

Annex B: Technical comments by PHSO and LGO on the Draft Public Service Ombudsman Bill

Abbreviations used: PCA 1967 - Parliamentary Commissioner Act 1967, HSC 1993 - Health Service Commissioners Act 1993.

Part of the Bill	What it is about	Comment
Clause 5	Who can make a complaint, removes the MP filter and allows for a complaint to be made on behalf of someone, such as an MP or any kind of advocate.	<ul style="list-style-type: none"> We would like the eligibility criteria currently included in section 6(4) and 6(5) of the PCA 1967 to be restated in the Draft Bill (as, for example, the change in the current draft coupled with the MP filter could see a significant increase in complaints from non-UK residents related to immigration issues), although it is important that this change is made in a way that does not impact on some of the services currently offered by the LGO.
Clauses 6 & 9	Matters which may be investigated cover maladministration, failure of a service and failure to provide a service.	<ul style="list-style-type: none"> We are content with the drafting of clause 6(1)(d) which is entirely consistent with the current position regarding the LGO. However, the LGO's position in respect of our ability to investigate all aspects of social care could potentially be curtailed by clause 1(4)(a) which describes the purposes of a PSO investigation as being to establish "whether the matter complained of involved maladministration or a failure on the part of the authority to which the complaint relates". The concept of maladministration is not applicable to private adult social care settings, so the PSO may have difficulties in investigating private care providers in the absence of further clarification in the Draft Bill. In addition, clause 9 appears to make an exception for questions of clinical judgment. We cannot see that this caveat would necessarily apply to care and treatment decisions which are often taken in multi-disciplinary settings. Given the increasing convergence of health and social care, it would seem sensible to bring both aspects together to ensure that the PSO may consider clinical judgment in all settings. These issues may simply be drafting oversight but we would like to seek clarification from the Cabinet Office.
Clauses 10 & 16	Investigation procedures.	<ul style="list-style-type: none"> Clauses 10(4) & (5) - we are concerned that there remains some tension between the requirement for investigations to be conducted in private and the Ombudsman practice of sharing draft reports and recommendations. The lack of a definition of 'private' both in the current legislation as well as in the Draft Bill does not sit easily with the increased

		<p>social expectation of public authority transparency. We would welcome clarification on this from the Cabinet Office. We would also welcome the requirement in 16(3)(a) to change to a ‘may’ from a ‘must’ with regard to laying these reports in Parliament to allow more flexibility on this where reports are less high profile and to enable publication at times when Parliament is not sitting where appropriate.</p>
Clause 24	<p>Approach to designations on enactment.</p>	<ul style="list-style-type: none"> • We understand that the aim of clause 24 is to ‘guarantee’ that the jurisdictions of PCA, HSC and LGO as they will be immediately before the enactment of the Bill will be automatically and fully transferred to the PSO. • More specifically, clause 24(3) provides continuity where a function transfers from a designated authority to one that is not, with the effect that the new authority is regarded as a designated authority. • Our understanding is that clause 24(3) aims to ensure that responsibility for existing complaints is not lost when, for example, one adult social care provider is taken over by another one after the first one has gone out of business. • We would like to seek confirmation that this is indeed the intention behind the clause and the problem of legacy complaints in social care when a provider goes out of business has been addressed in the Draft Bill.
Clause 27	<p>New duty on the PSO to promote best practice in complaint handling through provision of information, advice and training.</p>	<ul style="list-style-type: none"> • Clause 27(1) - we are concerned about the use of ‘must’ in the current Draft Bill and would prefer the use of ‘may’. • We have two specific concerns: <ul style="list-style-type: none"> (1) There are significant resource requirements of developing and keeping up to date material and provide training for effectively almost the entire public sector, particularly if a high degree of variation were needed to reflect the different types of organisations covered and to make such material truly useful for its audience. We would want to seek assurance that - as is currently the case for the LGO - the PSO would be able to recover costs in respect of the training activities provided. (2) The requirement could be unhelpful alongside clause 27(4). In a case where PSO has not produced guidance or it is there but does not reflect a particular circumstance in relation to a specific case, it could become an unhelpful part of the dialogue with the organisation that the PSO is investigating. We agree that the PSO should provide training and guidance as appropriate and where the PSO does this, for organisations to have to follow it. But given the potential resource implications and

		scope of the new Ombudsman’s jurisdiction, we would prefer for this to be drafted that it is clear that training and guidance would be provided with an element of Ombudsman discretion (e.g. ‘must as appropriate’) rather than as a straightforward duty (‘must’), without this caveat. This would allow such material to be properly targeted and developed over an appropriate timeframe.
Schedule 1	Appointment, tenure and conditions of service of the Ombudsman.	<ul style="list-style-type: none"> • See also schedule 2: <ol style="list-style-type: none"> (1) We welcome the distinction drawn between the Ombudsman’s annual report in respect of complaints (schedule 1, para 6) and the Chief Executive’s annual report on the operation of the scheme (schedule 2, part 5, para 21) and the Ombudsman’s annual resource accounts (schedule 2, part 5, para 19). (2) We would welcome further distinction being drawn between the two reports in terms of their respective titles and content.
Schedule 2	Role and work of the Board.	<ul style="list-style-type: none"> • See also schedule 1: <ol style="list-style-type: none"> (1) We welcome the distinction drawn between the Ombudsman’s annual report in respect of complaints (schedule 1, para 6) and the Chief Executive’s annual report on the operation of the scheme (schedule 2, part 5, para 21) and the Ombudsman’s annual resource accounts (schedule 2, part 5, para 19). (2) We would welcome further distinction being drawn between the two reports in terms of their respective titles and content. • Part 4, para 14(3) - This bans the PSO from employing anyone who is also employed by a designated authority. • While we understand and support the important intention behind this provision - the avoidance of any conflicts of interest - we are concerned this would prevent the PSO from employing clinical advisers. • PHSO currently employs clinical advisers who work part time in the NHS and provide caseworkers with essential advice on relevant NHS guidance, policies and processes. Their employment in the NHS is a prerequisite for their role as clinical advisers for PHSO. • We would like to seek an amendment to the Bill to ensure that the PSO will be able to employ clinical advisers who are also employed as medical practitioners by the NHS.

Schedule 4	Excluded matters in relation to local authority services and housing, international matters etc.	<ul style="list-style-type: none"> • The non-planning actions of the Homes & Communities Agency appear to have been taken out of the PSO’s jurisdiction inadvertently - the LGO part of the remit has been transferred to the PSO (schedule 4, para 4(2) of the Draft Bill), but not the parts which are currently in PHSO’s jurisdiction (see schedule 2 of the PCA 1967). We suggest deleting this para 4 entirely, to ensure that the relevant parts of PHSO’s jurisdiction regarding the Homes & Communities Agency are transferred to the PSO’s jurisdiction. • As currently drafted, schedule 4, para 9 of the Draft Bill will prevent the PSO from investigating certain legitimate complaints about the actions of Home Office staff when carrying out immigration/border/customs duties. Our understanding of the policy intent behind the provisions in the Draft Bill is that they aim to exempt from the PSO the criminal investigation functions of the Home Office. We agree with this intent but, in order for the PSO to continue to be able to investigate legitimate complaints, there should not be a restriction on all authorisations by the Secretary of State. We would be happy to suggest technical drafting changes to achieve this. • Schedule 4, para 15 - these provisions suggest that at least some actions of the NAO will be brought into jurisdiction of the PSO. We would welcome clarification what these actions may be.
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***Local Government and Social Care Ombudsman &
Parliamentary and Health Service Ombudsman
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