

Written evidence from David Czarnetzki (PHO 33)

**Public Administration and Constitutional Affairs Committee
Parliamentary and Health Service Ombudsman Scrutiny 2020-21 inquiry**

OVERVIEW AND SUMMARY

I thank the Committee for receiving evidence and for conducting its review, not only into the Ombudsman’s latest report, but also the last five years performance.

Committee members can enhance their understanding of the historic and continuing issues by becoming familiar with the following publications:

1. The report of the Independent Panel into the murder of Daniel Morgan published on 15th June 2021. This panel, chaired by Baroness O’Loan, identified what constitutes **“Institutional Corruption”** within a public body. Whilst that particular report focused on the conduct of the Metropolitan Police, the definition can equally be applied to PHSO given the weight of unchallenged public evidence submitted in recent years and the Ombudsman’s responses.
2. The book **“What’s the point of the Ombudsman”** published in June 2020 and also available as an e book, gives detailed accounts of the similar journeys undertaken by complainants on both the health and parliamentary side. This book provides a unique insight into the difficulties and obstacles complainants face when, having approached PHSO in good faith, they frequently find reports issued are unbalanced and do not reflect the evidence they presented to the Ombudsman.
3. The website **PHSO true story.com**. The section **‘Reform Agenda’** was written many years ago and much of it holds as true today as it did then.

SECTION A – HISTORICAL EVIDENCE

The Ombudsman has, without proper explanation for his actions save to say that the co-ordinator of PHSOtheFacts has made ‘serious and unfounded allegations’, unilaterally severed all communication with anyone associated the group. I have seen nothing from him, over at least four years, to quantify why he considers the serious allegations are ‘unfounded’. Matters came to a head for me at the Ombudsman’s 2019 open meeting in Manchester when, after the event, he published on his website a deliberate misrepresentation of my written questions. Ignoring or misrepresenting evidence submitted by complainants is a frequent, well founded criticism laid against the Ombudsman and falls within the definition of **Institutional Corruption** as defined by Baroness O’Loan.

I place in evidence my letter of 11th May 2021 to Linda Farrant, Chair of PHSO Audit, Risk and Assurance Committee.

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Dear Ms. Farrant,

I write to you in your capacity as Chair of PHSO’s Audit, Risk and Assurance Committee, and note the Committee has, within its remit, responsibility for:

- *Corporate Governance*
- *Upholding standards of propriety*

I raise my concerns, evidenced in the attached correspondence, that the Board in general, and the Ombudsman and his staff in particular, display serious failings in both the above areas.

As a result of the failure of Mr. Behrens and Elizabeth Davies to positively respond to Ms. Reynolds letters, this correspondence is initially being sent to you directly and in confidence.

*The attached e mail, (**Document 1**) sent by (*PHSO employee details redacted) to (redacted) on 30th April 2021, is the catalyst for writing this letter. The final line states:*

“The Ombudsman has previously indicated that due to serious and unfounded allegations, PHSO is no longer formally engaging with you in correspondence”

The clear inference is that PHSO holds personal information concerning (redacted) it considers contains serious and unfounded allegations. It is for (redacted) to decide whether to pursue this through a Subject Access Request

Request for action

I ask where the issues go from here. Going forward, what I, and others, seek to know is the following:

- *What precisely is Mr. Behrens issue with PHSOtheFacts? Is it a personal issue with (redacted) or the group as a whole?*
- *If the latter, how does PHSO want to communicate with us as members of the public. It seems ludicrous that neither Mr. Behrens nor Elizabeth Davies will respond to the letter of 22nd April, written on behalf of 25 people just because it had (redacted) name on it. Would PHSO prefer us each to send the same letter individually (which I now enclose).*
- *I am also associated with another group called NHS Complaints and Investigations. Has Mr. Behrens blocked contact with that group? I have no information that he has. If his issue with (redacted) is a personal one, you should accept this letter from me as written in a personal capacity.*
- *What precisely are the issues Mr. Behrens finds serious and unfounded? To make such bland accusations, mostly aimed at a particular individual diminishes perception of the Ombudsman to one of a petulant child in a school playground.*

*I ask that you personally acknowledge receipt of this letter by 20th May 2021. Acknowledgement from (*PHSO employee details redacted) or other PHSO staff, including Mr. Behrens, will not be acceptable*

In addition I ask that both you and Mr. Behrens examine this letter, and its attachments, to verify that PHSO identifies no error in the content. If PHSO has any dispute as to the evidence, you should notify me by Thursday 27th May 2021.

I consider the Board has not fully fulfilled its governance responsibilities. I request your personal final response to be returned by Thursday 10th June 2021 (within 14 days of 27th May)– the precise length of time PHSO required me to respond to one of your draft reports. This should include a response to the letters sent by Ms. Reynolds in October 2020 and 22nd March 2021 on my behalf and which I now submit personally.

Receiving your letters of response as an e mail and/or attachment will suffice.

I ask that you now examine and respond to this letter and the evidence of the attached documents in detail.

*(redacted) wrote to the Board in October 2020. The Board did not respond. Having given the Board ample time to do so, she posted the letter on the group’s website <https://phsothetruestory.com> on 15th March 2021. The website page is attached to provide your easy access to the original letter (**Document 2**). It has, so far, received 12 comments including one from me. In keeping with this post, Ms. Reynolds also wrote the attached letter (**Document 3**) to Elizabeth Davies on 22nd March on behalf of herself and a further 25 individuals. It was this letter that prompted the response from (*PHSO employee details redacted).*

I appreciate you were recently appointed as Chair of the Audit, Risk and Assurance Committee on 1st March this year. It is important you understand the history of this complex issue.

On 10th October 2017, Mr. Behrens met some members of our group at Millbank Tower during which he made no comment about “serious and unfounded allegations”. He had only been in post for about six months and there was hope he would recognise and demonstrate understanding of the issues neglected for so long by his predecessor, highlighted in negative reports aired at, and reported by, the Health Select Committee on 23rd January 2015.

*Following the meeting, (redacted) wrote to Mr. Behrens on 23rd October 2017 (**Document 4**). The letter was courteous in tone but firm in content, and fairly expressed the consensus of opinion within our group. The letter did not accuse any particular individual of corruption and, from my point of view, reflected the ongoing issues we were encountering as individual complainants.*

*The Oxford Dictionary definition of corruption is “affect or harm by error or alteration’. Mr. Behrens provided his response on 22nd November (**Document 5**). Since he wrote the letter, it is clear Mr. Behrens considers (redacted) “persona non grata”. The section regarding his future relationship with PHSOtheFacts is particularly relevant.*

He had an uncomfortable time when he met the group the previous month and, having attempted to control the meeting with his own agenda, did not seem to positively respond to ours. The subsequent blockage in communication was created by his interpretation of the word ‘corruption’. I used the phrase ‘institutional arrogance” to describe my experience with PHSO in my presentation at the meeting. This was a phrase he seemed to accept. It is to the continued shame of the organisation this arrogance still remains at the highest level.

So what was Mr. Behrens objective? In my opinion his plan was to get the group together, ‘listen’ to the issues and then find some excuse not to deal with us as a group, and follow a strategy of divide and conquer. This became clearer to me when Mr. Behrens discourteously

failed to respond to my letter of 25th November 2017 (Document 6) in which I clarified the position, particularly in relation to the Police response to our meeting with them.

Mr. Behrens wrote to Sir Bernard Jenkin on 1st February 2018 (Document 7). I ask that you note his comment about a 'useful meeting' with PHSOtheFacts, a group he had already severed communication with just over eight weeks earlier. The inference is that he found the meeting useful, not from a content point of view, but as an opportunity to disengage.

To this day it remains the position that PHSO staff are considered to be above the law when it comes to the offence of Misconduct in Public Office. Mr. Behrens was incorrect to state allegations of wilful misconduct were rejected by the Police (as he did on page 2 of document 5). The Police position, as conveyed to me in writing at the time, was they had no power to investigate. There is a vast difference between the two positions articulated by the Police and Mr. Behrens.

*It remains the case that any criminal misconduct by a PHSO employee cannot be progressed through the legal system according to the Police. My own case, highlighted at section B of my October 2017 letter, shows how PHSO refused to even hold an internal disciplinary enquiry into non-criminal actions by PHSO staff. The issues were raised with (*PHSO employee details redacted) who at that time, was an Executive Director at PHSO and did nothing. I had given my formal written complaint to Mr. Behrens at the October meeting.*

This presents a governance issue for the Board. If the Police have no power to intervene in any activity by PHSO officials that might be criminal or corrupt, how does the Board propose to expand and improve the seemingly lax disciplinary processes existing at PHSO?

I now move forward to the scrutiny session of the 2018-19 PHSO Annual Report by the Public Administration and Constitutional Affairs Committee (PACAC). The public evidence, recorded on the PACAC website, included a submission by (redacted). Her evidence included a serious and well-founded allegation of a major data breach at PHSO of which you will, or should be, fully aware. It is to her credit she did not magnify the breach and submitted her evidence with details of the individuals redacted. You will agree this is the action of a responsible citizen bringing a serious failing of PHSO to the notice of the authorities in a responsible way. It is to Mr. Behrens eternal shame he did not acknowledge her contribution with a letter of thanks.

It is important to understand how her ability to approach Mr. Behrens directly with the information had been compromised by his earlier decision not to communicate.

My evidence to the committee can be found at reference HOS001. I drew attention to the conduct of the PHSO open meeting, which I attended, held in Manchester in October 2019. Delegates to that meeting were invited to submit questions prior to the meeting and assured they would be answered on the PHSO website if time precluded them from being addressed at the meeting. My evidence to PACAC reproduced my questions sent to PHSO in advance regarding Police not having power to investigate Misconduct in Public Office at PHSO. I was not surprised the questions were not allocated for a response at the event. However, the text of my original questions were altered substantially, allowing PHSO to provide an unrelated answer on their website.

This raises another governance issue for the Board. If PHSO openly alters the questions asked at a public meeting, how can complainants have confidence their complaints are not altered to suit the PHSO investigation process? The short answer is they can't and it has been the failure of Mr. Behrens to personally understand the impact of this situation on complainants or his reputation.

A short exploration of PHSO on Trust Pilot will demonstrate my point. Nearly 60 negative reviews have been posted since January 2020.

*Mr. Behrens wrote to Sir Bernard Jenkin on 5th February 2019 (**Document 8**). One of the PACAC members, Rupa Huq, had raised a point about PHSO failure to publish minutes of Board meetings. Mr. Behrens response was:*

“This was an oversight and we are grateful to the Committee for bringing this to our attention. We can assure you that all Board minutes have now been published and we will continue to publish them routinely”.

Less than two years later we find nothing has changed. Publication of the minutes for the December 2020, January and February 2021 meetings were delayed and all promulgated simultaneously at the end of April 2021, just as Parliament went into recess. I personally made two Freedom of Information requests asking for publication. I suspect others did the same and it demonstrates how the failure to publish led to extra work for your Information Rights Officer.

This is a serious failure of governance by the Board. It is the Board's responsibility to ensure minutes of its meetings are published. The Board should now question the PHSO executive about the delay, particularly in light of Mr. Behrens response to PACAC in document 8.

Minute 3.1 of the February 2021 meeting will be of particular interest and concern to the public and has already created interest from some politicians and the press.

PHSO admit having 2,600 unallocated health complaints and the Board has approved that there will no longer be full investigations for those where the claimed injustice is at Level 1 or 2 of PHSO's severity of injustice scale.

The governance issue here relate to:

The setting of the criteria for level 1 and 2 and is it subject to arbitrary change by the Ombudsman or does it need Board approval?

What is the policy if complainants disagree with the criteria their complaint is placed in or if they subsequently provide additional evidence?

This is a travesty. Complainants who have waited patiently in the queue for a prolonged period of time are to be ceremoniously dumped. The process smacks of pre-determination and confirms the unaccountability of PHSO. I note that, as I write, two and a half months has passed with no effort made to inform PACAC who should convene to apply scrutiny to this major change. The Courts have similar issues with a backlog of cases, but there is no suggestion of dumping minor cases of theft for example.

PHSO is in a period of decline and those within the organisation should not be surprised at the sustained valid criticism and occasional satire of which it has become the subject. Mr. Behrens 2018-21 strategy has failed to provide the exemplary Ombudsman service he aspired to. There is a saying 'Justice delayed is justice denied' and the new policy at PHSO can be interpreted as 'Justice denied is justice denied'

Having approved the strategy of not investigating complaints, the Board has not exercised governance in ensuring Parliament be informed prior to implementing the new arrangements in order for PACAC scrutiny to take place. There is no published evidence to show whether the Board made any risk analysis of how this decision might increase the cases of litigation against the NHS by complainants and the workload of NHS Resolution.

Amanda Amroliwala is recorded as stating, at item 3.6 of the Board minutes dated 30th January 2020, that there remained a small group of vocal and challenging critics who were unlikely to ever be supportive.

The issue the Board failed to explore, from a governance point of view, is whether the small group has valid and evidenced criticisms. This letter and associated papers demonstrates we do.

Personally, I have some sympathy for the Ombudsman and the difficult position he finds the service in. The Covid crisis, a budget cut and major relocation have inevitably taken his eye 'off the ball'. It remains disappointing he will not constructively engage.

The Ombudsman service was described as 'not fit for purpose' in 2015. It lacks robust governance and external scrutiny. The reforms proposed in 2015 were totally inappropriate and the need for a proper Judge led public enquiry into NHS complaint investigations is long overdue.

The bigger picture is that those of us who have become embroiled in this field, PACAC, PHSO, PHSOtheFacts and other complainants all actually want Ombudsman reform. The Board decisions approved on 18th February 2021 will undoubtedly diminish the service further and betray the trust of the public and cause reputational damage to the Ombudsman.

It is disheartening that Michael Gove has no plans to put this reform on the agenda until after 2023-24 and maybe not even then. In the meantime there will more enquiries, with tragic findings, such as those reported by Baroness Cumberlege, Dr. Bill Kircup and Donna Ockenden in the latter half of 2020, coupled with the continued failure of PHSO to meet its raison d'etre.

*Yours sincerely
David Czarnetzki*

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**Copies of the documentation that accompanied my letter to Ms. Farrant can be supplied to the Committee ahead of the hearing if required.*

The Committee is asked to note the difference between the tenor of my letter, asking relevant and pertinent questions not related to my own case, and that of the PHSO response which I

consider to be aggressive, bullying and deliberately devoid of answers. If written to a less robust individual, it would undoubtedly cause severe distress and possibly exacerbate mental health issues. PHSO Trust Pilot entries provide evidence that such arrogance by PHSO is not unusual. I must correct the official PHSO response about the court case. The Judge ruled he lacked jurisdiction, not a lack of legal merit as PHSO describe.

I place in evidence the text of the PHSO Email response (PHSO employee personal details redacted)

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Dear Mr. Czarnetzki

I write in response to your emails of 28th May and 11th June 2021.

You contacted me to notify me that you had written to Ms. Farrant on 11 May 2021 raising issues for her to consider with documentary evidence. You imposed deadlines requiring M.s Farrant to acknowledge the letter by 20th May 2021, to advise you by 27 May 2021 if she had issues with the facts as you described and to provide a formal response by 10th June 2021. Your correspondence to M.s Farrant has now been referred to me to respond.

Your correspondence mentions issues which it is apparent are raised on behalf of 'PHSOthefacts'. We have been clear in the past as to why we consider the behaviour of 'PHSOthefacts' to be unreasonable and that in view of this behaviour it has been necessary to cease to engage with the group and its members.

It is important to say that we have a duty to prioritise the use of our resources and to act proportionately. We will do our best to respond to issues raised by complainants in relation to their own cases and similarly, we will respond to more general issues raised by members of the public where it seems right to do so. We have corresponded extensively with you about your case and the subsequent legal proceedings you issued. On 30th July 2019 the Court ordered your claim to be struck out due to having no legal merit. Since this point you have written repeatedly to criticize PHSO and its operations.

Given your clear association and identification with 'PHSOthefacts' and therefore with their refusal to behave reasonably we must take the same approach to correspondence from you as we do to correspondence from 'PHSOthefacts'. The Board Members provide PHSO with oversight, leadership and stewardship in relation to the governance of the organization but it not their role to comment, decide or intervene on individual cases or to correspond with complainants on matters arising from them.

Sending correspondence to Members of the Board and imposing timescales for a response does not change their role and does not oblige them to respond within the timescales you have imposed or at all. Further your characterization of matters as 'governance' matters does not mean that they are, in fact, governance matters. Your complaint that Ms Farrant's failure to respond amounts to a Board Member ignoring governance matters is rejected.

We will not therefore be providing a response to the points that have been raised in your letter but can say that Ms Farrant nor I have seen any issues of concern with regard to

matters raised. Furthermore we do not accept your view that our not responding amounts to an acceptance of your allegations or a failure in the governance of PHSO.

Our views will not be changed because of threats to make issues public. We consider the correspondence in this matter is now closed and we will not be acknowledging or responding to any further correspondence from you or 'PHSOtheFacts'.

We will continue to review our position with regard to the unreasonable behaviour of 'PHSOtheFacts' for which of course each participating member is personally responsible.

We are not aware of the group 'NHS Complaints and Investigations' but would suggest that if they wish to correspond on general matters with the Ombudsman, it would not be sensible to do so via members of 'PHSOtheFacts' whilst 'PHSOtheFacts' maintains its present stance.

Parliamentary and Health Service Ombudsman

THE KEY POINTS FOR PACAC TO CONSIDER AS A RESULT OF THIS EXCHANGE

- 1. Note the tone of response. I consider it a crude, unprofessional attempt to deflect from answering valid questions. Rather than address criticism, the Ombudsman expresses unwarranted hostility to his critics and has never identified or defined what he considers 'serious and unfounded allegations'.**
- 2. The inevitable consequence of the PHSO reply is I have reported the matter to the Information Commissioner, regarding this as a failure to comply with a Freedom of Information request. The Commissioner confirmed, on 4th October 2021, there is no need in law to use the phrase "Freedom of Information" when making requests and has advised that I give PHSO an opportunity to review their failure to comply. I sent PHSO an email in line with ICO instructions on 4th October and a reply is promised by 1st November 2021, too late to be included with this submission.**
- 3. I ask that, as PACAC is not a member of PHSOtheFacts, the committee itself now ask these pertinent questions, raised in the public interest, regarding PHSO governance to elicit the answers.**
- 4. The Annual Reports for 2019-20 (page 63) and 2020-21 (page 59) both state: "*In law the Parliamentary and Health Service Ombudsman is a Corporation Sole and has personal jurisdiction. This is not consistent with the requirements of good governance". The failure of the Board to give properly scrutiny and then acquiesce to the conduct of the Ombudsman regarding the governance issues raised in the correspondence has to be an issue of major concern.***

OTHER MATTERS ON WHICH THE COMMITTEE HAS ASKED FOR EVIDENCE

Bullying and Harassment.

Bullying at PHSO is not confined to being inflicted on the complainant. I draw the Committee's attention to the PHSO Staff Survey published 18th March 2021, page 25:

9% of staff admit to have suffered discrimination and 8% prefer not to say (total 17%).
12% of staff admit to have suffered bullying or harassment and 5% prefer not to say (total 17%).

Staff responding by preferring not to say can also be properly construed as ‘too frightened to say’ and as a consequence it has to be significant that **one in six** members of staff have not responded with enthusiasm for the current culture.

Board meeting minutes

As I make this submission, no minutes of Board Meetings have been published on the PHSO website since March 2021, despite the promise, by the Ombudsman in his letter of 5th February 2019, to the former chair of PACAC. The inevitable conclusion is the Ombudsman and his Board of Directors all have a ‘cavalier’ attitude to PACAC scrutiny and have broken an undertaking made to the committee, bordering on contempt.

**Note: Minutes of Board meetings held on 25th June and 7th July 2021 were published together week commencing 11th October (only after my FOI request of 4th October)*

It is also in the public interest for PACAC to address the ‘leveling down’ of investigations as reported in the Board Minutes of 3rd February 2021 (minute 3.1).

Impact on other organisations

I can report a freedom of information request I made to PHSO concerning Ombudsman costs was ignored and my subsequent complaint to the Information Commissioner upheld. PHSO’s Annual Report contains an admission of self reporting two data breaches to the Information Commissioner. A subsequent Freedom of Information request (the letter to Linda Farrant) has created further and unnecessary work for the Information Commissioner (see key point 2 above).

Issues are still arising from the Ombudsman failing to quash flawed reports. As a result of this, I have an ongoing issue with the Information Commissioner, escalated to First Tier Tribunal. This PHSO failure has created substantial work for my MP, the Tribunal, the ICO and the NHS Trust involved since 2018 (the date the Ombudsman recognized his initial report was flawed). Of greater importance is the fact that, having issued a flawed report, the Ombudsman failed to notify the Trust and that failure had to be addressed by my MP. The problem is the individuals involved left the Trust in the interim and can now continue to work in ignorance of the mistake in another setting.

Not bringing timely notice of a revised report to an NHS Trust can only add to the work of NHS Resolution who spent approximately £4billion on legal fees in each of the last 2 years. The Committee might like to identify how many reports has PHSO quashed, by its own hand, since reporting the change of policy to Sir Bernard Jenkin.

CONCLUSION – SECTION A

On 28th September 2021, PACAC published the Government response to the Committee’s 2nd Report of Session. In the original report, PACAC reiterated their previous recommendation of fundamental reform of PHSO governance.

The Government response is:

“We partially accept the recommendation. The work reforming PHSO has been paused and will require significant legislative time. The Government is considering how it can reform Ombudsman arrangements for the United Kingdom (government departments and agencies) and England (health)”.

The issues do not relate to PHSO alone. There are major issues of concern within the wider Ombudsman community, some of which have been recently highlighted by a reporter, Harry Brennan, of the Daily Telegraph. These are of sufficient concern that Lord Sikka has called for an enquiry.

Before the Government can begin to consider how to reform Ombudsman arrangements, a full and wide ranging enquiry into failures within the sector should commence without delay in order to make good use of the ‘pause’ in the Government’s own work. I ask PACAC to add their support to Lord Sikka’s call.

This lengthy submission is born of necessity. The exchange of correspondence is reproduced to inform the Committee in the interest of openness and transparency. It remains to be seen whether the Ombudsman and his Chief Executive continue to approach my valid, evidence based criticisms with their usual hostility to me personally and also to the wider group who have been victims of his failures. I ask the Committee to address these issues, as not doing so can only diminish the effectiveness of the Committee in the eyes of the public. I have been critical of the low level of Ombudsman scrutiny previously witnessed and have written to the Committee Chairman about this. I was appalled that, at the last hearing, much of the evidence previously submitted by the public was not addressed in a satisfactory way, yet the session promulgated to last two hours was completed in just over ninety minutes.

Now the Committee is calling for evidence relating to the whole of the current Ombudsman’s tenure, it is incumbent on the Committee to scrutinise the Ombudsman and his Chief Executive incisively, showing real teeth as opposed to loose fitting sets of dentures.

SECTION B – PARLIAMENT LEGISLATING TO MAINTAIN CONFUSION AND FAILURE

This section of my evidence relates to the draft Health and Care Bill currently in Committee Stage of its passage through Parliament.

On 18th October 2021, the Venice Commission gave an opinion (number 1044/2021) on the legitimacy of the Health Service Safety Investigation Branch (HSSIB) having the ability to prevent PHSO from accessing protected information held by HSSIB.

On 19th October 2021, the Ombudsman wrote to the Joint Health and Care Bill Chairs. He gives unqualified support for the findings of the Venice Commission.

I have read the draft bill and it is flawed in the area of NHS and Care complaints. On 1st August, I wrote to Keith Conradi at HSIB who courteously responded on 16th August. I did wish to also obtain the views of the Ombudsman but his email response, evidenced in Section A, made that impossible.

**The correspondence between Mr. Conradi and myself can be supplied to the Committee on request*

For the information of PACAC, I highlight the relevant areas of concern contained in the Bill:

Section 94 defines what will count as a qualifying incident for an investigation, but it also does NOT permit HSSIB to assess or determine:

- Blame
- Civil or Criminal Liability
- Whether action needs to be taken in respect of an individual by a regulatory body

Section 96 gives HSSIB authority to publish its own criteria, principles and processes for investigations. These must ensure that, so far as reasonable and practical, patients and their families are involved in investigations. The words ‘reasonable and practical’ are not defined.

Sections 97, 98 and 99 deal with the way final, interim and draft reports are submitted and circulated. However, it is **Section 101** which states these reports are NOT admissible in the following proceedings unless sanctioned by the High Court;

- Determining criminal or civil liability
- An employment tribunal
- Before a regulatory body (such as the GMC)
- Any appeal regarding the above.

Section 102 gives HSSIB wide powers of entry, inspection and seizure of documents. Subsection (1)(a) specifically prohibits entry into private dwellings. With recent developments in home working, this could be a flaw.

Section 110 provides a list of organisations HSSIB must co-operate with where investigations overlap. PHSO is on the list but the Local Government Ombudsman, who has responsibility for investigating care complaints is not.

Schedule 15 of this Bill will amend **Schedule 2, Parliamentary Commissioners Act 1967**. This measure will add HSSIB to the organisations subjected to PHSO investigations.

Taken together **Section 110** and **Schedule 15** are unlikely to ever be seen as compatible in the eyes of the public. To create an obligation for the two organisations to co-operate and then have one responsible for investigating the other will push credibility beyond its limit.

The Cabinet Office has consistently set itself against developing Ombudsman reform before 2023-24 and is on record as saying such reform is ‘paused’. If that be the case, the ‘pause’ should be used to good effect and an enquiry commenced as outlined in my conclusion to Section A.

CONCLUSION – SECTION B

My view of these issues remains constant in that:

- PHSO should have no part in the investigation of health and care complaints

- All health and care complaints should come under the umbrella of HSSIB with twin tracks for safe space and complaints currently overseen by PHSO
- PHSO and LGO should be merged into one new body to investigate their areas of responsibility except for health and care.
- Such reorganization would give public greater confidence in that they have a ‘one stop shop’ to which complaints, unresolved locally, can be referred and properly investigated by people with the relevant expertise.
- If the bill passes un-amended, the public will have no idea where to go. Will their complaint be seen as ‘systemic’ and go to HSSIB or ‘incidental’ and be investigated by PHSO.
- The legislation as proposed will drive the public towards claims for clinical negligence and away from seeking resolution via HSSIB and PHSO.

Despite my criticisms of the Ombudsman service, I applaud Mr. Behrens for coming out so strongly against this proposed legislation. However, his opposition to the Bill is based on the Venice Commission opinion. My opposition is as a member of the public who, having been through the process, can only see more confusion and failure. PACAC itself has called for Ombudsman reform and should forcefully do so again. I ask the committee to support having this Bill amended and also call for an enquiry to be conducted during this period of ‘pause’. Failing to do so will only lead to a lack of public confidence and place additional burden on NHS Resolution.

SECTION C - THE LEGALITY OF THE OMBUDSMAN REMAINING IN POST

In April 2021, the Cabinet Office wrote to the Committee seeking its view on extending the Ombudsman’s contract beyond 2022, stating he is best placed to see the organization through its new three year strategy. I would argue he is not best placed to change the existing culture having presided over it for nearly five years. There are also two further questions:

1. Will his professional integrity allow him to serve as Ombudsman if the Health and Care Bill went through without amendment, bearing in mind his strong objection to the proposed reduction of his powers?
2. Will that same professional integrity allow him to be party to an extension of tenure not permitted by law?

With regard to point 2, I remind the committee of the Parliamentary Commissioners Act 1967.

Section 1 (2A) A person appointed to be the Commissioner shall hold office until the end of the period for which he is appointed

Section 1 (2B) That period must be not more than seven years

Section 1 (3B) A person appointed to be the Commissioner is not eligible for re-appointment.

In the letter from the Chair of PACAC to the Ombudsman dated 22nd July 2021, it is clear that the Ombudsman was appointed for five years.

CONCLUSION – SECTION C

Any extension, whether to amend a ‘discrepancy’ or otherwise, will be a breach of the law and neither the Committee, nor the Ombudsman, should be party to such a breach.

Attached to Michael Gove’s letter of 30th April 2021 is Annex A. (A summary of the Parliamentary and Health Service Ombudsman).

Within the section entitled background it states “The Parliamentary Commissioner Act 1967 provides for a Commissioner to be appointed to the PHSO for a single, non renewable term of seven years”. This wording conveniently omits the words “not more than” contained within Section 1(2B) of the legislation as above.

The Annex states legal advice has been sought which suggests the PCA 1967 does not preclude this extension, yet the Parliamentary Commissioners Act 1967 is perfectly clear. Mr. Behrens has five months of his term of office left and the search for his successor should commence immediately. In the event the recruitment and appointment process has not been completed by 31st March 2022, there is scope, under Section 3 of the Act, for Mr. Behrens to be temporarily appointed as an Acting Ombudsman until his successor is appointed or for a period of 12 months whichever is the sooner.

I also refer PACAC to the exchange of letters dated 22nd July and 19th August 2021 between the Rt Hon Peter Riddell CBE, Commissioner for Public Appointments and Michael Gove at the Cabinet Office regarding delay in making public appointments. Mr. Gove’s response to Peter Riddell is not compatible with his letter to PACAC dated 30th April 2021.

The Government should be informed accordingly.

October 2021