donal Galligan
Director, Ombudsman Association