

Response by the Public Services Ombudsman for Wales to the Government of Jersey's consultation on a proposed model for a Jersey Public Services Ombudsman (JPSO)

I am pleased to have the opportunity to respond to the Government of Jersey's consultation on a proposed model for a Jersey Public Services Ombudsman (JPSO).

As Public Services Ombudsman for Wales (PSOW), I investigate complaints made by members of the public who believe they have suffered hardship or injustice through maladministration or service failure on the part of a body in my jurisdiction, which essentially includes all organisations that deliver public services devolved to Wales.

These include:

- local government (both county and community councils);
- the National Health Service (including GPs and dentists);
- registered social landlords (housing associations) and
- the Welsh Government, together with its sponsored bodies.

I am also able to consider complaints about privately arranged or funded social care and palliative care services and, in certain specific circumstances, aspects of privately funded healthcare.

I give my permission to be quoted and for the quotes to be attributed.

Context

My office was originally established by the Public Services Ombudsman (Wales) Act 2005. Arrangements for my office were subsequently reformed by [the Public Services Ombudsman \(Wales\) Act 2019](#) which came into force on 23 July 2019 ('the 2019 Act').

My response to this consultation is based on my experience of day-to-day work of an ombudsman office, as well as the lessons learned during the development of the 2019

Act.

Section 1: Background to proposals

I fully agree that the new JPSO service should be actively promoted. Low public awareness is a problem faced by many ombudsman schemes.

I also agree that, to fulfil the envisaged role, JPSO must have a sufficient capacity to actively investigate the facts of a particular complaint. However, the consultation document does not elaborate on how such capacity should be secured. I'd draw attention to s 19 of the 2019 Act which confirms that, for the purposes of an investigation:

- I may require a person I think is able to supply information or produce a document relevant to the investigation to do so.
- I have the same powers as the High Court in respect of the attendance and examination of witnesses (including the administration of oaths and affirmations and the examination of witnesses abroad) and the production of documents.

This section also proposes that JPSO should have the power to consider both the decision and the way in which the decision was reached – i.e. the merits of the decision. It appears to me that this remark is not pursued further in the document. By way of comparison, I am only empowered to consider merits of clinical decisions in connection with the provision of health or social care. It is not usual for an ombudsman to act as a 'reviewing' body by considering the merits of decisions in the absence of any evidence of maladministration.

Section 2: Functions of the JPSO

Q2.

In my view, all the functions suggested in this section are essential for an effective, modern ombudsman service. Equipping my office with some of these functions was one of the purposes of the 2019 Act. The Act complements my traditional reactive complaint handling function with a more proactive power to undertake investigations on my own initiative and to create a Complaint Standards Authority.

I'd also point out that the two functions of 'enabling lesson learning' and 'learning champion' appear to be similar to one another and could be combined for the sake of

clarity (indeed, the consultation document does so elsewhere, see page 8).

Q3.

My office, in line with common ombudsman practice, investigates complaints in private. This distinguishes the ombudsman practice from the adversarial approach applied in courts. Furthermore, in my view, it would be contrary to the principle of ombudsman independence if JPSO was under a *duty* to only hear complaints in public hearings. If deemed essential (given the concerns over a low level of trust in the transparency and openness of the Jersey government acknowledged in the consultation document), JPSO could be equipped with a discretionary power to hold such hearings. The exercising of this power could be made more transparent by adding a requirement for JPSO to produce and publish the principles guiding the decision to undertake such hearings.

Q4

I agree that JPSO should have a remit to investigate alleged maladministration or service failure. This is consistent with the remit of my office. My office may also investigate the failure of a body in jurisdiction to provide a service. As outlined above, the power to question the merits of decisions taken by public bodies is not usual in a traditional ombudsman scheme.

Q5

I agree that JPSO should not place an unfair unburden on the complainant by requiring them to provide full evidence of maladministration or service failure. However, I'd suggest avoiding the wording used in relation to this function earlier on in the consultation document, which refers to JPSO investigating 'on behalf' of the complainant (p 7). This wording could suggest that JPSO would act as the advocate of the complainant – contrary to the key ombudsman value of impartiality.

Q6

I'd advise against charging non-residents for JPSO services. Access to my service is free of charge. This is in line with an international norm for ombudsman schemes and the membership criteria of the Ombudsman Association.

I'd also draw your attention to the findings of a [2018 report by the Equality and Human Rights Commission](#) which suggest that groups such as migrants face significant

inequalities in accessing public services and healthcare in particular. Thus, they could especially require an ombudsman's help. However, it is a recognised phenomenon that those most in need may be least likely to complain to the ombudsman (the so-called 'Matthew effect'). Indeed, I'd point out that, despite no barrier of cost, I already appear to receive very few complaints from people who do not identify as Welsh, English or British. In my view, charging for ombudsman services could exacerbate the challenges that non-residents may already face in accessing administrative justice.

Q7

The document asks whether JPSO should only investigate complaints that relate to an act that happened after the date on which the States Assembly adopts the JPSO law. While such a solution is practical, it is important that transitional arrangements are in place to ensure access to justice for complainants. For instance, when the Public Services Ombudsman (Wales) Act 2005 abolished four separate ombudsman schemes in Wales to create my office, the Act stated that

- any complaint made or referred to one of these schemes but undetermined before the commencement date of the 2005 Act; or
- any complaint that could have been made or referred to one of these schemes and related to action taken by a person before the commencement date,

would be considered under the legislation governing those schemes, rather than under the 2005 Act.

I support the proposition that JPSO should normally only investigate a complaint up to 12 months after the complainant could reasonably be expected to be aware that they had a reason to complain. This mirrors the provisions in my legislation.

This section also states that JPSO should not investigate complaints more than 5 years after the act to which the complaint relates. I'd caution that, while such investigations could be technically possible, the passage of time could make it exceedingly difficult for the ombudsman to conduct the investigation to a required and expected standard. However, I welcome the proposal for the JPSO to have discretion in relation to older events, particularly if a matter is potentially serious and the public interest requires an independent investigation.

I support the proposition that JPSO should normally only investigate a complaint

where the complainant has exhausted the internal complaints process of the entity about which they have a complaint. This mirrors the provisions in my legislation.

I support the proposition that JPSO should normally only investigate complaints about matters which have resulted in hardship and injustice. This would mirror the provisions in my legislation. However, I'd point out that reference to 'complainant' in this section is unnecessarily restrictive, given the proposals for JPSO to be able to investigate on its own initiative.

Finally, I do not agree that the Chief Minister should be able to request JPSO to undertake special investigations, and that JSPO should consider such requests. While the consultation document assures that JPSO would retain discretion whether to investigate, in my view, such a provision could undermine substantive and perceived independence of the ombudsman.

Q8 – Q9

My Act enables me to investigate complaints from members of the public only.

Q10

Most of the functions listed in this section do not fall within my remit.

Section 3: Findings, Recommendations and Remedy

Q11 and Q12

I would agree that a body in jurisdiction should be expected to acknowledge and respect JPSO findings. Under my legislation, if I uphold a complaint and I judge that it raises issues of broader public interest, I have the power to issue 'a public interest report'. The body in jurisdiction which receives such a report is under a duty to publicise it (see section 24 of the 2019 Act for details). In 2018/19, I issued 14 such reports.

However, my recommendations are not binding. This is in line with the general ombudsman practice, which does not rely on enforcement, but rather on the power of publicity and reputation, as well as the public law duty of a public body not to reject recommendations irrationally.

I'd draw your attention to a relevant judgement in R (Bradley) v Secretary of State for Work and Pensions [2008] (see summary of the judgement [here](#)), which asserted that, although a minister was not bound to accept the findings or recommendations of the

Parliamentary Commissioner for Administration, they could not rationally reject them without 'cogent reasons.'

The fact that my recommendations are not binding does not lead to less compliance. Under s 26 of the 2019 Act, after receiving my recommendations, the body in jurisdiction must notify me within a specified period of the action it proposes to take in response to the recommendations and the timeframe within which it proposes to take this action. If I have not received such notification, or I am not satisfied with the action proposed, I may issue a special report on the matter. This report may be published by the Ombudsman and the listed authority that it concerns must reimburse the Ombudsman for the cost of publication. Since taking office in 2014, I have issued only 2 such reports.

My powers are consistent with those of a traditional public services ombudsman scheme which relies heavily on public accountability and the ability to either publicise a matter or, in some circumstances, lay reports before the Welsh Assembly. As outlined above, this is an effective mechanism when dealing with public (as opposed to private) bodies.

Q13

I agree that a good ombudsman scheme should provide a route for complainants and bodies in jurisdiction to review ombudsman decisions. I have such an internal process in place. My decisions can also be challenged via judicial review. I also have a process for dealing with complaints about my service. As the ombudsman is the final arbiter of decisions, I agree it is important that they may only be overturned by the Courts.

Q14

As stated above, I do not believe that ombudsman decisions should be binding. As outlined above, as public accountability is important in relation to public service delivery, I agree it is appropriate for the States Assembly to consider matters where a Minister may disagree with a recommendation of the JPSO (see Q11 and 12 above).

Q15

If I issue a special report (see Q11 and 12 above) in relation to the Welsh Government and the National Assembly for Wales Commission, these bodies must lay copies of

these reports before the National Assembly for Wales. I believe that this arrangement fulfils the envisaged function of a Statement by a minister to the States Assembly.

Q16

In principle, as above.

Q17

The JPSO should be able to offer all the remedies suggested in the consultation document. The office should also have the freedom to recommend other remedies, as it considers it appropriate.

Section 4: Jurisdiction and design principles

Q18 - 23

I would broadly agree with the range of bodies proposed in Section 4 that should be included in the JPSO's jurisdiction. I am not sufficiently aware of the administrative relationship between the Church and Parishes of Jersey and, as this is not a matter within my jurisdiction, this is not a matter on which I can comment.

I am supportive of adopting 'follow the money' as the key design principle defining the entities within the jurisdiction of the JPSO. This was also one of the core principles underpinning the calls for reform of the PSOW office by myself and my predecessor. We consistently emphasised that an ombudsman's jurisdiction should be citizen centred rather than focused on specific sectors or funding arrangements.

Section 5: Healthcare providers

Q24

In my opinion, healthcare providers should be included in the JPSO remit from the outset. In 2018/19, 41% of the complaints received by my office were related to health and I am aware that this proportion would be higher for some other public services ombudsmen in the UK.

If it is decided, nevertheless, to enact JPSO's jurisdiction over healthcare in a staged approach, it would, in my view, be useful for the legislation to be accompanied by a specific timetable for this process.

Q25

My experience leads me to believe that it would be difficult in practice to separate

clinical decisions from other kinds of healthcare administration and service failures. The power to question professional judgement in the clinical setting is essential to ensure that patients have been treated fairly and appropriately. JPSO's remit in relation to healthcare should therefore extend to complaints about clinical decisions; as well as matters relating to service provision.

Section 6: Other Watchdogs and Regulators

Q26

I generally agree that the relationship between JPSO and other watchdogs and regulators in Jersey is likely to involve the activities foreseen in the consultation document. The proposals for oversight of the complaint handling process by the bodies in JPSO's jurisdiction appear similar to the provisions in my legislation, which:

- place a duty on bodies in my jurisdiction to submit their complaints handling procedures to my office, if so directed;
- grant me the power to declare that the complaints handling procedures of the authority do not comply with the model for such procedures specified by my office.

However, it is not clear to me why the consultation document proposes for JPSO to be enabled to work jointly only with the Children's Commissioner and to share information only with the Commissioner for Standards and Comptroller and Auditor General. Furthermore, according to the document, only these two bodies would be empowered to refer complaints to JPSO.

Under the 2019 Act, if I decide that a matter that may be subject of my investigation could be also subject to investigation by other bodies, I am under a duty to:

- consult with other ombudsmen elsewhere in the UK and
- inform and consult with the Auditor General for Wales, Welsh Commissioners and some other statutory bodies in Wales.

Following consultation, I am also empowered to co-operate and work jointly with these bodies, as necessary.

In my view, it would be beneficial for JPSO to be enabled from the outset to consult, co-operate and, if deemed necessary, work jointly with all statutory bodies with responsibility for complaint handling, regulation and inspection of sectors related to

JPSO's remit (even if substantive overlaps between them prove to be limited in practice). It would also be beneficial and consistent if these bodies were equally enabled to consult, co-operate and work jointly with JPSO on a reciprocal basis.

It is difficult to provide a more precise view, since JPSO's remit is, at this stage, unclear. For instance, it has not yet been clarified which of the Jersey watchdog bodies and regulators would be accountable to JPSO or be held by JPSO to account. In my experience, such accountability relationships are not necessarily a barrier to co-operation. However, I have found it useful to establish memoranda of understanding with some bodies to clarify the relationship (see the current list of such arrangements [here](#)).

This section also considers empowering some bodies to 'refer' complaints to the Ombudsman. If what is meant is signposting, I am very supportive of the proposition that effective signposting arrangements should exist between JPSO and other watchdogs and complaint handlers in Jersey. However, I'd point out that, in my experience, signposting does not necessarily have to be provided for explicitly in legislation and can rely instead on good communication and engagement with other statutory bodies.

Section 7: Structure and governance arrangements

Q27

It is essential that an ombudsman is, and is perceived to be, wholly independent and accountable for decisions taken. It is for this reason that the PSOW Act 2019 specifies that I am corporation sole. Please note, however, that the legislation also includes safeguards to ensure that I have clear lines of accountability directly to the National Assembly for Wales. I believe that a Board structure has the potential to blur the lines of accountability and risks a lack of openness and transparency if adopted in an ombudsman scheme.

Q28

The consultation document states that the number of staff proposed for the new office is based on Law Commission recommendations. I note that:

- the Law Commission [2018 report](#) recommended that JPSO's workforce, in addition to the ombudsman, comprises two caseworkers, a part-time communications officer and an executive assistant;

- the Law Commission [2017 report](#) lists several ombudsman schemes in jurisdictions smaller than Jersey with higher staffing levels (e.g. Gibraltar Ombudsman, serving a population of 30,000 with 8 members of staff; or the Ombudsman for Bermuda, serving a population of 65,000 with 5 members of staff).

The above would suggest that the proposals for JPSO staffing are more modest than the recommendations of the Law Commission and some other ombudsman schemes in very small jurisdictions, based on the size of Jersey's population alone (just over 100,000).

Ultimately, however, it is difficult to assess how adequate these staffing levels would be, given that it is difficult to predict JPSO's workload. On the understanding that JPSO would be funded by the States Assembly, it would be down to the Assembly to adjust the funding as needed, to enable JPSO to conduct its work effectively.

It also appears that, given the stated intention that JPSO is visible and actively promoted (section 1), the inclusion of a communications officer from the outset may be prudent.

Other comments

I welcome the proposals to ensure direct access to JPSO (i.e. not via the States Greffe, as the current Complaints Board) (p 7).

Closing remarks

I trust that you will find my comments useful. Should you wish to discuss any of my points further, please do not hesitate to contact Ania Rolewska, the Head of Policy at my office (ania.rolewska@ombudsman.wales).



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