

CHAPTER TWELVE

THE PARLIAMENTARY COMMISSIONER FOR ENGLAND AND WALES OMBUDSMEN

Constitutional and Administrative Law

The Parliamentary Commissioner

INTRODUCTION

Parliamentary Commissioner for Administration

Ombudsman is a Scandinavian word and concept. It means an officer or commissioner. In the U.K. the office of Ombudsman is one through which matters are investigated on behalf of the citizen and reports of the investigation are made to Parliament.

Creation of the P.C.A.

Early in the 1960s it was perceived by some parties that there was a widespread public opinion that there was a real need for additional constitutional safeguards. This concern was expressed as a result of:

- A. The Crichton Down Affair 1954 : This caused concern that increasing state powers left the citizen unprotected from the faceless bureaucrats.
- B. Existing methods of redress through Parliamentary channels and through the courts did not guarantee a remedy for the citizen. M.P.'s could only ask questions and seek to embarrass. The courts could only act if there was illegality or an ultra vires act by an administrative body.
- C. 1940-1960 represented a dark age in administrative law. The courts had during the war years and for some time after, appeared to side with the administration against the citizen. The 1960-1980 period has seen a renaissance of judicial activism.
- D. Other countries had tried the Ombudsman system with perceived success, eg New-Zealand in 1962 and the Scandinavian countries themselves.
- E. The Labour Party published a White Paper in 1965.

The office represented a constitutional innovation. Standard British thinking was & still is, that anything new is potentially dangerous and must therefore be limited. The P.C.A.'s functions were thus limited in scope and the constitution protected by safeguards from perceived threats :-

- a) Against an undermining of ministerial responsibility by the office of the P.C.A. Parliament's job is to hold ministers responsible. If the P.C.A. did this a major function of Parliament would be removed.
- b) Britain was the first large country to introduce the office of Ombudsman. It was believed that the Ombudsman could be flooded with work and that the system would not cope. This fear proved to be totally unfounded, though whether this was because of a lack of understanding of his role by the public, or because of the tortuous method of reaching him and his lack of power is unclear.

Appointment

This is a government appointment. He holds office during good behaviour with retirement at 65. He may be removed by an address from both Houses of Parliament. He is excluded from membership of the House of Commons. He is a member of the Council of Tribunals whose functions overlap with the Ombudsman's office.

He also does the work of the Health Service Ombudsman set up in 1972-73. There are also now lots of other ombudsmen e.g. Ombudsmen for Local Authorities in England and Wales [1974] and an Ombudsman for Northern Ireland. The Health Service Ombudsman System (and also the Ombudsman for Northern Ireland [1969] - who has special enforceable powers through the courts) allows complaints to be made direct to the Ombudsman - but the P.C.A. can only be approached by way of an M.P. filter.

Methods of Investigation

The Ombudsman has a staff drawn from the Civil Service. The first two P.C.A.'s were civil servants, though lawyers have also been used. There is no direct access to the Ombudsman by the public. Complaints have to pass through an M.P. filter. It can be any M.P.. The M.P. chooses those complaints which he considers have substance and refers them to the Ombudsman. A complainant has to raise an issue within a year of becoming aware of the situation - though the P.C.A. has a discretion to extend the time limit. The Ombudsman cannot act on his own initiative - though Sir Cecil Clothier campaigned strongly for the power to do so. Initially letters sent direct to the P.C.A. were returned to the complainant but Clothier instituted the procedure of passing the letters to the complainant's M.P. so that the M.P. could then re-submit the complaint to him.

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The P.C.A. has a discretion whether or not to investigate a complaint. **Re Fletcher's Application 1970.** A citizen sought an order of Mandamus against the Ombudsman (an order by the court to force an authority to act under a duty). The court decided they could not order the Ombudsman to carry out an investigation.

The work is free to the complainant. It is regarded as one of the services of the Welfare State. Any investigation that is carried out is private and secret. The complainant has no right to appear. The principle officer of the office concerned must be given an opportunity to comment on the matter. Burgess discusses a situation where a complainant was not consulted. The officers indulged in a cover up which was believed by the Ombudsman who gave the department a clean bill of health. Only when successive complaints were received was it realised that the earlier complaint did in fact have substance.

In carrying out the investigation the P.C.A. has considerable powers over and above the ordinary M.P. However, they are not absolute and are subject to limitations. They are subject to Ministerial responsibility. The minister may claim Crown Privilege or hide behind the Official Secrets Acts to avoid revealing information to the Ombudsman.

Jurisdiction of the Ombudsman

The P.C.A. exists to investigate complaints by individuals and Corporate Bodies where they claim to have suffered INJUSTICE as a consequence of MALADMINISTRATION. *These terms are left deliberately undefined to allow room to manoeuvre. Nonetheless attempts have been made to define them by those who suggest that they need to be defined.* **De Smith**

Injustice means something wider than legally redressable damage and includes hardship and the sense of grievance which ought not to have arisen. This has merit in that legally redressable damage is covered by the common law and does not need the Ombudsman's attention. Maladministration covers a multitude of administrative sins! **Richard Crossman**

Maladministration : Bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude (baseness, depravity, vileness) arbitrariness etc. **s12(3) P.C. Act 1967** :

The merits of a decision should not be questioned where there has not in fact been maladministration. At first the P.C.A. strictly abided by the section but a more liberal interpretation has been given as a result of prompting by the Select Committee on the P.,C.A.. At the present time the P.C.A. is prepared to examine decisions of a thoroughly bad quality. The Select Committee also persuaded the Ombudsman to investigate departmental rules of questionable quality, ie bad rules. The trend is for the P.C.A. to examine a wider range of matters than those initially embraced by the first incumbent.

The P.C.A. is not intended to be a substitute for the ordinary courts and tribunals. The idea is that it is to give extra assistance in areas not dealt with by them. The P.C.A. should not act where there is a reasonable expectation that a solution can be obtained through the judicial system, It is clear however that the P.C.A. has in fact been involved in cases where a legal remedy is available eg the Congreve Case, which by its title indicates that it did eventually go to court. This is a developing trend towards greater jurisdiction for the P.C.A. see Wade.

The following departments and authorities are within the jurisdiction of the P.C.A. Most governmental departments, see Schedule 2 P.C.Act 1967, plus subsequent amendments, but not Local Authorities or the National Health Service which have their own Ombudsmen, or the Police and Public Corporations.

Schedule 3 P.C.A. 1967 lists those matters which cannot be investigated.

- a Foreign Relations.
- b Matters occurring outside the U.K.
- c Governments of Overseas Dominions.
- d Extradition and fugitive offenders.
- e Systems of investigating crimes ie the police.
- f Civil & criminal proceedings in any court, court martial or international tribunal.
- g Security of the State including passports.
- h The prerogative of mercy.
- i Medical matters.
- j Commercial contracts.
- k Employment in the armed forces, civil servants, teachers or police.
- l The grant of honours and royal charters.

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Once an investigation has been made a report is sent to the M.P. concerned. He can also submit special reports to Parliament e.g.:

- a) The Court Line Affair.
- b) The T.V. Licences Affair.
- c) The Duccio Affair.
- d) The War Pensions Affair.
- e) The Sachsenhausen Affair.

At the end of each year the P.C.A. submits an annual report to Parliament on his doings in general. The P.C.A. is only an investigator. All he can do is submit reports. He can only hope to be persuasive. He cannot alter a decision. However, the Departments generally accept his decisions and offer a remedy. Even if they disagree as to his finding they are likely to offer a remedy though of course this cannot be guaranteed in a system such as this.

The Select Committee on the P.C.A.

This was originally set up because M.P.'s were unhappy with the way that the P.C.A. was carrying out his work (he became known as Ombudsmouse). He was made to increase his jurisdiction. The Select Committee can investigate departments to see if they have responded to the P.C.A's recommendations. They can recommend changes in the law. They can also recommend ways to develop the role of the P.C.A. They were in favour of retaining the MP filter to prevent him being swamped by cases. They were also concerned that it would reduce the role of MPs. They have so far failed to persuade Parliament to give the P.C.A. a wider role. They do not act as a court of appeal from the P.C.A.

Evaluation and reform

The Ombudsman now has a website- you can get in through parliament. It is not a very jolly place to be but it does offer some data for updating and provides examples of his workload.

1995 Annual Report- some examples of the case he dealt with.

C277/93 - Mishandling of claim for mobility allowance. Ex gratia payment of £468.27 made as compensation for late payment of benefit.

C.444/93 - Delay in the payment of sickness benefit and invalidity benefit. Ex gratia payments made totalling £4120 for delay in payment of benefit; a refund of overpaid NICs made totalling £40.05; and the recovery of an overpayment of IS totalling £232.59 waived. DSS undertook to improve communications between BA and CA in cases involving benefit.

C.470/93 - Misdirection about possible entitlement to invalid care allowance and attendance allowance; failure to give advice about disability premium; and mishandling of claim for home responsibilities protection. Extra-statutory payments of attendance allowance, disability premium, carer premium and Christmas bonuses made totalling £12,811.15. Ex gratia payments of £3,254.22 made as compensation for the late payment of benefits. Class I NIC credits awarded from December 1987.

Statistics : These demonstrate that the PCA is either under utilised or that we live in something approaching utopia- the former seems more likely.

Year	Cases dealt with	Within Jurisdiction	Fully or partly upheld complaint
1996	1679	260	246

In comparison with the past the system is working better. More complaints are received, more cases investigated, less cases rejected and more cases are upheld. For example in 1991 only 183 cases were investigated and only 87 were upheld.

In 1996 the two departments that were responsible for the most complaints were the Inland Revenue and Social Security. The 1,933 complaints had come from 566 MPs so some send none and some send more than others. The figure for complaints in any one year will be a different figure to that of cases dealt with.

For 1996 the investigations led to the payment of ex gratia sums in some cases and also the repayment of costs, the payment of arrears of benefit, the waiving of a £15,000 interest charge in a tax case and for a veterinary student the funding of his clinical training at a cost of £37,000. These are clearly examples of some success.

Bradley and Ewing provide two leading examples of the Ombudsman's investigations may be given. The Sachsenhausen case was the first occasion on which he found a department to be seriously at fault. Under

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the Anglo-German Agreement of 1964, the German government provided £1 million for compensating UK citizens who suffered from Nazi persecution during the Second World War. Distribution of this money was left to the discretion of the UK government and in 1964 the Foreign Secretary (Mr Butler) approved rules for the distribution. Later the Foreign Office withheld compensation from 12 persons who claimed under these rules because of their detention within the Sachsenhausen concentration camp. Pressure from many MPs failed to get this decision reversed and a complaint was referred to the Ombudsman.

By this time the whole of the £1 million had been distributed to other claimants. After extensive investigations, the Ombudsman reported that there were defects in the administrative procedure by which the Foreign Office reached its decisions and subsequently defended them, and that this maladministration had damaged the reputation of the claimants. When this report was debated in the Commons, the Foreign Secretary (Mr George Brown) assumed personal responsibility for the decisions of the Foreign Office which he maintained were correct. He nonetheless made available an additional £25,000 in order that the claimants might receive the same rate of compensation as successful claimants. At the time, the prevailing view was that the 'Butler rules' were not enforceable in law since they conferred no rights on the claimants, now judicial review would be possible. In 1968, parliamentary pressure alone would not have been successful. Indeed, the Ombudsman's report was based on information about the Foreign Office decisions which parliamentary procedures could not have discovered. In retrospect, it appears that the Foreign Office erred in deciding to distribute the money itself, rather than entrusting this to the Foreign Compensation Commission, a judicial body for whose decisions the Foreign Secretary is not responsible.

The most elaborate investigation ever undertaken by the Ombudsman was into the Barlow Clowes affair, which no fewer than 159 MPs had referred to him. In 1988, the Barlow Clowes investment business collapsed, leaving millions of pounds owing to investors, many of whom were elderly persons of modest means. The Department of Trade and Industry had licensed the business under the Prevention of Fraud (Investments) Act 1958 (which later gave way to the more rigorous Financial Services Act 1986), though there were indications that the business was not properly conducted. The Ombudsman found that there had been maladministration in five respects on the part of civil servants. As a result, the eventual losses to investors exceeded what they would have been had the department exercised its regulatory powers with a sufficiently rigorous and enquiring approach. The government took the unusual course of rejecting the findings of maladministration, but nonetheless undertook *ex gratia* to provide £150 million to compensate investors for up to 90% of their loss. Had the investors attempted to sue the DTI in negligence, they would almost certainly have been unable to establish in law that the department owed them any duty of care.

In 1995 there was a second Special report laid before parliament by the PCA. The first such report in 1978 led to a government decision to introduce legislation enabling the injustice to be remedied. The second one resulted from the government's refusal to accept that the Department of Transport had acted wrongly over the planned Channel Tunnel rail link and the blight on properties in Kent affected by the plans. In 1997, the department adopted a scheme for compensating certain owners which the Ombudsman considered acceptable.

The 1967 Act does not allow the Ombudsman to give publicity to the report on an individual's complaint, but a quarterly selection of reports is published in an anonymous form. In the mid-1990s, Sir William Reid laid in Parliament several reports on investigations which he considered to be of general interest to MPs: these included reports on the Department of Agriculture's deliberate decision to deprive poultry farmers of their full right to compensation, excessive delays by Social Security in handling the new disability living allowance, and the innumerable errors made in relation to the Child Support Agency. Should more publicity be possible?

In 1994, an additional role was assumed by the Ombudsman under the non-statutory code of practice on access to official information, issued under the government's policy of open government. Where a department fails to make available information which should under the code be produced, the individual's complaint can be referred to the Ombudsman, who may deal with it as a complaint under the 1967 Act. Few complaints of this kind have been received (in 1996, only 44, of which 12 were investigated).

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EVALUATION

What is the Parliamentary Commissioner?

The normal means of complaint procedure available to a citizen has been through the courts or tribunals or through Parliament via the citizens Member of Parliament. These means of redress have proved to be very inadequate and other means of grievance procedure have been introduced.

The word 'Ombudsman' is a Scandinavian word and concept. It means 'a representative of the people'. The first Ombudsman was appointed as far back as 1809 in Sweden. Since its introduction, many countries around the world have adopted or introduced a similar position (For more examples see Barnett 1997).

It was perceived, by some parties that there was widespread public opinion that there was a need for some form of additional constitutional safeguard.

Factors which led to the creation of the Parliamentary Commissioner

The Critchel Down Affair of 1954

The existing methods of redress through Parliament and the Courts did not guarantee a remedy for the citizen. Members of Parliament could only ask questions and seek to embarrass, while the courts could only act if there was some form of illegality or an ultra vires act by an administrative body.

Between 1940 and 1960 this was seen as a 'Dark Age' in administrative law. During and following the war, it appeared that the courts sided with the administration against the citizen.

There was evidence that the notion of a Parliamentary Commissioner had been successful in other countries such as New Zealand and Scandinavia.

The Labour Party published a White Paper on the Parliamentary Commissioner in 1965.

At the time of its appointment, the Parliamentary Commissioner was a new concept in the United Kingdom, its functions were limited in scope and the constitution was protected by safeguards from perceived threats:

Against an undermining of ministerial responsibility by the Parliamentary Commissioner for Administration. It is Parliaments job to hold ministers responsible. If the Parliamentary Commissioner for Administration did this, a major function of Parliament would be removed.

The United Kingdom, was the first major country to introduce the office, it was believed that the Parliamentary Commissioner for Administration could be flooded with work and that the system would not cope. This fear has proved to be totally unfounded.

Appointment of the Parliamentary Commissioner

The Parliamentary Commissioner for Administration is appointed by the Government. He will hold office until his or her retirement at the age of 65. He may be removed by an address from both the House of Commons and the House of Lords. The Parliamentary Commissioner for Administration is excluded from being a member of the House of Commons, and is a member of the Council of Tribunals.

What is the Jurisdiction of the Parliamentary Commissioner?

The jurisdiction of the Parliamentary Commissioner is contained in s.5 (1) of the Parliamentary Commissioner Act 1967. The section provides, that a member of the public can make a complaint, and that the Parliamentary Commissioner for Administration can investigate that complaint where the person claims that they have suffered some form of injustice by mal-administration.

What can the Parliamentary Commissioner Investigate?

Schedule 2 of the P.C.A. (1967) provides that the following are areas in which the Parliamentary Commissioner may investigate:

- Ministry of Agriculture
- Charity Commission
- Ministry of Defence
- Registrar of Friendly Societies
- Home Office

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- Welsh Office
- Legal Aid Board
- Commission for Racial Equality
- Health and Safety Commission
- National Debt Office

Are there any restrictions on what the Parliamentary Commissioner for Administration can investigate?

A complete list of these may be found in Schedule 3 of the P.C A (1967). What follows are a number of examples:

- Foreign Relations
- Matters occurring outside the United Kingdom
- Governments of Overseas Dominions
- Extradition and fugitive offenders
- Systems of investigating crimes
- Civil and Criminal proceedings in any court, court martial or international tribunal
- Medical matters
- Commercial contracts
- Employment in the armed forces, civil servants, teachers or the police
- The granting of honours and royal charters

Does the Parliamentary Commissioner for Administration have any discretion as to what he investigates?

Where a matter falls within the ambit of the Parliamentary Commissioner's jurisdiction, under s. 5(5) of the P.C.A 1967, the Commissioner shall 'act in accordance with his own discretion'. The discretion granted to the Commissioner by the P.C.A. 1967 applies to both to accepting complaints and to investigation.

Judicial Review of the Commissioners decisions is unlikely. This was evident in the case of **Re Fletcher**.¹ However, this decision can be contrasted with that of **R v PCA ex parte Dyer**², where the Queen's Bench Division held that it had jurisdiction to review the work of the Commissioner.

What can the Parliamentary Commissioner investigate?

The Parliamentary Commissioner can consider any complaint where '**maladministration**' has occurred. Maladministration is the most important term relating to the Commissioner's jurisdiction, yet it is not defined in the P.C.A. 1967. According to Lord Denning (MR) in **R v Local Commissioner for Administration ex parte Bradford MCC**³, the term is open-ended and very difficult to define. The term originated from the Whyatt Report of 1961. According to Barnett (1997), the omission to define the term was deliberate, and it includes:

- Bias
- Neglect
- Inattention
- Delay
- Incompetence
- Ineptitude
- Perversity

For an explanation of the concept of maladministration in relation to the work of Local Government Commissioners see **R v Commissioners for Local Administration ex parte Bradford Metropolitan Borough Council**⁴, and **R v Local Commissioner for Administration ex parte Eastleigh Borough Council**.⁵

¹ **Re Fletcher** [1970] 2 All ER 527

² **R v Parliamentary Commissioner for Administration ex parte Dyer** [1994] 1 All ER 375

³ **R v Local Commissioner for Administration ex parte Bradford MCC** [1979] QB 287

⁴ **R v Commissioners for Local Administration ex parte Bradford Metropolitan Borough Council** [1979] QB 287

⁵ **R v Local Commissioner for Administration ex parte Eastleigh Borough Council** [1988] 3 All ER 151.

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The Investigation and Report of the Parliamentary Commissioner for Administration

The Commissioner has the same powers as a court in requiring the attendance of witnesses, the right of examination and the production of documents.

Where the Commissioner accepts, and conducts an investigation, a report will be sent to the principal officer of the relevant Department, and if the matter is not remedied the Commissioner may lay a special report before the House of Commons or the House of Lords.

The Commissioner has no power to grant a remedy or grant compensation

Accessibility and Public Awareness of the Parliamentary Commissioner

An individual can only gain access to the Parliamentary Commissioner via the MP filter system. Out of the many Ombudsmen around the world, the United Kingdom Commissioner is unique in that he has now power of initiative, being dependent upon references from the MP filter system.

So how are people to become more aware of the Parliamentary Commissioner? In 1988, the Commissioner considered the difficulties in increasing public awareness about the Commissioner's role and power, and despite an increase in advertising the public are still unaware of the Parliamentary Commissioner for Administration.

The **Barlow Clowes Affair** resulted in the highest ever of complaints being received by MPs at one time in 1988.

In an attempt to increase public awareness, the Parliamentary Commissioner for Administration, Michael Buckley, introduced a web site:

"I am concerned that a recent survey revealed that a lot of people in this country have not heard of the Parliamentary Commissioner . . . or if they have they are uncertain about exactly what sort of complaints he can investigate. I hope our web site explains this very clearly and will make my office accessible to many people" ⁶

The Complaints Procedure

When a complaint is made it may go through some of the following stages:

- An individual wishing to complain to the Parliamentary Commissioner for Administration must have the matter referred by a Member of Parliament. This is called the 'MP filter'.
- Complaints can also be made to the Parliamentary Commissioner for Administration directly.
- When the complaint is received, the office will have to determine whether or not the complaint falls within the Parliamentary Commissioner's jurisdiction and whether the complaint falls within the definition of 'maladministration'. A large number of cases are rejected at this stage.
- Where a complaint is accepted, an attempt will be made to reach an informal settlement. Many complaints are resolved without the full scope of an investigation or report.
- In some circumstances, there will have to be an investigation. The Parliamentary Commissioner for Administration will write and publish a report. If, as a result of the report, an injustice or maladministration is determined to have occurred then recommendations will be made. This may include that the aggrieved party may be compensated and that the administrative system may be improved in specified ways.
- The body, which is subject to the complaint, will decide whether or not to accept the recommendations.

⁶ Taken from 'Parliamentary Commissioner for Administration - Ombudsman 5 November 1997

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Statistics

According to Suer & Herberg (1995) the following number of complaints were made to the Parliamentary Commissioner for Administration in 1993:

1993	Number of Complaints	Percentage investigated in full (approx.)
Parliamentary Commissioner	1,244	25%
Health Service Commissioner	1,384	15%
Local Commission For Administration	13,307	3%
Judicial Review	2,878 applications for leave	30% of full cases receive a full hearing

According to Stott & Felix (1997), the number of complaints referred to the Commissioner has, until now, generally been fewer than 1,000 per annum. They note however that the number appears to be on the increase:

Year	Number of Complaints made
1971	548
1978	1,259
1992	945
1995	1,706

According to Allen, Thompson and Walsh (1994), the number of complaints made to the Parliamentary Commissioner were as follows

Year	Number of Complaints	Number of MPs referring complaints
1984	837	386
1985	759	373
1986	719	387
1987	677	379
1988	701	359
1989	677	361
1990	704	371
1991	801	432
1992	945	460
1993	986	429

Leyland & Woods (1997), provide even more recent figures:

Year	Cases Received	Investigated	Cases Wholly or Partly Justified
1994	1,332	226	200
1995	1,706	245	245
1996	1,906	N.A	N.A

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Reform of the Parliamentary Commissioner for Administration

The Parliamentary Commissioner for Administration suffers from a number of flaws. For instance:

- There is no right of direct access to the Commissioner
- The lack of a definition for the term 'maladministration'
- The scope of jurisdiction
- Remedies which can be awarded to complainants
- The fact that only recommendations can be made

You may want to consider the following questions when determining whether or not the system of the Parliamentary Commissioner for Administration is in need of reform:

- Do we need such a position?
- Does the Ombudsman undermine the position and role of MP's?
- Should the system of 'MP filter' still exist?
- Does the Ombudsman have sufficient power?
- Is the lack of public knowledge of the Ombudsman a problem?
- Should the Ombudsman have more powers to initiate more investigations?
- Should the Ombudsman have the power to enforce recommendations?
- Should the Ombudsman redress individual grievances or improve administration?

In 1994, the Select Committee on the Parliamentary Commissioner made 36 recommendations to 'broaden the scope of the ombudsman's work to secure greater access to and publicity for it, and to ensure that the office secures adequate funds and resources'. The Select Committee was of the opinion however that the 'MP filter' system should prevail!

JUSTICE and the National Consumers Council have argued for the reform of the system. The Committee summarised the objections to the 'MP filter' as follows:

- The public should have direct access to the Commissioner as a matter of right
- The filter is an anomaly, almost unknown in other Ombudsman systems
- Individuals may be unwilling to complain to an MP
- The filter system means that the likelihood of a complaint being referred to the Commissioner will depend on the MP
- The filter is an obstacle
- It creates an unnecessary bureaucratic barrier

Summary

Complaining to an Ombudsman differs from actually going to a court or before a tribunal. The techniques of a court or tribunal are inquisitorial and investigative rather than adjudicatory.

Remember who the main Ombudsman operating in the public sector are:

- The Parliamentary Commissioner for Administration
- The Health Service Commissioner
- The Commission for Local Administration

The type of complaints that the Ombudsman will investigate is where an 'injustice' or 'maladministration' has occurred.

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REFORM OF THE PCA

*1st Report, Select Committee on the Parliamentary Commissioner for Administration, Options for change.*⁷

15 There is much in the existing legislation which has stood the test of time.

There is little in the Office's experience to suggest the need to change ... PCA's ... existing powers or discretion to determine how investigations are conducted. Unless the ombudsman concept is to be fundamentally altered, the limitations on the PCA's remit to administrative actions (ie excluding legislative content and the need for changes to it, the merits of policies and decisions of a judicial or quasi-judicial character) should continue to apply though where a decision has been reached maladministratively PCA remains in a position to say so. Experience over the years suggest that no new mechanism to secure implementation of the recommendations of PCA ... is needed. The Select Committee's own existence has meant that, unlike some other ombudsmen, the PCA ... has [not] experienced particular difficulties in securing redress felt to be due.

The Committee then went on to consider various options for reform of the PCA (and also the Health Service Commission); these options, with the Government's and PCA's response to them, are discussed below by Phillip Giddings and Roy Gregory.⁸ After a far-reaching inquiry into the powers, work and jurisdiction of the ombudsman, the Select Committee's report of January 1994 made 36 recommendations designed to 'broaden the scope of the ombudsman's work, secure greater access to and publicity for it, and ensure that the office secures adequate funds and resources'.⁹ Thirty recommendations were directed to the Government, whose reply was set out in a memorandum appended to the Select Committee's report published in July 1994, and six to the ombudsman offices.

The Government's response

Scope

The Government agreed to look carefully at the committee's recommendation that the Parliamentary Commissioner Act should be amended so as to specify exclusions from, rather than inclusions within, the ombudsman's jurisdiction, but it will first examine whether publicity could achieve the objective of reducing confusion about whether particular bodies fall within the ombudsman's remit. ...

Access

Agreeing with the committee's view that the 'MP filter' should be retained, the Government undertook to play its part in enlarging access to the office by ensuring that the relevant Citizen's Charter literature states clearly what people can do if things go wrong, and that, if they remain dissatisfied, they can ask an MP to raise their case with the ombudsman. In cases where charter documents do not already contain such information it will be added at the earliest opportunity.

Publicity

The committee pointed out that public awareness is vital to the effectiveness of the ombudsman. Concerned at evidence that many people were ignorant of the ombudsman's services, the committee made two recommendations which the Government has accepted:

- (i) that at the earliest opportunity the relevant statutes be amended to refer to the 'Parliamentary Ombudsman' and the 'Health Service Ombudsman' (HSO);*
- (ii) that a newsletter summarising cases of interest in a more popular and easily accessible form be produced.*

A third recommendation - that a debate be held on the ombudsman in each Parliamentary session - was rejected by the Government, which argued that there was no widespread demand for it from Members and that the suggested newsletter could be a better way of keeping MPs informed. ...

Quality and impact: time taken in investigations

The committee considered that, notwithstanding recent progress on this front, investigations still take too long, and every effort should be made to meet the nine months target originally set in 1988. To this end the committee recommended, and the Government agreed, that the PCA should deal directly with complainants when requesting further information, while keeping the referring Member fully informed, as already happens in Northern Ireland.

⁷ HC 33 II (1993-94) : See also **Sourcebook on Public Law, Fenwick and Phillipson**

⁸ P Giddings and R Gregory, 'Auditing the Auditors: Responses to the Select Committee's Review of the United Kingdom Ombudsman System 1993' (1995) Public Law 46-51

⁹ First Report from the Select Committee, HC 333, 1993-H4

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Quality and impact: independence

The Government accepted the committee's recommendation that, in order to underpin the ombudsmen's independence and impartiality, legislation be introduced to provide:

- (i) that the Parliamentary and Health Service Ombudsmen be appointed by the Crown, on an address of the House of Commons, no motion being made for such an address except by the Prime Minister with the agreement of the chairman of the Select Committee and the Leader of the Opposition;
- (ii) that the expenses of the ombudsman offices be met from moneys voted directly by Parliament on estimates prepared by a new 'Public Administration Commission', consisting of the chairman of the Select Committee, the Leader of the House of Commons and seven non-ministerial MPs, one of whom would be chosen as chairman.

However, given the different structures and circumstances in Northern Ireland, the Government felt the application of those recommendations inappropriate there. The proposed Public Administration Commission, it added, should be required to have regard to any advice given by the Treasury.

Quality and impact: improvements in public administration

The Government broadly accepted three recommendations made by the committee, designed to enable the ombudsmen to promote 'good administration':

- (a) as with HSO reports, the Office of Public Service and Science (OPSS) should circulate epitomes of the Parliamentary Ombudsman's reports to all Government departments, drawing civil servants' attention to matters of concern and examples of good practice;
- (b) public bodies and departments reported upon should be required to publish a report to the ombudsman describing ways in which the maladministration and failures of service identified had been rectified;
- (c) OPSS should produce a booklet for civil servants on the work of the ombudsman.

Other recommendations relating to the improvement of administration were less well received. The Government saw difficulties in the committee's suggestion that the ombudsman should be able to conduct administrative audits of the bodies within his jurisdiction, pointing out that the PCA himself had noted the possibility that his independence in investigating complaints could be prejudiced if a complaint concerned an organisation whose administrative procedures he had 'approved' in some way. The Government was also concerned that a formal power to audit could duplicate the work of other agencies; the NHS, it pointed out, is already subject to various forms of audit, both internal and external eg the National Audit Office (NAO), the Audit Commission and the Health Advisory Service.

The Government also rejected the committee's recommendation that legislation be introduced to enable the ombudsman to initiate investigations where the committee had raised the matter informally with the ombudsman as a matter of concern. The Government felt that this would represent a fundamental change from the concept that his basic role is to investigate and suggest redress for people's grievances.

Provision of adequate funds and resources

The Government responded to the committee's concern about the resources necessary for the ombudsman's enlarged responsibilities by pointing out that the PCA's cash limit had already been increased by £659,000 to £5123 000 in 1993-94 to provide for additional staff and accommodation, and that for 1994-95 an increase of 86% to £9,504,000 on the forecast out-turn for 1993-94 had been agreed specifically to take account of the PCA's enlarged responsibilities.

Ombudsman responses

The PCA has reported that, of the six recommendations addressed to himself he has already started to implement two. In the interests of speed, once an MP has referred a complaint to him, he will now deal with the complainant directly, while keeping the referring Member in touch. He is continuing to work at reducing throughput times and will look again at the way those times are calculated and reported. He will consider the implications of the proposed public awareness and consumer satisfaction surveys when he makes his annual bid for resources. His thoughts on good administration are likely to be incorporated in the booklet *The Ombudsman in Your Files* which OPSS will produce for Government departments.

The Select Committee rejoinder

In its report of July 1994 the committee welcomed the Government's agreement to many of its recommendations but felt that some other responses merited further comment.

Constitutional and Administrative Law

The committee argued that the Government's rejection of an annual debate on the ombudsmen failed to address the parallel between their work and that of the Comptroller and Auditor General (C and AG). Both, the committee pointed out, are officers of the House of Commons, entrusted with vital work in examining the performance of Government departments and agencies. Both report to the House the findings of their investigations. It was anomalous that the work of the C and AG is debated annually while the reports of the ombudsmen are not. Recent ombudsmen reports had highlighted the need for effective scrutiny of standards of administration in the public service. ...

Comment

The Government's response to the Select Committee's report may be regarded as largely supportive. Only seven recommendations were wholly rejected. Of particular significance was the acceptance of the need for legislation putting the appointment and financing of the ombudsman on a more explicitly independent footing. How long it will take for such legislation to find a place in the Parliamentary programme remains to be seen.

...The need for an annual debate on the work of the ombudsmen is also likely to continue to exercise the committee. It was raised by several members in the debate on the PCA's work in December 1994.

But if a good deal remains unresolved, the outcome of the Select Committee's 1993 review clearly represents a further step in the development of the UK's ombudsman system into an effective mechanism for dealing with maladministration and the redress of grievances.

Notes

- 1 One reform to the PCA's powers came with the passing of the Parliamentary Commissioner Act 1994, which extends the jurisdiction of the PCA to cover 'actions taken in exercise of administrative functions by administrative staff of certain tribunals' (introduction to the Act).
- 2 What direction should reform of the PCA take? It is sometimes argued that if the PCA were to appear too demanding and a fortiori if he were afforded coercive powers he might exacerbate the very problems he is expected to solve. Administrators might be reluctant to take bold decisions for fear of the consequences; 'defensive administration' might be undertaken; time wasting procedures designed not to further administrative efficiency but to deflect criticism. However, against this it could be argued that administrators take the benefit of a courageous decision which turns out well in the form of promotion and will therefore accept the risk that it will turn out badly.
- 3 Probably the need to appear reasonably emollient is inherent in the role of the PCA as currently conceived, but it is arguable that it is not a necessary part of it. If, for example, members of the public could contact the PCA directly, and if his role was given greater publicity, he might feel more able to risk criticism from the departments if he is getting praise from the public.

Reading List

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