

# The Parliamentary Ombudsman: withstanding the test of time

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Parliamentary  
and Health Service  
Ombudsman

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## Foreword

At a time when the public sector is in a seemingly permanent state of flux, the achievement by a statutory office of its 40th anniversary is notable indeed. To be able to record widespread recognition as part of the constitutional fabric is an additional pleasure. Yet this happy task falls to me as the 8th holder of this office, the first woman and the first appointment from outside the previously established nurseries of the Bar and Senior Civil Service.

I mention my ground-breaking credentials not from any misplaced sense of iconoclasm but as a sign of the way in which this now venerable institution has begun to embrace the modernising agenda that has swept through public life in the last decade and more. That process of modernisation promises in the case of the Parliamentary Ombudsman a regime 'fit for purpose' well into the 21st century. It is my privilege to oversee the first stage of implementation.

It is a pleasure too to introduce Richard Kirkham's 40th anniversary publication, *The Parliamentary Ombudsman: Withstanding the test of time*. As Richard's paper demonstrates, the life and times of the Parliamentary Ombudsman have not been without their challenges. Born of a political climate in the 1960s that placed the emphasis firmly on modernisation, this innovative statutory office brought to these shores an institution conceived on foreign soil, the product of a Scandinavian legal and administrative ethos unfamiliar to the common law and UK constitutional settlement. In ways somewhat reminiscent of the reception 30 years later of the Human Rights Act, detractors feared the consequential decline of nothing less than parliamentary democracy itself. Even the office's supporters lamented the tendentious legislative framework within which it would operate, its 'botched' fabric and 'limping' gait. The jibe of 'Ombudsmouse' still wounds 40 years later.

Yet readers of Richard Kirkham's fine survey will discover that much has been achieved since that somewhat precarious start. The Parliamentary Commissioner Act 1967, despite, or perhaps because of, its brevity, has withstood the test of time: the 'MP filter' and the unenforceability of the Ombudsman's recommendations have not been so restrictive as to impede significantly the effectiveness of the office; and the central concept of 'maladministration' has proved over the years sufficiently malleable to allow the Ombudsman's role to adapt and grow. From its first major investigation, *Sachsenhausen* in 1967-8, when the Foreign Office was persuaded to reconsider its position on compensation payments, right through to my recent report on occupational pensions in 2005-06, when the Department for Work and Pensions was not quite so easily persuaded to provide a remedy for the complainants' loss of pension rights, the office of Parliamentary Ombudsman has shown itself a constitutional force to be reckoned with.

The particular service provided by the paper that follows is to help with the task of defining the nature of that 'force' as it has evolved over time. It is this perspective that makes the history of the office of more than antiquarian interest: just what the Parliamentary Ombudsman is, where her remit starts and ends, what her relationship with the courts and tribunals should be, are questions still very much with us.

Let me draw upon Richard Kirkham's paper to suggest some answers. The original purpose of providing an aid to Parliament in its constitutional scrutiny of the Executive has evolved alongside the increasing sophistication of administrative law in the intervening period. Whilst the

office would not expressly espouse a role as ‘people’s champion’ in emulation of some overseas models, it has certainly carved for itself a distinctive niche in the judicial landscape, as a source of dispute resolution, as a guardian of good public administration, and as a systematic check upon departmental effectiveness.

These three distinctive, but inter-related, roles define much of what the office is currently about and where its future challenges lie. The investigation and resolution of individual complaints remains the staple diet of the office’s work, the evidential base against which patterns of good and bad practice can be mapped. To that task I increasingly bring the sort of ‘strategic’ approach expected of any modern Ombudsman system: early diagnosis; appropriate levels of response (not the ‘Rolls Royce approach’ for its own sake); the ability to use the intelligence yielded to aid future prevention as well as immediate cure. The Ombudsman is not a court or tribunal, certainly not a court or tribunal of the sort familiar to lawyers of a common law jurisdiction. Ombudsmen and courts are like chalk and cheese: superficially similar, but of very different texture and ingredients. Liberated from the burden of imposing enforceable remedies, with wide discretion, the Ombudsman is free to establish a very different relationship between the disputing parties, based upon trust and shared understandings, not formal compliance. It will remain the task of the office to uphold its distinctive tradition and practice whilst simultaneously forging stronger links with the rest of the system of administrative justice, including the courts and tribunals.

Central to that linkage is a shared understanding of respective roles in exercising good guardianship of public administration more generally. The Ombudsman has a special part to play. It is in recognition of that special role that I have embarked upon the creation of *Principles of Good Administration* to help shape consensus on what modern public service delivery should look like, to create expectations against which it can be judged (by my office and by others), and to act as a catalyst for reflection and future development. In the end, the task of delivering high quality public services rests with government departments themselves. My role is to facilitate that process, to enable the emergence of well-founded principles of behaviour and better delivery. It is by being if not quite a ‘champion of the people’ then at least a serious ally of the people that I can best exercise my function of ‘aid to Parliament’. The two go hand in hand, the one effortlessly enveloping the other.

It is here that the role of ‘systematic check’ is of particular value. Unlike the courts and tribunals, I am not constrained by the need to be concerned exclusively with the isolated or particular incident. Where clear justification arises, I can issue a special report to highlight systemic shortcomings, identify remedies and propose longer-term change. The authority of such reports comes from the quality of their findings and the compelling nature of their arguments. Once again, trust and shared understanding rather than formal compulsion are the essential conditions of success.

The paper quite rightly identifies various themes that recur down the decades: the need for more ‘joined-up’ complaints handling across the public sector; the need for the Ombudsman to demonstrate the impact of her work; and the question of how the office can be made properly

accountable to Parliament. It is gratifying to read the conclusion that, *'the Parliamentary Ombudsman has proved to be an effective addition to the system of administrative justice in the UK'*. It is certainly the case, nevertheless, that a few touches of modernisation would still be very welcome: more clarity about the relationship between the Ombudsman and the courts and tribunals; more recognition that in a devolved environment there is even greater need for Ombudsmen in Scotland, Wales, England and Northern Ireland to work together from time to time in the best interests of complainants. It might even be about time we allowed citizens direct access to the Ombudsman. Just about everyone else in the world seems able to live with that idea. Yet direct access would not be warranted at just any price: the present relationship between the Ombudsman and Parliament is valuable and something to be conserved; to disturb that constructive relationship just for the sake of it would be an act of reckless folly.

On the underlying question of whether we need new substantive legislation, I remain unconvinced that we do. I do not, for example, see any genuine need for a power to make my recommendations enforceable. This is a system that relies on shared understandings and mutual trust. The courts are not the place to make the system work. There is, however, one important proviso. If government departments were ever regularly and systematically to reject the Ombudsman's findings, I have little doubt that the calls from the public, and indeed from Parliament, for enforceable recommendations would become too loud to resist. That would be a sad day, and a sign that the delicate balance achieved these past 40 years had been irrevocably damaged.

As Richard Kirkham's paper demonstrates, there is much in the present arrangements to celebrate and to nurture. The key is trust amongst the various constitutional players. With that trust, an active and positive Ombudsman can only be good for public administration and public services. Without it, we might just find ourselves stumbling into a crisis that nobody wants.

**Ann Abraham**

**March 2007**

# The Parliamentary Ombudsman: withstanding the test of time

During its first forty years, the Parliamentary Ombudsman (PO)<sup>1</sup> secured redress for thousands of citizens and, on many occasions, persuaded government departments and other public authorities to tackle administrative weaknesses. In doing so, the Office established a commendable reputation for competence and independence. Yet despite taking on an increasingly important role within the unwritten constitution, it has been criticised in the past for failing to achieve its full potential.<sup>2</sup> In response, the objectives and working practices of the Office have been considerably developed and refined. The question that needs to be considered now is how the PO can best contribute in the 21st century to the effective scrutiny of government and the provision of redress.

In addressing this issue, after a brief description of the origins of the PO, this article assesses whether its founding Act, the Parliamentary Commissioner Act 1967 ('the 1967 Act'), is still fit for purpose. There have been a number of amendments to the 1967 Act that have expanded the PO's jurisdiction, but its core has remained on the statute book largely unchanged from the original version. The review here will conclude that the 1967 Act has withstood the test of time well, but for some time it has been recognised that an update is necessary if the Office is to make further improvements to its service. Given the past delays in introducing such a reform,<sup>3</sup> it is a remarkable coincidence that forty years on from the PO coming into being, not one but two separate revisions of the

1967 Act have received Parliamentary attention in the 2006-07 session.

The first set of proposed reforms follows a 2005 consultation paper issued by the government. This paper recommended the removal of some of the procedural restrictions on the Office's work in order to give proper legal recognition to the manner in which it has evolved.<sup>4</sup> A Regulatory Reform Order has been put before Parliament to implement the required amendments.<sup>5</sup> At the same time, Parliament is considering the Tribunals, Courts and Enforcement Bill. During the course of debate on the Bill, attempts have been made to introduce further amendments to the 1967 Act.<sup>6</sup> If either measure is passed, this will be an important and positive development which will assist the PO's ability to function in the modern day public sector. With legislative reform now on the government's agenda, this article concludes by examining some of the other key policy issues that currently face the Office and the challenges that lie ahead.

It is an interesting time for the ombudsman community and the administrative justice sector more generally, as the latent potential in alternative redress becomes increasingly recognised. With this in mind, the occasion of the PO's fortieth anniversary is an opportune moment for all interested parties to discuss the PO's existing and future role.<sup>7</sup>

## 1. The Original Design

Any evaluation of the 1967 Act must start with an understanding of the constitutional and legal environment within which the PO was introduced. By the 1960s, it had become very apparent that redress mechanisms in the UK had



not kept up with the growth in government that had taken place during the 20th century.<sup>8</sup> In comparison with today, applications for judicial review were rare, with the relevant procedural rules in the High Court incoherent and the administrative law applied there underdeveloped. The tribunal system was a more accessible redress mechanism and had recently been reformed,<sup>9</sup> but large areas of executive activity were left outside its scope. As a result, citizens were too often left with no alternative but to pursue their grievances against the government through political or parliamentary channels. The *Crichel Down* affair in the 1950s had brought the shortcomings of this situation to wider public attention when a public inquiry was held into alleged maladministration within the Ministry of Agriculture. This inquiry provided a rare public insight into the operation of government departments and the potential injustices that could result. With this potential exposed, after *Crichel Down*, the need for improved forms of public sector redress mechanisms could no longer be ignored.<sup>10</sup>

To this problem the ombudsman was the eventual answer and was strongly advanced by the report of a leading reform group, JUSTICE.<sup>11</sup> The initial calls for such a body were rejected by the government of the day, but in 1964 the Labour party came to power having made provision for ombudsman legislation in its manifesto.<sup>12</sup> The idea was not new, as ombudsmen already existed in the Nordic countries and New Zealand, but the model eventually chosen for the UK was not taken directly from these versions. Instead, the 1967 Act owed more to the protracted debate that preceded its introduction and the concerns that were raised about the scheme at the time. In particular, it had been argued that the introduction of an ombudsman would conflict with the doctrine of ministerial responsibility;

that the Office would be overwhelmed with complaints; and that the role of MPs, and indeed Parliament itself, would be undermined. To counter these objections, a distinctly British design of the ombudsman was devised, one which deliberately placed Parliament at the heart of the scheme. A model for this approach was found in the Comptroller and Auditor-General, a post which provided a Parliamentary precedent for the extensive fact-finding powers to be conferred on the new body. This vision positioned the PO as an aid to Parliament rather than the citizens' defender, with individuals required to submit their complaints to MPs. MPs then possessed the discretion whether or not to pass the complaint on to the PO and received the results of PO investigations by way of a report. In addition, provision was made for reports to be submitted to Parliament and a select committee was established to oversee the PO's work.

To the consternation of some the 1967 Act differed in crucial respects from the proposals that had originally been mooted by JUSTICE, such as rejecting the recommendation that the MP filter should be removed after five years. Another idea that was not pursued was JUSTICE's proposal to establish, in addition to the PO, a general administrative tribunal to which appeals could be made against the merits of administrative decisions when a specialised tribunal was not already available. No attempt was made in the 1967 Act to link the work of the ombudsman with that of either the courts or tribunals. Indeed, the ombudsman institution was set up as a completely distinct branch of the administrative justice network, with the apparent implication being that where legal matters were at stake the PO would not pursue a complaint. Shorn of such radical innovations and apparently conservative and restrictive in its design, the 1967 Act was not well received in

political, academic and media circles. For many an ‘ombudsmouse’<sup>13</sup> had been introduced and the 1967 Act itself was described by one leading academic as ‘a limping and restrictive statute’ which was ‘undoubtedly botched’ and ‘would not do’.<sup>14</sup>

Despite the criticisms, there were two clear innovatory features of the 1967 Act which over time have worked in the favour of the Office. First, the 1967 Act added something to the administrative justice network that had previously been absent. MPs already possessed the celebrated role of pursuing the grievances of their constituents, but the existence of a specialised officer with statutory powers to investigate complaints significantly strengthened their ability to secure redress. Second, even though limitations were placed on the scope of the PO’s authority, the 1967 Act was drafted in a manner that conferred a high degree of discretion on the PO and left many questions unanswered. In part this reflected a healthy realisation that no-one knew quite how the new body was going to operate. Of the ombudsmen already in existence around the world, none were entirely equivalent to the version being proposed for the UK or had operated in a constitution the size and nature of the British Parliamentary system. Whatever the reason or intention of the government and Parliament, the legislative design used in the 1967 Act established an institution which was free to evolve flexibly in a number of key areas.

## 2. The Parliamentary Commissioner Act: an evaluation

Given the lukewarm reception that the 1967 Act received, it is perhaps surprising that it has survived forty years without more significant amendments. But in hindsight we can now see that the initial response was as much a product of the poverty of the overall administrative justice network at the time, than of the 1967 Act itself. Indeed, of the criticisms of the 1967 Act that remain today, the most important of them still relate to the PO’s role within that larger network.<sup>15</sup> As for the Office itself, Parliament and the media were given early notice of its potential when in one of its first major investigations, *Sachsenhausen*, the PO managed to persuade the Foreign Office to reconsider its position on compensation payments.<sup>16</sup> Ever since, debates on the PO have concentrated more on how to make better use of the Office, than whether to replace it.

### **The discretionary power of the PO**

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The effectiveness of the 1967 Act in facilitating the work of the PO owes much to the wide discretionary powers contained within it. This implies that of the limiting factors on the ability of the Office to function, perhaps the most important is the attitude of the post-holder and the interpretation that he or she gives to the 1967 Act. The idea that the PO could operate with such a degree of freedom was given a significant boost by the courts early in the history of the Office. In *Re: Fletchers Application*,<sup>17</sup> leave to hear a case against the PO’s decision not to investigate a complaint was refused on the grounds that the 1967 Act granted the PO discretion whether or not to investigate. This ruling did not mean that the PO

could not be legally challenged, but it did send out a strong message to potential complainants as to the authority of the PO's decisions. Indeed, it was not until 1993 that the courts first clarified that the PO's decisions were subject to judicial review.<sup>18</sup> Until now, the only successful challenges of the PO have been those in the *Balchin* case.<sup>19</sup>

The approach that the courts have adopted in cases involving the PO suggests that they will not readily interfere with an exercise of the Office's discretion.<sup>20</sup> This is important, for were the courts to have taken a more activist line then it is probable that the history of the Office would have been very different. Many of the benefits of the post, such as reduced costs and stress for claimants, would be lost if it were too easy to challenge the PO's reports in the courts.<sup>21</sup> More fundamentally, by adopting such an approach, the courts have allowed the PO considerable room to develop the Office. This situation can be criticised in terms of legal certainty, but it has meant that the early critics have often been proved wrong. In practice, many of the restrictions that were believed to be in the 1967 Act, and which might well have been intended by those that introduced it, have not proved to be as constricting as once feared. In possession of a significant amount of discretionary power, each new PO has been able to move the Office in the direction that was felt necessary and appropriate. Whether each post-holder has taken full advantage of these discretionary powers is a separate question, which will not be explored here.<sup>22</sup>

### Maladministration

The most important area in which the PO has been able to exercise considerable discretion is in determining whether or not maladministration leading to injustice has occurred in any given investigation.<sup>23</sup> For some years many saw this

test as granting the PO insufficient power and lacking in any true meaning.<sup>24</sup> To rectify this, various proposals have been put forward for the PO to be given wider powers, such as being able to report on unreasonable, unjust or oppressive decisions.<sup>25</sup>

Today the arguments that the PO should have a wider mandate are much less prominent than they were, mainly because it is now appreciated that the maladministration test is extremely malleable.<sup>26</sup> The challenging nature of the test can be demonstrated by a review of some of the more famous ombudsman investigations of the past, many of which involved innovative applications of the test to new situations.<sup>27</sup> But coming to a conclusion on maladministration can be a tough task for the PO given the politically sensitive nature of some of the decision-making investigated. Ordinarily, therefore, the skill of the PO is to concentrate a finding of maladministration on the manner in which the policy decision has been made or implemented and not on the merits of the decision itself. The recent *Occupational Pensions*<sup>28</sup> report provides a good example of this approach.<sup>29</sup>

Although most ombudsman investigations focus on administrative procedures, this does not mean that ombudsmen cannot investigate the merits of decisions of public authorities. The 1967 Act left a degree of flexibility on the issue. Section 12(3) prevents the PO from questioning 'the merits of a decision taken *without* maladministration' (added emphasis). This implies that where a decision is taken *with* maladministration then the PO can legally consider the merits of the decision. More controversially, an administrative decision that is wholly unreasonable to most rationally minded people is a clear example of maladministration.<sup>30</sup> Either way, the PO is entitled to explore the

merits of a particular administrative decision during the course of an investigation. Were this not the case, it would often be impossible to come to a conclusion as to whether maladministration or an injustice had occurred.<sup>31</sup>

A further key aspect of the concept of maladministration is that it can be used to resolve complaints where legal grounds could also be argued.<sup>32</sup> For instance, in the *Debt of Honour* report,<sup>33</sup> the PO found that the manner in which an *ex gratia* compensation scheme had been announced by the Ministry of Defence amounted to maladministration due 'to the misleading impression that it created'.<sup>34</sup> For the Ministry of Defence, this finding was not easy to accept, partly because the Court of Appeal had previously found that the same announcement lacked sufficient precision to create a legitimate expectation according to the law.<sup>35</sup> Such a finding demonstrates that the duties that can be inferred from the maladministration test can actually go further than equivalent doctrines in law. This principle is supported by the courts<sup>36</sup> and is one to which public authorities should pay more attention.

The test of maladministration, therefore, has proved to be a powerful and adaptable tool for the task to which the PO was assigned. In other countries ombudsman legislation provides more detail on the powers granted to the ombudsman, but it is questionable whether the result is necessarily a more intense scrutiny of administrative decisions.<sup>37</sup> The lack of clarity as to the meaning of the maladministration test is problematic, however, as it effectively grants the PO a high degree of autonomy. But there are ways that this criticism can be tackled. First, as with any decision-maker in the public sector, there is an onus on the PO to explain the reasoning behind her findings. In this regard, comprehensiveness has always been a feature of

PO reports. The second response is for the PO to be more transparent about the Office's understanding of maladministration. Here the Office has not always been so helpful, but following a consultation exercise, in 2007 it is introducing a set of *Principles of Good Administration*.<sup>38</sup> How this is to be applied is going to be crucial to the future of the Office. The expectation must be that from now on ombudsman reports will ordinarily refer back to elements of the *Principles* in explaining findings of maladministration. This is a step to be encouraged and is evidence of the maturing of the post now that the full force of the maladministration test has been recognised. In fact, in terms of the development of administrative law more generally, it could represent the beginning of one of the most important innovations in recent years.

## Injustice

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What the term injustice means has caused less controversy than that of maladministration.<sup>39</sup> Here too the PO has found the term sufficiently flexible to allow the Office to provide redress in a wide range of cases, such as to take into account the anger, upset and outrage felt by citizens who have experienced the consequences of maladministration. In addition, it has been established that individuals can sustain injustice in consequence of maladministration, even where there are a number of factors which together caused the specific loss or detriment claimed by complainants. In the *Occupational Pensions* report, for instance, the PO took care to identify that the loss of pension rights experienced by the complainants was partially due to the wider context within which the pension schemes involved operated. But the actions of the Department for Work and Pensions did reduce the opportunities for the

complainants to mitigate the losses that they suffered, and this was the injustice caused by the identified maladministration.

Finally, it is worth noting that the need to focus an investigation on whether or not injustice has occurred has not prevented the Office from broadening investigations to conduct more systematic reviews of administrative arrangements where appropriate. This inherent flexibility is important as it enables the PO to provide a broader service than facilitating redress alone.

## Redress

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The 1967 Act is silent on the manner in which redress should be implemented. It was always implicit in the ombudsman scheme, however, that the Office would make its findings clear in the reports produced and that it would then be for the public authority involved to respond accordingly. Unfortunately, for the first thirty years of the Office a rigid adherence to this procedure did appear to restrict the PO's work. Arguably, section 10 of the 1967 Act requires the PO to produce a report following each investigation. This requirement to produce a reasoned and defensible report was partly why the Office formerly employed so-called 'Rolls Royce' investigatory techniques for all complaints, even when they were not entirely necessary to achieve redress in individual cases. This approach led to considerable delay in processing complaints and much criticism from Parliament.<sup>40</sup>

For the last ten years the Office has responded to these criticisms by interpreting the 1967 Act differently and adopting a much more flexible working regime which allows more informal dispute resolution procedures to be used where appropriate.<sup>41</sup> This change in approach has led to significant improvements in processing time and

no apparent evidence of complainants losing out as a result. On the downside, there is a risk that a complainant's interests are compromised by reducing the formality of any investigation. To counter these risks, it is important that complainants are consulted on proposed settlements.<sup>42</sup>

Another area where the 1967 Act is silent is on the role of the PO in making recommendations as to the specific remedy that should be made available. Nevertheless, the PO has for a long time adopted the policy of making such recommendations and the lawfulness of this approach has been recognised in the courts.<sup>43</sup> Within recommendations, the PO has been able to consider a variety of solutions. Where possible, the purpose of remedies is to return the complainant to the position that they should have been had the maladministration not occurred. In addition, the complainant's sense of outrage and the inconvenience caused by being forced to pursue a redress mechanism are also often recognised. No detailed research has ever been undertaken to compare settlements obtained through the ombudsman system with those awarded in the courts,<sup>44</sup> but frequently the PO is able to secure significant redress in scenarios where redress would not have been obtained elsewhere.<sup>45</sup> It is also noticeable that the courts have advocated using the level of financial recompense recommended by the public sector ombudsmen as a guide.<sup>46</sup> In any event, the utility of using the PO as opposed to the courts depends on a variety of factors, not least the objective of the complainant. For instance, the big limitation on the ability of the PO to obtain redress is that the Office generally has no power to issue injunctions or stay a decision of a public authority pending the completion of an investigation.<sup>47</sup> If this is required then clearly the PO is not the correct route by which to pursue redress. This limitation

aside, the PO's work has come to provide a role model for how public authorities should be considering the issue of redress.<sup>48</sup>

### **Integration into the administrative justice system**

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Perhaps one of the weakest aspects of the 1967 Act has been the absence of any clear explanation of how the work of the PO and the other players in the administrative justice system, in particular the courts, interlink. For the original drafters of the 1967 Act this was a deliberate oversight as the PO was designed to take on cases which were outside the ordinary remit of the courts. Indeed, when legal proceedings are available to the complainant, the presumption in the 1967 Act has been that the PO should not undertake an investigation.<sup>49</sup> Today, this presumption is unrealistic because administrative law has expanded so significantly that most complaints against a public authority can potentially be pursued through the courts. Fortunately, to address this overlap, within the 1967 Act an exception was included that allows the PO to investigate a complaint when it would be unreasonable to insist that the complainant pursue the legal avenue. This is another aspect of the 1967 Act which has conferred considerable discretion on the PO. Given the changes in the administrative justice landscape since 1967 this flexibility has been essential.

In certain circumstances, it is possible for a complaint to be pursued through both the courts and the PO, and this dual 'review' has on occasion proved extremely helpful in securing both a remedy and a change in administrative practice.<sup>50</sup> Nevertheless, what this potential duplication of work illustrates is the need for a more holistic approach to the administrative justice system in order to provide proportionate redress. This call appears to have been recognised in the Department for Constitutional

Affairs' Administrative Justice White Paper in July 2004<sup>51</sup> and, as indicated above, attempts have been made during the debate on the Tribunals, Courts and Enforcement Bill to introduce amendments to the 1967 Act to this end. Thus when it becomes clear during legal proceedings that a case could be better dealt with by an ombudsman, it would be helpful if the court could transfer a case without prejudice to the complainant's legal rights.<sup>52</sup> Likewise, when an ombudsman discovers that the outcome of an investigation hinges upon an unresolved legal question, then proceedings could possibly be speeded up were the ombudsman able to refer the issue of law to the courts. Currently, in this area such proportionate redress is reliant upon the common sense of the parties involved and the flexibility of procedural rules. There are limits in both regards, and legislative change could provide a much needed boost to the ease with which complainants receive redress.

### **Administrative Guidance**

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The 1967 Act did not make it the duty of the PO to offer guidance to the public sector about arrangements that could lead to improved administration. In practice, however, there was never anything to prevent the PO from finding ways to promote good administrative practice through its recommendations in individual reports on resolved complaints, subject-specific reports submitted to Parliament, or by way of general publication. All previous post-holders have recognised the positive benefits to be gained where an investigation identifies and reports on administrative improvements that will prevent maladministration being repeated. Indeed, the determination to establish long-term change was one of the reasons why for so long the Office employed rigorous techniques for almost all investigations. In order to bring down investigation times, combat increased

numbers of complaints, and to make the service more consumer-orientated, today the Office is more selective in the production of detailed reports. If the guidance function is to be maintained, this means that the PO must be careful not to settle complaints before establishing whether there are broader lessons to be learnt.<sup>53</sup> Arguably though, the administrative recommendations that the PO now makes are more high profile and tend to target major systemic concerns about the operation of an investigated department.<sup>54</sup>

In undertaking such large scale investigations of administrative systems and producing such detailed reports, we see a side of the PO's work which may not have been prominent in the 1967 Act itself, but has long been viewed as one of the most important contributions that the Office can bring to the constitution.<sup>55</sup>

## Jurisdiction

One of the key ways in which the 1967 Act does place effective limits on the ability of the PO to operate is by listing in Schedule 2 the public bodies within the Office's jurisdiction, rather than relying on a list of exclusions which would otherwise allow the PO freedom to accept complaints on all areas of public sector activity. This approach has occasionally attracted criticism because there is the potential for gaps to appear in the PO's jurisdiction when new bodies are created.<sup>56</sup>

This problem has been minimised by the expansion in the jurisdiction of the ombudsmen in the UK public sector since 1967. The major developments were the introduction of the specialised ombudsmen to deal with local government and the health service.<sup>57</sup> Likewise, and more controversially, in some areas of public sector activity alternative forms of redress mechanism have been set up to deal with

complaints, such as in the prisons, education and police sectors. These developments have meant that the public sector has become littered with subject-specific redress mechanisms, with different degrees of power and autonomy.

While complaints mechanisms have proliferated the PO's jurisdiction has not remained static, as the government has periodically been persuaded to introduce amending legislation.<sup>58</sup> Schedule 3, however, still lists a number of subject areas which are outside the PO's jurisdiction. On the whole these restrictions can be easily explained, such as the bar on the PO investigating the commencement and conduct of proceedings before any domestic or international court.<sup>59</sup> The exclusions that have attracted the most criticism are the exclusions of contractual and commercial matters, and public service personnel complaints. The need for these exclusions has been regularly questioned by, amongst others, Parliamentary select committees.<sup>60</sup> They have been justified on the basis that the core role of the PO is 'to investigate the complaints against government by the governed and not against government in its role as employer or customer'.<sup>61</sup> It is also arguable that in these areas alternatives, such as the courts, are usually more appropriate. Nevertheless, in an era when private sector provision has become an increasingly important feature of governance, the exclusion on contractual and commercial arrangements needs to be monitored to ensure that this governance technique is not used as a means by which to prevent accountability. Another issue here is the interpretation that the PO gives to the public/private divide, as for example, where a public function is contracted out to a private supplier.<sup>62</sup> Fortunately, once more this is an area where the Office does retain some discretion

and appears to have used it in a positive fashion.<sup>63</sup>

### **The MP filter**

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One of the most criticised aspects of the 1967 Act, both at the time of its introduction and since, is the MP filter. The concerns that the filter was originally designed to address, to preserve the traditional position of MPs and control the flow of complaints, now seem outdated if not irrelevant.

The early fears of an avalanche of complaints were not borne out. If anything, the MP filter has been too successful and in the past a common criticism targeted at the PO has been that it is underused and has failed to raise its profile sufficiently.<sup>64</sup> It is hard to quantify how many complaints should be going to the PO. The wider complaints system that now exists is more developed than the one in place when the 1967 Act was first introduced and the PO normally expects complaints to be put to second-tier complaint handlers before she considers them. What this arrangement suggests is that the need for the PO to be protected by a filter mechanism is much reduced and the current post-holder has stated that her Office could cope without the MP filter.<sup>65</sup> At worst, removing the MP filter is likely to place more demands on the Office to act as an advisory service directing complainants towards the appropriate service. Yet this is a function that it already performs.

As to whether the role of MPs would be threatened by the removal of the MP filter, such an argument is barely credible today. The government itself has noted 'that a very small proportion of MPs' contacts with their constituents is associated with the use of the ombudsman'.<sup>66</sup> Moreover, no-one is suggesting that MPs should not be able to pursue for

themselves any complaints received. The point is that MPs who do not at least seek the advice of the PO where a complaint is received run the risk of failing their constituents.<sup>67</sup>

Fortunately, there is evidence today that the MPs themselves no longer see the need for the filter. In 2004 the Public Administration Select Committee (PASC) and the Office conducted a joint survey and found that of the MPs questioned 66% favoured the removal of the filter.<sup>68</sup> The PASC has recommended its removal for some time<sup>69</sup> and the current PO, mirroring the viewpoints of her predecessors, has noted that such a move would assist the Office in its continuing efforts to become more transparent and open to complainants.<sup>70</sup> Removing the filter would also bring the PO into line with most of the other UK public sector ombudsmen. Even the government has in the past indicated that the arguments in favour of retention are unsustainable,<sup>71</sup> yet because it has concluded that change would require primary legislation this issue remains unresolved.<sup>72</sup>

### **Investigatory powers**

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One of the key reasons why the PO has become accepted as an important redress mechanism has been the Office's ability to produce independent, well reasoned and accurate reports. It is highly doubtful that this could have been achieved without the strong investigatory powers created in the 1967 Act.<sup>73</sup> In the history of the Office there have been very few occasions when the government has used its residuary powers under the 1967 Act to refuse disclosure.<sup>74</sup> This level of access to information gives to the work of the PO enhanced credibility and enables the Office to take on with confidence even politically sensitive investigations. On the other hand, the PO has periodically had cause to complain to Parliament that the government has been slow to comply



with requests for information.<sup>75</sup> Under the 1967 Act, the PO could tackle this problem through legal proceedings, but to achieve successful outcomes the PO is reliant on maintaining good relations with the government. Therefore, a decrease in government cooperation can be viewed as an early indicator of a much larger problem.

### **Powers of enforcement**

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A feature of the 1967 Act that attracts regular criticism is the lack of enforcement power it grants the PO. The PO can make recommendations, but the public body under investigation retains the discretion to refuse to implement those recommendations. According to the 1967 Act, once the PO has exhausted her skills of persuasion, all she can do is submit a special report to Parliament under section 10(3) where 'it appears ... that the injustice' investigated 'has not been, or will not be, remedied'.

The extent to which this is considered a weakness of the 1967 Act depends upon a number of factors. First, the PO and the government must take much credit for the fact that this feature of the 1967 Act has rarely proved to be a problematic issue. It is difficult to quantify the exact number of occasions when the PO has failed to secure redress. In the early years of the Office the PO had to put in a considerable effort to persuade various government departments, in particular the Inland Revenue, to make *ex gratia* compensation payments.<sup>76</sup> How many of these cases were finally settled is unclear, but what is known is that on only four occasions has the PO felt it necessary to issue a section 10(3) report to Parliament notifying it of a failure of the government to provide suitable remedies.<sup>77</sup> Furthermore, on only one of those occasions, the most recent and ongoing *Occupational*

*Pensions* case, has the government continued to refuse to provide appropriate redress to remedy the injustice sustained once the relevant Parliamentary select committee had reported its support for the PO's findings and recommendations. Notwithstanding the number of complainants affected by the *Occupational Pensions* case, the past track record of the PO and the support that the Office receives from Parliament, suggests that the current arrangement has been extremely successful.

A second consideration is the principal reason why the PO lacks enforcement powers. Far from being an unusual flaw in ombudsman design, this is a common solution in ombudsman schemes and goes to the heart of the work that the institution is expected to perform.<sup>78</sup> Ombudsmen are given almost total access to information and people within public bodies, and possess a very broad remit with which to investigate public sector activity. Given the potential depth of such investigations, the consequences of an ombudsman's report can have a huge impact on the design of future policy. Recognition of the potentially sensitive nature of the ombudsman's work is one of the reasons why ombudsman schemes tend to leave the power of implementation in the hands of the public authority concerned. Political accountability between the decision-maker and the electorate for the consequences of an ombudsman's report is thereby maintained. Arguably, another important benefit of this arrangement is that because public authorities know that they retain control of their decision-making, they are more likely to be encouraged to participate constructively in the investigation. It is this fear that powers of legal enforcement would radically alter the hitherto cooperative nature of the ombudsman's work that best explains why most ombudsmen are reluctant to go down this route.<sup>79</sup>

Building on this understanding, a third point needs to be taken on board. As public authorities retain the final decision to provide redress, for the purposes of Article 6 of the European Convention of Human Rights, it is unlikely that the investigations and reports of the PO could be considered determinations of civil rights. Were the PO to possess powers of enforcement, this position could change.<sup>80</sup> Such a development would almost certainly force the Office to reconsider its working practices. This could mean the increased use of formal hearings and more frequent legal representation. If this were the case, then the whole ethos and rationale of the ombudsman institution would be severely challenged and it is possible that many of the benefits would be lost.

Advocating powers of legal enforcement, therefore, is an argument that needs to be treated with care. There are ways that it could be introduced which might minimise the likely negatives, but it is not a step that should be taken lightly. Nor is there overwhelming evidence that the Parliamentary mechanism currently in place needs strengthening. Perhaps a more appropriate solution has been identified in the recent case of *Bradley et al v Secretary of State for Work and Pensions*. In this case Mr Justice Bean was prepared to quash the Secretary of State's decision to reject one of the PO's finding of maladministration in the *Occupational Pensions* report and accordingly directed the government to reconsider one of the PO's recommendations.<sup>81</sup> In doing so, Mr Justice Bean implied that while public authorities retain the discretion not to implement the recommendations of ombudsmen, it is unlawful to reject their findings of maladministration unless those findings can be 'objectively shown to be flawed or irrational, or peripheral, or there is genuine fresh evidence to be considered.'<sup>82</sup> Were public authorities to adhere to such a

principle of law on the rare occasion that they refuse to implement the PO's recommendations, it would have the benefit of focusing political attention on the reasons why they made that decision rather than the finding of maladministration by the PO.

### 3. Ombudsman issues to consider

Here is not the place to undertake a detailed analysis of the work of the Office over the past forty years or the input of the different post-holders,<sup>83</sup> but a few themes will be explored as they relate to the key criticisms that have been levelled at the PO in the past and present.

#### **The organisation of the English public sector ombudsmen**

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Just a few years ago the talk in the ombudsman sector was all about reorganisation. In 2000 a Cabinet Office paper proposed the establishment of an integrated ombudsman's office for England. This plan would have pooled together the work of the Health Service Ombudsman for England and the Local Government Ombudsmen for England, as well as the PO with its pan-UK jurisdiction.<sup>84</sup> The idea appeared to have the backing of the government, but contained a number of unresolved questions.<sup>85</sup> In particular, the proposals never got to grips with the implications for citizens living in Scotland, Northern Ireland and Wales. Under the proposals, these citizens would have been required to complain to an 'English' ombudsman in those areas of executive activity affecting them that were still controlled by the UK government.

For the moment, the integration agenda in England appears to have been dropped, and alternative means are now being pursued to address some of the weaknesses in the ombudsman set-up identified in the original proposals. A key area of concern for the ombudsmen has been their ability to provide a coherent service in an age of complex governance. The issue is that the increased use of the partnership approach to governance has meant that some complaints involve more than one public body, and that often those bodies belong to the jurisdiction of different ombudsmen. Where this situation occurs, complainants have to make separate complaints and when the relevant ombudsmen investigate, by law, they are generally prevented from conducting joint investigations or issuing joint reports. The solution currently before Parliament in the Regulatory Reform Order 2007 is to relax the powers of the PO, the English Health Service Ombudsman and the English Local Government Ombudsmen to facilitate joint working,<sup>86</sup> and this approach should secure positive results. However, not only is the Order less complete than the original integration plans and some potential problems will remain,<sup>87</sup> it does not address the crossovers between the work of the PO and other public services ombudsmen.

Another weakness that inspired the integration plans was the apparent under-use of the ombudsmen. The objective was to simplify the point of public access to the ombudsman system. At present, this area of the administrative justice system is complicated by the existence of a number of subject-specific complaints mechanisms, each with a completely separate point of entry for the complainant. By establishing a 'one-stop shop' it was hoped that the process of complaint could be made easier and a platform provided from which the

ombudsmen themselves could better advertise their services and raise public awareness. In other words, there would be a move towards the user-friendly citizen-orientated complaints service that many argued should have been at the heart of the original proposals for the PO in the 1960s. A 'super-ombudsman' could perhaps even operate as the focal point of the entire alternative redress network with enhanced responsibilities for auditing 'lower-tier' redress mechanisms.<sup>88</sup>

With the introduction of integrated ombudsmen in Wales<sup>89</sup> and Scotland<sup>90</sup> to join the *de facto* integrated Northern Ireland Ombudsman,<sup>91</sup> it now looks unlikely that the PO will be merged with any other ombudsmen.<sup>92</sup> A more realistic merger would involve the English Health Service Ombudsman and the English Local Government Ombudsmen, possibly together with the Housing Ombudsman Service.<sup>93</sup> This solution would secure many of the advantages originally mooted by the Cabinet Office report, particularly if it were possible to bring the new ombudsman within the direct overview of Parliament. This latter move, however, would mean having to overcome the traditional local government objection to complaints against local authorities being open to potential scrutiny by Parliament.

### **How much of an impact does the PO really have?**

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The question of how to raise the profile of the PO has been a recurring issue. In this respect, the Office has not been idle in recent years and a concerted effort has been made to modernise its working practice in favour of the complainant. Being customer-orientated has not always been one of the PO's strengths,<sup>94</sup> hence it is to be applauded that the Office has made recent efforts to refocus on the needs of the complainant and to involve the complainant

more in the investigative process than previously.<sup>95</sup> The simplest way, however, to improve the connection between the PO and the public would be to remove the MP filter, if ever Parliamentary time could be found to enact such a simple measure.

One method of making the post better known is to submit subject-specific reports to Parliament to conclude an investigation with significant public interest. Such reports tend to attract wide public attention, but the downside to this approach is that there is bad publicity to be gained where a government department refuses to comply with the PO's recommendations. In this context, the biggest challenge yet to the authority of the PO is the stance the Department of Work and Pensions has taken towards to the PO's *Occupational Pensions* report, a report which did receive headline media attention. Although it is still possible that the government will provide an effective remedy in response to the report,<sup>96</sup> already there has been comment from a number of quarters about the ineffectiveness of the ombudsman.<sup>97</sup> If this set of events occurs too often, the danger is that complainants will lose trust in the ombudsman, with a possible increase in judicial review applications the result.

This brings us to the most important factor in the success of the PO – the Office's relationship with the government. Up to a point, the government could reduce the effectiveness of the ombudsman scheme through a concerted campaign of non-compliance. It is, therefore, worrying that in recent years the government has initially responded in an unhelpful and negative manner to several high profile PO reports.<sup>98</sup> The PASC has described this series of events as unprecedented.<sup>99</sup>

Unfortunate as the government's attitude sometimes is towards the PO, the authority of

the PO cannot be accurately assessed by the Office's ability to secure *immediate* redress. A trawl through PO cases of past and present reveals that in the more controversial cases, redress can take some time to secure. Ultimately though, the PO's record is strong, with redress being secured on almost every occasion, not just for the individual complainants but for significant numbers of people also affected by the uncovered maladministration.<sup>100</sup> This is testament to the strength of PO reports and the work of Parliament in persuading the government to devise workable solutions to the problems identified by the PO.

In any event, the impact of an ombudsman cannot be measured purely in terms of the provision of redress. While the PO was designed as a redress mechanism, from the outset the intention was also to create an institution that would support Parliament in calling the government to account. In this regard, the PO's work has always been successful in uncovering and making available information about the actions of the public authorities within its jurisdiction, to a degree that would not have occurred had the Office not existed.

Taken together, therefore, the achievements of the PO have been considerable. Moreover, one of the reasons why the PO has, on occasion, come into conflict with government departments has been because the Office has been prepared to take on investigations in politically sensitive areas and has not allowed the cost implications of its findings to deter it. In other words, the fact that the Office has been called upon to do battle with government on more than one occasion in recent years is arguably evidence that the PO is doing her job well.

## How accountable is the PO?

The 1967 Act is commendably short. Although it contains some specific limitations on the Office's ability to operate, the key to its continued functionality is the degree to which it places faith on the decision-making capacity of the PO. But, as already noted, this strength exposes the Office to criticism that no-one really knows how it operates. It also places an enormous emphasis on the ability and character of the incumbent PO to produce results. Given the trust that has to be placed in the PO, to demonstrate that public expectations are being met the Office requires a mechanism by which it can be scrutinised and called to account.

In the past, this function was on occasion performed by the Cabinet Office in its ad hoc reviews of the PO. An additional form of accountability is provided by the courts through judicial review, but is rare. More constructively, the current PO has established an advisory board '[t]o enhance the governance of the Office, improve the transparency with which it operates and bolster the independence of the role' that the PO performs.<sup>101</sup> However, as useful as this board may be to the PO in providing advice and a forum for raising difficult questions, only two external members attend the board and it has no remit to report publicly.

The real key to the accountability of the Office, and one of the strengths to the current PO design, is the role of Parliament. Accountability issues were not dealt with directly within the 1967 Act itself, but a Parliamentary select committee was established shortly after the Act was passed to oversee the PO's work and receive reports.<sup>102</sup> The arrangement has worked particularly well in giving support to the PO's findings, with the aforementioned examples of section 10(3) reports being the best evidence of the relationship in operation. In addition, the

relevant select committee has almost always scrutinised the work of the PO on an annual basis and undertaken a number of more targeted reviews of specific aspects of the PO's work. The result of these reviews has often been a constructive dialogue with the PO and the government, with many an attempt made to secure improvements in the Office and legislative change. The select committee's recommendations have not always been accepted,<sup>103</sup> but where reviews have taken place they have added to the perception that the PO is an important part of the administrative justice network that has an aura of fairness, competence and impartiality.

If the PO is to preserve its current position, and indeed grow and become an even more effective institution, it is important that this link is retained and built upon. Furthermore, given the politically sensitive nature of some of the issues that the PO is called upon to tackle, the PO as presently established is probably not capable of successfully operating without such Parliamentary support. In this respect a cautionary note should be made about Parliament's current capacity to scrutinise the PO. In 1997 the decision was made to restructure the select committee system. The result was that, whereas formerly there had been a dedicated select committee to the PO, there is now the PASC which possesses a remit much wider than just the PO. In terms of the support that the PASC has provided the PO, its performance has so far been exemplary. This was demonstrated twice in the 2005-06 Parliamentary session in its thorough review of two highly contentious section 10(3) reports. There must, though, be some question marks about the ability of the PASC to perform the regular scrutiny function that its predecessor took so seriously. Each and every year since 1997 the PO has been invited along to give evidence,

but on only two occasions during that period has the PASC found the time to conduct a more in-depth study of the work of the Office.<sup>104</sup> The difficulty here is that were there to be any developing deficiencies within the operation of the Office, it is unclear at what stage the overworked PASC would pick them up.

## 4. Ombudsmen in the 21st century

The PO has proved to be an effective addition to the system of administrative justice in the UK, but a number of challenges will face the PO through the 21st century and may lead to further amendments to the Office's powers.

The most important driving force behind any future developments will be the changing landscape of the administrative justice system. Since 1967, the PO has become increasingly surrounded by other public sector ombudsmen and a plethora of specialised complaints systems. The complexity and apparent incoherence of this network can cause problems. Given the myriad of potential crossovers between the different complaints mechanisms and the public authorities they are designed to investigate, to provide an effective service the Office cannot afford to operate in isolation. Even without organisational reform, the Office needs to continue its efforts to improve links with the remainder of the administrative justice system. In response to this growth in redress mechanisms, at some point in the future the government will have to visit this issue and attempt to provide a more holistic approach to managing and organising this sector.<sup>105</sup> Too often in the past the government has undertaken localised reviews of specific

areas of the administrative justice system, with insufficient attention being paid to the implications for other branches of the sector. It may be that the current distribution of complaints bodies works and is appropriate. But there is a sense that it is excessively complex and largely unknown or misunderstood by the general public. As the senior figurehead in the non-judicial and non-tribunal sector, the PO should be a prime mover in leading the debate in this area.

There are tentative signs that the need to renew civil justice in this country is on the government's agenda.<sup>106</sup> The Tribunals, Courts and Enforcement Bill could be part of the solution and will introduce a new Administrative Justice and Tribunals Council<sup>107</sup> to oversee the sector. The PO will sit on the new Council and its role will be to 'keep the administrative justice system under review' and 'consider ways to make the system accessible, fair and efficient'.<sup>108</sup> But the extent to which this provision will empower the Council to commission research, undertake root and branch reviews, and make recommendations is as yet unclear. As with the 1967 Act and the PO, much will depend on the attitude and energy that the Council brings to its role.

If an overarching review of the administrative justice system in the UK were undertaken, it is highly likely that it would conclude that the distinct post of the PO should be retained. The PO's proven ability to take on politically sensitive issues of executive decision-making and its direct link to Parliament are essential facets of the Office that would be hard to improve upon. In any event, in the short to medium term, the position of the PO will remain. As long as this is the case, the continuing challenge for the PO will be the same as it has always been - to find the

optimum way to perform its various roles, the priority of which were never confirmed in the 1967 Act. This means balancing the requirement to secure redress for complainants and the need to offer constructive advice on how best to achieve long-term administrative improvements. But the PO is also part of the overall accountability system and is attached to Parliament. This has proved a successful arrangement on a number of occasions in the history of the Office. The question is how far can this model go? One of the most important aspects of a healthy liberal democracy is the capacity to scrutinise the executive. In this respect, because of its rare powers of investigation and its reputation for independence, the PO is peculiarly well positioned to play a part in this process. This is particularly so in those disputes where there is uncertainty and disagreement about the factual element of the dispute. With these strengths, there are strong arguments for placing a greater emphasis on this aspect of the PO's work by empowering the Office to undertake own-initiative investigations.<sup>109</sup> The most commonly cited argument against such a power is that it would risk reducing the contact between the PO and complainants. But it could be created in such a way that emphasised that its purpose was to explore areas where maladministration likely to cause injustice might be occurring. A further argument against such a power is that it would expose the PO to investigating issues purely because they were in the media spotlight. But there are ways to filter the investigations taken on. The PASC has been talked of as one solution. Nor should the fear that the Office be swamped be taken as read. The European Ombudsman, for instance, already possesses such a power and undertakes only a handful of such investigations each year.<sup>110</sup>

The proposal for own-initiative powers, however, is not an immediate likelihood. Were it to be introduced it should be done only after a much wider review of the administrative justice system, as referred to above. Perhaps a future Office may develop a more focussed role undertaking administrative audits than it does now, once it became clear that other redress mechanisms in the system were sufficiently capable of providing redress. On this topic, however, the current PO has suggested that existing government arrangements to consider redress are frequently inadequate and that there is an urgent need to return to the Citizens Charter agenda of the 1990s.<sup>111</sup>

Of the PO's more immediate concerns, there is the Office's introduction of the *Principles of Good Administration*, which is the most forthright attempt yet to demystify the concept of maladministration. As the title suggests, the aim behind the *Principles* is also to promote good administrative practice within the public sector. Evidence of the long-term impact that the work of the PO can have on administrative practice is provided by the government's recent undertaking to revise its official guidance in *Government Accounting* which followed the PO's findings in the *Trawlermen's* report.<sup>112</sup> Similarly, to heighten the influence of the *Principles*, in the future there may be a case for it to be reflected in a Code issued by the Cabinet Office, or better still, a Parliamentary resolution.

A more important issue still than the definition of good administration is the recent series of disputes between the PO and the government, which have illustrated a weakness in British democracy and threaten to undermine the ombudsman scheme. While the PO can call upon the support of Parliament, the success of the Office is partially dependent on public

authorities implementing its recommendations. Perhaps out of recognition that this relationship needed to be strengthened, in 2006 the Cabinet Secretary announced that a senior civil servant would take on the role of Permanent Secretary ‘Champion’ for PO issues, assisting the liaison between the Office and government departments.<sup>113</sup> At the same time, the PO has more than once suggested that the government should update its internal guidance on the PO, *Ombudsman in your files*.<sup>114</sup> It is to be hoped that such developments will encourage government departments and ministers to engage in a more constructive dialogue with the PO than that which occurred following the *Occupational Pensions* report. A return to the diplomatic approach adopted in previous disputes between the PO and the government would be preferable,<sup>115</sup> and would still enable the government to retain control of the form and amount of redress provided.

## Conclusion

The Office of the PO has not been immune from criticism, but these criticisms should be understood within the context of an evolving institution finding its place within the constitution. In the early years the Office's first challenge was to establish its credibility and to obtain the confidence of both complainants and government departments.<sup>116</sup> While this preliminary objective was largely achieved a major unwanted side-effect, and one which can still draw comment today, was the excessive time that it took to resolve complaints. Out of this experience it has become clear that the PO cannot rely upon the quality of its reports alone. To remain a viable institution it must

provide a prompt service to its most important stakeholder, the complainant.

Despite the problems that the Office has sometimes experienced, later post-holders have been able to take advantage of the solid foundations that were laid by their predecessors and have increasingly explored the flexibility contained within the 1967 Act. In more than one respect this is leading to a more effective and interesting institution, one which is able to develop and promote high administrative standards. Indeed, at its best, the PO should ‘be a harbinger of the future’ and point to ‘tomorrow's standards today’.<sup>117</sup>

The work of the PO is strengthened by the growth in the ombudsman community that has taken place since 1967, which has allowed ideas about the potential in the role to be explored and shared.<sup>118</sup> The fact that the current PO has an ombudsman background and was neither a civil servant or a lawyer, as with all her predecessors, is perhaps the most important recognition yet of the importance and distinctiveness of this branch of the civil justice network.

A few required amendments aside, the Parliamentary Commissioner Act remains a good piece of legislation and the constitution is much stronger for the Parliamentary Ombudsman. As well as improving the power of the citizen to gain redress, as was originally intended, Parliament itself has gained a valuable tool in the ongoing process of calling the government to account.

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## References

- <sup>1</sup> The formal title of Parliamentary Commissioner for Administration is rarely used today. In recent times the office of the Parliamentary Ombudsman has rebranded itself as the Parliamentary and Health Service Ombudsman. This reflects the fact that at all times the same person has occupied the position of Parliamentary Ombudsman and the Health Service Ombudsman for England.
- <sup>2</sup> Eg R.Gregory and J.Pearson, 'The Parliamentary Ombudsman after twenty-five years' [1992] 70 *Public Administration* 469; N.Lewis and P.Birkinshaw, *When Citizens Complain: Reforming Justice and Administration*, (1993) Open University Press: Buckingham; P.Birkinshaw, *Grievances, Remedies and the State*, second edition, (1994) Sweet and Maxwell: London; C.Harlow and R.Rawlings, *Law and Administration*, second edition, (1997) Butterworths: London.
- <sup>3</sup> Select Committee for Public Administration, Third Report, *Ombudsman Issues* HC 448 (2002-03), paras.4-5.
- <sup>4</sup> Cabinet Office, *Reform of Public Sector Ombudsmen in England* (2005) Cabinet Office Publications: London.
- <sup>5</sup> Regulatory Reform (Collaboration etc between Ombudsmen) Order 2007.
- <sup>6</sup> Amendment 93, proposed by Lord Newton, HL Deb vol.689 col.303-305 31 January 2007.
- <sup>7</sup> Ann Abraham, *The Ombudsman, the Constitution and Public Services: A crisis or an opportunity?* Constitution Unit Seminar on the Ombudsman, 4 December 2006. Available at [http://www.ombudsman.org.uk/about\\_us/FOI/whats\\_available/documents/speeches/ombudsman\\_constitution\\_publicservices.html](http://www.ombudsman.org.uk/about_us/FOI/whats_available/documents/speeches/ombudsman_constitution_publicservices.html)
- <sup>8</sup> Eg J.D.B.Mitchell, 'The Flexible Constitution', [1960] *Public Law* 332.
- <sup>9</sup> Tribunal and Inquiries Act 1958.
- <sup>10</sup> For a contemporary account, see D.N.Chester, 'The Crichton Down Case', 32 [1954] *Public Administration*, 389.
- <sup>11</sup> Whyatt Report, Sir J.Whyatt, *The Citizen and the Administration: The Redress of Grievances*. A Report by Justice, (1961) Stevens: London.
- <sup>12</sup> Labour Party, *Let's Go With Labour for a New Britain*, (1964). For a full account of the debates and developments that preceded the 1967 Act, see R.Gregory and P.Giddings, *The Ombudsman, the Citizen and Parliament*, (2002) Politico's Publishing: London, chapters 2-5; F.Stacey, *The British Ombudsman* (1971) Clarendon Press: London.
- <sup>13</sup> W.Gwyn, 'The British PCA: ombudsman or ombudsmouse?', [1973] *Journal of Politics* 35, 45-69.
- <sup>14</sup> G.Marshall, 'The British Parliamentary Commissioner for Administration', *Annals of the American Academy of Political Science*, May 1968.
- <sup>15</sup> N.D.Lewis and R.James, 'Joined-up Justice: Review of the Public Sector Ombudsmen in England' [2000] *The International Ombudsman Yearbook*, vol 4, 109.
- <sup>16</sup> HC 54 (1967-68).
- <sup>17</sup> [1970] 2 All ER 527.

<sup>18</sup> *R v Parliamentary Commissioner for Administration, ex parte Dyer* [1994] All ER 375. By this stage it had already been decided that decisions of the Local Government Ombudsman could be reviewed, *R v Local Commissioner for Administration for the North and East Area of England, ex p Bradford City Council* [1979] QB 287.

<sup>19</sup> *R v Parliamentary Commissioner for Administration, ex parte Balchin* [1996] EWHC Admin 152; [1997] JPL 917; *R v Parliamentary Commissioner for Administration, ex parte Balchin (No 2)* [1999] EWHC Admin 484; [2000] JPL 267; *R v Parliamentary Commissioner for Administration, ex parte Balchin (No 3)* [2002] EWHC Admin 1876. A successful legal challenge has also been brought against the PO's sister ombudsman, the Health Service Ombudsman, *Cavanagh others v Health Service Commissioner* [2005] EWCA Civ 1578; Times, January 13, 2005.

<sup>20</sup> In this context, see also the case law on the Local Government Ombudsmen.

<sup>21</sup> P.Giddings, 'Ex p. Balchin: findings of maladministration and injustice' [2000] *Public Law* 201.

<sup>22</sup> For a description of the history of the Office and the use of the 1967 Act by the past post-holders, see Gregory and Giddings, n 12 above.

<sup>23</sup> Parliamentary Commissioner Act 1967, s.5(1).

<sup>24</sup> G. Marshall, 'Maladministration' [1973] *Public Law* 32.

<sup>25</sup> JUSTICE, *Our Fettered Ombudsman* (1977) JUSTICE: London, para.19.

<sup>26</sup> M.Seneviratne, *Ombudsmen: Public Services and Administrative Justice*, (2002) Butterworths: London, 45-46.

<sup>27</sup> Eg Fifth Report of the PCA, *The Channel Tunnel Rail Link and Blight: Complaints against the Department of Transport* HC 193 (1994-95); Second Report of the PCA, *The Barlow Clowes Affair* HC 76 (1989-90).

<sup>28</sup> Sixth Report of PCA, *Trusting in the pensions promise: government bodies and the security of final salary occupational pensions*, HC 984 (2005-06).

<sup>29</sup> The PO's findings were supported by the Public Administration Select Committee, *The Ombudsman in Question: the Ombudsman's report on pensions and its constitutional implications*, Sixth Report HC 1081 (2005-06).

<sup>30</sup> Intriguingly, the very first Select Committee review of the PO encouraged the Office to find maladministration for 'bad decisions' and 'bad rules', Second Report from the Select Committee for the Parliamentary Commissioner for Administration, HC 350 (1967-68). It is unclear whether this instruction was ever really acted upon.

<sup>31</sup> *Bradford*, n 18 above.

<sup>32</sup> On the potential for crossover, see A.Bradley, 'The role of the ombudsman in relation to citizens' rights' [1980] *Cambridge Law Journal* 39(2) 304, 320-331.

<sup>33</sup> Fourth Report of the PCA, 'A Debt of Honour': *The ex gratia scheme for British groups interned by the Japanese during the Second World War*, HC 324 (2004-05).

<sup>34</sup> *ibid* para.157.

<sup>35</sup> *Association of British Civilian Internees: Far East Region v Secretary for Defence* [2003] EWCA Civ 473; [2003] QB 1397.

<sup>36</sup> Eg *Miller and another v Stapleton and another* [1996] 2 All ER 449, per Carnwath J at 465; *London Borough Council v Awaritefe* [1999] 32 HLR 517, per Pill LJ at 531; *R v Local Commissioner for Administration, ex parte Liverpool City Council* [2001] 1 All ER 462.

<sup>37</sup> Eg The Parliamentary Commissioner (Ombudsman) Act 1962 (New Zealand), s.19.

<sup>38</sup> Parliamentary and Health Service Ombudsman *Principles of Good Administration*, (2007).

<sup>39</sup> Although see *Balchin (no 2)*, n 19 above and *Bradley, Duncan, Parr and Waugh v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin) paras.67–70.

<sup>40</sup> Eg Select Committee on the Parliamentary Commissioner for Administration, *The Powers, Work and Jurisdiction of the Ombudsman*, First Report, HC 33 (1993-94), paras.12-21.

<sup>41</sup> Parliamentary and Health Service Ombudsman, *Annual Report*, HC 348 (2005-06), 36-41.

<sup>42</sup> Although it was originally proposed to confirm the more flexible approach to completing investigations (Cabinet Office, n 4 above, paras.50-56), this proposal was not thought necessary to include in the 2007 Regulatory Reform Order, see *The Explanatory Memorandum on the Regulatory Reform (Collaboration etc between Ombudsmen) Order 2007*, (2007) Cabinet Office: London, para.58.

<sup>43</sup> *Bradley et al*, n 39 above, para.42.

<sup>44</sup> Although see the Law Commission, *Remedies Against Public Authorities: scoping report*, (2006) The Law Commission: London.

<sup>45</sup> Eg in the *Reeman* Case (Case No.C.557/98) the complainants were paid significant compensation following a PO investigation, where previously they had failed in the Court of Appeal, *Reeman v Department of Transport* [1997] 2 Lloyd's Rep 648.

<sup>46</sup> *Bernard v Enfield LBC* [2002] EWHC 2282; [2003] HRLR 4.

<sup>47</sup> The one exception is s.7(4) of the Parliamentary Commissioner Act 1967 which allows the PO to direct that someone who has been deported should be re-admitted at least until an ombudsman investigation has been completed.

<sup>48</sup> Select Committee on the Parliamentary Commissioner for Administration, *Maladministration and Redress*, First Report, HC 112 (1994-95).

<sup>49</sup> Parliamentary Commissioner Act 1967, s.5(2).

<sup>50</sup> With *Debt of Honour*, the challenge to the legality of its policy in *Elias v Secretary of State for Defence* [2005] EWHC 1435 (Admin) may have been partly responsible for the Ministry of Defence belatedly accepting the PO's recommendations. In *Congreve v Home Office* [1976] QB 629 the Court of Appeal found that the Home Office had acted unlawfully where previously the PO had found maladministration. While in *NHS funding for long term care*, HC 399 (2002-03), the Health Service Ombudsman, the PO's sister ombudsman, partially based her finding of maladministration on the fact that a number of Health Authorities were not complying with the Court of Appeal's ruling in *R v North and East Devon HA, ex parte Coughlan* [2000] 2 WLR 622.

<sup>51</sup> Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (2004), Cm 6243.

<sup>52</sup> The case of *Anufrijeva v Secretary of State for the Home Department* [2003] EWCA Civ 1406; [2004] QB 1124 demonstrated how disproportionately expensive the pursuit of maladministration complaints in the courts can be. See also Law Commission, n 44 above.

<sup>53</sup> M.Elliott, 'Asymmetric devolution and ombudsman reform in England' [2006] *Public Law* 84, 88.

<sup>54</sup> R.Kirkham, 'Auditing by stealth? Special Reports and the Ombudsman' [2005] *Public Law* 740.

<sup>55</sup> C.Harlow, 'Ombudsmen in search of a role' (1978) 41 *Modern Law Review* 446.

<sup>56</sup> n 40 above, para 50.

<sup>57</sup> Local Government Act 1974; NHS Reorganisation Act 1973.

<sup>58</sup> Eg Parliamentary and Health Services Commissioners Act 1987. Amendments can be made by Order in Council, Parliamentary Commissioners Act 1967, s.4 (as amended).

<sup>59</sup> Parliamentary Commissioner Act 1967, sched.3, s.6.

<sup>60</sup> Eg First Report from the Select Committee on the Parliamentary Commissioner for Administration, 1971-72, HC 215, iii-vi.

<sup>61</sup> Cabinet Office, P.Collcutt and M.Hourihan *Review of the Public Sector Ombudsmen in England*. (2000) Cabinet Office Publications: London, para 5.11.

<sup>62</sup> Lewis and James, n 15 above, 117-122.

<sup>63</sup> A discretion for which there is some support in s.5(1), see also Seneviratne, n 26 above, 108-109.

<sup>64</sup> Gregory and Pearson, n 2 above.

<sup>65</sup> Second report of Public Administration Select Committee, *Tax Credits: putting things right*. HC 577 (2005-06), Ann Abraham, Oral Evidence, Q 6.

<sup>66</sup> Cabinet Office, n 62 above, para 3.42.

<sup>67</sup> n 40 above, para 72.

<sup>68</sup> Parliamentary and Health Service Ombudsman, *Summary results of the survey of Members of Parliament on the work of the Ombudsman* Available at [http://www.ombudsman.org.uk/about\\_us/FOI/whats\\_available/documents/surveys/mp\\_survey\\_04.html](http://www.ombudsman.org.uk/about_us/FOI/whats_available/documents/surveys/mp_survey_04.html)

<sup>69</sup> Public Administration Select Committee, *Annual Report of PO*, fourth report, HC 106 (1999-2000), para 6.

<sup>70</sup> n 66 above, *Memorandum to the Public Administration Select Committee*, para. 4.1.

<sup>71</sup> Cabinet Office, n 62 above, ch.3.

<sup>72</sup> n 4 above, para. 31.

<sup>73</sup> Parliamentary Commissioner Act 1967, s.8 and s.9.

<sup>74</sup> In 1975, the government issued a certificate under the Parliamentary Commissioner Act s.8(4) during the *Court Line* investigation, Fifth Report of the PCA, HC 498 (1974-75), and in 1971 a notice was issued under s.11(3) (Case 130/S – *Non-release of documents relevant to tax affairs*, Second Report of PCA, *Annual Report* HC 116 (1971-72), pp180-183).

<sup>75</sup> Eg Eighth Report of the PCA, *Annual Report* HC 897 (2001-02), para.1.6.

<sup>76</sup> Eg Select Committee on the Parliamentary Commissioner for Administration *Second Report* HC 334 (1971-72), para.20; *Report from the Select Committee on the Parliamentary Commissioner for Administration* HC 268 (1974), paras 1-3.

<sup>77</sup> *Rochester Way, Bexley – Refusal to meet late claims for compensation* HC 598 (1977-78); *The Channel Tunnel Rail Link and Blight: Complaints against the Department of Transport* HC 193 (1994-95); *Debt of Honour*, n 33 above; *Occupational Pensions*, n 28 above.

<sup>78</sup> Eg see R.Gregory and P.Giddings (eds), *Righting Wrongs: The Ombudsman in Six Continents* (2000) IOS Press. There are exceptions, eg in Northern Ireland a complainant can apply to court to enforce a ruling of the Commissioner for Complaints, the Commissioner for Complaints (Northern Ireland) Order 1996, article 16. See also, Public Services Ombudsman (Wales) Act 2005, s.20.

<sup>79</sup> n 7 above.

<sup>80</sup> See for instance, the legal advice to the Pensions Ombudsman who has the power to make binding orders, *The Pensions Ombudsman and Article 6 of the European Convention on Human Rights - Opinion - Ms Monica Carss-Frisk*, available at <http://www.pensions-ombudsman.org.uk/publications/docs/article6opinion060801.doc>.

<sup>81</sup> n 39 above, para.92.

<sup>82</sup> *ibid* para.58.

<sup>83</sup> See Gregory and Giddings, n 12 above.

<sup>84</sup> n 62 above.

<sup>85</sup> Eg see B.Thompson, 'Integrated Ombudsmanry: Joined-up to a Point' [2001] *Modern Law Review* 459; Lewis and James, n 15 above.

<sup>86</sup> See articles 2-11.

<sup>87</sup> Elliot, n 54 above.

<sup>88</sup> Harlow and Rawlings, n 2 above, p.455.

<sup>89</sup> Public Services Ombudsman (Wales) Act 2005.

<sup>90</sup> Scottish Public Services Ombudsman Act 2002.

<sup>91</sup> The posts of Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints are held by the same person. It has been recommended that these two posts should be formally merged, see Office of First Minister and Deputy First Minister for Northern Ireland, *Review of the Offices of the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints* (2004).

<sup>92</sup> Although the PO already shares staff and facilities with the Health Service Ombudsman.

<sup>93</sup> Elliott, n 54 above.

<sup>94</sup> Sir Michael Buckley, *The Ombudsman*, December 2003, p.11.

<sup>95</sup> n 41 above.

<sup>96</sup> As this article is written, the Department for Work and Pensions has been directed to reconsider its response to the PO's report in *Bradley et al*, n 39 above. Although this ruling may be considered on appeal, the Department for Work and Pensions has undertaken to look again at the issue, HC Deb vol.457 col.419-431 22 February 2007 (John Hutton, Secretary of State for Work and Pensions).

<sup>97</sup> n 7 above.

<sup>98</sup> n 29 above, para.70.

<sup>99</sup> *ibid.*

<sup>100</sup> eg see Second Report of PCA, *State earnings-related pension scheme (SERPS) inheritance provision: redress for maladministration*, HC 271 (2000-01).

<sup>101</sup> Parliamentary and Health Service Ombudsman, *Governance Statement*, available at [www.ombudsman.org.uk/about\\_us/governance/governance\\_statement.html](http://www.ombudsman.org.uk/about_us/governance/governance_statement.html).

<sup>102</sup> Standing Order 146.

<sup>103</sup> Eg see n 61 above.

<sup>104</sup> Public Administration Select Committee: *Review of the Public Sector Ombudsmen in England* HC 612 Third Report (1999-2000); *Ombudsman Issues* Third Report HC 448 (2002-03).

<sup>105</sup> Lewis and James, n 15 above, pp.123-133.

<sup>106</sup> n 51 above.

<sup>107</sup> Cl.44.

<sup>108</sup> Schedule 7, cl.13(1)

<sup>109</sup> Public Administration Select Committee (1999-2000), n 105 above, para.11.

<sup>110</sup> Eg in 2005 the European Ombudsman commenced five own-initiative investigations, *Annual Report 2005*, European Ombudsman: Brussels, p.157.

<sup>111</sup> Ann Abraham, *Oral evidence to the Public Administration Select Committee*, HC 251-i, 18 January 2007, Q.2.

<sup>112</sup> Second Report of PCA, *Put together in haste: 'Cod Wars' trawlermen's compensation scheme*, HC 313 (2006-07), para.167.

<sup>113</sup> Sir Gus O'Donnell, *Oral evidence to the Public Administration Select Committee*, HC 884-v, 16 May 2006, Q.249.

<sup>114</sup> Cabinet Office, *The Ombudsman in your files*, last revision Jan 1997.

<sup>115</sup> See *Barlow Clowes and Channel Tunnel Rail Link*, n 27 above.

<sup>116</sup> Gregory and Pearson, n 2 above, 471.

<sup>117</sup> N.Lewis, 'World Ombudsman Community: aspects and prospects' *Indian Journal of Public Administration*, 39(4) [1993] 663, 665.

<sup>118</sup> See in particular the British and Irish Ombudsman Association, <http://www.bioa.org.uk/>



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