

Housing Ombudsman's evidence

CLG Select Committee 6 March 2017

Introduction

1. Following the Cabinet Office consultation in 2015, the Government announced in December 2015 that the Housing Ombudsman should remain separate from the proposed Public Services Ombudsman (PSO) at this stage. However the draft Public Service Ombudsman Bill makes provision in case policy changes in the future.
2. At the CLG Select Committee on 6 March 2017, I was asked to provide a written summary of my views on the provision for the inclusion of housing complaints in the draft Bill. This evidence reflects my own and my team's views, and considers the responses provided by landlords, tenants and many other stakeholders to the initial consultation on the introduction of a PSO in 2015, and views expressed during my recent consultation on the Housing Ombudsman Service's proposed business plan for 2017-18.
3. I am conscious however, that the housing sector and potential complainants have not been consulted on this draft Bill and should this Bill or any other go forward, I would urge government and parliament to work together to establish a procedure to enable a formal consultation process to take place before it is introduced.

Executive Summary

4. The Bill has clearly been drafted primarily to bring together the jurisdictions of the Local Government and the Parliamentary and Health Service Ombudsmen. The result is essentially a *Public Sector* Ombudsman Bill focussed on joining up top-tier investigation of complaints into the “non-commercial” public functions of designated authorities. Unfortunately this means that the Bill does not make provision for the inclusion of a comprehensive scheme for the resolution of housing complaints across both public and private sectors.
5. The Housing Ombudsman service provides complaint resolution and redress at the earliest opportunity based on our knowledge of housing law, policy and the sector and we work with our industry regulator to address systemic issues.

6. The Housing Ombudsman Scheme is open to all landlords and covers all their housing management activities (with some minor exceptions) including “commercial activities” which may be through subsidiaries and/or for profit .
7. Consequently, if the housing provisions were enacted and used, they would reduce access to an Ombudsman for many potential housing complainants, significantly change the nature of the service offered to landlords and residents and the potential to drive up housing standards across the public and private sector
8. The potential advantages of a one stop shop, primarily for those local housing authority tenants dealing with multiple complaints, would not outweigh the impact on other tenants, leaseholders and shared owners across the public and private sector.
9. The social care provisions in the Bill (another potential advantage of the PSO model) also need to be substantially reworked as private care home providers are themselves not in most cases designated authorities providing public functions.
10. An alternative model for the PSO which truly covered “public services” rather than “public functions” and retained a Housing Ombudsman and expert staff, reporting to a Chief Ombudsman, could have merit. It could cover a much wider range of public services such as energy, education and possibly a wider range of housing services. Specific provision could be made to retain links between the Housing Ombudsman within the PSO and the Social Housing regulator. This would though be a much larger undertaking than is envisaged here and the draft Bill would need substantial redrafting.
11. Any Ombudsman service needs to be able to provide adequate redress for complainants. The PSO as envisaged in the draft Bill would not be able to do so. If an Ombudsman service cannot “put things right” for complainants then becomes irrelevant.

Key issues

Public Services

12. The definition of “public services” has not been properly considered, and although the term “public services” appears in the title of the draft Bill it is undefined within it. A narrow definition of “public service” could mean “public sector” as in public authorities, whereas a broader one could mean “public service” as in those services which the public deems essential and therefore requiring an Ombudsman’s oversight. Housing across the

public and private sectors is a “public service” in the latter sense, but not in most cases the former.

13. The broader definition could also include education, energy, transport etc. Other property-related services such as those provided by letting agents or estate agents could also be considered public services in this sense. Complaints against these organisations are currently dealt with by the property redress schemes, most significantly the Property Ombudsman Service and Ombudsman Services (Property). The success of any scheme for resolving housing complaints relies heavily on strong engagement with, and understanding of, the housing and property sector as a whole.
14. The draft Bill seems heavily focussed on the “public sector” organisations, with “add on” provisions for housing and social care. Given the importance of both of these issues for our economy and our society they deserve more detailed consideration.

Public functions

15. The draft Bill’s focus on “designated authorities exercising public functions” reflects this confusion. This approach could deny access to the Ombudsman to many housing complainants.
16. The draft Bill proceeds from the basis that the Public Service Ombudsman (PSO) will have jurisdiction to investigate “designated authorities” who exercise “public functions”¹. A person is excluded from designation if that person “provides commercial services otherwise than in the exercises of functions of a public nature”². The Bill then makes provision for local housing authorities³ and social landlords⁴ to be brought into that jurisdiction at a later date.
17. As recent caselaw (*Macleod v Peabody* (2016), and *Weaver* (2009)) has established, Housing Associations are “hybrid” organisations – i.e. some of their functions may be those of a public body and some private. Since social landlords are increasingly developing their commercial housing activities to meet the demand for more homes of different tenures e.g. the development of properties for open market sale, shared

¹ Clause 22.

² Clause 23(3).

³ Clause 8 and Schedule 4.

⁴ Clause 26.

ownership and market rented tenancies, the functions which will come within the PSO's jurisdiction under the draft Bill seem likely to reduce over time.

18. Furthermore, while some of the functions of local housing authorities and housing associations will be "public" and hence come within the jurisdiction of the PSO, private sector landlords appear to be excluded entirely.⁵
19. The Housing Ombudsman (THO)'s jurisdiction covers social landlords (primarily housing associations) who are or have been registered with the social housing regulator and local authority landlords. Private landlords may also join the Scheme on a voluntary basis.⁶ There is no restriction on the provision of "commercial services". THO's role in the private sector has further potential to grow as the number of private rented properties in England increases. This includes a sharp rise in the number of families living in the private rented sector. Membership of the Housing Ombudsman Scheme offers a positive and effective alternative to the courts as a method of resolving tenancy disputes.
20. The draft Bill thus has the potential to reduce access to the Ombudsman as a route of redress for housing complaints; I and my team would like to see our remit expanded. We would like to encourage *more* private sector landlords to join the scheme and have already been discussing some other areas where we would like to expand our current jurisdiction (e.g. market rented tenancies of Local Housing Companies) with government. It would be a backward step if new legislation limited recourse to the Ombudsman to tenants whose landlord is an authority providing non-commercial services.
21. It is worth saying that private care home owners providing services under contract to private residents would also be unlikely to be viewed as public authorities providing public functions.

Approach to dispute resolution

22. Our role is quite different to the PSO's as set out at Clause 1(2) which is: "to investigate, on behalf of Parliament, complaints made by or on behalf of members of the public". Throughout, the draft Bill focusses solely on "investigation" and makes no provision for

⁵ Clause 23(3) prohibits the designation of a person if or to the extent that the person provides commercial services "otherwise than in the exercise of functions of a public nature".

⁶ See paragraph 1 of Schedule 2 to the Housing Act 1996 and paragraph 8 of the Housing Ombudsman Scheme.

the local resolution of complaints. This undermines the potential for the PSO to drive positive change.

23. Local resolution has been a key aspect of THO's work for many years, particularly since the Localism Act 2011. Under the terms of the Housing Ombudsman Scheme, the role of the Ombudsman is to:

- resolve disputes involving members of the Scheme, including making awards of compensation or other remedies when appropriate, and
- support effective landlord-resident dispute resolution by others.

24. It is an easy and a common assumption that ombudsmen are solely a final-tier redress route, and that we will provide no assistance before every other avenue has been exhausted and a complainant is still without a satisfactory solution or redress. While this is true of many public sector ombudsmen, others including ourselves and the Financial Ombudsman Service, have moved increasingly towards trying to intervene early to support parties to resolve cases as quickly as possible.

25. THO's dual role under the scheme means that we are heavily involved in local resolution, both before and during the landlord's own complaints procedure. Ultimately, the number of complaints that we can help to resolve early is one of the key criteria against which we judge our effectiveness because we know that early is best, both for residents and their landlords and this approach is very successful and highly valued by both.

26. Where a complainant contacts us before the landlord's complaint procedure has been completed, the Ombudsman's expert staff provide guidance to help them navigate their landlord's complaints procedure as well as helping them to articulate their complaint clearly. This help is particularly important for vulnerable complainants who may not have the knowledge, skills or the persistence, on their own, to go through a landlord's complaints procedure and then pursue a complaint to a top-tier redress scheme.

27. When things go wrong with housing, tenants or leaseholders have to live with problems every day so disputes can escalate quickly and the actual reason for the dispute can be lost. This can cause the long-term relationships between landlords and residents to sour. We take an active role throughout the process.

28. This approach encourages landlords to see complaints as valuable insight to help them improve their services. We encourage both landlords and residents to work together to improve individual situations and services more widely. We believe that an Ombudsman's focus should be on resolution, putting things right and learning from outcomes. An investigation will sometimes be the most appropriate way of achieving this outcome but in the majority of cases it should be possible for the Ombudsman to facilitate a local resolution. Between April and December 2016, 83% of the complaints we received were closed without the need for a formal investigation.

A Housing Ombudsman and a core housing function with expert staff

29. When I responded to the consultation in 2015, I suggested that if the THO were to be included the PSO Bill should make provision to retain a Housing Ombudsman and a separate housing function (and, if appropriate, separate function leads for each other area, e.g. health, social care, etc.).

30. The responses to the initial consultation from residents, landlords and other key stakeholders such as the Tpas, CIH and the National Housing Federation showed how much most people in the housing sector valued a Housing Ombudsman and expert staff.

31. Clear leadership enables effective communication with the sector. A strong presence in the sector and close engagement enables us to keep the confidence of both landlords and residents. This is critical to successful complaint handling and work to drive up standards across the sector.

32. Complaint handling must be grounded in a knowledge of the law and practice of the sector. The quality of our decisions and the solutions the Housing Ombudsman can suggest are based on this expert knowledge.

33. A generic complaints handling approach was felt by many to be likely to impact on the quality of the service and its potential to act as a catalyst for driving positive change in each sector. It is possible that a different model of PSO, e.g. one with a Chief Ombudsman and lead Ombudsmen for each sector could avoid these risks but the draft Bill has not addressed these concerns.

34. The requirement that the Board of the PSO prepare a "functions and resources strategy"⁷ will not give sufficient comfort that housing complaints will be given

⁷ Paragraphs 3 and 4 of Schedule 2 to the draft Bill.

adequate prominence within the new organisation's strategy. The provisions are not equivalent to the detailed provisions regarding the business plan in the current Housing Ombudsman Scheme. I have just had the benefit of a very helpful consultation with landlords, tenants and other key stakeholders on THO's business plan for 2017-18. This informs our approach to complaints, our operational and spending priorities. This close engagement between myself, my team and the sector is critical to our continuing success.

Social Housing Regulator

35. Linked to the need for a Housing Ombudsman and expert staff is the need for a clear relationship with the Social Housing Regulator. A clear and effective delineation of jurisdiction and an effective working relationship between the Ombudsman and the regulator is essential for driving up standards in the sector.
36. The relationship with the regulator is built into the current scheme - any new member of our scheme is obliged to inform the regulator that it has joined.⁸
37. We work with the regulator to ensure that complainants to either organisation are signposted between us effectively, i.e. that those seeking regulatory action contact the regulator and those requiring individual redress contact THO. If we spot a pattern of maladministration findings we will also consider making a statutory referral of that landlord to the regulator and we can provide more general anonymised data on complaints to the regulator. If any member failed to comply with an order they would also be reported to the regulator under paragraph 46 of the Scheme, though in practice this is not an issue. We are about to publish a memorandum of understanding with the regulator which sets out our current working arrangements and are also exploring with DCLG whether any further provisions are required in the Scheme to facilitate joint working on potential systemic issues.
38. As drafted, the Bill does not recognise THO's relationship with its sector specific regulator; any PSO Bill needs to ensure that both Ombudsman and Regulator can exercise their functions effectively and work together to drive up standards in the social housing sector.

⁸ See paragraph 7.

Working with other Ombudsmen

39. The main intention of the draft PSO Bill is to ensure a seamless service to complainants and to eliminate confusion regarding overlapping jurisdictional boundaries between different Ombudsmen.
40. We believe that the Bill will achieve this aim for some complainants, i.e. in relation to top-tier investigations which also relate to local government, health or central government functions. A combined PSO would provide a “one stop shop” for some complainants e.g. allowing local housing authority tenants to contact just one ombudsman if they had multiple complaints against a council. But housing is relevant to so many issues that a housing ombudsman needs to work just as effectively with a wide variety of other Ombudsmen.
41. The most significant engagement for us is not with the LGO or the PHSO, but with other property redress schemes. In 2015-16 we signposted 663 cases to property redress schemes such as the Property Services Ombudsman or Ombudsman Services (Property) compared with 581 cases to the LGO and 3 to the PHSO. The number of referrals that the Housing Ombudsman makes to the LGO has been declining in recent years (despite the expansion of the LGO remit to include social care), whereas the number of referrals we make to private sector redress schemes has been increasing. We also have some engagement with the Financial Ombudsman Service e.g. on NHBC warranties for new-build properties.
42. In most of these cases there are no jurisdictional overlaps, we are simply signposting complainants to the right service. However, some examples of unclear jurisdiction between the THO and LGO were discussed at the Select Committee hearing e.g. housing allocations (allocations under Part 7 of the Housing Act 1996 are dealt with by the Local Government Ombudsman) and Local Housing Companies (LHC tenants paying market rents will not usually have access to THO). We currently have a Memorandum of Understanding in place between the LGO and THO to manage these issues, but relatively small changes to our legislation or scheme would improve the situation.
43. There is also clearly potential to further develop the approach to complaints regarding housing and property issues in the private sector. Collaboration with the private sector schemes currently works well, but a combined Housing and Property Ombudsman scheme would be an alternative option. Potentially this could incorporate some of the

ideas that have been put forward in relation to a “New Homes Ombudsman”. These jurisdictions could also come within the remit of a Housing and Property Ombudsman sited within a PSO. However, such ideas should be something for my successor to consider.

Funding

44. Members of the Housing Ombudsman Scheme pay an annual subscription on a per unit basis, and this is largely funded by residents from their rents so both landlords and residents feel a strong sense of ‘ownership’ of our scheme.
45. Some respondents to the 2015 Cabinet Office consultation were concerned that unless a ‘ring fenced’ arrangement was established within a new PSO social landlords could subsidise other types of complaints.
46. The draft Bill makes no mention of funding arrangements. It is not clear how this will work, particularly since local housing authorities and social landlords could be incorporated via the draft Bill through different legislative routes.

Remedies for complainants

47. The draft Bill does not ensure adequate redress for complainants. Clause 14(8) merely provides that a designated authority must “have regard to” but is not required to “give effect to” any PSO recommendations. There should be a *duty* for the authority to take the PSO’s recommendations into account and the authority should only be permitted to reject the PSO’s recommendations if they can show that they have cogent reasons not to do so.
48. The only sanction in the event of non-compliance with recommendations appears to be in clause 15 (special statements) whereby where there has been injustice or hardship which the PSO considers has not been, or will not be, remedied the Ombudsman may require the authority to provide her/him with information about what the authority has done or proposes to do in response to the finding. The Bill seems to be silent on what the repercussions would be on an authority which does *not* provide that information.
49. The only reference to “compensation” in the draft Bill is in clause 10 - to cover expenses incurred in bringing a complaint and amounts to cover loss of time. The PSO has no power to award compensation for maladministration.

50. The Housing Ombudsman, by contrast, has very wide powers of redress under the legislation and the Scheme. I can determine a complaint by reference to what is, in my opinion, is fair in all the circumstances of the case and can order the payment of compensation⁹ and require the performance or non-performance of contractual or other obligations or rights¹⁰.
51. There appears to be no power in the draft Bill for the PSO to make orders on the completion of an investigation. We believe that the PSO should be given such a power and that such orders should be made enforceable if necessary (e.g. by secondary legislation)¹¹
52. Any Ombudsman service needs to be able to provide adequate redress for complainants. If an Ombudsman service cannot “put things right” for complainants then becomes irrelevant.

Inflexible legislation

53. Some of the observations about the challenges posed by the current draft of the PSO Bill, and the suggestions for amendments to its provisions, relate to the fact that it embeds too much into the structure of the primary legislation. My team and I have doubts about whether this is the only, or even the best, approach – particularly given the fast-evolving nature of the sector.
54. The issues relating to jurisdiction identified earlier are largely as a result of primary legislation which failed to anticipate changes in the housing sector – e.g. the increasing move towards delivering housing functions through local housing companies or towards local housing authorities letting homes at market rents (thus, potentially, taking them outwith the 2008 definition of “social housing” - which we note the PSO Bill has re-used, notwithstanding the interpretative difficulties that it poses in a 2017 housing sector).
55. By contrast, those aspects of my jurisdiction which are included in the Housing Ombudsman Scheme, approved by the Secretary of State, are flexible enough to move with the times and adapt to developments within the sector.

⁹ Paragraphs 7(1) and (2)(a) of Schedule 2 to the 1996 Act (and paragraph 43(b) of the Scheme)

¹⁰ Sub-paragraph 7(2)(b) of Schedule 2 (and paragraph 43(c) of the Scheme)

¹¹ Section 186D of the 2011 Act provides a power to enforce the Housing Ombudsman’s determinations, although it has not thus far been necessary to commence this provision because THO orders are complied with: 97% compliance within 3 months.

The removal of the democratic filter

56. The removal of the democratic filter is a really positive aspect of the draft Bill. Like the equivalent provisions on “designated persons” for the Housing Ombudsman this can sometimes block or delay complainants’ access to the Ombudsman. I would like to see this changed within my own legislation.

Overall summary

57. Whilst the intention of the Bill is admirable, as currently drafted, the flaws within the Bill outweigh the positive changes and could reduce both the service available to housing complainants, particularly the most vulnerable, and the potential to improve housing standards.

58. Consequently, government faces some clear policy choices. If government decides to continue with the current narrowly-drawn bill, then I would suggest that the provisions for housing should be removed. Consideration should be given to whether the remit of the Housing Ombudsman Scheme should be expanded and how collaboration with other property ombudsman or redress schemes could be enhanced.

59. Alternatively, government could embark on a more radical reform aimed at introducing a comprehensive “Public Service Ombudsman” Bill, incorporating housing and potentially some other essential public services. The more flexibility there is in the construction of any founding legislation, the easier it would be to address problematic issues as they arise.

A handwritten signature in black ink that reads "Denise Fowler". The signature is fluid and cursive, with "Denise" on the top line and "Fowler" on the bottom line.

Denise Fowler
Housing Ombudsman

19 April 2017