

STATES OF JERSEY



PUBLIC SERVICES OMBUDSMAN: ESTABLISHMENT OF OFFICE

Lodged au Greffe on 12th February 2018
by Senator P.F.C. Ozouf

STATES GREFFE

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

- (a) that the recommendations from the Clothier Report on the Machinery of Government in Jersey and the Jersey Law Commission that “An Ombudsman should be appointed to hear and determine complaints of maladministration” should be progressed as a matter of priority;
- (b) to agree that the scope of a Jersey Public Services Ombudsman should include –
 - (i) the departments of the States of Jersey; and
 - (ii) regulatory bodies appointed by the States of Jersey, except for the Jersey Financial Services Commission;
- (c) to request the Chief Minister to commission research on the costs of introducing a Public Services Ombudsman scheme in Jersey, which should encompass the matters for research set out in **Appendix 1** to the accompanying Report;
- (d) to request the Chief Minister to consult widely on the design of the Public Services Ombudsman scheme, including with the members of the Jersey Complaints Board, which was established by the Administrative Decisions (Review) (Jersey) Law 1982, in order that the best elements of the Complaints Panel scheme are retained within the new system;
- (e) to request the Chief Minister to bring forward primary legislation to establish the office of a Public Services Ombudsman, to replace the States of Jersey Complaints Board, as soon as is practicable, and to agree that the primary Law will include provisions for the detail and scope of the Ombudsman arrangements to be set out in Regulations and, where appropriate, Order-making powers;
- (f) to request the Chief Minister to establish, and appoint with the concurrence of the Jersey Appointments Commission, a minimum of 3 suitably qualified individuals to act as a Shadow Board to oversee and drive the tasks set out in this proposition and, as soon as is practicable, for this Board to assume the role of a Shadow Public Services Ombudsman;
- (g) to request relevant Ministers to ensure that there is good co-ordination between the work of the newly-appointed Children’s Commissioner and the Public Services Ombudsman;
- (h) to request that the Ombudsman Board, as described in paragraph (f), should work in close co-operation with the Financial Services Ombudsman, with a view to assessing the desirability of creating a

single Ombudsman Service for Jersey, if there are tangible benefits for complainants, service providers and the 2 Ombudsman functions;

- (i) to request the Chief Minister to set out a timetable for bringing such primary legislation and Regulations to the States for approval, and for appointing a Shadow Ombudsman Board and bringing an Ombudsman service into operation.

SENATOR P.F.C. OZOUF

REPORT

Previous recommendations

The 9th Chapter of the report of Sir Cecil Clothier [published](#) in January 2002 recommended that –

“An Ombudsman should be appointed to hear and determine complaints of maladministration by Departments”,

The chapter is shown in **Appendix 2** to this Report.

A [report](#) from the Jersey Law Commission entitled “Improving Administrative Redress in Jersey” was published in October 2017. The 6th Chapter of this report considers the need for a Jersey Public Services Ombudsman. The report makes 2 recommendations –

“6.1 The Government of Jersey should make an ‘in principle’ decision to support next steps in the creation of a Jersey Public Services Ombudsman (JPSO).

6.2 The Government of Jersey should request the Jersey Law Commission to develop institutional design options for the JPSO.”.

The relevant chapter is shown in **Appendix 3** to this Report.

Links to other relevant reports can be found in **Appendix 4**.

Background

In 2004, the Privileges and Procedures Committee (“PPC”) presented a report to the States Assembly after reviewing the States of Jersey Complaints Panel.

The Committee concluded: *“it was not minded to recommend that a public sector ombudsman be established in the Island at this time”.*

Since that time, a number of public service ombudsman schemes have been set up in other small jurisdictions, and these could be a valuable point of reference in further development of a future scheme in Jersey.

When the States of Jersey Complaints Board (initially the Jersey Administrative Appeals Panel) was first set up, complaints had previously been heard by States Members – essentially politicians and civil servants were reviewed by politicians.

In its current format, the Board consists of local people carrying out the role of adjudicating on complaints.

A Jersey Public Services Ombudsman scheme would mean that professional experts would undertake this work.

In addition, one of the factors highlighted by the Independent Jersey Care Inquiry was how difficult people find it to challenge and make complaints in Jersey. There were

some suggestions about ways to give children more of a voice, and the Children's Commissioner is already in post.

However, it is not only children who find this difficult; the process of making a complaint about a public body can be challenging for anyone, and many do not have sufficient funds to escalate their complaint to the courts if they feel that they have not been dealt with fairly.

This can leave people feeling angry and powerless and it destroys trust in our public bodies.

There is no independent option for people to escalate their complaint if they cannot fund it via the courts, and this needs to be addressed.

We now have a Financial Services Ombudsman, but there are many occasions when people may have a grievance against a public body.

Many similar jurisdictions to Jersey have an ombudsman who can provide this service independently; the recommendation for a Children's Commissioner acknowledges the need for children to have this independent option to consider any grievances, but adults also need that provision. Some jurisdictions have a Children's Ombudsman, and initially this had been included as a possibility in the research undertaken. Matters have moved on, and also whilst the roles of Children's Ombudsmen and Children's Commissioners appear to be very closely interlinked in the places where they operate, at the same time there seems to be much duplication. As the Children's Commissioner position has been created and an appointment made – this proposition does not seek to encroach on the role of the new Children's Commissioner. Instead, the Assembly could request that a there should be meaningful dialogue with the 2 services and they are invited to draft and sign an MOU to establish co-operative workings from the start. The approach would be a mutually beneficial one for both services.

In the majority of cases, the principal features of an ombudsman scheme are –

- Ombudsman schemes resolve complaints. They are not regulators, though some of their decisions may be seen as precedents and have wider effect.
- The ombudsman model is used to resolve complaints made by someone 'small' (citizen/consumer) against something 'big' (public body or commercial business).
- Ombudsman scheme procedures are designed to redress the difference between the resources and expertise available to the citizen/consumer and those available to the body/business.
- Access to ombudsman schemes is free for citizens/consumers, and they are not at risk of an order for costs. Ombudsman schemes handle enquiries as well as complaints, because dealing with an enquiry may head off a complaint (for example, by resolving a misunderstanding).
- The citizen/consumer first complains to the body/business, accessing the ombudsman scheme if dissatisfied with the body/business's response (or if it does not respond within a reasonable time).

- When dealing with complaints, ombudsman schemes seek to achieve a fair resolution at the earliest possible stage – rather than working towards an assumed future hearing. Ombudsman schemes use flexible and informal procedures – resolving cases by mediation, recommendation or decision as appropriate.
- Ombudsman schemes do not just rely on the evidence the parties volunteer. They actively investigate cases (using their specialist expertise) – calling for the information they require. So the outcome is not affected by how well either of the parties presents his/her/its case, and representation by lawyers (or others) is not necessary.
- Ombudsman scheme recommendations/decisions are based on what is fair in the circumstances, taking account of good practice as well as law. The ombudsman publicly feeds back the general lessons from cases they have handled, so stakeholders (including government/regulators) can take steps to improve things for the future.
- Because there is a flexible and informal process, and representation is not necessary, the costs of an average ombudsman case are significantly less than an equivalent case in a court or tribunal.

A Jersey Public Sector Ombudsman

The States of Jersey Board of Administrative Review has served the Island well for many years. Following on from the Clothier Report, reform has also been suggested within a recent report from the Jersey Law Commission, entitled “Improving Administrative Redress in Jersey”, where the need for a Public Services Ombudsman for Jersey is, again, recommended.

An ombudsman would investigate complaints of maladministration by States of Jersey departments and associated public bodies.

The financial case

Each year Islanders and businesses pay hundreds of millions of pounds in taxes into the States Treasury, essentially for the States to provide directly or indirectly through service providers of various types, a range of services.

If the States of Jersey were a business – which it is not – it would be the largest organisation/ company/ service provider – in the Island by a substantial margin.

Whilst the States of Jersey’s percentage spend expressed as a portion of GNI is low compared to many places – the States is nevertheless the dominant organisation in the Island in many ways.

Whether the services are provided at –

- zero cost to user
- a co-payment made by user
- users are charged full cost recovery.

Historically, the States of Jersey has not had a sophisticated complaints procedures as exists, albeit not universally, in some private sector organisations.

Consumers who purchase goods and services normally have statutory rights to seek redress when they are unhappy, and in competitive markets they can choose to take their business elsewhere.

Individual States Members often take up individual cases for their constituents on matters of public service delivery. These routes will still inevitably play an important role; however, such are the huge importance to individuals of the services being sought by the States, literally often the implications are life-long or life-changing – the issues under discussion are some of the most important issues in people’s lives.

Scope of an Ombudsman

The ombudsman would receive complaints from an aggrieved person against public services; they usually have the power to investigate, to recommend corrective action where required, and to issue a report.

An ombudsman offers this service free of charge, thus is accessible to individuals who could not afford to pursue their complaints through the courts or wish to avoid needing to try and claim legal aid. Maladministration can be broadly defined as a public body not having acted properly or fairly, or having given a poor service and not put things right.

Public Services Ombudsmen have powers similar to a court, including –

- conducting formal investigations
- requiring documents to be produced
- requiring witnesses to attend and be examined, in some instances under oath.

However, there are distinctions between ombudsmen and the courts.

The courts determine whether people have suffered damage as a result of unlawful actions and are concerned with the legality of an action or decision. An ombudsman would generally ask different questions and look at different issues; doesn’t usually involve lawyers or litigation, and proceeds more informally, using inquisitorial methods rather than the adversarial approach of a court.

An ombudsman offers an alternative system of justice, but is not a substitute for a court.

We must recognise that those affected by the abuse detailed in the Independent Jersey Care Inquiry Report are not the only ones who have suffered; there are others in Jersey who may have had similar experiences but were never in the care of the States of Jersey. There must be no barrier to an individual seeking justice and a fair hearing if they feel that they have a grievance against a public body which has not been dealt with justly.

Financial and manpower implications

There will obviously be initial set-up costs for the work and establishment of the new Public Services Ombudsman. There is a considerable body of work, including numerous reports dating back to 2000, which set out and advance the case for a Public Services Ombudsman and document the experience of other jurisdictions. Drawing from this information and laws already in place will reduce the cost of set-up. It is difficult to estimate precisely the costs, but they are estimated to be within the region of £200,000 to £250,000.

If this proposition is accepted, the set-up costs should be prioritised against the head of expenditure allocation for Public Sector Restructuring.

The ongoing annual costs in 2019 should be prioritised from departmental underspends from 2018 and 2019, and thereafter should be properly estimated, verified and inscribed, as the report suggested, in the 3rd Medium Term Financial Plan which will allocate all departmental public sector spending for the period 2020 to 2024.

A better deal for Islanders

1. *Best for Citizens* – Accessibility and Effectiveness: reformed arrangements and institutions should be easily accessible by and intelligible to members of the Public with a complaint; should inspire confidence that complaints will be investigated thoroughly; and should provide assurance that public service providers will take action to learn from mistakes and to prevent repetition.
2. *Best for States of Jersey Legislative and Government* – Accountability and Governance. Such arrangements should meet modern standards by delivering clear accountability of the Public Sector to the States Assembly, both in terms of performance against key objectives and for the effective and prudent use of public money. They should also meet contemporary norms for effective internal governance.
3. *Value for Money* – the expected findings of the Ombudsman should be designed to ensure and maximise the potential to deliver ever greater value for money, reflecting continuing pressure on public funds and the ongoing imperative of seeking to achieve more with less.

Suggested Work Programme

When the in-principle decision has been made to introduce a Public Services Ombudsman, the Chief Minister's Office should commission up-to-date research on the expected set-up and ongoing costs; and the expected benefits for service delivery and value for money that will result from an operational Public Services Ombudsman scheme in Jersey, to include the following –

1. Assessment of the operation and effectiveness of Ombudsman schemes in small jurisdictions, e.g. Bermuda, Gibraltar and the Cayman Islands.
2. What lessons can be learned for Jersey from recent developments in Ombudsman schemes across the U.K. – particularly the newer schemes in Wales, Scotland and Northern Ireland.
3. Consider which other public bodies in addition to those approved by the Assembly should be included within the remit of a Jersey Ombudsman.
4. With regard to design and implementation, to consult widely on the design of the Jersey Ombudsman, including the members of the States of Jersey Complaints Board, to ensure that the best elements of this scheme are included.
5. Consider how the proposals for a wide-ranging public sector and health remit can complement the recent appointment of the Children's Commissioner to ensure that maximum advantage of the complementary aspects of these roles is made.
6. Explore the procedures available to a Jersey Ombudsman, particularly alternative dispute resolution methods ("ADR").
7. Examine the potential relationships between a Jersey Ombudsman and other mechanisms for redress (including the Royal Court and appeals to Tribunals).
8. Estimate a range of the types of potential case-loads that a Jersey Public Services Ombudsman could expect within public sector service types, e.g. Health, Social Security, Planning and non-States Departments.
9. Explore what, if any, scope there may be for joint working between the Channel Islands Financial Ombudsman ("CIFO") and a Public Services Ombudsman.
10. Consider the political and practical feasibility of developing a Public Services Ombudsman in conjunction with Guernsey, examining whether there are lessons for joint working from the creation of CIFO.
11. To work closely with the Jersey Courts Service and associated Tribunals to ensure efficient, effective and efficacious working.
12. To ensure that the new Ombudsman is set up in a manner which maximises the opportunity for embracing the latest digital working practices to ensure value-for-money, maximum public accessibility and transparent working.

13. To set out the financial and staffing implications, a full costed operating model for a Jersey Ombudsman, and to ensure that the necessary resource requirements are placed before the States Assembly for approval in the 3rd Medium Term Financial Plan.

The Clothier Report

<https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/ID%20ClothierReport%20100331%20CC.pdf>



States of Jersey

**Report of the
Review Panel on the
Machinery of Government
in Jersey**

December 2000

Foreword

*"A state without the means of some change
is without the means of its conservation."*

Edmund Burke

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Chapter 9

An Ombudsman for Jersey?

- 9.1 In most modern democracies provision is made for the citizen to complain about maladministration of his or her affairs by the various departments of government. The accepted device for doing this is nowadays the Ombudsman, a word borrowed from Sweden, where in 1809 the Sovereign appointed Baron Mannerheim to hear and determine complaints against his civil servants in his absence. The argument in favour of an Ombudsman for Jersey is strengthened by the proposal to shift more of the administrative decision-making in the system to the Civil Service. The function of an Ombudsman would help to relieve the States of many minor matters of complaint, at present often the subject of lengthy debate
- 9.2 Edmund Burke to whom we owe our foreword, remarked that in any civilised state the citizen's complaint must be listened to, adjudicated upon and a remedy supplied if the complaint is well founded.⁴ It should be understood that an Ombudsman is concerned only with dilatory, incompetent or discourteous dealings with the citizens' affairs. An Ombudsman who tries to review the discretionary decisions of government, properly arrived at, is not merely risking his own appointment but endangering the institution of the Ombudsman.
- 9.3 In Jersey complaints of this character are supposed to be considered by an Administrative Appeals Board, composed of senior figures, some of whom have been prominent in government in earlier days. They cannot consider any complaint unless it has first been investigated and judged worthy of consideration by the States Greffier in his or her sole discretion. The investigative staff and powers available for this purpose seem to us to be very limited which explains why the consideration of complaints is very slow indeed. But, of course, the Greffier's first priority is to serve the States and it seems to us unreasonable to expect him or her to undertake this burdensome task without substantial additional staff. If a complaint reaches the Board and is upheld, there is no satisfactory sanction which can be applied to the errant administrator or committee to oblige them to make amends.
- 9.4 We consider these arrangements to be quite unsatisfactory. We **recommend** the institution of a proper Ombudsman to hear complaints of maladministration by Government Departments. This would be a matter of little difficulty and no great expense. The Ombudsman should be an independent person and endowed with powers to order the production of papers and files and to command the attendance of witnesses. If a finding is

⁴ Those readers with the time and inclination might find it instructive to read Burke's "Thoughts on the Cause of the Present Discontents", 1770, wherein they will find many reverberations in the Jersey of today.

made in favour of the citizen, and the responsible Department does not volunteer to remedy the grievance, the power of compulsion should lie in the States, to whom the Ombudsman reports and whose officer he is. The States should jealously guard the authority of the Ombudsman if they find his report acceptable.

- 9.5 The arrangements for access to the Ombudsman vary from country to country. In France and England the citizen must first apply to his Member of Parliament, who should and usually does put the complaint to the relevant Department. If the response does not satisfy the complainant, he may then apply to the Ombudsman. In smaller countries access to the Ombudsman is usually direct.
- 9.6 There are, therefore, several options for Jersey. It would be reasonable to provide that the complainant must first approach the relevant Department and then, if not satisfied, have direct access to the Ombudsman. Alternatively, he or she could be required to go through an MSJ but with the ultimate right to put the complaint before the Ombudsman if still not satisfied. If what is complained of amounts to a wrong which is recognised by law, as opposed to mere maladministration, most systems require the citizen to exercise his or her judicial rights.
- 9.7 The workload of a Jersey Ombudsman could not in the nature of things be great and could be discharged by a part-time appointment. There could even be an ombudsman chosen not only by Jersey but by others of the Channel Islands, just as there is a Channel Islands Court of Appeal for legal matters. We leave the choice to the States, remarking however that the agreement of Guernsey is not a pre-requisite to the creation of the office of Ombudsman in Jersey.

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Law Commission Report

https://jerseylawcommission.files.wordpress.com/2016/04/jsylawcom_topicreport_ad_minredress_final.pdf

CHAPTER 6 PROPOSAL FOR A JERSEY PUBLIC SERVICES OMBUDSMAN

What is an ombudsman?

- 6.1** The term "ombudsman" originated in Sweden in the early 19th century. During the 1960s and 1970s, many countries around the world set up ombudsman schemes to deal with complaints against government. These developments were driven by concerns about the growing power of government and the relative inaccessibility of legal remedies due to cost and formality.
- 6.2** Typically, the remit of an ombudsman is to investigate cases of alleged maladministration in public administration causing injustice. More recently, ombudsman schemes have been set up in the private sector (for example, banking, insurance and financial services)¹²⁴ as a way of dealing with complaints in an independent way.
- 6.3** The Ombudsman Association, an international organisation of ombudsman bodies, defines the role of an ombudsman as follows:¹²⁵
- Ombudsmen offer their services free of charge, and are thus accessible to individuals who could not afford to pursue their complaints through the courts.
- They are committed to achieving redress for the individual, but also, where they identify systemic failings, to seek changes in the work of the bodies in their jurisdiction, both individually and collectively.
- They can generally undertake a single investigation into multiple complaints about the same topic, thus avoiding duplication and excessive cost.
- They are neutral arbiters and not advocates nor "consumer champions".
- They normally ask the body concerned and the complainant to try to resolve complaints before commencing an investigation.
- They usually seek to resolve disputes without resort to formal investigations where this is possible and desirable.
- Where they identify injustice, they seek to put this right.
- 6.4** The role of ombudsmen in "identifying systematic failings" in public administration is of particular importance. The UK public sector ombudsmen work proactively with central and local government to improve the quality of decision-making and complaint handling.
- 6.5** In some countries, the ombudsman has the status of an officer of parliament. In the United Kingdom, the Parliamentary Commissioner for Administration (sometimes referred to as "the PCA" or the "Parliamentary Ombudsman") set up in 1967 has this position. The PCA determines complaints against central government departments. Complaints cannot go directly to the PCA but must be referred by a Member of Parliament; this feature of the system has been criticised for many years. An ombudsman does not have to be an officer of parliament. In England, the Local Commission for Administration (often called "the Local Government Ombudsman") set up in 1974, which deals with complaints against local authorities, does not have this status.

¹²⁴ In 2014, the governments of Jersey and Guernsey cooperated to establish the Channel Island Financial Services Ombudsman: see www.ci-fo.org.

¹²⁵ See www.ombudsmanassociation.org/about-the-role-of-an-ombudsman.php.

6.6 In the UK, the Government has proposed reforms of the structure of the ombudsmen system, merging the PCA, Health Service Commissioner and the Local Government Ombudsman.¹²⁶

Comparison with the States of Jersey Complaints Panel

6.7 The States of Jersey Complaints Panel, examined in Chapter 5, is often regarded as the Jersey institution that stands in the place of an ombudsman. Indeed, the Complaints Panel has "associate membership" of the Ombudsman Association as a "complaint handler member". But in several important respects, an ombudsman and the Complaints Panel are different.

| Feature | Ombudsman (typically) | States of Jersey Complaints Panel |
|--|--|--|
| Office holder | A salaried professional expert | A group of 12 unremunerated members of the public appointed by the States Assembly |
| Staff | Case workers and support staff | All support work is carried out by the Deputy Greffier of the States |
| Criteria of review | "Maladministration" | The list of criteria in Article 9(2) of the Administrative Decisions (Review)(Jersey) Law 1982 |
| Methods of work | Informal resolution if possible. Formal private investigation leading to a published report where informal resolution is not possible. Reports are anonymised. | Some use of informal resolution by the Chairman or Deputy Chairmen. Adjudication at a formal hearing leading to a published report. The hearings are normally in public and the reports are not normally anonymised. |
| Remedies | Power to make recommendations. High level of compliance by public authorities | Power request that Minister reconsiders. Rejected by Ministers in high proportion of cases |
| Role in promoting good standards of administration and dispute resolution within public authorities | Ombudsman actively engage with Ministers and civil servants to encourage continuous improvement in the quality of public administration. | This is not part of the remit of the Complaints Panel (though some specific recommendations in published reports may seek to make improvements in particular contexts) |
| Public awareness activities | Ombudsmen engage in a wide variety of activities to make | Little or no activity by the Complaints Panel to publicise its work to the public. |

¹²⁶ See Cabinet Office, *A Public Service Ombudsman: a Consultation* (2015); a Draft Public Services Ombudsman Bill was published in December 2016.

public aware of ombudsman's role.

Own-initiative powers to investigate where there is evidence of systemic problems

Some ombudsmen have this power.

The Complaints Panel does not have this power.

Debates about a public sector ombudsman for Jersey

6.8 In 2000, one of the principal recommendations of the *Report of the Review Panel on the Machinery of Government in Jersey* (the Clothier report) was the creation of an ombudsman.¹²⁷

We recommend the institution of a proper Ombudsman to hear complaints of maladministration by Government Departments. This would be a matter of little difficulty and no great expense. The Ombudsman should be an independent person and endowed with powers to order the production of papers and files and to command the attendance of witnesses. If a finding is made in favour of the citizen, and the responsible Department does not volunteer to remedy the grievance, the power of compulsion should lie in the States, to whom the Ombudsman reports and whose officer he is. The States should jealously guard the authority of the Ombudsman if they find his report acceptable.

6.9 In May 2004, the Privileges and Procedures Committee (PPC) presented a report to the States Assembly reviewing the operation of the States of Jersey Complaints Panel (as it is now called) and assessing the case for introducing an ombudsman scheme. PPC

- accepted "that the establishment of an Ombudsman in Jersey might, in itself, be sufficient to re-establish confidence in a system of informal dispute resolution
- noted that the number of complaints made to the States of Jersey Complaints Panel "is very small at present" – implying that the case load could not justify the introduction of an ombudsman scheme
- rejected the idea that a public sector ombudsman scheme could be combined with an ombudsman for financial services:¹²⁸ it was thought unlikely that an ombudsman could be appointed who had sufficient expertise in both financial services and public administration; moreover, it was thought likely to cause confusion to amalgamate two different sectors
- rejected the idea that a public sector ombudsman could be shared with Guernsey, noting "this would seem to imply that the Ombudsman might not always be readily available to deal with complaints which would run contrary to the desire to provide a swift response to complaints"
- was concerned about the costs of setting up a public sector ombudsman, estimating operating costs of £300,000 a year, "which could be difficult to justify in present financial circumstances".

¹²⁷ *Report of the Review Panel on the Machinery of Government in Jersey* Part 9.

¹²⁸ In November 2015, the Channel Islands Financial Ombudsman began work. This is a joint scheme between Jersey and Guernsey. In Jersey, the CIFO operates under the Financial Services Ombudsman (Jersey) Law 2014; there is corresponding legislation in Guernsey.

- 6.10 PPC concluded that it was "not minded to recommend that a public sector Ombudsman be established in the Island at the present time". The States Assembly accepted PPC's conclusions and subsequently introduced a range of reforms to the States of Jersey Complaints Panel.¹²⁹
- 6.11 The "Complaints Panel vs Ombudsman" debate seems to on sincerely held opposing views about two matters.
- 6.12 The first is cost. As noted above, in 2004, PPC estimated that the annual operating budget of an ombudsman would be £300,000. We make no assessment of this figure; the cost would be related to the design of the new ombudsman service. Judgements about expenditure of public resources is ultimately for politicians. This assessment needs to be made having regard to the benefits that accrue from the investment.
- 6.13 The second concerns who should carry out the work.
- When originally set up as the States of Jersey Administrative Appeals Panel, complaints were heard by States Members: the model was of politicians reviewing fellow politicians and their civil servants.
 - In its current format, the Complaints Panel consists of local people, who are mostly not experts in public sector dispute resolution, carrying out the role of adjudicating on complaints. Jersey has a long tradition of valuing honorary service in public institutions, including in the Honorary Police.
 - If a Jersey Public Services Ombudsman was set up, the work would be carried out by professional experts – the Ombudsman him or herself (and if the case load required it, one or more case workers).

Proposal for a Jersey Public Services Ombudsman

Recommendation 6.1: The Government of Jersey should make an "in principle" decision to support next steps in the creation of a Jersey Public Services Ombudsman (JPSO).

Recommendation 6.2: The Government of Jersey should request the Jersey Law Commission to develop institutional design options for the JPSO.

- 6.14 As we noted in Chapter 5, there continues to be opposition to the idea of replacing the States of Jersey Complaints Panel with a public services ombudsman. The Complaints Panel and States Members on PPC criticised the proposal contained in our April 2016 Consultation Report for a fresh look at the benefits and costs of creating an ombudsman scheme for the Island.
- 6.15 Against this political background, and mindful of our role as an independent law reform agency, we have sought to contribute in the ongoing debate in two ways.
- In Chapter 5, we set out a series of "alternative recommendations" for changes to the law and practices of the Complaints Panel. As we indicated, however, we are not confident that these proposals would solve the problems we identified.
 - Here in Chapter 6, we propose that a further step should be taken in developing an institutional design for a Jersey Public Services Ombudsman (JPSO). If the Government of Jersey supports further exploration of the proposal for a JPSO, the Jersey Law Commission would undertake further work to develop an outline design for the new institution and an assessment of its costs and benefits. If the Government of Jersey is

¹²⁹ See Part 4.

committed to maintaining the States of Jersey Complaints Panel, and sees value in our alternative recommendations in Chapter 5, we will not carry out further work about a JPSO.

6.16 The proposed study would:

- assess the operation and effectiveness of the ombudsman schemes established in other small jurisdictions (for example, Gibraltar, Bermuda and the Cayman Islands)
- consider recent developments in the operation and effectiveness of the various public sector ombudsman schemes across the United Kingdom (where relatively new ombudsman schemes exist in Wales, Scotland and Northern Ireland) and lessons to be learnt for Jersey
- examine what public bodies should fall within the remit of a Jersey public services ombudsman. A point of particular importance is whether complaints in relation to health services would be included.
- investigate the procedures that a Jersey public services ombudsman could use, including alternative dispute resolution (ADR) methods¹³⁰
- consider the relationship between a Jersey public services ombudsman and other redress mechanisms (including appeals to tribunals and the Royal Court and the work of the Jersey Audit Office)
- estimate the likely case load of a Jersey public services ombudsman
- develop a design, or different design options, for a costed model for a Jersey public services ombudsman.

6.17 The research would involve desk-based research, interviews (face-to-face where possible or by video conference calls where travel is uneconomic) and public consultation.

Ombudsman schemes on other very small jurisdictions

6.18 One development that has taken place since the 2004 PPC report to the States Assembly is that public service ombudsman schemes have been set-up in a number of other small jurisdictions. These will be a useful point of reference in further development of options for institutional design for a JPSO.

Gibraltar Public Services Ombudsman

6.19 The Gibraltar Public Services Ombudsman was established in 1999, serving a population of 30,000.¹³¹ In 2015, its jurisdiction was extended to cover the Gibraltar Health Authority. It promotes a telephone helpline as a way of accessing its services and actively publicises its role to the public. It works proactively with government bodies to champion continuous improvement in the quality of public administration.

6.20 The office consists of the Ombudsman and eight members of staff. In 2015, it received 164 complaints. Many cases were resolved informally. Nine cases were subject to formal investigation leading to reports. It has a website containing useful information about how to make a complaint and the work of the GPSO. It distributes copies of its annual report from a stall in Main Street and conducts surveys to test levels of public awareness and understanding of the GPSO's role.

¹³⁰ On ADR, see Chapter 8.

¹³¹ See information at www.ombudsman.org.gi.

Ombudsman for Bermuda

- 6.21** The Ombudsman for Bermuda serves a population of 65,000. It was established in 2004. Its mission is "To investigate administrative actions of an authority for the purpose of deciding whether there is evidence of maladministration on the part of the authority" and "Pursuant to an investigation, to make recommendations to an authority concerning administrative action that formed the subject of the investigation and, generally, about ways of improving its administrative practices and procedures".¹³²
- 6.22** The current Ombudsman has set as her strategic aims: great public access, greater public awareness, and championing best practice. The Ombudsman and her team take an active approach to raising awareness, including education sessions in schools, organisations and for government departments. The Ombudsman has a user-friendly website and publishes an informative annual report.
- 6.23** In 2016, over 260 people contacted it and they recorded a total of 285 cases. In addition to the Ombudsman, the office has five members of staff.

Office of the Complaints Commissioner

- 6.24** In the Cayman Islands (population 63,000), the Office of the Complaints Commissioner (OCC) was created in 2004. Its aim is "To investigate in a fair and independent manner complaints against government to ascertain whether injustice has been caused by improper, unreasonable, or inadequate government administrative conduct, and to ascertain the inequitable or unreasonable nature or operation of any enactment or rule of law".¹³³ The OCC uses investigations, which are conducted in private.
- 6.25** As well as receiving complaints, the OCC has powers to carry out "own initiative" investigations into aspects of public administration where there is evidence of systematic failure. The OCC engages in public education outreach, including promoting the OCC's work at public festivals and an "open house" for members of the public to visit the OCC's offices.
- 6.26** During the financial year 2015-16, the Office received 26 enquiries, 133 complaints and completed 96 investigations. The office consists of an Acting Complaints Commissioner and four members of staff. We have not been able to ascertain the cost of running the OCC.

What a JPSO would do

- 6.27** In developing the institutional design for a JPSO, it will be important to specify the full range of functions to be carried out.
- 6.28** Looking into individual complaints would be a core aspect of a JPSO's work. We have already noted the stark contrast between the tiny number of complaints that reach the States of Jersey Complaints Panel and the significantly higher numbers that reach the ombudsman schemes in Gibraltar, Bermuda and the Cayman Islands (each of which has a population smaller than Jersey's).
- 6.29** A JPSO would also have a wider role of working with public bodies to improve the quality of public administration. This is a major emphasis of many ombudsman schemes and something that the States of Jersey Complaints Panel is unable to provide in a systematic way.
- 6.30** In a written response to our Consultation Report, Dr Chris Gill (now of the University of Glasgow) draw our attention to his research on complaints handling in England, which we expect to be a

¹³² See information at www.ombudsman.bm.

¹³³ See information at www.occ.ky.

point of reference in our future work on a JPSO.¹³⁴ Dr Gill's study investigates questions about the practical impact of the work of ombudsman, courts and tribunals have on the day-to-day work of public bodies. One of Dr Gill's policy recommendations is that ombudsmen should be "learning champions", which would have three facets:

"Spokesperson: working collaboratively with courts and tribunals, the ombudsman could distil and disseminate important decisions taken by other redress mechanisms. This would draw on the institution's skill in packaging messages in ways that are accessible to administrators. Rather than only drawing on its own casework, it could bring together and disseminate important, cross-cutting administrative justice principles. Drawing on its closer understanding of bureaucratic decision-makers, the ombudsman could be charged with the coherent presentation of administrative justice principles to bureaucratic audiences.

Relationship manager: here the ombudsman would function as a conduit for interchange between decision-makers and redress mechanisms. The ombudsman could either create professional networks or develop existing ones, which would function as spaces in which administrative justice principles could be disseminated and as fora in which shared understandings of good practice could be jointly developed. This would capitalise on the ombudsman's ability to enter into professional networks and would allow it to extend its scope as a policy actor. This would also allow the ombudsman to identify more clearly areas where the decision-makers require training or guidance.

System fixer: The third dimension of the ombudsman as learning agent would require new powers of own-initiative investigation, which could be harnessed to trouble-shoot problem areas within the administrative justice system. For example, the ombudsman might launch an investigation in areas where there are high levels of successful appeals, or in response to concerns raised in the annual reports of the Senior President of Tribunals. The ombudsman might also investigate where new initiatives have a significant knock on effect on the administrative justice system, such as currently in relation to mandatory reconsideration. There is also potential for the ombudsman to follow up individual cases. Particularly where important legal precedents are set, the ombudsman could have a role akin to Special Masters in the US court system (Cannon 2004). Here, judges might refer cases to the ombudsman for follow up where public interest issues appear to be at stake. Such a proactive role is quite different from the fire-fighting approach currently adopted by the [Local Government Ombudsman in England]; however, this thesis' findings suggest that the potential benefits of the ombudsman within the administrative justice system are currently underdeveloped".

- 6.31 A JPSO could work closely with the proposed Chairman of the Jersey Administrative Appeals Tribunals,¹³⁵ the Jersey Audit Office,¹³⁶ and public bodies.

¹³⁴ Selected responses to consultation are available on www.jerseylawcommission.org.

¹³⁵ See Chapter 3.

¹³⁶ The office of Comptroller and Auditor General (C&AG) was established in 2005 under the Comptroller and Auditor General (Jersey) Law 2014. The remit of the C&AG includes the audit of financial statements and wider consideration of public funds including internal financial control, value for money and corporate governance. As we noted in Chapter 2, there are close connections between effect complaints handling and value for money.

ADR related to the States of Jersey Complaints Panel

- 8.23 Our principal interim recommendation (discussed in Chapter 5 above) is that the States of Jersey Complaints Panel should be replaced by an ombudsman scheme. If this does not happen, we looked at ways in which the effectiveness of the Complaints Panel could be improved.
- 8.24 Since 2006, the Complaints Panel has express powers to seek to resolve complaints informally. Under Article 3(3) of the Administrative Decisions (Review)(Jersey) Law 1982 Law as amended:
- If the Chairman (or Deputy Chairman) decides that a review of the matter by a Board is justified, he or she may nevertheless first attempt informal resolution of the matter and in that case may use whatever means that he or she considers reasonable in the circumstances to achieve such a resolution.
- 8.25 During the research interviews, interviewees with experience of serving on the Complaints Panel expressed unease about the use of this power: there is a concern that if the chairman or deputy chairmen are involved in informal resolution this may bar their participation at a hearing (if the informal resolution fails) because they may no longer be regarded as impartial if they have had private meetings with civil servants.¹⁴⁷ Another issue that emerged during the research interviews is that there is no requirement for the chairman or deputy chairmen to be trained in ADR or to be accredited mediators.
- 8.26 In response to these problems, in **Alternative recommendation 5.7** we propose that all members of the Complaints Panel (not only the Chairman and Deputy Chairmen) should have power to "attempt informal resolution". The corollary of the widening of this power is that all Complaints Panel members should be undertake training in ADR. Also, the power to attempt informal resolution should include power to refer a complaint to mediation by an external third party (for example, a member of the Community Mediation panel), if both parties agree.

ADR related to the proposed Jersey Public Services Ombudsman

- 8.27 If a public service ombudsman is established in Jersey (as we recommend in Chapter 6), we envisage that some complaints would be resolved using ADR techniques (often referred to as "informal resolution" in this context)¹⁴⁸ rather than a process of formal investigation leading to a published report. Use of ADR should be part of the detailed implementation research study that we recommend. Where ADR is used, the principle of transparency¹⁴⁹ should require information about the extent and success in the use of ADR to be included in the ombudsman's annual report.
- 8.28 Looking at ombudsman schemes elsewhere gives cause to think that ADR is likely to play a limited role in the future work of a Jersey public services ombudsman. As we noted, in the early years of ombudsmen in the UK the work of the ombudsmen focused on carrying out a full investigation into complaints leading publication of a full report. More recently, UK ombudsmen have recognised that they needed to use a broader range working methods. Since 2007, the three main public sector ombudsmen in England have express power to "appoint and pay a mediator or other appropriate person" to assist in the conduct of an investigation.¹⁵⁰ It appears that the ombudsmen have made relatively little use of ADR in practice – though the UK Parliamentary and Health Service Ombudsman acknowledged that there may be cases where

¹⁴⁷ See Part 4.

¹⁴⁸ See M Doyle, V Bondy, C Hirst, *The use of informal resolution approaches by ombudsmen in the UK and Ireland* (October 2014), a study funded by the Nuffield Foundation.

¹⁴⁹ See Recommendation 6.1 above.

¹⁵⁰ Regulatory Reform (Collaboration etc between Ombudsmen) Order 2007.

mediation is "especially appropriate in enabling the parties to explore their differences with a trained facilitator, achieve insight and empowerment, and devise for themselves a way forward".¹⁵¹ The Local Government Ombudsman reported in March 2010 that they "do not routinely offer mediation as a means to resolve complaints; although a small number of mediations are being carried out as part of a pilot scheme in operation in the Coventry office".¹⁵²

ADR related to the Royal Court

- 8.29** As discussed in Chapter 7, the Royal Court is part of the Island's administrative redress system through its roles in hearing statutory appeals against administrative decisions and applications for judicial review.
- 8.30** In relation to statutory appeals, we recommend that the right of appeal under many Laws should be transferred to the proposed Jersey Administrative Appeals Tribunal (JAAT); the Royal Court should remain the forum for appeals that are likely to raise more complex issues of fact or law and in all cases where JAAT determines an administrative appeal there should be a "second appeal" on point of law to the Royal Court.¹⁵³ We see little or no scope for the use of ADR in the context of the Royal Court's proposed jurisdiction over administrative appeals. The primary function of the Royal Court in this context should be to interpret and apply legal principles. There is a strong public interest in this happening in open court and published judgments.
- 8.31** We recommend that Royal Court Rules Review Group extend its work to review the operation of Applications for Judicial Review Part 16 (see Recommendation 7.5). As part of this review, it would be possible to consider the experience in England and Wales relating to ADR and judicial review.¹⁵⁴
- 8.32** In 2001, the Court of Appeal in England issued strong words of warning in a judgment, urging applicants and their legal advisers to use ADR methods rather than judicial review.¹⁵⁵ The *Cowl* case concerned a decision of a local authority to close residential accommodation for elderly people. Lord Woolf CJ referred to "heavy obligation" to resort to litigation only if it is really unavoidable. If litigation is necessary, the courts should deter the parties from "adopting an unnecessarily confrontational approach to the litigation". The Administrative Court should, the court said "scrutinise extremely carefully" claims for judicial review so as to ensure that parties tried "to resolve the dispute with the minimum involvement of the court". Ample powers existed under the Civil Procedure Rules (CPR) for the Administrative Court to hold, on its own initiative, an inter partes hearing at which both sides could explain what steps they had taken to resolve the dispute without the courts' involvement using complaints procedures and other forms of ADR. In the years since *Cowl*, there has been little progress towards establishing a principled basis on which ADR can be used in public law disputes (some cases are not suited to ADR because they require a point of law to be determined), finding a suitable funding regime (who will pay for mediation?) or working out how ADR can take place in the short time before a claim for judicial review must be started (promptly and in any event within three months).
- 8.33** In its October 2015 report, the Royal Court Rules Review Group recommended "issue of a practice direction and amendment to the form of the summons for directions to require mediation

¹⁵¹ Ann Abraham, 'The ombudsman and "paths to justice": a just alternative or just an alternative' [2008] *Public Law* 1, 4.

¹⁵² See www.lgo.org.uk/guidance-inv/settling-complaints/mediation.

¹⁵³ See Chapter 7.

¹⁵⁴ See Varda Bondy and Linda Mulcahy, *Mediation and Judicial Review: an empirical research study* (The Nuffield Foundation/The Public Law Project 2009).

¹⁵⁵ *Cowl v Plymouth City Council* [2001] EWCA Civ 1935; [2002] 1 WLR 803.

Links to other relevant online resources

“The creation of an English Public Services Ombudsman: mapping a way forward” by Richard Kirkham and Jane Martin –

<http://www.democraticaudit.com/wp-content/uploads/2014/06/Democratic-Audit-Creation-of-a-Public-Services-Ombudsman.pdf>

“Six Rules for getting it right (The Ombudsman’s Guide to good administration)” issued by the Office of the Ombudsman in Dublin, Ireland –

<https://www.ombudsman.ie/en/Publications/Guidelines-for-Public-Bodies/Six-Rules-for-Getting-it-Right/Six-Rules.pdf>

Ombudsman Association website –

<http://www.ombudsmanassociation.org/>

“Ombudsman Association 2017 (Promoting independent complaint resolution)” (*Annual Report of the British and Irish Ombudsman Association*) –

http://www.ombudsmanassociation.org/docs/Annual_report_OA_16-17_Final.pdf
