

OMBUDSMAN SCHEMES: GUIDANCE FOR DEPARTMENTS

Introduction

1. Ombudsman Schemes have proved increasingly popular as a means to investigate and resolve, determine or make recommendations with regard to complaints. But it is important to develop an Ombudsman Scheme only where appropriate to the task, in order to use the particular characteristics of Ombudsmen to best effect. This note provides a summary of the key characteristics of Ombudsman Schemes.

2. The context within which Ombudsman schemes are developing is one of change. The Government is committed to the creation of a new unified body to replace the existing offices in England of the Parliamentary Commissioner for Administration (the PCA), the Health Service Commissioner and the Commissioners for Local Administration as soon as parliamentary time allows. In the meantime, it is important to maintain a proper balance between the development of new Ombudsman schemes (where they are needed), and simply extending the remit of existing schemes where that is possible. In choosing the best option, Departments will need to:

- determine exactly why additional adjudication is required, and what it will add to that which is already available via existing schemes and through the Department's own internal complaints mechanisms. Where a Department is satisfied that additional adjudication is required, the key question is whether a genuinely independent ombudsman body is required, or whether an independent complaints examiner internal to the Department (and thus not wholly independent) will suffice;
- consult with Cabinet Office, who act as the Government liaison point on Ombudsman matters, and with DCA who lead on redress policy generally across government.

The Characteristics of Ombudsman Schemes

3. There is a wide range of Ombudsman schemes in the United Kingdom, with varying methods of operation developed to meet the needs of their clients. Some are concerned with the public sector, while others deal with the private sector. Some are statutory, some non-statutory, some have compulsory membership, whilst others are voluntary. Ombudsman schemes are designed to be user friendly and to be useable by unassisted complainants. They offer advantages over litigation which would be an alternative in some cases.

4. The term Ombudsman has been occasionally used to describe bodies which are internal to the bodies which they adjudicate upon, and thus not wholly independent of them. Departments will need to assess carefully the relationship between any newly created body and the Department to which it relates before deciding whether it should be described as an Ombudsman body.

5. The key features common to all Ombudsman schemes which make them attractive as mechanisms for complaints handling and dispute resolution and which distinguish them from, for example, arbitration and mediation, may be summarised as follows:

- Ombudsmen offer access to justice which might not otherwise be available, offering redress not available from the Courts and in cases which might not be considered by the Courts.
- Ombudsmen are independent and impartial and conduct their investigations in private.
- Ombudsman schemes are free to complainants.
- Ombudsmen can usually take account of what is fair and reasonable in all the circumstances, and are not bound by a strict interpretation of the law or precedent.
- It is not necessary for the complainant to obtain professional advice in order to make a complaint to an Ombudsman.
- Ombudsmen do not name complainants but they all publish digests of their decided cases. Some publish reports in which they name organisations which are the subject of the complaint.
- Compliance with an Ombudsman's recommendations is secured by a variety of means – by law, by contract, by a regulator or by the moral force and the standing of the Ombudsman. Non-compliance is rare.
- Ombudsman schemes make extensive use of informal settlements and conciliation; some offer access to mediation.
- Ombudsmen level the playing field between the under-represented complainant and the large and powerful organisation which is the subject of the complaint.

- Ombudsmen are inquisitorial, not adversarial, and investigations are conducted in private. Ombudsmen can examine records, interview witnesses and use professional experts where appropriate. The procedure for investigations can be tailored to the circumstances of the case.

6. For the bodies complained against, the advantages of Ombudsman schemes are that they avoid the cost and publicity of litigation while offering a system of redress to their users and clients. For private sector schemes, the costs are shared among their members. For public sector schemes, the costs are borne by the taxpayer.

7. Ombudsmen have the further advantage over litigation in that they can advise on systemic change. They can consider the situation which gave rise to the complaint as a whole and make recommendations for a change of practice or procedure in a particular institution or across a whole sector of the economy, for the benefit of all future users.

Steps to establishing an Ombudsman Scheme

8. In considering whether to establish a new Ombudsman scheme, and if so how, you may find it useful to consider the following points:

- Is an Ombudsman scheme appropriate for the service concerned?
If you are seeking to provide a means of independent investigation of complaints about a service, whether in the public or private sector, with the objective of providing a remedy for the complainant for any failure and recommendations for improving the service, an ombudsman scheme is likely to be appropriate (contact BIOA/Cabinet Office – details below).

If you are seeking to provide a means of appeal against a decision by a body such as a Government department, a tribunal may be more appropriate (contact DCA – details below).

If you are seeking to create a body which will supplement the Department's own complaint handling procedures, but which will carry out its functions internally reporting to the Department, then an independent complaints examiner might be more appropriate (contact Cabinet Office – details below).

If you are seeking to create a service the primary aim of which is advocacy, such as the Children's Commissioner for Wales, the title "ombudsman" is not appropriate.

Certain issues, such as those where a principle of law is involved, may best be resolved through the courts.

- Has Article 6(1) of the ECHR been taken into account?

Ombudsmen may need to comply with the requirements of Article 6(1) of the European Convention on Human Rights. Whether a scheme needs to comply, and if so how it needs to comply, will depend upon the nature of the individual scheme. The following issues will need to be considered:

- Is the ombudsman scheme a “public authority”;
- If so, is the ombudsman determining “civil rights and obligations”;
- If the ombudsman scheme is a public authority determining civil rights and obligations, the following issues will need to be considered:
 - Fair proceedings;
 - A reasonable timescale for the process;
 - Whether an oral hearing is necessary;
 - Whether the hearing should be held in public;
 - Whether the judgement should be made public.

- Do you need to develop a mechanism for dealing with cases that have wider regulatory implications?

When creating statutory ombudsmen to work alongside regulators you might need to consider whether cases that have wider regulatory implications will arise, and if so how you will deal with them.

- Has there been consultation with the British and Irish Ombudsman Association (BIOA)?

BIOA has a significant body of experience and expertise in the running of Ombudsman schemes. Departments considering setting up a new Ombudsman scheme should consult BIOA on best practice. BIOA can be contacted as follows:

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Secretary,
British and Irish Ombudsmen Association
94 Milner Drive
Twickenham
Middx TW2 7PJ

☎: 020 8894 9272

E-mail: secretary@bioa.org.uk

Website: www.bioa.org.uk

- Government Departments considering setting up an ombudsman scheme should also consult the Department for Constitutional Affairs and Cabinet Office as follows:

DCA

tpb@dca.gsi.gov.uk

CABINET OFFICE

Sally Perry
Propriety and Ethics Team
Cabinet Office
70 Whitehall
London SW1A 2AS

☎: 020 7276 2471

Fax: 020 7276 2495

E-mail: sally.perry@cabinet-office.x.gsi.gov.uk

Website: www.cabinet-office.gov.uk

Further details

9. Annex A to this paper reproduces Schedule 1 to the Rules of the British and Irish Ombudsman Association (BIOA) which sets out in detail the criteria the Association uses for recognition of Ombudsman Offices, and can serve as a useful guide to the details of Ombudsman Schemes.

BRITISH AND IRISH OMBUDSMAN ASSOCIATION

SCHEDULE 1 TO THE RULES

CRITERIA FOR THE RECOGNITION OF OMBUDSMAN OFFICES

A. Introduction

The core role of an Ombudsman is to investigate and resolve, determine or make recommendations with regard to complaints against those whom the Ombudsman is empowered to investigate by the exercise of powers and in accordance with procedures described in these criteria.

The term 'Ombudsman' should only be used if four key criteria are met. Those criteria are:

- independence of the Ombudsman from those whom the Ombudsman has the power to investigate;
- effectiveness;
- fairness; and
- public accountability.

Detailed criteria which should in the longer term be achieved by all recognised Ombudsman schemes are set out in part B.

Given the considerable range of Ombudsman schemes in the public and private sectors and the variations in their constitution, jurisdiction, powers and accountability, the detailed criteria need to be interpreted with sufficient flexibility to encompass those variations.

Independence, for example, may be achieved in several ways. Hence, in the private sector the body which appoints the Ombudsman and to whom the Ombudsman reports, can be regarded as independent, provided that those of its members who are representatives of organisations subject to the Ombudsman's jurisdiction, constitute a minority of the membership.

Initially, recognition of existing schemes will be dependent on whether, broadly speaking, they meet the key criteria; it will not be withheld if, in some respects, the detailed criteria are not met. However, over time it is expected that the constitution of all schemes would be developed to the extent necessary to meet the detailed criteria. For example, in the

longer term the power by those subject to investigation to veto the proposed appointment or reappointment of an Ombudsman should, where it exists, be removed.

In due course, it is expected that in the private sector all, or virtually all, firms in an industry with an Ombudsman scheme or schemes should participate in the scheme or schemes, even though in the short term, especially when a scheme is first established, a lesser number of firms may participate.

The decision on which schemes are recognised as meeting the key criteria will be made by the Executive Committee or a General Meeting on the recommendation of the Validation Committee. The Validation Committee will also consider according to the rules which schemes meet the detailed criteria in full and which do not. In respect of the latter, the Validation Committee will in due course review its initial recognition, when requested to do so, having regard to the extent to which progress has been achieved towards meeting the detailed criteria in full.

B. Detailed Criteria

1. Independence

- a). The jurisdiction, the powers and the method of appointment of the Ombudsman should be matters of public knowledge.
- b). The persons who appoint the Ombudsman should be independent of those subject to investigation by the Ombudsman. This does not exclude minority representation of those subject to investigation on the appointing body, provided that the body is entitled to appoint by majority decision.
- c). The appointment should be either for a minimum of three years or until a specified retirement age. If the former, it may be renewable. The initial term of office and any renewal should normally commence before the age of 65 years and be of sufficient duration not to undermine independence.
- d). The appointment must not be subject to premature termination other than for incapacity or misconduct or other good cause. The grounds on which dismissal can be made should always be stated, although the nature of the grounds may vary from scheme to scheme. Those subject to investigation by the Ombudsman should not be entitled to exercise the power to terminate the Ombudsman's

appointment, but this does not exclude their minority representation on the body which is authorised to terminate.

- e). The remuneration of the Ombudsman should not be subject to suspension or reduction by those subject to investigation, but this does not exclude their minority representation on the body authorised to determine it.
- f). The Ombudsman alone (or an appointed deputy) must have the power to decide whether or not a complaint is within the Ombudsman's jurisdiction. If it is, the Ombudsman (or an appointed deputy) must have the power to determine it.
- g). Unless otherwise determined by statute the Ombudsman should be required to report to a body independent of those subject to investigation, but this does not exclude their minority representation on that body. That body should also be responsible for safeguarding the independence of the Ombudsman.
- h). The office of the Ombudsman must be adequately staffed and funded, either by those subject to investigation or from public funds, so that complaints can be effectively and expeditiously investigated and resolved.

2. **Accessibility**

- a). The right to complain to the Ombudsman should be adequately publicised by those subject to complaint.
- b). Those subject to complaint should be required to have proper internal complaints procedures.
- c). The office of the Ombudsman should be directly accessible to complainants unless otherwise specified by or under statute.
- d). The Ombudsman's procedures should be straightforward for complainants to understand and use.
- e). Those complaining to the Ombudsman should be entitled to do so free of charge.

3. **Powers and Procedures**

The Ombudsman should:

- a) Be entitled to investigate any complaint made to the Ombudsman which is within the Ombudsman's jurisdiction without the need for any prior consent of the person or body against whom the complaint is made. This does not preclude a requirement that before the Ombudsman commences an investigation, the complainant should first have exhausted the internal complaints procedures of the person or body being investigated.
- b) Save as otherwise provided by law, have the right to require all relevant information, documents and other materials from those subject to investigation.
- c) Be entitled but not obliged, to disclose to the complainant or to the person being investigated such information, documents and other materials as shall have been obtained by the Ombudsman from the other of them unless there shall be some special reason for not making such disclosure, for example, where sensitive information is involved or disclosure would be a breach of the law.
- d) Proceed fairly and in accordance with the principles of natural justice.
- e) Be required to make reasoned decisions in accordance with what is fair in all the circumstances, having regard to principles of law, to good practice and to any inequitable conduct or maladministration.
- f) In all cases which it is decided not to accept for investigation, notify that decision to the complainant and the reasons for it.

In all cases investigated, notify in writing the decision and the reasons for it to the parties concerned.

4. Implementation of Decisions

Either

- a). Those investigated should be legally bound by the decisions or recommendations of the Ombudsman; or
- b). There should be a reasonable expectation that the Ombudsman's decisions or recommendations will be complied with. In all those cases where they are not complied with, the Ombudsman should have the power to publicise, or require the publication of such non-compliance at the expense of those investigated.

5. Annual Report

The Ombudsman should publish an Annual Report. The Ombudsman should be entitled in that report, or elsewhere, to publish anonymised reports of investigations.