Principles of Public Law

Andrew Le Sueur, LLB, Barrister
Reader in Laws, University College London
Javan Herberg, LLB, BCL, Barrister
Practising Barrister, Blackstone Chambers
Rosalind English, LLM, MA, Barrister

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COMMISSIONERS FOR ADMINISTRATION ('OMBUDSMEN')

We saw in Chapter 9 that, despite policies aimed at steering people away from the courts, the public appetite for litigation has not abated, particularly as a means of calling public authorities to account for their actions. Nevertheless, there are many types of public activity which cause dissatisfaction, and these may not always be subject to legal challenge either before the courts or in the many tribunals that are available, because there has been no technical breach of the law. This is where the ombudsmen come in. The term 'ombudsman' is a borrowing from Swedish administrative law. The first ombudsman in this country was the Parliamentary Commissioner for Administration (PCA), a post established in 1967. Since then, the role of the ombudsman has spread to other sectors of public life: there is an ombudsman for the National Health Service and an ombudsman for local government. While their areas of remit may differ, they all have in common the important role of making public authorities accountable to individuals for administrative failure. This administrative failure is known in ombudsman terms as 'maladministration', and people's complaints must concern themselves with the way decisions are reached, and the manner of their implementation, rather than the quality of the decisions themselves. Any findings or recommendations made by an ombudsman at the end of the investigative process are not legally binding on the public authority complained against. The ombudsmen have no sanctions, but rely, instead, on co-operation.

Maladministration is not a cause of action or ground of judicial review recognised by the courts. Therefore, the ombudsmen provide a form of redress where the complainant cannot take legal action. Nevertheless, in many cases there may be an overlap between the ombudsmen's jurisdiction and those of the courts; the complainant may be able to point, for example, to a breach of natural justice, which is actionable in judicial review proceedings, in addition to a case of maladministration. The current reforms to the civil justice system include a number of mechanisms for discouraging people from pursuing their disputes through the courts; judges will be obliged, for instance, to ask litigants whether they have tried alternative dispute resolution before proceeding to formal litigation. In disputes with public authorities, where there may be an overlap between the ombudsman's jurisdiction and judicial review procedures, it is suggested that the aggrieved individual ought to allow the ombudsman to investigate the complaint first, before going to court. This may not prevent the complainant from returning to court; indeed, an adverse finding by the ombudsman may trigger successful judicial review proceedings. This happened in *Congreve v Home Office* (1976). The PCA here

upheld the complaint of maladministration by the Home Office in failing to renew television licenses at the old rate, and this finding led to successful judicial review proceedings where the court found that the minister had acted illegally in revoking the licences of people who had sought to avoid the new, increased licence fee by renewing their previous licence ahead of time.

It can be seen from this brief introduction that recourse to the ombudsman may have some advantages where the complainant has no recognisable legal cause of action. It is not, however, possible to evaluate the efficacy of this institution without some evidence as to the level of co-operation the ombudsmen secure from the public authority into which they conduct their investigation, because, without this co-operation, there is no redress for the complainant. This can be gleaned to a certain extent from the annual reports put out by the ombudsmen themselves. There are also a number of 'no-go' areas, with obvious implications for the redress of grievances. The PCA may not, for example, investigate any action taken for the purposes of the investigation of crime, or action in relation to passports, nor any action taken in matters relating to contractual or other commercial transactions by central government. The list of excluded activities is given below, 10.4 (and is to be found in s 5(3) and Sched 3 of the Parliamentary Commissioner Act 1967). But first, it is worth looking at the roles of the four main public service sector ombudsmen.

10.1 Who are the ombudsmen?

The first main public sector ombudsman to be set up was the PCA. He investigates cases of injustice caused by maladministration in central government departments and some other institutions. The current office holder is Michael Buckley, a former civil servant. The PCA is based in London and is staffed by civil servants on secondment from government departments; this is sometimes said to be a weakness, since the ombudsman's office should be seen to be neutral and independent. This PCA enjoys similar status and tenure of office to that of a High Court judge, which means that he is formally appointed by the Queen and holds office during 'good behaviour', and, more importantly, can only be removed by the Queen following addresses by both Houses of Parliament. Mr Buckley also holds the post of Health Service Ombudsman, established in 1973 to look at allegations of maladministration in the National Health Service.

The Local Commission for Administration (LCA) was set up in 1974 to deal with complaints of maladministration against local authorities in England and Wales. England is split into three areas, with a commissioner for each. The current local ombudsmen are Mr Osmotherly, Mrs Thomas and Mr White. They deal with complaints concerning maladministration by local authorities, mainly in the fields of social services, planning and housing. We will look in more detail at some of their casework below.

In addition to the above, it is worth mentioning another public sector ombudsman with special responsibilities. The Prisons Ombudsman Office (formally known as the Independent Complaints Adjudicator) was instituted in 1994 on the recommendation of the Woolf Report into the serious riots at Strangeways Prison. This was part of a package of reforms introduced in 1992, in which Prison Boards of Visitors ceased to hear disciplinary charges against prisoners; prison governors are now entirely responsible for this. If a prisoner believes that a disciplinary finding is wrong, or that proper procedures were not followed, he can now appeal to the Prisons Ombudsman (see Morgan, R, 'Prisons accountability revisited' [1993] PL 314).

There is also an ombudsman for the European Community to deal with complaints concerning instances of maladministration in the activities of the Community institutions or bodies (with the exception of the Court of First Instance and the Court of Justice acting in their judicial role). The current holder of the post is Jacob Soederman, formerly Parliamentary Ombudsman in Finland. Although the ombudsman played no direct role in the mass resignation of the Commission in February 1999 in response to a damning report on corruption, his investigations into transparency, or lack of it, in Commission recruitment procedures, and public access to Commission documents, will have an important impact on the newly constituted Commission.

In addition, a plethora of private sector ombudsmen have been created to investigate complaints in service industries such as banking, insurance and estate agencies. Most of these ombudsmen have been established and financed by the industries themselves, and have no special statutory powers. They form part of the system for self-regulation (see above, 8.2.3). Other private sector ombudsmen have been set up by statute, such as the Building Societies Ombudsman and the Legal Services Ombudsman, established under the Courts and Legal Services Act 1990. This ombudsman oversees how the professional bodies deal with complaints against solicitors, barristers and licensed conveyancers. He is, however, precluded from investigating allegations relating to matters for which there is immunity from actions in tort, such as advocacy in court. The fact that some private sector ombudsmen are set up by statute, and others are just voluntary, creates an untidy picture – especially when it comes to the way in which complaints against the ombudsmen may be made. If an ombudsman has statutory powers, then a person dissatisfied with a decision not to investigate a case of maladministration (for example) can apply for judicial review of that ombudsman (for example, *R v Parliamentary Commissioner for Administration ex p Balchin* (1997)). But, if the ombudsman is merely 'voluntary', and has no statutory powers, then judicial review is probably not possible (for example, *R v Insurance Ombudsman Bureau ex p Aegon Life Insurance Ltd* (1994)).

Ombudsmen for both the public and private sectors have begun to work closely together, and meet regularly under the auspices of the UK and Ireland Ombudsmen Association formed in 1993, the aims of which include improvement of public awareness of the functions performed by ombudsmen.

10.2 Injustice as a consequence of maladministration

What all these very different ombudsmen have in common is the power to deal with 'maladministration'. None of the statutes establishing the various ombudsmen actually define what is meant by 'maladministration'. A useful, but not comprehensive, guide was provided by Richard Crossman, a minister at the time the PCA was first established. It is now known as the 'Crossman Catalogue': 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness, and so on'. 'And so on' may prove useful to the Commissioners, giving some discretion and flexibility regarding that which can be investigated.

Since the Crossman Catalogue, the annual PCA reports have revealed additions to these categories, including unwillingness to treat a complainant as a person with rights, neglecting to inform, failure to monitor faulty procedures, and the failure to mitigate the effects of rigid adherence to the letter of the law where this produces manifest inequity. It is not enough, however, to complain simply that there has been 'maladministration'; the complainant must establish that he has been caused some 'injustice' thereby; there must be some causal link, in other words, between the public authority's behaviour and the loss caused to the complainant (*R v Local Commissioner for Administration ex p Eastleigh BC* (1988)).

The best way to understand what maladministration means is to look at some reports of ombudsman investigations, and then consider the statistical evidence of the rate of success of these complaints. The following sections focus on the work of the PCA, the Health Service ombudsman and the local ombudsmen respectively.

Here are some recent PCA investigations (summarised in its report of 1997–98):

(a) the PCA upheld a taxpayer's complaint that the Inland Revenue had delayed resolving his tax affairs after he left the UK, with the result that he continued to pay tax unnecessarily. The Revenue did refund this overpayment, but only after the investigation by the PCA did they deal with the complainant's claim for lost interest and costs, making him an ex gratia payment of £1,500;

(b) an increasing number of complaints reaching the office of the PCA concern the activities of the controversial Child Support Agency set up by the government in 1993 to trace absent parents (usually fathers) and make them contribute towards their children's upkeep. When the CSA failed for

three years to secure regular payment of child support maintenance by an absent parent (one of the agency's key functions), the ombudsman upheld a complaint that the delay had caused financial loss, distress and inconvenience to the mother. The CSA awarded her *ex gratia* payments of £2,384.26;

(c) a complainant on income support had declared to the benefits office that she was working part time. A fraud officer interviewed her about her employment, but took no account of her declaration of earnings, even though that information was available to him. The ombudsman upheld her complaint declaring that she had been caused distress by being wrongly suspected of dishonestly claiming income support, and that there were serious failures in the handling of her complaint.

So financial compensation does not always follow an adverse finding by the PCA. Over the 15 month period covered by the 1997–98 report, the ombudsman's recommendations of compensation resulted in payments ranging from £30 (to a member of the public who had experienced difficulty in booking a driving test using a credit card) to £50,044.30 (compensation paid by Customs and Excise for losses, costs and inconvenience to a member of the public who, for a period, had been denied a certificate of VAT paid on a boat he wished to import into France). The availability of other remedies, such as a recommendation by the ombudsman to the erring public authority to apologise to the complainant, fits in with the ombudsman's remit, which is to 'emphasise the value placed on the admission of mistakes and the attempt to make right any harm done' (Select Committee on the PCA, *First Report for Session 1994–95 on Maladministration and Redress*, HC 112).

These reports may make for anodyne reading, but they perform the important function of attracting publicity to the ombudsman's findings. The contents of these reports are privileged from defamation.

Some examples of the Health Service Ombudsman's investigations, summarised in his annual report of 1996–97, are as follows:

(a) Staff at University College Hospital failed to inform the complainants of their father's deterioration and death. There followed a delay in giving the family an opportunity to see the body and general lack of tact in dealing with the complaint. The complaint was upheld, and the NHS Trust concerned was criticised for lack of instructions to staff on informing patients about the condition of patients near to death. The ombudsman's office also criticised the trust for a 'disgraceful lack of sensitivity to a bereaved relative'.

(b) An individual submitted a formal complaint through the internal complaints procedure about the clinical mismanagement of his late father's cardiac condition. The Newham Healthcare NHS Trust failed to make a substantive reply to the letter for five months, and when it did, the response was addressed to the deceased patient and not to the

complainant. The ombudsman upheld the complaint that the matter had been dealt with inadequately, and he also recommended that individuals should be informed about avenues of appeal from the internal complaints procedure, either to independent review or to the ombudsman himself.

(c) A man suffering from acute appendicitis was kept waiting for about eight hours on a trolley in the Accident and Emergency Department of Hillingdon Hospital before being attended to. He complained that he had received inadequate care, and also alleged that insensitive personal remarks had been made within his hearing. Both complaints were upheld, and the ombudsman recommended that better procedures were put in place to ensure that staff contact the on-call surgical team; the fact that the complainant's arrival in hospital had coincided with the national changeover day for junior doctors, when they change appointments, was no excuse. The hospital also apologised for the alleged insensitive remarks, although they had not been substantiated.

The local ombudsmen conduct investigations into claims of injustice form maladministration by a local authority, local police authority or water authority. Many complaints are about housing and planning. As can be seen from the cases below, recommendations for compensation, when they are made, tend to be modest:

(a) Mr and Mrs H contended that a local council had failed to deal properly with their complaints about dust caused by quarry workings close to their home. They said that they had suffered consequent nuisance from limestone dust settling on their property. The local ombudsman upheld the complaint that the local council had failed to ensure compliance with the conditions for authorisation of the quarry works and the council's delay in responding to the property owners' complaints amounted to maladministration. She recommended that the council pay the complainants £250 to reflect the frustration and distress they had experienced in seeking a response from the council to their complaints. The council accepted this recommendation.

(b) Mrs J, who owned a guest house close to the city centre, complained on behalf of seven resident guest house owners on her street that the council had failed to carry out proper consultations about the introduction of residents' parking in the area. As a result, the complainants said that they had to pay for parking that was formerly free, that the amount of overall parking space had been reduced, and that they had suffered subsequent loss of trade because of insufficient parking space for their guests. The local ombudsman held that the lack of proper consultation had amounted to maladministration by the local council and he recommended that the council should give Mrs J and the six others on whose behalf she had taken the complaint six months' free parking time each and that Mrs J should be awarded £150 for her 'time and trouble' in pursuing these complaints. The council accepted these recommendations.

(c) A complainant informed the local ombudsman that her local council had failed to ensure the protection of a group of mature trees, when approving a planning application for a development close to her home. The local ombudsman found that the council had not considered the probable effect of the development on the trees (which were subject to a preservation order). As a result of the ombudsman's report, the council undertook to fund a replanting scheme to replace the trees that had been lost and to carry out remedial works on remaining damaged trees and to compensate residents for costs incurred in removing dead trees (a total expenditure of £4,000).

10.3 The statistics

The reports indicate not only the nature of some of the individual cases investigated, but are illustrative of the general pattern of the types of complaints brought and the rate of investigation:

1997–98	Complaints	Percentage investigated in full
PCA	1,528	20%
HSC	2,660	4%
LCA	14,969	3%

The number of complaints received by the Health Service Ombudsman has increased most dramatically of all the public sector ombudsmen. In 1989–90, he only received 794 complaints; the current figures represent a 24% increase on the previous year. This is partly because this ombudsman's jurisdiction has recently been extended to cover complaints about the exercise of clinical judgment by health service professionals and complaints about family practitioners, and the very small percentage of investigations undertaken is partially explained by the fact that clinical investigations take much longer, because of the need for the involvement of expert assessors. In contrast to the office of the Health Service Ombudsman, the PCA and the local ombudsmen receive relatively few complaints when one considers the width of their respective jurisdictions. The number of complaints submitted to the PCA has barely increased since 1993, when 1,244 letters were received, 24% of which were investigated. Bear in mind the vast number of decisions taken by public servants on behalf of a population of almost 60 million, and then the tiny number of complaints can be put in perspective. Later, we shall consider the causes of this, and whether it is a problem.

It is also worth noting how few complaints receive a full investigation by all the public sector ombudsmen. As we shall see, this is, in part, because many complaints made fall outside the scope of the ombudsmen's jurisdiction, and so are filtered out at a preliminary stage. Also, the ombudsmen often manage to resolve complaints by informal contact with the

public authority without any need for a full formal investigation. The Health Service Ombudsman, for example, sends the majority of the complaints he receives back to the internal complaints procedure set up under the NHS, which is the more appropriate body for dealing with many of the matters raised.

A potentially important area of the current PCA's jurisdiction concerns complaints under the Code of Practice on Access to Government Information, a non-statutory code in operation since 1994. This imposes a non-binding obligation on public authorities to provide certain types of information, and the responsibility for seeing that the government acts in accordance with this Code of Practice is placed on the PCA. The basis for his jurisdiction here is based on the twin criteria of maladministration and injustice; the failure by the public authority in question to provide the information in accordance with the code is deemed to constitute an injustice. However, since the code was put in place, relatively few complaints have been received under this head; only 27 complaints came into the office in 1997–98. When the Freedom of Information Act passes into force, this subject will pass out of the PCA's jurisdiction, since the Act will give legal backing to the right to certain categories of information and a special Commissioner for Information will be appointed to adjudicate on disputes. The current PCA has expressed his concern that 'the creation of yet another public sector complaints authority will make an already complex and fragmented system still harder for complainants to use and understand' (1997–98 Report, para 1.15).

10.4 Limits on the ombudsmen's powers

Not every incident of 'maladministration' by a public authority can be taken to the ombudsmen for investigation. The ombudsmen are able to investigate only those public bodies specifically referred to in the ombudsmen's respective statutes. Some of these limitations are relatively uncontroversial; others less so. The following are all excluded from the PCA's jurisdiction:

(a) complaints relating to matters affecting the UK's relationship with other countries or international organisations;
(b) criminal investigations and national security;
(c) the commencement or conduct of civil or criminal proceedings;
(d) any exercise of the prerogative of mercy by the Home Secretary;
(e) matters relating to contractual or commercial transactions of government departments;
(f) grievances concerning the pay, discipline, pensions, appointments and other personnel matters in the armed forces and Civil Service;
(g) the grant of honours, awards and privileges within the gift of the Crown.

An area of real concern has been the exclusion from the jurisdiction of both the PCA and the Health Service Ombudsman and the local ombudsmen of matters relating to commercial or contractual transactions. Since the 1980s, many public services have been 'contracted out'. These services include the care of the elderly and chronically sick, refuse collection, and catering and cleaning in public institutions. Recent legislation has gone some way to meet these criticisms. The Health Service Ombudsman can now investigate complaints relating to services provided through the internal market created by the NHS and Community Care Act 1990 (s 7(2) of the Health Service Commissioner Act 1993). The Deregulation and Contracting Out Act 1994 extends the PCA and local ombudsmen's jurisdiction to contracted out functions of central and local government.

It should be mentioned here that not all these activities are amenable to judicial review by the courts either. We will see from Chapters 11–16 that some of these are expressions of the prerogative power of the Crown, such as the making of international treaties and the grant of honours. Other areas, such as the employment conditions of civil servants, may be excluded from the purview of judicial review by statute. However, the power of the courts to scrutinise these activities in judicial review proceedings is not so clearly curtailed as it is in the case of the ombudsman, as we will see in looking at the range of public activities which could properly be described as contractual or commercial which have been successfully challenged in judicial review proceedings.

In addition, complaints are subject to a time limit; they have to be made within 12 months from the day the aggrieved person first had notice of the problem. This would appear to be more generous than the time limit imposed for the institution of judicial review proceedings – within three months from the date of the offending administrative act – but, again, the courts do have the discretion to extend the time for application for permission in cases where there is a 'good reason' so to do (see below, 17.3). The PCA does not enjoy this discretion. This is one of the limits on the jurisdiction of the PCA which he himself believes should be removed. He has expressed regret, for example, that he is not able to investigate personnel matters in the public service.

10.5 The ombudsman process

In this section, we trace the steps that have to be followed when complaining to either the PCA, Health Service Ombudsman or the local ombudsmen, highlighting the most controversial features. The first point to make is that the process can take a long time: all the ombudsmen have backlogs of cases waiting to be dealt with. In its 1997–98 report, the PCA noted that the average throughput time for investigations completed was over 87 weeks; in his judgment, he says in his report, 'these figures were unacceptable' (see above,

1.4). Equally, the Select Committee on Public Administration commented in 1997 that the average time taken for Health Service Ombudsman investigations – nine months – is 'too long', particularly since many complaints are months old by the time they reach his office.

10.5.1 The PCA

If a person is aggrieved by the maladministration of a central government body, he cannot complain to the PCA directly: only complaints referred to the PCA office by an MP will be considered. The MP need not be the complainant's own constituency MP. This so called 'MP filter' is regarded by most commentators (but not all) as a major weakness in the institution of the PCA. The bar on direct access to the PCA needs to be set in a historical context. Parliament became the supreme law making body following the English Civil War and the constitutional settlement of the 17th century (see Chapter 3). Three centuries later, Parliament is still seen, or at least sees itself, as the forum for the redress of grievances. This is the reason – apart from administrative convenience – for the MP filter. The ombudsman system is, therefore, firmly attached to Parliament, rather than the people: the PCA is perceived to be a creature of Parliament rather than a citizen's champion, as he is in other democracies.

The MP filter has two main functions. First, to give the MP a chance to deal with the complaint himself or herself – for example, by writing a letter to the relevant government department. Sometimes, this is all that is needed to resolve a problem. Secondly, it is suggested that MPs play a useful role in weeding out unmeritorious complaints, or complaints about matters which fall outside the PCA's jurisdiction. In reality, this does not happen, as many MPs seem not to understand what types of complaints the PCA is able to investigate; a large proportion of complaints referred to the PCA by MPs have to be rejected by the Commissioner's office, on the ground that they fall outside his jurisdiction as set down by the 1967 Act.

Drewry and Harlow carried out research into how MPs were using the PCA in the mid 1980s (see '"The cutting edge"? The PCA and MPs' (1990) 53 MLR 745). They found that every year, about 70% of MPs refer between one and six complaints to the PCA. Interestingly, over 26% of MPs had received a request from a person living in another MP's constituency to pass a complaint on to the PCA. There was considerable uncertainty as to what an MP should do in such circumstances. Drewry and Harlow conclude that the office of the PCA 'is held in low esteem' both by MPs and the public.

Whether or not such low esteem is justified, it has been pointed out in a study of the constituency case work of MPs that the MPs sometimes have to monitor ombudsmen investigations themselves to ensure that investigations are conducted thoroughly and effectively (see Rawlings, R, 'The MP's complaints service' (1990) 53 MLR 22 and 149.) The PCA in fact receives more

complaints directly (which he has to reject) than he receives from MPs. The PCA was so concerned about this that, in 1978, he introduced machinery whereby, with permission of the complainant, he would pass on the complaint to an MP, who in turn could pass it back to the PCA to investigate.

The debate over direct access to the PCA continues. In 1977, a report by JUSTICE, *Our Fettered Ombudsman*, recommended direct access, as did the JUSTICE/All Souls Review in 1988. The PCA himself would also like to see direct access. In his report, he again complains about the obstacle of the MP filter:

> That hurdle is not required before an approach is made to me as Health Service Commissioner. It applies to almost no other national ombudsman throughout the world. I remain of the view that the filter serves to deprive members of the public of possible redress.

However, not everyone accepts the need for the removal of the MP filter. Carol Harlow has argued against this, and has challenged the assumptions that underlie the calls for direct access ('Ombudsman in search of a role' (1978) 41 MLR 446; Harlow, C and Rawlings, R, *Law and Administration*, 2nd edn, 1998, London: Butterworths, Chapter 7). She is not keen to see a huge increase in the number of cases investigated by the PCA which would be likely to occur if the MP filter were to be removed. On the other hand, it has been argued that the relatively low numbers of complaints made to the ombudsmen is a fundamental flaw in the institution, and without an expansion of their case load, which could be achieved by removing the MP filter and expediting the investigations undertaken, they cannot properly perform their task of correcting maladministration in the public sector.

10.5.2 Access to other ombudsmen

In contrast to the PCA, the Health Service Ombudsman and the local ombudsmen allow complainants direct access. In the early years of the local ombudsmen, there was a requirement that complaints had to be referred by a councillor, but this was removed by the Local Government Act 1988, since when the public have been able to approach the local ombudsmen directly. This led to a dramatic rise of 44% in the number of complaints received; now over 83% of complaints are made directly, rather than via a local councillor. This strongly suggests that the removal of the MP filter for the PCA would result in a considerable increase in work for that office.

10.5.3 The ombudsman filter

Once a complaint has been received by one of the ombudsman's offices, the first task is to determine whether it falls within that ombudsman's jurisdiction and whether it shows a *prima facie* case of maladministration. As we will see, a

very large proportion of cases are rejected at this stage, because the subject matter falls outside the jurisdiction of the relevant ombudsman or the complaint is not about 'maladministration'.

The ombudsman's office also has to consider whether the aggrieved person should be taking legal proceedings. As was mentioned in the introduction to this chapter, there may be an overlap between ombudsman redress and a judicial review matter. It has to be said that, in many of the complaints listed above, 10.2, 'maladministration' simply involves incompetence, failures in communication and insensitivity on the part of public authorities and their employees. In such cases, there would be no grounds for the complainant to apply for judicial review; there has been no illegality, irrationality or procedural impropriety. But, at other times, the complaint of 'maladministration' may also give grounds for some sort of legal challenge. Careless administration – for example, losing documents – could possibly give the basis for suing for negligence. A public authority's inordinate delay in complying with a statutory duty might give grounds for judicial review. This can cause problems. All the main ombudsmen are precluded from investigating complaints of injustice caused by maladministration if the complainant has a legal remedy available. For example, the Parliamentary Commissioner Act 1967 provides:

> 5(2) Except as hereinafter provided, the Commissioner shall not conduct an investigation under this Act in respect of any of the following matters, that is to say–
>
> (a) any action in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment or by virtue of Her majesty's prerogative:
>
> (b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law:
>
> Provided that the Commissioner may conduct an investigation notwithstanding that the person aggrieved has or had such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect him to have resort or have resorted to it.

The ombudsmen have tended to interpret this restriction on their powers to investigate cases with a good degree of flexibility. Sir Cecil Clothier, a former PCA, said that 'where process of law seems too cumbersome, slow and expensive for the objective gained, I exercise my discretion to investigate the complaint myself' ((1980–81) HC 148).

10.5.4 The investigation

If the complaint does pass the initial screening, then it is fully investigated. The ombudsman's method is inquisitorial rather than adversarial. This will normally involve a person from an ombudsman's office interviewing the

aggrieved person to hear his or her account of the events alleged to constitute 'maladministration'. The civil servant, or local government officer in the public authority, will also be interviewed, and will be given a chance to answer the allegations made. Sometimes, the matter will end there, with an informal resolution; one of the advantages of this form of dispute resolution is that the ombudsman may put some pressure on the public authority at this pre-investigation stage to provide a suitable remedy to the complainant. Such informal inquiries avoid the time consuming process of putting a complaint formally to the department and receiving their comments, then starting a full investigation. Many complaints are resolved at this stage when the ombudsman finds that, though there may have been mistakes, they have not caused 'injustice' to the complainant.

If a formal investigation does proceed, the ombudsman has extensive statutory powers to compel witnesses to give evidence under oath and disclose documents. The ombudsman is not hindered by a number of common law and statutory rules which restrict the production of certain documents in court proceedings, such as the withholding of documents on grounds of public interest immunity or under the Official Secrets Acts (although cabinet documents can only be seen if certified by the Prime Minister or the Cabinet Secretary). An investigation cannot be stopped by a minister; indeed, any obstruction of the ombudsman's investigation may be referred to the High Court for punishment for contempt.

10.5.5 The report

If the investigation has failed to produce an informal negotiated settlement of the complainant's grievances, then staff in the ombudsman's office produce a written report. A copy is sent to the aggrieved person, the public authority which has been investigated, and the MP or any councillor who referred the complaint.

10.5.6 The response to the report

The public authority has an opportunity to respond to the report. In practice, the details of the report often meet with indifference. A recent survey revealed that over 50% of MP respondents said that they 'hardly ever' or 'never' read PCA reports, and 11% found these reports 'not at all useful' (Select Committee on the PCA, *First Report Session 1993–94*, HC 33, para 25). However, this indifference has appeared to have relatively little impact on redress. Central government departments almost invariably assent to the PCA's findings and, where this has been recommended, they pay compensation to the victim of the injustice caused by maladministration.

There are, however, very real problems with non-compliance with local ombudsmen reports by some local authorities. Following the Local

Government and Housing Act 1989, local councils which refuse to take satisfactory action following adverse reports from the local ombudsman are required to publish a statement in a local newspaper at their own expense. This can cost more than the sum that the local ombudsman had recommended as compensation! Only four such statements were issued in 1996–97, as opposed to 11 in the previous year. The 1989 Act also created monitoring officers to follow up cases where redress has been refused. These reforms have resulted in some improvement, but non-compliance remains a problem for the local ombudsmen. In the Citizen's Charter of 1991 (discussed in some detail in the previous chapter), the government stated:

> ... if difficulties continue we will take the further step of introducing legislation to make the Local ombudsman's recommendations legally enforceable, as those of the Northern Ireland Commissioner already are.

10.5.7 The ombudsman reacts

In fact, none of the ombudsmen are keen on the idea of court enforcement proceedings, because they fear that the threat of the courts could harm the co-operative relationships they usually enjoy with public bodies. This view was supported by the JUSTICE/All Souls Review only with regard to the PCA: with regard to the local ombudsmen, where real problems of non-compliance exist, it was recommended that the disappointed complainant should be able to apply to the county court for relief.

The final stage in the 'ombudsman process' is for the ombudsman to react to the public authority's response: as we have just noted, none of the ombudsmen has any powers to enforce their findings, whether it be that the public authority give an apology, revoke a decision or pay compensation. The ombudsmen rely on persuasion and publicity to encourage compliance.

That the PCA is a servant of Parliament is emphasised by the fact that he makes quarterly and annual reports to Parliament. Sometimes special detailed reports are made on investigations of particular importance, such as the one into the Barlow Clowes affair (discussed below, 10.6), or into the matter of 'planning blight' cast over properties in the vicinity of the proposed Channel Tunnel link, due to the confused signals coming from government as to where the link was going to be placed (*Channel Tunnel Rail Link* (1994–94) HC 819). The PCA's close association with Parliament is further enhanced by the existence of a Select Committee on the PCA for Administration (consisting of backbench MPs), which scrutinises the work of the ombudsman, liaises with the office, and produces its own reports on the PCA and the Health Service Ombudsman. The Health Service Ombudsman submits reports to the Secretary of State for Health, who must then lay the report before Parliament.

10.6 The Barlow Clowes affair

Having sketched out what typically happens during the course of an ombudsman investigation, we can now go on to look in more detail at one particular investigation – that of the Barlow Clowes affair.

10.6.1 The background

Barlow Clowes was set up in 1973 by Elizabeth Barlow and Peter Clowes; it was a brokerage business selling relatively secure gilts-based investments. Put very simply, the company acted as middleman, investing customers' money on their behalf, in the hope of gaining a profit. Any profit would go to the investor who supplied the money, and the company would claim a fee for its efforts. Following government deregulation of the money markets, Barlow Clowes prospered and expanded in the 1980s. An important part of government policy was to open the markets to small investors; rather as the Conservatives had worked to extend home ownership, so they encouraged ordinary people to take their chances in the City of London. Barlow Clowes specialised in services for such people; all its advertising in the popular press was aimed at small, inexperienced investors. Many investors dealt directly with Barlow Clowes, but many also used financial intermediaries with whom Barlow Clowes' portfolios were a popular product for their small investors. The intermediaries often made no effort to spread the risk of individual investments, putting all of an individual's life savings into Barlow Clowes. The typical profile of a Barlow Clowes investor was of a Conservative voter of modest means and advancing age, who wished to invest so as to gain financial security in old age.

The investors 'knew' their savings would be safe. All of Barlow Clowes' brochures and letterheads were stamped with the words 'licensed by the DTI' (Department of Trade and Industry). This department had a system of inspection of financial institutions, and if the company passed muster, it was given a licence and required, by the DTI, to publicise this in its literature and on letterheads.

In June 1988, Barlow Clowes went into liquidation following a demand by the Securities and Investment Board (a regulatory body) that they be wound up. Barlow Clowes owed a total of £190 million in high risk ventures. Instead of investing money in safer government securities, it had invested £100 million in high risk ventures. Large funds had been removed from Britain and taken offshore to Jersey, where financial controls are weaker. Mr Clowes had been able to lead a luxurious lifestyle, which included the purchase of property and yachts. As early as December 1984, the Jersey funds were £3.65 million less than obligations. The DTI had failed to notice the existence of the Jersey partnership and the department's procedures were inadequate to reveal this capital shortfall. This happened despite warnings from the accountants,

Touche Ross. Despite having licensed Barlow Clowes for 13 years, the DTI had no useful mechanism for monitoring its licensee.

Unfortunately for the investors, they could not institute proceedings in the courts, since English tort law does not recognise a duty of care owed to people in their position by the DTI (see a similar matter currently going through the courts in *Three Rivers DC v Bank of England* (1999)). In consequence, many of them complained of maladministration to the PCA, saying that the DTI had failed properly to investigate the group when granting licences to the investment companies and that these failures led to their losses. Following nearly 200 requests from MPs, the PCA began what was to be the 'most complex, wide-ranging and onerous investigation' he had undertaken.

10.6.2 The report of the PCA

The report of Barlow Clowes by the PCA found five areas of maladministration by the DTI, including licensing errors and failure to monitor the company. The DTI was also responsible for an unnecessary delay in acting that resulted in further losses. The PCA strongly recommended compensation be paid by the DTI.

10.6.3 The government's response

The initial government response to the report in 1988 was defensive, reminding the PCA that all investments involved risks. It refused to accept the report unreservedly (see *Observations by the Government of the PCA* (1989–90) HC 99. The Secretary of State for Trade and Industry (Lord Young) refused to compensate investors. The PCA was not the only source of pressure on the government. The media condemned the whole affair, calling it a 'scandal on a grand scale'. *The Times* wrote of 'amateurish arrangements' and the *Financial Times* of 'tunnel vision' at the DTI. A highly effective pressure group, the Barlow Clowes Investors' Group, campaigned with the media, putting considerable political pressure on the government. By the end of 1989, Nicholas Ridley, the new Secretary of State for Trade and Industry, agreed that compensation should be paid. Ridley made a statement to the House of Commons on 19 December 1989. He said that 'in the exceptional circumstances of this case and out of respect for the office of PCA' he would make substantial ex gratia payments amounting to over £150 million.

Why the change of heart by the government? There was more than one reason. The media and the investors' group had embarrassed the government. Also, the Select Committee on the PCA voiced strong concern regarding the government's reaction to the scandal. The final factor in the government's change of heart was the publication of the PCA's thorough and condemnatory report. Although no one took political responsibility for the fiasco, this episode marked an important triumph for the office of the PCA. Without his

investigation and report, it is unlikely that such a level of compensation for the investors would have been achieved.

10.6.4 General lessons

The PCA did not win this victory on his own. A powerful political pressure by the investors' group, the media, MPs and the Select Committee all played a vital role. Indeed, it could be said that the Barlow Clowes affair highlights some of the weak areas in the ombudsman system:

(a) the PCA's report need not be accepted by the government, although the Barlow Clowes affair shows that the government will often not dare ignore a report entirely;

(b) one of the criticisms made by the government of the report was that the ombudsman had mistakenly questioned the merits of decisions by the DTI, rather than mere maladministration. There is no easy dividing line between policy and operation in public services, and too strict an interpretation of the ombudsman's remit could unduly restrict his decision;

(c) an important point is that the jurisdiction of the PCA is limited to the investigation of governmental bodies, with the consequence that the other personnel involved in the scandal, such as the Stock Exchange, FIMBRA, and the intermediaries, accountants and solicitors (all of whom were involved and probably at fault) could not be investigated. Whilst it would not be appropriate to the role of the PCA to investigate non-governmental bodies, this limitation meant that the report was not able to include adequate recommendations to protect investors in the future.

10.7 The future for ombudsmen

In many ways 'ombudsmen' are a growth area, with many private sector industries, such as banking and insurance, deciding to set up investigative complaints mechanisms for their customers. The public sector ombudsmen, by contrast, are looking less successful. As we have noted, the PCA is held in low esteem by many MPs and has a very low public profile. Things are little better for the local ombudsmen, whose reports are often flouted by local authorities. All the ombudsmen have backlogs of cases waiting to be investigated, a product of inadequate resources. Some cynics argue that the ombudsmen were never really intended to work effectively, merely to give the illusion that grievances could be redressed. But if there is to be reform, what should it try to achieve?

10.7.1 Fire fighting and fire watching

One fundamental choice that may have to be made is between the ombudsman as 'fire fighter' and 'fire watcher' (to use Harlow's terminology). The former clears up the mess and tackles problems as they occur (responding to individual grievances), the latter looks to the future and attempts to prevent problems. Harlow has argued that the PCA is not equipped to deal with numerous small complaints; we have a Rolls-Royce service which is put to best effect by giving a quality service, rather than dealing in quantity. Harlow therefore opposes direct access to the PCA. She chooses to emphasise the effect that the ombudsman can have on improving administration: 'a complaint is primarily a mechanism which draws attention to more general deficiencies'. To boost his powers, Harlow suggests that the PCA should be able to investigate and intervene on his own initiative. In a report in 1978, the Select Committee on the PCA recommended that the PCA should have the jurisdiction to carry out a systematic investigation of a particular area of the administration, if a tally of individual complaints pointed to a general problem. This was firmly rejected by the government on the grounds that it was not necessary and would distract the PCA from investigating individual complaints (Cmnd 7449, 1979).

For Harlow, the desirable output of the PCA's office should be a limited number of high quality reports which result from investigations initiated by himself or MPs. These reports would have a beneficial effect upon the administration, which could learn from past mistakes, and thereby improve future performance. The bulk of citizens' complaints should be tackled by MPs, or at a local level, or by specialist agencies, such as tribunals. The problem with the latter is that many complaints involving maladministration could not be handled unless the matter there also involved a legal right; in this sense, tribunals are constrained by the same limitations as courts. The PCA is all too aware of the need for this type of 'fire watching', but does not regard this to be mutually exclusive with his role of handling grievances. Of some of his reports, he writes: 'These should be read by public servants. They should learn from others' similar errors.' He believes that there should be a publication of guidance for public servants, as there already is by the local ombudsmen. The PCA is concerned not just to redress individual grievances, but also to benefit all in similar positions. The plethora of complaints generated by the Child Support Agency, for instance, led to a practice by the PCA of limiting his investigations to those cases where a new problem not previously investigated appeared to have occurred.. The PCA commented in his 1997–98 report that 'It continues to be a cause for concern that, all too often, the CSA's performance shows the same, often easily avoided, basic errors as have featured in successive Ombudsmen's reports since CSA's inception' (Chapter 3, para 3.3).

The local ombudsmen were enabled by s 23 of the Local Government and Housing Act 1989 to produce a Code of Guidance called 'Devising a complaints procedure for authorities'. Since this has been produced, many more complaints are dealt with internally by local government. The local ombudsmen now view a failure by a local authority to establish a proper internal complaints procedure as, in itself, amounting to maladministration. But the local ombudsman has no enforcement powers.

Another possible reform is to raise the public profile of the ombudsmen. Some commentators argue that the PCA is too much an 'invisible ombudsman'. Since 1997, modest efforts have been made to publicise the role of the PCA – publicity leaflets have been issued, the ombudsman himself has held meetings with voluntary organisations in the advice-giving sector, and a website has been put up giving basic information about the ombudsman's role (<http://www.ombudsman.org.uk>). However, this level of publicity compares poorly with ombudsmen in other countries such as Austria. Here the ombudsman (the *Volksanwaltschaft*) goes out on circuit, a sort of assize, and he advertises his intention of sitting in a particular location. He advertises on television, where he explains and reports on cases recently resolved. His office has a well publicised direct telephone line for the public, and the complainant pays only 1 schilling for the call, regardless of the real cost. The Irish ombudsman also travels around his country and the Commonwealth ombudsman of Australia advertised himself on milk bottle tops by arrangement with the suppliers! In *When Citizens Complain*, 1993, Milton Keynes: Open UP, N Douglas Lewis and Patrick Birkinshaw argue that there is an urgent need for a different culture in the PCA: they believe that he is too much an adjunct to Parliament, too much of an insider. They call for the PCA to have greater visibility and accessibility.

10.7.2 Ombudsmen and internal complaints procedures

The Citizen's Charter initiative laid the stress on the establishment of internal complaints procedures to allow individuals to complain about the inadequacies in public service. Concerns have also been expressed that such informal internal complaints procedures deprive the wider public of an opportunity to see that justice is done in open proceedings (see above, 9.3.1). In any event, when these internal complaints procedures fail, the Charter recognised that 'there must be an external route for taking things further'. A new grievance redressing mechanism was to be created. The White Paper had proposed 'lay adjudicators', who would be volunteers, use common sense and deal with 'small problems'. By the end of 1994, not a single lay adjudicator had been appointed. The Office of Public Service and Science, which has overall responsibility for the Citizen's Charter, says that there are no plans for any in the future, though there is still a possibility that some may be appointed. It was felt that lay adjudicators would prove to be just another tier with which the complainant had to deal. Instead, the public information

leaflets on various public services produced under the auspices of the Citizen's Charter often refer complainants to the relevant ombudsman if the complaint has not been addressed. Overall, the Citizen's Charter programme looks set to rely heavily upon the ombudsman system. Indeed, it is the policy of the Office of Public Service to attract complaints.

The PCA himself recognises his partnership with the Citizen's Charter programme. The predecessor of the present PCA stated, in 1993, that that he communicated with the Office of Public Service and uses the 'Charter targets' (performance levels to which the various public services set and aspire to achieve) to help him, taking account of failures to meet targets.

A good example of the relationship between an internal complaints structure and ombudsman jurisdiction is to be found within the NHS. In 1996, a new unified procedure was introduced into the NHS for dealing with all complaints, whether they concerned hospital services, family practitioners, or clinical complaints about hospital doctors. A 'convenor', who is generally a director of the relevant health authority, determines which complaints should go to a special panel, which then adjudicates upon it and provides a solution. Since this procedure takes much less time than a full investigation undertaken by the ombudsman, it has significant advantages. However, the Health Service Ombudsman reported, in 1996–97, that a large number of complaints that come his way were ones which should have been dealt with by the internal complaints system, but which had remained unresolved. Many cases were referred back to the NHS trusts, thus giving the complainant a frustrating sense of buck-passing and delaying the resolution of the complaint even further.

It seems that the Citizen's Charter is affecting the role of the ombudsmen in various ways. If, in the future, the Charter results in growing numbers of 'small problems' being referred to ombudsmen, then the limitations on the ombudsman's role – whether caused by jurisdictional limits, the MP filter or lack of publicity – may become less significant.

COMMISSIONERS FOR ADMINISTRATION ('OMBUDSMEN')

The ombudsman system is a method of redress of individual grievances which does not necessitate using the courts. The work of the ombudsmen can be used to improve the administration of services to the public.

The public sector ombudsmen are:

(a) the PCA (PCA Act 1967);

(b) the Health Service Ombudsman (NHS Reorganisation Act 1973; HSC Act 1993);

(c) the Local Government Ombudsmen (Local Government Act 1988);

(d) the Prisons Ombudsman (Woolf Report 1992, set up 1994).

In addition to these, there is the European Parliament Ombudsman, who investigates complaints relating to maladministration by the Community institutions, and there are also ombudsmen for handling complaints in various service industries, some of whom are part of statutory regulatory framework.

The PCA and local ombudsmen investigate injustice as a result of maladministration, and do not review the merits of a decision. All ombudsmen have public access, except for the PCA, for which there is an MP filter.

The public sector ombudsmen, and especially the PCA, have a low public profile and a poor reputation amongst some MPs. The ombudsmen receive very few complaints as a proportion of the population.

The ombudsman system should be reviewed in the political and social context of the UK. The Citizen's Charter has affected the work of the ombudsmen.