

# **SCOTTISH PUBLIC SECTOR OMBUDSMAN BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Scottish Public Sector Ombudsman Bill introduced in the Scottish Parliament on 22 November 2001. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 43–EN.

### **POLICY OBJECTIVES OF THE BILL**

2. The key policy objective of the Bill is to establish a one-stop shop headed by a new Scottish Public Sector Ombudsman to deal with complaints currently dealt with by the Scottish Parliamentary Commissioner for Administration (SPCA), the Health Service Commissioner for Scotland (the "Health Service Ombudsman"), the Commissioner for Local Administration in Scotland (the "Local Government Ombudsman") and the Housing Association Ombudsman for Scotland. The Ombudsman will also take over:

- the Mental Welfare Commission's function of investigating the handling of complaints relating to mental health; and
- complaints against Scottish Enterprise and Highlands and Islands Enterprise whose External Complaints Adjudicators will be abolished.

3. The Bill aims to establish a public sector complaints system which is open, accountable, easily accessible to all and has the trust of the Scottish public. This will be achieved by way of:

- a simpler and more effective means for members of the public to make complaints about maladministration in the public sector;
- a re-enforcement of the Ombudsman's independence from the authorities within his or her jurisdiction; and
- improved publicity and transparency of the Ombudsman's functions.

4. The Bill is necessary to meet the requirement of section 91(1) of the Scotland Act 1998 (the 1998 Act) for the Scottish Parliament to make provision for the investigation of certain complaints of maladministration made to its members and which relate to action taken by or on behalf of a member of the Scottish Executive or other office-holders in the Scottish

Administration. Section 91(4) requires the Parliament to have regard (among other things) to the Parliamentary Commissioner Act 1967 when making such provision. The Executive has done so in drafting the Bill.

5. Section 91 of the 1998 Act did not require any action to be taken in respect of the roles of the Local Government Ombudsman, the Health Service Ombudsman or the Housing Association Ombudsman for Scotland. The Executive gave a policy commitment in *Partnership for Scotland*, published in May 1999, to ensure that government in Scotland is representative, responsive, participative, open and efficient. This was followed up, in the Scottish Executive's second Programme for Government *Working Together for Scotland*, by further commitments to deliver effective public services. These commitments tie in with the White Paper *Modernising Government*, published by the UK Government in March 1999. An essential element of the Modernising Government programme is a modern complaints system which is open, accessible and accountable and which has the trust of the public.

6. The Executive's aim is to set up a new complaints system which is specifically designed to suit Scottish circumstances. Accordingly, rather than look at the maladministration arrangements for the Scottish Administration in isolation, the Executive expanded this exercise to consider the arrangements for the other main public service Ombudsmen in Scotland, in particular the Health Service Ombudsman and Local Government Ombudsman. The opportunity was also taken to assess the role of the Housing Association Ombudsman.

## **CONSULTATION - GENERAL**

7. The Scottish Executive has undertaken two consultations on the policy contained in the Bill. The first consultation document, *Modernising the Complaints System*, was published on 3 October 2000. It sought views on a wide range of issues which needed to be addressed in establishing new Ombudsman arrangements. It was distributed widely to around 800 organisations and individuals, including special interest and community groups, equality groups, public bodies and professional and trade organisations. The Ombudsmen also sent copies and questionnaires on behalf of the Executive to 650 people who had recently submitted complaints. A total of 86 responses to that consultation were received, together with 216 completed questionnaires from complainants.

8. A second consultation document, *A Modern Complaints System*, was published on 11 July 2001 and distributed on a similar basis to the first. The second paper sought views on detailed proposals based on the responses to *Modernising the Complaints System*. A total of 94 responses were received, 32 of which were from complainants.

9. The Scottish Executive has prepared a paper summarising the responses, which will be placed in the library of the Scottish Executive and the Scottish Parliament Information Centre.

## **ONE-STOP SHOP**

10. The "one-stop shop" established by this Bill combines the SPCA, the Health Service Ombudsman and the Local Government Ombudsman. These persons:

- operate in the public sector;

- are established by statute;
- deal with matters which fall within the legislative competence of the Scottish Parliament; and,
- are entirely independent of the departments or authorities which they investigate.

11. The existing Housing Association Ombudsman for Scotland will also be included in the one-stop shop. Although housing associations are not public bodies, they do share many of the same characteristics as public sector landlords and the issues which concern housing association tenants are very similar to those which concern public sector tenants.

12. External Complaints Adjudicators, who currently deal with complaints against Scottish Enterprise, Highlands and Islands Enterprise and Local Enterprise Companies, will be wound up and such complaints will now be dealt with by the new Ombudsman.

13. Following publication of the Millan Committee's Report, *New Directions – Report on the Review of the Mental Health (Scotland) Act 1984*, the Executive considered how best to reconcile any changes to the overall structure of public sector Ombudsmen with the particular arrangements for mental health services in the light of the recommendations contained in that Report. The Committee recommended that:

“The investigation of the handling of complaints by NHS bodies under the NHS complaints procedure concerning people with mental disorders should be the responsibility of the Health Service Commissioner.”

14. Accordingly, the Bill provides for the Mental Welfare Commission's function of investigating the handling of complaints relating to mental health to be transferred to the new Public Sector Ombudsman with the other responsibilities of the Health Service Ombudsman.

### **Alternative approaches**

15. Two main types of one-stop shop were considered:

- a “college” of Ombudsmen, where the separate Ombudsman appointments are retained but they share the same office building, support staff and other resources; and
- one all-encompassing “Public Sector Ombudsman”, who might have Deputy Ombudsmen some or all of whom could specialise in particular types of complaint, e.g. health, local government, etc.

16. There was some support during the first consultation for the “college” type of one-stop shop, mainly on the grounds that an all-encompassing Public Sector Ombudsman might not maintain the same levels of expertise in particular areas as the existing specialist Ombudsmen. On the other hand, that approach would lack flexibility and would not improve efficiency and effectiveness to the same degree as one Public Sector Ombudsman. The second consultation paper opted for the Public Sector Ombudsman approach and made clear that the concerns about expertise would be addressed to a large extent by making provision for the appointment of

Deputy Ombudsmen who would be able to specialise in particular subject areas, e.g. health, housing or local government. The responses showed overwhelming support for this approach. Accordingly the Bill provides for a one-stop shop comprising one Public Sector Ombudsman supported by a maximum of three Deputy Ombudsmen. The Ombudsman will allocate responsibilities to the Deputies as he or she sees fit according to variations in workload and business priorities at any particular time.

17. Consideration was also given to the possibility of bringing other Commissioners operating in the public sector, e.g. the Scottish Information Commissioner proposed in the Freedom of Information Bill, within the same one-stop shop as the Ombudsmen. The Executive did not envisage that such an approach would necessarily mean legislating to combine statutory appointments or functions. Indeed, this would be likely to create difficulties with managing the workload and competing priorities. For this reason, the Bill does not make any provision for the one-stop shop to include other Commissioners. However, there would be nothing to prevent the Ombudsman sharing an office, and other resources such as administrative support staff, with other Commissioners.

#### **AUTHORITIES, ETC LIABLE TO INVESTIGATION**

18. The Bill broadly provides for the new Ombudsman to cover the same authorities, bodies, etc as are currently covered by the Ombudsmen who are to be replaced by the one-stop shop.

19. Assessors, who carry out rating valuations of properties, have also been brought within the jurisdiction of the new Ombudsman, as have Scottish Enterprise, Highlands and Islands Enterprise and Local Enterprise Companies.

20. A full list of the authorities and bodies to be covered by the new Ombudsman is set out in schedule 2 to the Bill. The listed authorities in schedule 2 all fall into one of the following categories:

- Scottish public authorities with mixed functions or no reserved functions;
- cross-border public authorities;
- publicly-owned companies, i.e. companies wholly owned by the Scottish Ministers or by a listed authority;
- other persons exercising functions of a public nature, e.g. family health service providers and independent providers (paragraphs 5 and 6 of schedule 2) and registered social landlords (paragraph 18 of schedule 2), but only as respects those functions.

21. The entries in Part 2 of schedule 2 will be amendable by Order in Council – this ensures that the list can be kept up to date without the need for primary legislation. However, the power to amend is limited to Scottish public authorities with both reserved and devolved functions or with devolved functions only and publicly owned companies. A person who falls into neither of these categories but who appears to exercise functions of a public nature can be added to Part 2 of schedule 2. No new cross-border public authorities can be designated under the Scotland Act. The amending power in respect of cross-border public authorities is therefore effectively limited

to amendments in respect of possible changes to the name of the body concerned, or to delete a body from the schedule should it be wound up. Accordingly, any major extension of the Ombudsman's remit, e.g. to include private sector bodies, would require primary legislation.

22. There are some bodies which have been deliberately excluded, as follows.

- **Nationalised industries** – these are commercial organisations which like any other company have their own internal complaints procedures and are subject to company law and to legislation related to their business, e.g. transport. Any customer who remains dissatisfied after having gone through the internal complaints procedure has the option of writing to an MSP or the Minister concerned. If they are not satisfied with the Minister's response, they could then complain to the Ombudsman about the Minister's handling of the matter.
- **Advisory non-departmental public bodies (NDPBs)** – their role is solely to provide advice to the Scottish Ministers and does not involve providing a service to members of the public. The one-stop shop would be able to investigate complaints of maladministration in any action taken by a Minister or the Executive based on that advice.
- **Water authorities** – are subject to investigation by the Water Industry Commissioner whose role is wider than considering complaints relating to maladministration. Should a member of the public consider they have not had their complaint properly investigated by the Commissioner, it would be open to them to complain to the Ombudsman, as the Commissioner falls within his or her jurisdiction.
- **Scottish Agricultural and Biological Research Institutes (SABRIs)** – these are all established as limited companies and do not provide a service directly to members of the public. Most of their research work is undertaken on behalf of the Scottish Executive. As with advisory NDPBs, maladministration in any action taken by a Minister or the Executive based on research or advice provided by a SABRI could be investigated by the one-stop shop. SABRIs also undertake research for other organisations, mostly in the public sector, but this is a commercial arrangement rather than a public service and so would not be a matter for the Ombudsman to investigate.
- **Reserved authorities** – authorities which deal only with matters reserved to Westminster fall within the jurisdiction of the UK Parliamentary Ombudsman. However, the Scottish Ministers and some Scottish public authorities have functions in reserved areas which could be subject to investigation by the new Ombudsman, for example: operation of the pension schemes for local government, the NHS, teachers, and the police and fire services; road traffic regulation functions such as imposition of temporary restrictions and traffic calming; functions relating to the supply of electricity, including giving consent for generating stations and power lines; control of pipelines beginning and ending in Scotland; giving certain directions relating to the distribution of lottery money in Scotland.

## **Alternative approaches**

23. Instead of listing the authorities which are within the Ombudsman's jurisdiction, the Executive considered whether the Bill should provide that all Scottish public authorities are within the jurisdiction unless specifically excluded. The advantage of this approach would have been that the list of authorities would not need to be amended as bodies are created or dissolved. However, the Executive concluded that it would not have been possible to produce a sufficiently precise definition of "Scottish public authority" and so this approach would be likely to lead to confusion as to which authorities were within the Ombudsman's jurisdiction.

## **MATTERS WHICH MAY BE INVESTIGATED**

24. The primary role of the Ombudsman will continue to be the investigation of complaints by members of the public who claim to have sustained injustice or hardship in consequence of maladministration in connection with the exercise of administrative functions. The Bill also retains the other specialised functions of the Health Service Ombudsman, i.e. investigation of complaints about:

- poor service by a health service body;
- failure of a health service body to purchase or provide a service which it was their function to provide;
- the care and treatment provided by a doctor, nurse or other trained professional;
- family doctors (GPs), or about dentists, pharmacists or opticians providing a NHS service locally.

25. However, the Bill does not retain the Housing Association Ombudsman's (HAOS) powers to investigate complaints which relate to matters other than injustice caused by maladministration. This is a power which is unique to the HAOS and has hardly ever been used. The present HAOS is satisfied that the general power to investigate injustice resulting from maladministration is sufficient to deal with any complaint which he would consider it necessary to investigate.

26. The Ombudsman will be given a new power to investigate maladministration in the internal organisation and management of schools, but will continue to be excluded from investigating matters directly relating to education. He or she will also continue to be able to investigate maladministration in the process leading up to contracts or commercial transactions (e.g. refusal to allow a particular company to tender) and in the administration of courts (e.g. arrangements for calling witnesses, payment of expenses etc).

27. The Ombudsman will, as at present, be excluded from investigating discretionary decisions. The processes leading up to the making of such decisions will continue to be open to investigation.

28. The Bill broadly retains the list of matters which existing statutory Ombudsmen are specifically prevented from dealing with. A comprehensive list of the restrictions and exclusions are set out in sections 7 and 8 of, and schedule 4 to, the Bill.

29. The Bill closes a loophole by allowing the new Ombudsman to investigate complaints about FHS practitioners or independent providers who have retired or otherwise ceased to provide a service. Such complaints must be made within 3 years of the date on which the practitioner or provider ceased service. Otherwise, they will be subject to exactly the same rules as any other Ombudsman complaint. In particular, the same time limit for submission of a complaint would apply, i.e. not more than 12 months after the day on which the aggrieved person first had notice of the matters complained about.

## **ACCESSIBILITY OF THE OMBUDSMAN**

30. The Bill aims to establish an open, accessible and accountable complaints system. Accordingly it will be made as easy as possible for members of the public to complain to the Ombudsman. This will be achieved in a number of ways.

31. Currently all complaints to the SPCA have to be submitted via an MSP. The Bill provides for the removal of the MSP filter so that the public can address complaints directly to the Ombudsman. However, it will be open to the aggrieved person to submit their complaint via an MSP, if they so wish.

32. As at present, the Bill provides that complaints must be made by the aggrieved person or by their personal representatives, where the aggrieved person has died or is for any reason unable to act. However, to improve accessibility the Bill contains a new provision for complaints to be made by a representative authorised in writing by the aggrieved person to complain on their behalf.

33. At present all complaints must be submitted in writing. The Bill provides that there will be a presumption that complaints be submitted in writing, but also provides for the Ombudsman to have discretion to accept oral complaints in special circumstances, e.g. where the complainant has difficulty reading or writing or there is exceptional urgency. It also provides for complaints to be submitted to the Ombudsman using electronic communications.

34. The Bill provides for the existing time limit for submission of complaints to be retained, namely 12 months from when the matter complained about first came to the attention of the aggrieved person, or at the discretion of the Ombudsman.

35. A new provision is made for bodies within the jurisdiction of the Ombudsman to be required to provide information about the right to complain to the Ombudsman, in or with:

- any published document containing information about services which they provide to the public or about their complaints procedures; and
- responses to any complaints made to them.

36. The Bill provides for authorities to request an investigation as a means to address cases where there has been public criticism of a department or an authority but as no complaint has been made to the Ombudsman he or she cannot investigate. The intention is that this option should be used very much as a last resort and that it does not impose an unreasonable burden on the Ombudsman. The Bill therefore provides that, before requesting an investigation, an

authority should have taken all reasonable steps to resolve the problem. The decision on whether or not to investigate would remain at the discretion of the Ombudsman.

### **Alternative approaches**

37. The opportunity was taken to consider whether anyone should be allowed to complain when they became aware of a case of maladministration, whilst giving the Ombudsman discretion to reject complaints that were frivolous, vexatious or in which the complainant did not have sufficient interest. The Executive supports the clear majority view during consultation that screening out frivolous complaints could be very time-consuming and a waste of resources which would be better employed dealing with genuine complaints. Accordingly the Bill provides for the retention of the existing provision that complaints must be made by or on behalf of the aggrieved person.

38. The Executive considered whether the Bill should provide for the Ombudsman to initiate investigations without having received a complaint. The Executive has accepted the consensus view of consultees that the primary role of the new Ombudsman should continue to be the investigation of individual complaints and the power to initiate investigations could distract the Ombudsman from that role. Instead the Executive will reinforce the provisions for the Ombudsman to share information with auditors, Commissioners (e.g. the Scottish Information Commissioner) and Ombudsmen and Commissioners in other parts of the UK, to minimise the risk of any cases of maladministration being missed.

### **INVESTIGATION PROCEDURE**

39. Two main issues arose when considering policy on investigation procedure:

- whether more detailed provision for investigation procedure should be included in primary or secondary legislation or whether it should be left to the Ombudsmen to set up their own procedures; and
- the need for improved consultation and co-operation between the new Ombudsman and other statutory Ombudsmen, auditors and Commissioners.

40. The Bill enables the Ombudsman to conduct investigations as he or she sees fit, provided that investigations are conducted in private and the authority in question (or any individual named in the complaint) is given an opportunity to comment on allegations contained in the complaint. The Ombudsman will be expected to ensure that investigation procedures are made clear to complainants and the authorities and bodies within his or her remit. It will of course be open to the Parliament, through the relevant committee, to scrutinise the work of the Ombudsman, question him or her or his or her deputies, and suggest improvements.

41. The Executive intends to remove the inconsistencies in the existing provisions for co-operation and consultation between each of the existing Scottish public sector Ombudsmen and also with their counterparts in England and Wales. The aim is to ensure that all public sector Ombudsmen co-operate with each other equally. The Executive also intends to expand these provisions to include auditors and other Commissioners.



42. Establishing the one-stop shop should, of course, resolve any co-operation problems in Scotland. In addition, the Executive proposes to make provision for the new Ombudsman to co-operate and share information with:

- the UK Parliamentary Ombudsman, the Health Service Ombudsmen for England and Wales, the Local Government Ombudsmen for England and Wales and the Independent Housing Ombudsman for England;
- the Auditor General for Scotland; and
- the Scottish Information Commissioner and UK Information Commissioner.

43. Other similar organisations may be added by subsequent legislation, as they are established or their functions are adapted, and provided that there is a need for information to be shared.

44. The Executive intends to lodge amendments to the Bill at Stage 2 to add the provisions relating to the Scottish office-holders. The provisions relating to UK office-holders will need to be included in an Order under section 104 of the Scotland Act 1998, to ensure that the provisions work properly on a UK basis. (Section 104 is a power to make provision consequential on an Act of the Scottish Parliament – an Order under this section is subject to Parliamentary scrutiny at Westminster.) Other similar organisations may be added by subsequent legislation, as they are established or their functions are adapted, and provided that there is a need for information to be shared.

### **Alternative approaches**

45. The Executive considered whether it would not be appropriate to include detailed provisions for investigation procedure in primary legislation but concluded that this would result in inflexible procedures which are difficult to update in the light of experience or as circumstances change. The Executive also considered that it is unnecessary to provide for procedures to be set out in detail in secondary legislation, as past experience indicated that the Ombudsmen could be relied upon to establish appropriate procedures without legislation.

46. The consultation responses showed clear agreement with the Executive's views on this matter. Accordingly, the Bill does not seek to make detailed provision for investigation procedure.

### **EVIDENCE**

47. The existing statutory Ombudsmen have comprehensive powers to gather evidence for the purposes of an investigation. Additionally, an Ombudsman can apply to the Court of Session for a person to be dealt with for contempt, if that person has obstructed the Ombudsman or his or her staff, or has acted or failed to take any action which would constitute contempt of court. The Housing Association Ombudsman has no statutory powers of its own.

48. The Executive considers that the existing Ombudsmen had all the powers they required to gather information for the purposes of an investigation, and this view was reinforced by those

consultees who responded on this point. The Bill therefore provides for the new Ombudsman to have the same evidence-gathering powers as the existing Ombudsmen. Some aspects of the evidence gathering powers in relation to papers held by the UK Government may need to be included in an Order under section 104 of the Scotland Act 1998.

49. During consultation on the policy to be contained in the Bill the Executive's attention was drawn to an anomaly concerning evidence relating to applications for legal aid made to the Scottish Legal Aid Board (SLAB). Section 34(1) of the Legal Aid (Scotland) Act 1986 prevents SLAB from disclosing information furnished for the purposes of that Act without the consent of the applicant or the person who furnished it. Section 34(2) specifies certain circumstances in which section 34(1) does not apply, e.g. disclosure of information for the purpose of investigating a complaint of professional misconduct by the Law Society, the Scottish Solicitors' Discipline Tribunal or the Faculty of Advocates, but this does not cover investigations by the Ombudsman. The Ombudsman's evidence-gathering powers, set out in section 13 of the Bill would not override section 34, which means that SLAB could not disclose information to the Ombudsman without first obtaining consent from the relevant person. This is out of line with the otherwise comprehensive powers available to the Ombudsman. If a person withheld their consent, this could prevent the Ombudsman from obtaining all of the evidence he or she needs to complete an investigation. Therefore, the Bill seeks to amend section 34(2) to disapply section 34(1) in relation to disclosure of information to the new Ombudsman for the purposes of investigation.

## **CONFIDENTIALITY**

50. Information provided to existing Ombudsmen cannot be disclosed except in certain limited circumstances, e.g. for the purposes of the investigation and any report on it. The Executive sees no reason to remove or dilute this provision in this Bill, as the guarantee of confidentiality helps to ensure that any authority or person from whom the Ombudsman is seeking evidence feels safe to give their evidence fully and freely in the knowledge that it will only be used in connection with the investigation. It should also be remembered that any official information given to the Ombudsmen is either already available elsewhere or else subject to statutory restrictions on disclosure, e.g. under the Official Secrets Acts. It would not be appropriate for a complaint to the Ombudsman to be used to circumvent any statutory provision.

51. The consultation responses agreed with the Executive's view on this matter. Therefore, the Executive proposes that this Bill will continue to provide for information provided to the Ombudsman to be protected from disclosure.

52. The Executive's attention has been drawn to the fact that the present confidentiality provisions apply only to information obtained in the course of, or for the purposes of, an investigation but this does not take account of the increasing practice of Ombudsmen to seek to resolve complaints informally without resorting to full investigation. Informal resolution is usually able to deliver the desired outcome for the complainant much more quickly than formal investigation. The Executive sees no reason why information disclosed to the Ombudsman in such circumstances should not benefit from the same protection from disclosure as information relating to a formal investigation. Indeed, the Executive believes that any information provided to the Ombudsman should be treated as confidential. Therefore, the Bill provides that information obtained by the Ombudsman in connection with any matter in respect of which a

complaint or request for investigation has been made, must not be disclosed. However, the Ombudsman needs to be allowed to disclose information for the purposes of pursuing his or her enquiries, for example so that he or she can give the authority affected some details of what the complaint is about. The Bill therefore allows the Ombudsman to disclose information for the purposes of:

- any consideration of a complaint or request;
- an investigation and any report on it;
- any inquiry or proceedings for an offence under the Official Secrets Act or for an offence of perjury, relating to an investigation;
- any proceedings for obstruction or contempt relating to an investigation.

53. The Bill also replicates the existing Health Service Ombudsman provision that where, in the course of an investigation, the Ombudsman obtains information to the effect that a person is likely to constitute a risk to the health and safety of patients, he may disclose that information to appropriate persons in the interests of the health and safety of patients.

## **OBSTRUCTION AND CONTEMPT**

54. The Bill replicates the existing Ombudsmen's powers in respect of obstruction and contempt. Where a person, without lawful excuse, obstructs the Ombudsman in the performance of his or her functions, or a person does any act or fails to take any action in relation to an investigation which, if the investigation were a proceeding in the Court of Session, would constitute contempt of court, the Ombudsman may apply by petition to the Court of Session. The Court may then inquire into the matter and after hearing any witnesses who may be produced against or on behalf of the person in question, and any statement which may be offered in defence, may deal with the person as if the person had committed a contempt of court in relation to the Court of Session.

## **REPORTING ARRANGEMENTS**

55. The Bill provides that the reporting arrangements for the new Ombudsman should be as follows:

- Where the Ombudsman decides not to conduct an investigation following a complaint, he or she must send a statement of his or her reasons to the complainant or their authorised representative and the authority or person complained against.
- Where the Ombudsman decides not to conduct an investigation following a request, he or she must send a statement of reasons to the authority which requested the investigation.
- A report of an investigation must be sent to the complainant or their authorised representative (or, if appropriate, the authority which requested the investigation), the authority or person investigated, and the Scottish Ministers. A copy of the report must also be laid before the Parliament.

- A report must not identify any person unless, after taking into account the public interest and the interests of the person in question, the Ombudsman decides it necessary to do so.
- After the authority receives the report, it will be required to make copies available for inspection or purchase and to publicise the arrangements. The Ombudsman may direct that a report shall not be made available, if he or she thinks fit after taking account of the public interest and the interests of the complainant and other persons.
- If the Ombudsman considers that the complainant has suffered an injustice or hardship and the injustice or hardship has not been or will not be remedied, he or she may lay a special report before the Parliament and copy it to those who were copied the investigation report. The Ombudsman may also publicise the report in the same way as an investigation report.
- The Ombudsman must annually lay before the Parliament a general report on the performance of his or her functions. This may include any general recommendations which the Ombudsman may have. To demonstrate that the Ombudsman is accountable for his or her functions, the Bill will enable the Parliament to give the Ombudsman directions as to the form and content of his general report.
- The Ombudsman may from time to time lay before the Parliament such other reports on his or her functions as he or she thinks fit.

56. These arrangements are intended to ensure that the activities of the new Ombudsman are seen to be open and fair, while not imposing excessive burdens on him or her. They are based on those of the existing SPCA and the Health Service Ombudsman but are extended to include provisions, similar to those of the Local Government Ombudsman, for publishing investigation reports.

57. The provisions relating to cases of unremedied injustice or hardship (i.e. cases where the Ombudsman considers a person has suffered an injustice or hardship and the injustice has not been or will not be remedied) are less prescriptive than the present local government provisions. The Executive's intention is to establish arrangements which are simpler and less time-consuming but still allow the Ombudsman to publicise such cases and to draw them to the attention of the Parliament. In addition, rather than make it mandatory for the Ombudsman to report on and publicise cases of unremedied injustice, the Bill provides for such matters to be left to the Ombudsman's discretion. Sometimes only a minor part of the injustice will not be remedied or the matter will be addressed in a different way to that recommended by the Ombudsman and, in such cases, follow up action may not be justified. The Executive is confident that this arrangement will allow a reasonable degree of flexibility, while being sufficiently rigorous to encourage compliance with Ombudsman recommendations.

### **Alternative approaches**

58. There were some suggestions from consultees that all reports should be published in accessible formats such as Braille, large print, audio tape, etc. While the Executive would encourage the new Ombudsman to produce reports in accessible formats, it is unlikely there will be sufficient demand to justify the cost of producing all reports in each of the accessible formats.

Therefore the Bill does not require the production of reports in accessible formats. Instead, it will be left to the Ombudsman to decide what formats to produce in response to demand and in accordance with legal requirements such as the Disability Discrimination Act 1995 and the Race Relations Amendment Act 2000.

## **DEFAMATION**

59. The Bill allows the new Ombudsman a level of protection from the law of defamation as is provided to the present Ombudsmen by existing statute. The following are absolutely privileged:

- any statement made by the Ombudsman in relation to a decision not to investigate, a report, a special report or an annual report,
- any statement made by the person aggrieved, or their representative or the authority against whom the complaint was made, in communicating with the Ombudsman for the purposes of this Act, or by the Ombudsman in communicating with any such person for those purposes,
- any statement made in relation to the publication of any matter in pursuance of the arrangements for making Ombudsman reports available to the public.

## **ENFORCEMENT**

60. None of the existing public sector Ombudsmen have powers to enforce their recommendations or to impose sanctions on an authority or body which fails to remedy an injustice or hardship. The Executive considered whether the Ombudsman should be given enforcement powers and indicated during consultation that it was inclined to the view that it should be left to the Scottish Ministers to take whatever enforcement action is considered necessary in any particular case, or the Parliament where it is not satisfied with the action taken by the Ministers. Currently, the SPCA and the Health Service Ombudsman can make a special report to the Parliament on any case where an injustice is not remedied and it is likely that the relevant parliamentary committee would then call on the body concerned to explain why they have not followed the Ombudsmen's recommendations.

61. Some consultees suggested that the new Ombudsman's investigation reports should be publicised in the same way as those of the present Local Government Ombudsman. Currently the Local Government Ombudsman's reports are sent to the local authority concerned, who are then required to advertise them and make them available to the public. Where the authority fails to take satisfactory action in response to the Ombudsman's recommendations, he or she can require them to publish a statement in a local newspaper giving details of the action recommended by the Ombudsman and the reasons for not having taken such action. Consideration was given also as to whether the new Ombudsman should be given a similar power, but the Executive's experience indicates this power would be unlikely ever to be necessary in practice.

62. There was some limited support from consultees to give Ombudsmen enforcement powers but a clear majority accepted the arguments made against such an approach. There was general agreement that it should be left to the discretion of the Scottish Ministers or the Scottish

Parliament to take whatever enforcement action they consider necessary. Most of the responses favoured publicising investigation reports and requiring authorities to publish a statement where they fail to take action on an Ombudsman's recommendations.

63. The Bill does not therefore provide for the new Ombudsman to have powers to enforce his or her recommendations or to impose sanctions on an authority or body which fails to remedy an injustice or hardship. The Scottish Ministers will as now have discretion to take whatever enforcement action they consider necessary (e.g. by promoting legislation to correct procedures or provide for payments, etc; where a Scottish Executive department is at fault they could direct officials to take appropriate remedial action). Alternatively, it will be open to the Scottish Parliament to take action where it is not satisfied with the action taken by the Ministers. For example, through its Committees the Parliament could call Ministers, Chairmen or Chief Executives to account for their actions; it could pass a resolution calling for action; or MSPs and Committees could initiate legislation.

64. Provision is made in the Bill for the new Ombudsman to have discretion to lay before the Parliament a special report on any case of unremedied injustice and copy it to the Scottish Ministers. He or she will also be able to publish the report. However, the Bill will not require authorities to publish a statement where they fail to take action on the Ombudsman's recommendations. The Executive believes that the publication of a special report by the Ombudsman will itself draw attention to and generate publicity for the failure, and that requiring a statement will not provide any more incentive to comply. It will, of course, also be open to the Scottish Ministers or the Scottish Parliament to take whatever action they consider appropriate to address the matters covered in a special report. In these circumstances, a statutory requirement to publish a statement would seem unlikely to serve any useful purpose.

## **APPOINTMENT**

65. The Executive regards it as essential to maintain the Ombudsman's independence from the bodies which he or she investigates, while making the appointment process more modern and democratic. In developing the proposals for appointment of the Ombudsman and Deputy Ombudsmen, the Executive has sought to ensure that they are consistent with the arrangements proposed for the Scottish Information Commissioner in the Freedom of Information Bill (introduced in the Parliament on 27 September).

66. The Bill therefore provides that the Ombudsman and Deputy Ombudsmen shall be appointed by Her Majesty on the nomination of the Parliament. Provision is made to prevent the Ombudsman or Deputies from holding certain public appointments or paid offices, during their period of appointment. They will also be disqualified from certain public appointments or paid offices for 3 years after appointment. These disqualification provisions are designed to avoid conflicts of interest or allegations of corruption. Provision disqualifying the Ombudsman and Deputy Ombudsmen from election or appointment to certain other offices (eg MP, MSP) will need to be made in an Order under section 104 of the Scotland Act 1998, as it is outwith the competence of the Scottish Parliament to legislate in relation to UK office-holders or to disqualify any person from being an MP or MSP.

67. The Bill will provide that the new Ombudsman and Deputy Ombudsmen shall be appointed for a period to be determined by the Parliamentary corporation, which must not exceed 5 years. They will be eligible for re-appointment for a second term but re-appointment for a third term will be allowed only if it is desirable in the public interest due to special circumstances. The Ombudsman and Deputies will retire compulsorily on 31 December in the year in which they reach the age of 65. They may be relieved of office by Her Majesty on request, or may be removed from office by resolution of the Parliament, which if passed on a division must be supported by at least two thirds of the total number of MSPs. Other terms and conditions may be established by the Parliamentary corporation.

68. The Bill provides for the pay, allowances and pensions for the new Ombudsman and Deputy Ombudsmen to be determined by the Parliamentary corporation. It also provides that the salary of the Ombudsman or the Deputies shall be abated by the amount of any pension payable in respect of a public office.

69. Both consultation exercises prior to the Bill discussed a variety of alternatives to the existing title of "Commissioner". The responses made it very apparent that "Ombudsman" is the most widely recognised and understood name. No other alternative was identified which would clearly indicate the distinctive nature of the job. It is also worth noting that "Ombudsman" is the most widely used and understood term throughout the world and is also used for the vast majority of similar offices in the private sector in Britain and Ireland. Therefore, in line with the majority view of consultees, the Bill proposes that the formal legal titles should be "Scottish Public Sector Ombudsman" and "Deputy Scottish Public Sector Ombudsman".

### **Alternative approaches**

70. The Executive sees considerable merit in having a corporate name for the one-stop shop, which could be used in all publicity and guidance but concluded that it would not be appropriate for this to be imposed by the Bill. It will be open to the new Ombudsman to decide what if any corporate name to use.

### **FINANCE AND STAFFING**

71. The Bill provides that the Parliamentary corporation will pay the salaries and allowances of the Ombudsman, the Deputies and their staff, and all expenses of the Ombudsman in exercising his or her functions (e.g. accommodation and running costs, etc). The Ombudsman, one of the Deputies, or a member of his or her staff will be the accountable officer. The Ombudsman will be required to submit annual accounts to the Auditor General for Scotland for auditing. The levy which local authorities currently pay to Audit Scotland to fund the Local Government Ombudsman will be discontinued but there will need to be a small reduction in local authorities' revenue support grant equivalent to the amount of the levy. This money will be passed to the Parliamentary corporation.

72. It will be for the Ombudsman to appoint staff on such terms and conditions as he or she may determine, and to make arrangements for pensions, allowances and gratuities to any person who has ceased to be a member of staff. The terms and conditions of staff and the arrangements for pensions, allowances and gratuities will require the approval of the Parliamentary corporation. The Bill makes transitional arrangements for the staff of the existing Ombudsmen

to transfer to the new Ombudsman on terms which, taken as a whole, are no worse than their present terms and conditions. It also provides for the new Ombudsman to deal with complaints which the existing Ombudsmen have not been able to complete before the new Ombudsman takes up his or her powers.

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

### **Equal opportunities**

73. The Executive considers that there is nothing in the Bill which would prevent or discourage the Ombudsman from performing his or her functions in a manner which is sensitive to gender, sexual orientation, age, ethnicity, disability, culture or religious belief. The Bill contains particular provisions which aim to assist those with impaired physical, sensory or mental ability (see paragraphs 74 and 75 below). The Bill provides for all sectors of the general public to have greater accessibility to the Ombudsman function, and the Ombudsman will have discretion to make his or her reports available in accessible formats dependent on demand.

74. In respect of making a complaint to the Ombudsman, the existing statutory framework allows complaints to be made by a representative on behalf of an individual who has died or is for any reason unable to act for themselves. The Bill extends such provision to simply allow an aggrieved person to authorise a representative to act on their behalf (see paragraph 32 above). This provision may have a significant impact in terms of ensuring that the Ombudsman can consider complaints from those who may not have previously, for whatever reason, been in a position to further their case.

75. Presently, all complaints need to be submitted to the existing Ombudsmen in writing. It is recognised that such a requirement creates a significant barrier for people who have difficulty reading and writing. The Executive's aim is to create a more inclusive complaints system and therefore the Bill provides for the Ombudsman to have discretion to accept oral complaints (see paragraph 33 above). It is hoped that such provision will encourage people with reading and writing difficulties to use the complaints system and not to be deterred from complaining because of such problems. The opportunity has also been taken in the Bill to provide for the submission of complaints by electronic communications.

76. As well as accounting for improvements to the Ombudsman system in respect of making complaints, there was also a need to ensure that the Ombudsman's consideration of complaints was inclusive to all. The Executive recognised that there would be a benefit if any reports the Ombudsman would produce under the legislative framework proposed by the Bill could be published in accessible formats such as Braille, large print, audio tape, languages other than English, etc. While the Executive would encourage the new Ombudsman to produce reports in accessible formats, it is unlikely there will be sufficient demand to justify the cost of producing all reports in each or any of those formats. The Executive therefore concluded that it would not be appropriate for the Bill to make any specific provision on this matter. The Ombudsman will be subject to the requirements of the Disability Discrimination Act 1995 and the Race Relations Act 2000. Accordingly it will be for the Ombudsman, in complying with that legislation, to assess the demand for his or her reports to be published in accessible formats.



### **Human rights**

77. The Executive considers that the Bill is compatible with the European Convention on Human Rights. The Ombudsman's general role is to determine whether or not maladministration has occurred in the public sector. However, the Ombudsman's role is that of investigating and reporting. The Ombudsman cannot force compliance with any findings or recommendations made. Therefore, the Ombudsman does not determine civil rights and obligations and no issues in relation to Article 6 of ECHR arise. The Bill provides that the Ombudsman and others will be protected from actions of defamation in certain circumstances. The Executive considers that such provision satisfies the requirements of Article 6 and 8 of ECHR.

### **Island and rural communities**

78. The Executive considers that the Bill has no disproportionate effect on island communities as compared with other communities. The provision for complaints to be made orally (e.g. by telephone) or by electronic communications will help to make the Ombudsman more accessible to residents in island or rural communities.

### **Local government**

79. There should be only a limited impact on local government. The main impact will be the need to provide information on the right to complain to the Ombudsman. As the Bill allows for such information to be provided with leaflets on their services, there will be no need to reprint existing material.

### **Sustainable development**

80. There will be no negative impact on sustainable development.

### **Impact on business**

81. No regulatory implications for business arise from this Bill.

82. There are no other matters which Ministers believe require inclusion.

*This document relates to the Scottish Public Sector Ombudsman Bill (SP Bill 43) as introduced  
in the Scottish Parliament on 22 November 2001*

# **SCOTTISH PUBLIC SECTOR OMBUDSMAN BILL**

## **POLICY MEMORANDUM**

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