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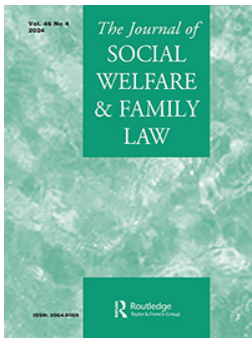
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Parliamentary scrutiny of the Parliamentary and Health Services Ombudsman

Richard Kirkham

School of Law, University of Sheffield, Sheffield, UK

ABSTRACT

Six years on from the last major move to introduce reform of the public services ombudsman sector in the England, this article reflects briefly on one of the reasons why reform measures that have been widely touted for the sector have not been implemented. The short answer offered is that the current model of ombudsman that operates in England suits the dominant administrative justice culture in England, as driven by all governments of recent years, one which focuses on individual complainants. In making this argument, the article reflects on a recent Parliamentary scrutiny session of the Parliamentary and Health Services Ombudsman.

KEYWORDS

Administrative culture; ombudsman; Parliamentary review; legislative reform

Introduction

One of the claimed strengths of the British model of the public services ombudsman is the close connection between the ombudsman office and the legislative bodies that oversee them. This relationship makes it more likely both that public authority will respect the work of the ombudsman, and that the office will be pressurised to operate in line with wider public and political demand. A feature of this relationship is the regularity with which dedicated legislative committees review the work of office, a set of exchanges which tells us a lot about political attitudes towards administrative justice. In exploring this matter, this article reflects upon a recent review of the Parliamentary and Health Services Ombudsman (PHSO) by the Public Administration and Constitutional Affairs Committee (PACAC) in the Westminster Parliament.

The article begins with a discussion of the relationship between administrative culture and the design of administrative justice institutions such as the ombudsman. In doing so, it expands upon the core features of the Whitehall and Westminster approach towards administrative justice, and suggests that that approach amounts to a primarily individualistic conception of administrative justice. In support of that claim, the article then reviews the recent PACAC meeting (PACAC (Public Administration and Constitutional Affairs Committee) 2021a; 2021b), noting the lines of inquiry that dominated the session as well as the ways in which the PHSO attempts to layer onto its office functions that break out of an individualistic focus on complaint-handling. Finally, the article concludes

CONTACT Richard Kirkham  r.m.kirkham@sheffield.ac.uk

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by reflecting upon the comfortable familiarity with the status quo demonstrated by the line of inquiry adopted by PACAC. For many in Parliament, as well as government and public administration, it would seem that the current model of ombudsman that operates in England suits the dominant view of administrative justice. If correct, this helps explain why the widely touted reform of the public services ombudsman sector in the England remains allusive (Kirkham and Gill 2020).

Variable administrative justice cultures and the ombudsman

Administrative justice is a contentious area of study in part because its foundations are inherently political and cultural. The level and nature of administrative justice provided for is dependent to a large degree on what public administration, and political power, is willing to cater for. This background pressure entails that administrative justice solutions including institutional ones, are likely to vary significantly over time and place. The ombudsman is a strong example of this phenomenon.

Ombudsman scholarship is rich in claims as to what the ombudsman should do and how it should be designed, and at an international level standards have been set for how the ombudsman institution should operate (Council of Europe 2019). Notwithstanding these various prescriptions, in different countries and over different times subtle and sometimes radical variability in the ombudsman sector can be observed, with the institutional model being deployed both as a complaints handler (Rowat 1965) and an accountability agent capable of a range of additional functions (Stuhmcke 2012). In explaining this sort of diversity, legal transplant scholars have long noted that even where an institutional model is transplanted root and branch from one country to another, if it is to take hold and be successful, the nature of the transplant should be adapted to match its local environment (Twining 2004, Graziadei 2009, Dorsett 2014). Given the risks of failure caused by an inability to manage the tensions of working against the grain of local practices, it is predictable that this need to be sensitive to local conditions and secure sustainability drives differences in global practice. In this context, it is also unsurprising that the UK ombudsman sector has evolved in a very different way, not just to neighbouring European countries, but also to other common law countries.

One useful way to explain the resultant diversity of the ombudsman model is through grid-group cultural theory (GGCT) (Kirkham 2021). GGCT is a typological tool grounded in anthropology and which has been widely used across a number of disciplines to analyse social phenomena. The purpose of the approach is not to offer normative arguments for the best solution, but to aid understanding of the choices made in creating societal solutions at different times and places (eg Douglas and Wildavsky 1982, Thomson *et al.* 1990, Halliday and Scott 2010). The theory postulates that ultimately there are four dominant types of cultural bias that come to influence society, labelled individualism, hierarchy, egalitarianism and fatalism. Rarely does one cultural bias neatly describe a society or community and there will always be tensions and inconsistencies within societies as to the dominant bias. Nevertheless, amongst public administration scholars (Hood 1998), it has been argued that there tends to be a high degree of congruence between the policy solutions that are adopted within a society and the political cultures within which they are set (Halliday and Scott 2010, p. 184). Likewise, it is anticipated that in the administrative justice sector, institutional design will come to mirror the dominant cultural bias.

The usefulness of this approach to understanding the nature of the ombudsman sector is that it helps explain some of the differences in institutional design between the traditional ‘English’ solution towards ombudsman design and the solutions that are commonly found elsewhere. Politically at least, England and its public administration possess several strong elements of an individualistic culture, one which is defined by GGCT as placing a high value upon the capacity for people to operate outside of rigidly structured groups and with minimal external regulation imposed on society. This cultural bias is focused on personal responsibility and the dominance of the market-place. Where a need for public service is accepted in an individualistic society, the dominant administrative culture places a premium on the individual’s service experience and economic efficiency (Adler 2003, pp. 334–5). Correspondingly, the delivery of administrative justice under individualism is built around ‘bottom-up’ solutions and delivered through processes that maximise the input of the individual.

Complaint systems, such as the ombudsman, fit well within the individualistic cultural bias because they connect the voice of the user directly with public decision-making processes (Hirschman 1970, Simmons *et al.* 2007). The natural role for an ombudsman within this approach is to facilitate the expression of grievances by managing a high turnover of complaints effectively and efficiently. Dispute resolution more than the provision of justice is the main goal, leading one author to dub this model of ombudsman design as the ‘consumerist ombud’ (O’Brien 2018, pp. 40–1). Meanwhile, other contributions that an ombudsman is often called upon to perform in other countries, such as systemic investigations and own-initiative inquiries, are of secondary importance and only incidentally supplied.

If accepted as an accurate portrayal of administrative justice culture in England, this provides one possible explanation for the ongoing resistance to ombudsman reform in England. Put bluntly, ombudsman reform is non-forthcoming in England because the existing ombudsman design for the leading public services ombudsman largely delivers upon the dominant administrative justice culture there. This is a culture that favours ombudsman schemes being used primarily for resolving individual grievances, over and above broader accountability functions with a higher level objective of pursuing the public interest or justice.

The resultant dominant emphasis on complaint-handling contrasts with the way that ombudsman design has developed in the devolved countries in the years since they have been given the autonomy to develop administrative justice in tune with local conditions. Alongside wide complaint-handling powers, the ombudsman legislation in Northern Ireland (Public Services Ombudsman Act (Northern Ireland) 2016, Scotland (Scottish Public Services Ombudsman Act 2002) and Wales (Public Services Ombudsman (Wales) Act 2019) provides the office with additional powers to act as a complaint standards authority, and in Northern Ireland and Wales also the power to investigate matters of their own-initiative. These more proactive, even regulatory-like roles, fit more naturally in an administrative culture that is more hierarchical or egalitarian. In other words, this model of an ombudsman is an easier fit within cultures that are more comfortable with powerful autonomous institutions that serve to promote executive accountability (Barbour 2007), guarantee formal justice, or ensure trust in the administration of government (Behrens 2015, Vitale 2018). In these administrative cultures, an

ombudsman office, and the information that derives from ombudsman investigations, is more readily accepted as an important resource capable of being used reflexively to heighten the quality of public service for all, as well as resolving individual grievances.

Recent evidence of the nature of English ombudsmanry

Legislative design

In exploring the administrative culture that the ombudsman is expected to work under, in this article the PHSO is situated under the umbrella of the ‘English’ ombudsman sector, even though the jurisdiction of the Parliamentary Ombudsman branch of the office is applicable to the ‘UK’ as a whole. Despite the constitutional position of the Parliamentary Ombudsman, the ‘English’ label is adopted here because the numbers of complaints it receives is disproportionately from English complainants and the public bodies it investigates are almost always located in England and often service only England-based citizens. Additionally, the office is based in Manchester and London, and the scrutiny of the office is undertaken by a Parliament which is heavily loaded towards England-based Parliamentarians. By contrast, in terms of cultural influences, the day-to-day impact on the PHSO of Northern Irish, Scottish, or Welsh public administration and politics is minimal.

Evidence to support the claim that a ‘consumerist’ understanding of the work of the English public service ombudsman sector best explains its design, comes in part from its legislation. The PHSO’s legislative powers are contained in the Parliamentary Commissioner for Administration Act 1967 and the Health Commissioner Act 1993, both of which focus almost entirely on the establishment and constitution of the office and its powers of investigation of complaints. The other main public services ombudsman in England, the Local Government and Social Care Ombudsman (LGSCO), operates under slightly more expansive legislation than the PHSO (Local Government Act 1974). This legislation does at least refer to the LGSCO having a role to play in providing guidance and there is some power for the office to expand investigations beyond the resolution of an individual complaint (Local Government Act 1974, s.26(D)). Some ombudsman-like schemes deployed in England also operate with a wider remit in some respects, as with the Prisons and Probation Ombudsman’s residuary duty to inspect deaths in custody (Prisons and Probation Ombudsman 2021, para. 28). Even so, the primary duty and expectation on all schemes, and the general drift in Whitehall and Westminster-based ombudsman-design policy, is that all these bodies are first and foremost complaint handlers.

The strength of this focus on complaint handling can be observed in the reasons that the government has previously given for rejecting more ambitious proposals for ombudsman reform that might broaden the powers of the office (eg Kirkham and Gill 2020). For instance, in the most recent reform attempt, the government’s rebuttal of a more expansive or regulatory role for the office was justified by a concern that such powers would risk distracting the office from its core complaint handling function (Cabinet Office 2015). Furthermore, in the reform Bill that the government did put together to introduce a new Public Services Ombudsman (PSO), the importance of the user-complainant to the work of the PSO would have been built into the ombudsman design

through a new accountability device, called a ‘Corporate Board’. This Board would have had responsibility for scrutinising performance (Cabinet Office 2016). Notably, the performance standards listed in the Bill placed a strong emphasis on financial or user focused complaint handling standards, and there was no mention of broader conceptions of administrative justice.

As will be seen below, however, legislation on the ombudsman does not restrict the office to complaint-handling functions alone. This is because the legislation leaves considerable discretionary gaps within which schemes can flex their operational activity provided resources allow. This flexibility means that notwithstanding the legislative emphasis placed on the complainant in the ombudsman’s work, some of the initiatives that the PHSO deploys indicates an office that is permanently exploring ways to push the boundaries of its remit. There is a tension here which under the right circumstances, may yet lead to reform to bring legislation more in line with ongoing practice (Creutzfeldt and Kirkham 2020).

Parliamentary scrutiny and complaint handling

The pressure for an enhanced focus on complaint handling in the ombudsman’s work is one that can be driven as much by Parliament as it is by the government and public administration. The views of the select committee can be observed thanks to the relative regularity with which Parliament engages in the work of the ombudsman. In the past, such Parliamentary inquiries into the work of the ombudsman have been influenced by user-demand and on occasion by private sector practice in the ombudsman sector where mass complaint-handling is more common (eg Select Committee on Communities and Local Government,; PASC (Public Administration Select Committee) 2014).

Oversight of the PHSO is part of the remit of the Public Administration and Constitutional Affairs Committee (PACAC) and the PHSO has been subject to at least one annual scrutiny session by PACAC and its predecessor committees for most of the past 45 years. Using the most recent round of Parliamentary scrutiny of the PHSO as an example, the claim will be made in this section that the majority of the attention in such sessions tends to be on complaint handling and managerial issues, broadly fitting in with the ‘consumerist’ model of the ombudsman identified above.

Typically, PACAC will review the work of the PHSO after the office has published its Annual Report, and the Committee pre-empts its reviews with a call for evidence. In recent years, most of that evidence has come from complainants dissatisfied with the outcome of their complaint. The 2021 scrutiny session reflected this pattern. Of 26 submissions, 17 came from former complainants. A further submission came from a medic criticising the quality of the PHSO’s investigations (PACAC 2021c). Such evidence is then used to support scrutiny of the office’s work in an oral session with the office holder, which in 2021 was Rob Behrens who was accompanied by his Deputy, Amanda Amroliwala.

Ordinarily, key areas that scrutiny is aimed at include standard organisational and accounting issues that would apply to any public body. Along these lines, in a departure from past practice, PACAC reserved the last quarter of the 2021 evidence session for a one-to-one meeting with Rob Behrens, to explore whether to recommend extending his term of office to the full seven years under the 1967 Act (PACAC 2021b, Q. 71–87).¹ This

part of the session concentrated on the leadership and managerial roles for which Behrens was particularly responsible. Additionally though, to support scrutiny of the functioning of the office, in recent years PACAC has interrogated the office's annual staff survey, which has sometimes told a story of a disgruntled and hard-worked team at the PHSO (*ibid*, Q. 43–8). The 2021 review of the survey led to a discussion familiar to many organisations of the future prospect of office working post-covid and the likelihood of office downsizing.

Whilst organisational issues are important part of the scrutiny process, the 2021 evidence session, like many of its predecessors, spent the majority of its time reviewing the office's complaint handling work. It is not the role of PACAC to reopen the specifics of the individual complaints that are brought to its attention but it can and does interrogate the office's capacity to offer high quality investigation. For instance, a key area of contention which the Committee looked into in 2021 was the suitability of the medical knowledge that the PHSO has access to in health complaints (*ibid*, Q. 35–36). Establishing a 'failure in a service provided by a health service body' (Health Commissioners Act 1993, s.3(1)(a)) is one of the most challenging areas of the PHSO's work, one which led it to commission an external report on its clinical review work (PHSO (Parliament and Health Services Ombudsman) 2018a). This is one example of the efforts that the PHSO takes to evidence and improve its complaint handling work. Explaining these strategies, another initiative the PHSO referred to was a plan to form a new public panel to review past cases (PHSO 2018b, p. 13). In the Deputy Ombudsman's words, the purpose of such a panel would be service improvement related, 'to ask whether we could have done them better. Could we have been more empathetic? Could we explain things better?' (PACAC 2021b, Q. 37).

In investigating the PHSO's complaint handling capacity, as with most years, PACAC looks not just at policies and strategies, but also the performance of the office against a range of standards, many of which are set out by the office itself in its annual reports and Service Charter commitments (PHSO 2021c). Amongst other things, these standards include details about the numbers of complaints handled, time taken to deal with complaints and recommendations upheld. This attention given to performance measures is unsurprising, as it is the most readily available set of metrics that can be obtained and is capable of allowing for an element of comparability year on year. Follow-up surveys of complainants have also become a big part of the PHSO's management process, and provides considerable additional data for the PHSO and PACAC to digest. In the words of Rob Behrens, 'no counterpart ombudsman organisation anywhere – as far as we know – does this as regularly as we do over the course of a year' (PACAC 2021b, Q. 39).

The standout issue that PACAC had to unpick in 2021 was the impact of the covid pandemic on the operation of the office. In the midst of the extraordinary moment of March/April 2020 when the country went into lockdown, the PHSO made the decision to stop investigating health complaints for three months. NHS England made it clear at that point of time that it was withdrawing staff from complaint-handling duties and the PHSO agreed to respond in kind (PACAC 2021b, Q. 8–11). What this led to throughout 2021 was a significant delay in processing complaints and in a bid to tackle the delay, the PHSO made a subsequent decision to increase the threshold at which complaints are accepted for investigation, unless there was evidence of systemic maladministration (*ibid*,

Q. 14). This issue tells an interesting tale of both ombudsman and PACAC conceding to the need to reduce the office's potential to provide a complaint service, with the least serious cases not being fully investigated. For instance:

We are talking about things such as a missed appointment at a GP, or a repeated delay in prescriptions where there has been no clinical impact but it has been inconvenient, distressing and so on (ibid, Q. 15, per Amanda Amroliwala, Chief Executive Officer and Deputy Ombudsman, PHSO).

What this incident evidences is the degree to which administrative justice is a malleable concept and dependent on the politics, culture and, in this instance, the administrative economics of what can be delivered. What the account also provides a window into is the increased scrutiny that such periods of pressure can place on complaint-handlers, with the Deputy Ombudsman noting that as the frustrations of complainants build up there are 'an increasing number of people who are intolerant and are becoming more and more challenging, demanding and abusive' (ibid, Q. 13).

Another user-focused line of inquiry that PACAC looked into was the capacity for the ombudsman to encourage awareness and accessibility of the office. Notwithstanding the growth of social media and the internet in modern times, this remains a significant challenge for all ombudsman schemes particularly during the pandemic when physical outreach events were necessarily restricted. Several schemes, including the PHSO, have moved to be more transparent in publishing their work online in recent years. Points discussed in the session were the enormous amount of effort that had been put in to maintain adequate phone connection with the office during the pandemic (ibid, Q. 4) and the importance of maintaining a diverse workforce if outreach efforts were to be successful (ibid, Q. 22). As a further means through which to demystify the office and raise debate, Rob Behrens' term of office has included the introduction of an annual lecture series and the launch of the 'Radio Ombudsman' platform to discuss the ombudsman's work with a series of influential people with public services, and former complainants.

Interestingly, one proposal of the ombudsman to improve the accessibility of the office did not receive the full support of PACAC on this occasion. This was the proposal to remove the MP filter requirement, by which all complaints to the Parliamentary Ombudsman have to go through an elected MP. Here the Chair, William Wragg, objected to the suggestion that he had previously stated support for the reform and another member, Lloyd Russell-Moyle, appeared lukewarm on the idea (ibid, Q. 57–62). Care should be taken not to read too much into this short exchange, one which extended beyond the session into an exchange of letters between the Rob Behrens and the Committee. This exchange made clear that support for the removal was contingent on the ability of MPs to retain knowledge of their constituency complaints. That this issue remains a concern is curious, as most proposals for reform of the MP filter would not shut Parliamentarians out of the process altogether but instead give complainants the option of complaining direct to the ombudsman or through their local MP. Nevertheless, this exchange further emphasises the embedded traditional perception of the ombudsman office as a body that lacks full autonomy to operate as an accountability agent. Thus, there may be a focus in the English model on complaint handling, but it is a model that also remains reliant on the central power of Parliament in the UK constitution. The

response of PACAC appeared to risk returning us to a 1960's perception of the role of the ombudsman, one which the PHSO himself described as 'subservient and deferential' (ibid, Q. 62).

Another arguably dated and technical aspect of the PHSO's remit also came under scrutiny in evidence to the hearing (see PACAC 2021d, 2021e). With a focus on providing a remedy to individual complaints, English Ombudsman schemes tend to conceive of this process as a one-shot option for aggrieved complainants. Hence the legislation only mandates an ombudsman investigation if the complainant has not previously pursued an alternative remedy, particularly if that alternative is a legal one (e.g. see Kirkham 2004). Where, for instance, a legal action has been brought under medical negligence, then the PHSO is statutorily barred from accepting a further complaint under ostensibly the same set of facts (e.g. Parliamentary Commissioner Act 1967, s. 5(2); Health Service Commissioners Act 1993, s. 4(1)). It has been a while since this clause has been tested in court and different interpretations are available, particularly where it can be argued that the remedy provided under the first dispute resolution route is not complete. The Select Committee inquiry provided no clear steer on the matter, although the ombudsman himself indicated support for giving the office more discretion in such situations (see PACAC 2021e). Nevertheless, the continued and long-lasting lack of Parliamentary time given to the project of ombudsman reform speaks volumes for the relative lack of Parliamentary concern with the current balance applied to ombudsman complaints. As a result, the current position remains that it is sufficient that an aggrieved party is given *an* opportunity to obtain resolution of their grievance. Further, that it is unnecessary, or unrealisable, to attempt the achievement of full justice by more than one form of dispute resolution process, or to provide the PHSO with the power to pursue investigations purely for the public interest.

Parliamentary interest in the ombudsman's broader administrative justice potential

Taken in isolation, all of the lines of inquiry pursued above would suggest Parliamentary support for a mainly consumerist model of ombudsman in England, with a maximisation of values such as short resolution times, good communication and high user satisfaction. Further, during this Parliament, PACAC (2019–21) has done little to promote the broader possibilities of the office. Admittedly, the covid pandemic has probably drawn attention away from the work of the ombudsman, but no additional inquiries into the ombudsman's work have been called and only a brief mention was made of the need for reform legislation in its previous annual review of the PHSO (PACAC 2021a, para. 41).

Even so, it is incorrect to imply that complaint handling is all that the office achieves or all that PACAC is willing to reflect upon. Ever since its inception, the office of the PHSO has pitched itself as more than a complaint handler and has shown an awareness that the consumerist model of the ombudsman is one that carries risks. Focusing purely on complaints permanently raises citizen expectations to potentially unrealistic levels as to what a complaints system can achieve. The scale of complaints in the public sector is such that most complaints have to be managed locally, and the PHSO will always have to decline to investigate large numbers of the complaints that it receives if it is to manage its workload. Moreover, even with those complaints it does investigate, most

work on complainant satisfaction evidences a close correlation between the satisfaction levels of users of public service ombudsman schemes and the outcome of their complaint (Creutzfeldt 2018). This means that complaints that are not upheld will frequently lead to dissatisfied complainants, all the more so as these will often be complainants that have been working their way through the complaints process for an extended period of time. If all the ombudsman is set up to deliver is the role of a mass complaint handler, the more it is likely to become exposed to user-dissatisfaction. The risk here is that attention becomes drawn to the adequacy of the standards being enforced by the PHSO and the office becomes portrayed as primarily designed to ‘manage’ complaints efficiently to closure rather than providing justice (Gilad 2008, Gill *et al.* 2020). These are concerns that have occasionally been repeated by user-representative organisations, such as the Patients Association (Patients Association 2014) and is an image that can be very hard to displace.

Perhaps aware of this dilemma, it is notable that the PHSO invests a significant amount of energy in promoting other aspects of its operation and that PACAC is willing to entertain the value of such work. For instance, in the year under review the PHSO produced two reports which brought together broader lessons from its investigations into health services (PHSO 2020, 2021b). For another earlier report on NHS eating disorder services, PACAC queried as to whether there was a need for it to follow-up with its own inquiry, illustrating one form of partnership work between Parliament and the ombudsman that can be very useful (PACAC 2021b, Q. 52). Perhaps of more lasting impact, the PHSO has been working with the NHS and a range of different other stakeholders on developing a set of NHS Complaints Standards (PHSO 2021a), notwithstanding the lack of specific statutory direction or supporting powers to undertake this role. Here the goal is to establish agreed complaints approaches across the health sector, a project which no other interested stakeholder, either regulator or service providers, had the incentive or possibly skill-set to deliver by themselves. This is an innovation that may next be transposed across to central government departments, and may come accompanied with improved training and ultimately better local complaint handling (PACAC 2021b, Q. 49). What will be interesting to observe for the future is how successful such initiatives can be without the extra legislative powers that schemes in Northern Ireland, Scotland and Wales already possess.

Conclusion: the pragmatic ombudsman

The 2021 PACAC review of the PHSO provides support for the claim that the current committee is broadly happy with the existing settlement for the office. Relatively little attention was paid to the wider possibilities of the office, and PACAC’s work since 2019 has consistently focused most of its attention on the PHSO’s complaint handling work. Whilst PACAC’s previous report did renew its predecessors call for new legislation (PACAC 2021a, para. 41), there is little urgency being given to the matter. The insistence that even if the MP filter were to be removed MPs should still be updated on constituent complaints implies that for this group of Parliamentarians, the office is seen more as a convenient repository for the complaints of aggrieved constituents than an autonomous actor with a duty to act in promoting the public interest and administrative justice.

This reticence of Parliament to think far beyond the ombudsman's complaint handling role is a familiar scenario for the PHSO. This entails that in the short-to-medium term if the office wants to pursue the broader accountability potential of the office it will have to continue to focus on more pragmatic options, such as through partnership working and well-chosen lines of inquiry from which systemic lessons can be drawn (Creutzfeldt and Kirkham 2020). Much good work has been achieved this way as the English ombudsman sector has sought to grapple with dated legislation, with innovation both in terms of accountability and service adaptation being a feature of the last ten years (Kirkham 2021). In fairness, Parliament has never done anything to foreclose such innovations, and PACAC and its predecessors have generally been encouraging of this form of work. For the time being, however, Parliament appears content to continue with a complainant-focused model of ombudsmanry for England that leaves service providers to get on with the business of delivering services free from the enhanced oversight that reformed ombudsman legislation might achieve.

Note

1. When Rob Behrens was originally appointed in 2016, it was for only a five-year term because the understanding at that time was that a new public service ombudsman scheme would be in place by 2021. This new scheme would have harmonised the work of both the PHSO and the LGSCO. In these circumstances, the intention was for a new ombudsman to be appointed shortly after the new scheme had been established.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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