

Report of the FEFC Ombudsman 1998~99

1 *My terms of reference provide that I shall submit an annual report to the Council, which will, in*

turn, make it publicly available. This report covers the period from 1 August 1998 to 31 July 1999, my third year of report.

2 *I was appointed on 26 July 1996 for the period to 31 July 2000. My appointment is set in the context of the conduct of the Council's business in FEFC Circular 96/24 (30 September 1996). My terms of reference appear in full in the annex to FEFC Circular 96/25 (30 September 1996), as corrected in a circular letter from the Council (16 October 1996); and again, more recently, in Circular 99/03 (29 January 1999).*

Support

3 I have continued to receive the assistance of the secretary to the Council (and acting secretary) on matters relating to the operation of my office. It has not yet been necessary for me to avail myself of the arrangements made for me to have access to independent legal advice.

Complaints

4 I am empowered to receive and consider two classes of complaint: those from institutions concerned about the Council's administration, and those from the Council's own staff concerned about compliance with the Council's code of conduct.

Complaints from Institutions

5 As in previous years, I have received several informal communications during the year about the possible reference to me of a complaint. None of those enquiries call for comment in this report. I reported last year that a complaint to me from College D was still under investigation. I report on the outcome of my consideration of that complaint below.

6 On 25 February 1999, College E referred a complaint to me about the Council's handling of the consideration of the weighting to be applied within the Council's funding methodology to London area costs. The complaint was subsequently supported by College F (3 March 1999). Having satisfied myself that the Council's own internal complaints procedures had not been fully used in relation to this complaint, I so advised Colleges E and F on 15 March 1999. The matter has not since been referred back to me.

7 On 1 June 1998, I received a complaint from College D. I accepted the complaint for consideration on 10 June 1998. In considering the complaint, in addition to considering the copies of the correspondence provided to me between the college and the Council's officers, together with a considerable volume of supporting documentation, and including all the correspondence relating to both stages of the college's use of the Council's internal complaints machinery, I also:

- a. asked for, and received, further specified documentation from the college;
- b. visited the Council's offices to review all the relevant files;
- c. asked for, and received, further specified documentation from the Council;
- d. interviewed Council officers, including the chief inspector, the relevant regional senior inspector, the chief auditor, the secretary to the Council, the (then) acting secretary to the Council, and the responsible audit manager;
- e. asked specific questions in writing of, and received replies from, the chief inspector, the chief auditor, and the chair of the college governing body, and;
- f. discussed the factual content of my report on the complaint (that is including my findings but *not* my recommendations) at draft stage with the chair of the college governing body and the principal of the college; and with senior officers of the Council.

I am grateful to all the parties for their co-operation.

8 The college complained of maladministration in that, in dealing with the college's concerns over the conduct of the audit service of the Council in connection with the college's recent full inspection, the Council:

- i. failed to deal properly with concerns about inconsistency of judgement;
- ii. failed to deal properly with issues about the treatment of evidence;
- iii. insisted (by inference improperly) on a prescribed management style, and;
- iv. used a pejorative style of reporting involving sophistry and misquotation.

9 My report was sent to the parties on 14 November 1998. In summary, I found that the first, third and fourth legs of the college's complaint were not made out, but that to a limited extent (which I specified in detail) the Council had failed to deal properly with issues about the treatment of evidence. There was no evidence of, nor any suggestion of, any associated financial loss; nor did I consider that any financial compensation was appropriate. I therefore recommended that *the Council should fully accept and acknowledge the points I had made in its response* (that is, to my report) *to the college*. It has done so.

10 FEFC Circular 99/03 (consistent with FEFC Circular 96/25, which was then still in force) provides that the Council will normally respond (to the complainant) to any recommendations I make within one month. The Council's response was issued on 19 January 1999 which, given that this was the first occasion on which it had had to

consider a substantive report from me, and given the intermission of the Christmas/New Year break, I regard as being within the spirit of the circular.

11 I deal further below with the Council's handling of my report; and with the wider issues identified during my consideration of the college's complaint.

Complaints from Members of the Council's Staff

12 There have been no enquiries from members of the Council's staff. No complaints from members of the Council's staff have been referred to me during the year.

Other Matters

Council Internal Procedures, and Communication with the Chairs of Governing Bodies

13 As an integral part of my consideration of a complaint, my terms of reference explicitly provide that I may make recommendations about the future handling of similar issues. A number of such points arose in connection with my consideration of the complaint made by College D. In summary, they concerned:

- i. the provision of definitive versions of relevant documents;
- ii. the appropriate involvement of senior Council officers in routine 'consistency checks' of certain draft reports;
- iii. clarity about the simultaneous use of two differing grading systems (for inspection and audit assessments respectively), and;
- iv. communications with college governing bodies.

I made recommendations to the Council in respect of all these matters.

14 With the exception of point (iv), the Council indicated that it had found my recommendations helpful; and I am assured that appropriate changes to internal Council procedures have been made.

15 During my consideration of the complaint, I became somewhat concerned by some aspects of the Council's methods of communication with the governing body of College D. I was fully satisfied that those concerned had followed normal Council practice: and I was equally satisfied that there was no failure in that practice. But I was also of the opinion that the sequence of events showed that further consideration needed to be given by the Council to its standard patterns of communication with governors (and consequently with the chairs of governing bodies) at least in relation to some aspects of the Council's work.

16 My concern focused essentially on the Council's practice, in relation to matters of governance, of relying on its well-established standard practice of communicating with colleges through the college principal (the college's chief executive); and communicating directly with governing bodies (through the chair) only rarely.

17 Most colleges (like College D) are, by statute, exempt charities, whose governors are therefore in the position of trustees. The principal is an important member of the governing body, but he is only one of the governors. The governors elect their own chair, in whom is vested the leadership responsibility for the governance of the college (and, from time to time, the leadership responsibility for the appointment of a principal). I therefore recommended to the Council that it should consider whether, on matters of governance, the primary point of policy contact in the college should be the chair of governors.

18 The Council did not accept the thrust of my recommendation. The Council takes the view that the charitable status of colleges does not mean that its main contact on governance matters should be the chair. The Council quite properly indicated that it was not aware of (any) widespread concern in the sector about the present arrangements, but undertook to consider its conclusion further should such concerns become apparent.

19 Following the publication of the Council's report on the investigations into the alleged irregularities at Halton College (published April 1999), I raised this matter again with the Council (3 May 1999). The Council reaffirmed its previous position, while assuring me about particular circumstances in which it would invariably communicate directly with the chair of the responsible governing body (for example, where an allegation made to the Council directly implicates a college principal). I was also informed that the matter had not been raised at all during the then recently completed cycle of annual regional meetings with the chairs of governors.

Consideration of my Reports by the Council

20 At the point when my report on the complaint made by College D was being completed for sending to the college and to the Council, it became clear that the Council had not previously given detailed consideration as to how best to discharge its responsibility to respond to reports from me. I made it clear (15 November 1998) that in my view my reports should be seen by the full (FEFC) Council.

21 The Council considered the matter in December 1998 and decided that delegated authority should be given to its chair to receive and respond to my (final) reports, with advice from the chair of the Council's audit committee. It also decided that the chair of the audit committee should report to the next meeting of that committee on any advice given; and that the committee could then report to the Council if this was thought necessary.

22 This is entirely a matter for the Council to decide. However, I have also considered the possibility, provided for in FEFC Circular 99/03, that a complaint may be made to me following the Council's consideration of a complaint made against the chief executive (of the Council) personally, in which case the complaint falls to be dealt with *in the first instance* by the chair of the Council. I am satisfied that in any such case the consideration of my report must lie with the full Council.

Distinction Between Appeals and Complaints

23 The complaint from College D related to alleged maladministration in connection with that college's then recent full inspection. Some enquiries that I have received about the possible making of a complaint have related to similar matters where the college concerned has been aggrieved about the substance of the Council's decision or stance, as well as about the process(es) by which the Council arrived at its position. It has therefore become clear to me that I should emphasise in this annual report the distinction between the consideration of a complaint (or an appeal) by the Council and/or its officers on its behalf, and consideration by me as the independent FEFC Ombudsman. In accordance with my terms of reference, I am explicitly barred from considering the merits of a decision properly reached by the Council, including its policies or judgements (*a paraphrase of part of paragraph 4 of my terms of reference as set out in FEFC Circular 96/25 and FEFC Circular 99/03*). It will be apparent that this distinction is a particularly difficult one to make in the context of a complaint of maladministration which relates, for example, to an inspection, especially if it were

to appear that it might be the case that a failure of due process might have been a contributory factor in the making of a particular judgement.

24 This distinction is an important one, common to the work of (almost) all ombudsmen. Only if it becomes apparent that the making of a decision was tainted by maladministration does the substance of an issue (as opposed to matters of due process) become potentially my concern. It would then normally be the case that the substantive issue would fall to be reconsidered *de novo* by the Council (if necessary, under appropriately modified arrangements); and that compensatory action might be called for.

Parliamentary Commissioner for Administration (the Ombudsman)

25 In late 1998 I was alerted by the Council's officers to the possibility that the remit of the ombudsman might be extended to include the work of the Council: and in February 1999 I was informed by them that the government was indeed extending the responsibilities of the ombudsman to include the Council's business. On both occasions I was asked for, and provided, some advice to the Council's officers.

26 Statutory Instrument 1999 No. 277 (The Parliamentary Commissioner Order 1999) was made on 10 February, laid before parliament on 22 February, and came into force on 15 March. It provided for a very substantial addition to the list of those bodies which 'are subject to investigation by the parliamentary commissioner for administration', among which is now included the FEFC.

27 Despite repeated enquiries by the Council's officers, the relevant government department was not able to provide any information about the precise nature of the ombudsman's relationship with the Council. The Council issued a general information letter to colleges about the new formal position on 1 April 1999.

28 Further clarification is still needed. It is still the case that important questions remain unanswered – for example, the rights of access of governing bodies/corporations, if any, to the ombudsman, whose office was essentially set up to consider complaints from individual members of the public, and then only on reference to him by a Member of Parliament.

29 Subsequent to this becoming subject to investigation by the ombudsman, the Council has been consulted by the responsible government department on the review of the public sector ombudsmen in England. The Council's response took account of the advice I had already offered.

30 Since the coming into force of the Statutory Instrument, I have invariably advised enquirers that it *might* be the case that they were entitled to avail themselves of the services of the ombudsman, but that neither I nor the Council's officers could advise them on an informed basis. At no stage have I received any relevant information from, or been consulted by, the relevant government department.

Conclusion and Acknowledgements

31 As in previous years, at the invitation of the secretary to the Council, I have offered observations to Council officers on a number of procedural matters. None of these relates to my handling, or to my consideration, of complaints.

I record here my thanks to the secretary to the Council, to the acting secretary, and to the clerk to the Council, for their assistance during the year.

John Bevan