§ Law in Context

Law and Administration

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Into the jungle: Complaints, grievances and disputes

Contents

1. Informal justice

(a) Origins

Much of the energy of modern administrative law has been spent on alternative dispute resolution (ADR). Alternative to what? In the course of the next chapters, we shall see that this question can have several answers. We could be talking of inquisitorial alternatives to adversarial procedure; of documentary procedure as alternative to oral hearings; of internal review as alternative to tribunals; of inquiries as alternative to ministerial appeals (such as we find in the education and planning systems); of arbitration and mediation instead of

litigation. There is a natural tendency, however, for administrative lawyers to think in terms of tribunals as alternatives to courts. This is, as we shall see, how the debate has evolved.[1]

A famous nineteenth-century aphorism described justice 'like the Ritz hotel', as open to rich and poor, marking a growing concern over what would we should today call the 'access to justice' problem. The simile was a telling one. Litigation, even in essential areas, was quite simply beyond the means of the majority of the population. Legal services for the poor were exceptional. In criminal law there were 'poor person's defences' but even this provision was not formalised until the twentieth century.[2] In civil cases, unpaid legal assistance was virtually restricted to charitable provision and the 'pro bono' activities of the legal profession. Despite patchy efforts at reform, this situation did not change materially until the introduction of the Legal Aid and Advice Act 1949.[3] A period of relative generosity in the provision of legal aid ensued only to be followed by a serious turndown since 1990.[4]

Not only were courts inaccessible but they had also gained a reputation for conservatism. Judiciary and Bar Council alike were notable for opposition to law-reform measures. The courts' performance in deciding statutory appeals against, for example, railway and canal companies was poor; worse still was the experience of arbitration under the Workmen's Compensation Acts of 1897 and 1906, largely carried out by county court judges. Intended as 'inexpensive' machinery for dispute resolution, the procedure led to a flood of conflicting decisions emanating from pro- and anti-employer judges, swamping the Court of Appeal. The experience induced government to experiment with alternatives. The Old Age Pensions Act 1908 set up local committees to arbitrate disputes, with appeal to the Local Government Board. Benefit disputes under the National Insurance Act 1911 were settled by local 'courts of referees' with appeal to an Insurance Commissioner, bypassing the 'ordinary' courts. Thus the foundation of a modern system of welfare tribunals 'providing a free service to their users and in front of [which] legal representation was unnecessary' was being laid at the turn of the century.[5]

These were, however, by no means the *first* administrative tribunals. Stebbings sets their origin in the nineteenth-century period of reform

[1] H. Genn, 'Tribunals and informal justice' (1993) 56 *MLR* 393, 394. And see C. Glasser and C. Harlow, 'Legal services and the alternatives: The LSE tradition' in Rawlings (ed.), *Law, Society and Economy* (Clarendon Press, 1996).

[2] By the Poor Persons Defence Act 1930. See further B. Abel-Smith and R. Stevens, *Lawyers and the Courts* (Heinemann, 1967).

[3] *Ibid*., Ch. VI. And see *Report of the Committee on Legal Aid and Legal Advice in England and Wales*, Cmnd 6641 (1945) (the Rushcliffe Committee).

[4] Legal Action Group, *A Strategy for Justice* (LAG, 1992). And see the Courts and Legal Services Act 1999 and the Legal Services Act 2007.

[5] Abel-Smith and Stevens, *Lawyers and the Courts*, p. 117. And see R. Wraith and P. Hutchesson *Administrative Tribunals* (Allen and Unwin, 1973), p. 28.

when Factories Acts were passed, the poor-law system was reformed, the first public-health regulation set in place and a miscellany of Boards, Commissions and inspectorates installed, charged with implementation (see Chapter 2):

> It was clear and foreseeable that this controversial increase in government interference with the private, professional and property affairs of individuals would give rise to disputes between individuals and between individuals and the state. The provision of a system of dispute resolution was necessary and urgent if the smooth implementation of the legislation was to be ensured, because the opportunity of raising grievances and having them properly addressed was central to pacifying hostile public opinion.
>
> Because the requirements in each case were very specific, the choice of dispute-resolution body was not a straightforward one. First, the personnel had to possess specialist knowledge because the rules to be implemented were not those of the common law, but novel and technical administrative regulations. The restructuring of land rights, for example, would demand a knowledge of agricultural practice and management, while ensuring an efficient and safe railway system would require a knowledge of railway management and engineering skills. Secondly, disputes had to be resolved quickly so as not to hinder the implementation of government policy and to meet public demand, and to do so the procedures had to be simple and informal. The process had to be accessible to be acceptable to the public, and that meant that it had to be affordable. This could only be ensured by making legal representation unnecessary and by keeping the proceedings local. Furthermore, most disputes would be minor ones of fact rather than principle or law, and might be very numerous.
>
> With these very specific requirements, the established organs of dispute resolution were seen to be inadequate. Though the regular courts of law had the advantages of familiarity, authority, independence, tested procedures and respected judges, they were too slow and the requirement for legal representation also made them prohibitively expensive. And while the judges were experts in law and the handling of evidence, they did not possess the new and necessary technical knowledge. The courts were not suited to handling large numbers of small disputes quickly, and the judges themselves were reluctant to adjudicate what they saw as not law but administrative regulation . . . As the limitations of the established institutions of the regular legal system were appreciated, the dispute-resolution function was given to the implementing bodies themselves. It was at this point, when the administrative body acquired adjudicative functions, that the modern statutory tribunal was recognisable.
>
> Each Act laid down its tribunal's composition, its jurisdiction and to some extent its procedures. When the procedures were not found in the parent Act, each tribunal constructed its own. It is clear from the evidence that the tribunals drew on the courts of law, other orthodox legal processes and institutions, as well as general legal values for their composition and procedures. Nevertheless each was self-contained, an ad hoc body individually conceived to suit the subject matter of the legislation it sought to implement and undertaking a mixture of legislative, administrative and policy functions with strictly circumscribed

> and subordinate adjudicatory powers. Subject-specificity was all-important because it determined the detail of a tribunal's composition, procedures and, most importantly, its jurisdiction. Each was sui generis and developed in almost total theoretical and practical isolation.[6]

At this early date, Stebbings argues, the pattern was already set of heterogeneous 'bespoke tribunals', designed specifically for a single purpose without any overall design or guiding principles. This is the pattern that we live with today and have to try to rationalise. It is in the same sense that we ourselves talk of the administrative justice landscape as a 'jungle': a dense and obscure region on the borders of administrative law, in which subsists a tangled mass of gripes and grumbles, grievances and complaints.[7]

(b) Donoughmore to Franks

In the search for court-substitutes, green light theory came into its own. Many green light theorists were actively involved in the early years of the twentieth century in working for reform of legal services.[8] Laski campaigned for legal aid. Robson, who criticised courts for doing 'absolutely nothing to modernize, to cheapen or to bring into accord with modern needs a fantastic procedure which has been obsolete for at least a century',[9] never ceased to argue for a systematised administrative justice 'in the main independent of the courts of law'. He believed that to submit tribunals to judicial control was to reintroduce 'the legalism and unfreedom of the formal judicature, the avoidance of which is one of the main objects sought to be obtained by the machinery of administrative justice'.[10] *Justice and Administrative Law*, Robson's wide-ranging study of 'Trial by Whitehall',[11] compared and contrasted judicial and administrative decision-making. It looked not only at areas such as vehicle licensing and planning where rights of appeal were vested directly in ministers but also contributed studies of little-known tribunals such as railway courts, transport and war damage tribunals, and tribunals for children's homes. The study extended to the 'domestic tribunals' of 'voluntary organisations', as Robson called the various self-regulatory professional bodies, such as trade associations and trade unions, universities

[6] C. Stebbings, 'Comment: A Victorian legal legacy – the bespoke tribunal' (Council on Tribunals, *Adjust*, April 2007). And see C. Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge University Press, 2006); H. Arthurs, *Without the Law: Administrative justice and legal pluralism in nineteenth-century England* (University of Toronto Press, 1985); Wraith and Hutchesson, *Administrative Tribunals*.

[7] R. Rawlings, 'In the jungle' (1987) 50 *MLR* 110.

[8] C. Glasser, 'Radicals and refugees: The foundation of the *Modern Law Review* and English legal scholarship' (1987) 50 *MLR* 688.

[9] W. A. Robson, 'The Report of the Committee on Ministers' Powers' (1932) *3 Political Quarterly* 346.

[10] *Ibid*.

[11] W. A. Robson, *Justice and Administrative Law*, 3rd edn (Stevens, 1951).

and the legal and medical professions, charged with the task of hearing complaints against their members.

Amongst Robson's objectives and the objectives of his followers was the development of user-friendly machinery for the resolution of 'small claims'. But not even the keenest advocates of informal justice were at this stage prepared to move far from the legal paradigm. Thus much of Robson's classic study was devoted to identifying judicial qualities and the characteristics of adjudication. He saw the need to bring 'some measure of consistency and system' into their activities, arguing for the laying down of 'certain overriding principles to be applied by all administrative tribunals in the manner best suited to their individual functions'.[12] He also favoured the establishment of an administrative appeals tribunal for better oversight and control. Robson focused on ministerial and administrative decision-making and the way administrators took decisions. His was, in other words, a 'top-down' rather than a 'bottom-up' approach.

Street, on the other hand, looked at the clientele for administrative justice, highlighting its special needs:

> Here is a class of litigant often unfamiliar with the legal process and lacking the financial means to pay to be represented at hearings. Nervous, inarticulate, over-awed, mistrustful of bureaucracy, impatient of legal forms – he is indeed a special case . . . He must be around the table with people, some of whom he sees as like himself, people to whom he can speak freely, who will be tolerant of his fumbling, discursive, often irrelevant, disorderly presentation of his case. Accessibility to justice in the land of welfare benefits is not merely helping the claimant; it is ensuring beforehand that there is a tribunal, an atmosphere, a procedure welcomely receptive and comforting to him.[13]

Although this passage hints at a new, 'bottom-up' perspective on administrative justice focused on complainants and their needs, Street did not move far on to the terrain of ADR. He dismissed conciliation as a technique for resolving welfare disputes 'as an excuse for the adjudicator not discharging his hard appointed task of finding out what the facts in dispute are and applying the relevant law to them'.[14] There is no suggestion either that a mediator, arbitrator or ombudsman might be more 'welcomely comforting' to welfare claimants than oral, court-type proceedings. Street relied on tribunals as the primary means for dispensing 'justice in the welfare state'.[15] For all his mention of tribunal users, his remained largely a 'top-down' perspective, in which tribunals are court substitutes. Tribunals existed, or so Wade argued, to dispose of dis-

[12] *Ibid*., Ch. 8.

[13] H. Street, 'Access to the legal system and the modern welfare state: A European report from the standpoint of an administrative lawyer' in Cappelletti (ed.), *Access to Justice and the Welfare State,* (European University Institute, 1981) 310.

[14] *Ibid*.

[15] See H. Street, *Justice in the Welfare State*, 2nd edn (Stevens, 1975).

putes 'smoothly, quickly and cheaply'; the object was not the best article at any price but the best article consistent with efficient administration.[16] A model of administrative justice was emerging in which courts and tribunals formed the top two tiers of a pyramid of dispute resolution of which the bottom two were internal review and administrative adjudication. Administrative lawyers were slow to take note of any but the top two tiers. Equally, they were slow to characterise tribunals and inquiries as forms of ADR, even though, at least by the 1980s, the movement for alternatives to civil justice, emanating from the US, was growing fast.[17]

The Franks Committee on Tribunals and Inquiries,[18] which followed Crichel Down in 1955 and is discussed in Chapter 11, was a landmark for administrative justice. If, as Robson had asserted, Donoughmore suffered from the 'dead hand of Dicey',[19] then Franks, with its attempt to sever 'administrative' from 'judicial' functions, suffered from the dead hand of Donoughmore. Franks characterised tribunals as 'machinery for adjudication', a definition with permanent effects. It not only recommended extending the supervisory jurisdiction of the High Court and Lord Chancellor's Department (in strong contrast to Robson's preference for an administrative appeals tribunal) but also the introduction of legal representation, legal advice and legal aid. With Franks, the judicialisation that Robson feared was well under way and the link with ADR had to all intents and purposes been broken. As Wade put it contemporaneously, 'a new system for the dispensation of justice [had] grown up side by side with the old one'.[20]

For twenty years or more, tribunals were to be pushed towards a court-substitute function until finally it came to be accepted that they were 'a third tier in the administration of civil justice',[21] a characterisation that reached its zenith with the Tribunals, Courts and Enforcement Act 2007. Franks also laid the foundation for the four-level structure mentioned earlier, in which level 1 (primary adjudication) and level 2 (internal review) were characterised as *administrative. Adjudication* kicked in only with two further levels of appeal, to a tribunal (level 3) and finally, appeal on a point of law to the courts (level 4). The division, justified in terms of cost and numbers, had several unfortunate consequences. On the one hand, the influence of adversarial trial-type procedure was boosted, discouraging experiment and

[16] H. W. R. Wade, *Administrative Law* (Clarendon Press, 1961), p. 196.

[17] See R. Abel, *The Politics of Informal Justice* (Academic Press, 1982); J. Auerbach, *Justice Without Law?* (Oxford University Press, 1983); Cappelletti (ed.), *Access to Justice and the Welfare State*; and C. Glasser and S. Roberts (eds), 'Special Issue, Dispute Resolution: Civil justice and its alternatives' (1993) 56 *MLR* 277- 470.

[18] *Report of the Committee on Administrative Tribunals and Enquiries*, Cmnd 218 (1957). For the Donoughmore Committee, see above, p. 36.

[19] Robson, 'The Report of the Committee on Ministers' Powers' .

[20] Wade, *Administrative Law*, pp. 196-7.

[21] Abel-Smith and Stevens, *Lawyers and the Courts*, p. 264. See also, JUSTICE–All Souls Review, *Administrative Justice: Some necessary reforms* (Clarendon Press, 1988).

innovation; on the other, appeals might be founded on shoddily prepared and reasoned cases conducted by junior administrative officials without much understanding of due process or judicial review. As Ison was cynically to remark:

> Even when statute law prescribes an alternative, such as an inquisitorial model, there is still pressure for a tribunal to gravitate to the adversary system. It is promoted in several ways; the heavy concentration on adversarial processes in legal education, judicial review, legal history, and the general inclination of the legal profession to see court proceedings as a model to be emulated. Excess capacity in the legal profession also seems to be stimulating an aversion to procedural models in which lawyers might seem to be superfluous.[22]

It could be argued too that Franks gave to the notion of adjudication an individualistic flavour, advantageous to individuals and corporate bodies flying under the 'individual' flag of convenience. Collective interests, which might receive a more sympathetic hearing in administrative and democratic decision-making, often take second place in adversarial proceedings.[23] Reinforcing this paradigm is the expanding influence of ECHR Art. 6(1) (the 'human rights for lawyers' clause), limiting the extent to which 'alternatives' to trial-type procedure can be a final method of determining civil rights and obligations (below, Chapter 14).

In its consideration of inquiries, the reasoning of Franks was similarly shaped by the Donoughmore analysis. Franks did not, as it might properly have done, focus on inquiries as a paradigm of inquisitorial procedure but saw its task as being to find 'a reasonable balance' between 'judicial' and 'administrative' functions. The general conclusion was that neither terminology was appropriate; inquiries were a 'halfway house' between the administrative and judicial.[24] But while Franks carefully stressed the hybrid function of inquiries and the ever-present policy element, the effect of bracketing tribunals and inquiries encouraged an assumption that 'what is right for a tribunal is also right for an inquiry'. The tendency to convergence was accentuated by the focus on planning inquiries, already more procedurally standardised and judicial than ad hoc inquiries (below). When Franks demanded a statutory code of procedure for planning inquiries, the inevitable result was to increase procedural formality. Thereafter the debate would crystallise around 'how much "judicialisation" the inquiry procedure can stand'.[25]

[22] T. Ison, '"Administrative justice": Is it such a good idea?' in Harris and Partington (eds), *Administrative Justice in the 21st Century* (Hart Publishing, 1999), p. 26. See also L. Mulcahy, 'Sliding scales of justice at the end of the century: A cause for complaints', *ibid*.

[23] Ison, '"Administrative justice"', 27. And see A. Chayes, 'The role of the judge in public law litigation' (1976) 89 *Harv. LR* 1281.

[24] Cmnd 218 [272–4] quoted below, p. 575.

[25] B. Schwartz and H. Wade, *Legal Control of Government: Administrative law in Britain and the United States* (Oxford University Press, 1972), p. 163.

To sum up, administrative lawyers had by the 1960s accustomed themselves to two main alternatives to court proceedings. Tribunals, accepted as 'machinery for adjudication', were seen essentially as small claims courts, dealing with matters such as entitlement to welfare benefits, insufficiently important for courts. We follow the post-Franks moves to judicialisation in Chapter 11. Inquiries, on the other hand, were accepted as a specifically English, 'advanced and sophisticated' contribution to administrative law and practice.[26] But although their hybrid and inquisitorial character was admitted in theory, in practice they too came under pressure to conform to trial-type procedure as witnesses to inquiries began, for example, to see themselves as parties and demand individual representation. We trace this development in Chapter 13. Our main aim in this chapter is to trace the movement for ADR in the sense of alternatives to civil justice into a wider search for 'proportionate dispute resolution' (PDR). Against a background of a rising tide of complaints to public bodies government has not unnaturally shown much interest in ways of damming the flood. We shall focus on internal complaints-handling machinery, designed to prevent complaints from escalating into disputes; on private complaints-handling systems and on the ombudsman system, based on investigative and negotiatory techniques.

2. Digging down

If courts form the top tier of the administrative-justice pyramid and tribunals the second, then ombudsmen represent a further downwards step. Working alongside and not in competition with courts, ombudsman schemes were introduced for 'the little man': as a means of 'giving protection to the citizen against injustice caused by faulty administration'.[27] The ombudsman widened the net to trawl for 'grievances' or 'complaints' as well as full-blown 'disputes' that courts supposedly could settle but, as Rawlings noted, this extension to 'small claims' did not demand a great change in the traditional top-down perspective.[28] Both tribunals and ombudsmen were an informal alternative to courts: a form of 'relief road' to deal with cost, overload and delay. Mitchell saw ombudsmen as filling a gap better filled by an administrative court,[29] while Schwartz and Wade, who thought the 'most surprising feature' of the Office of the Parliamentary Commissioner for Administration (PCA) was the absence of legal staff, were unwilling to allocate the new arrival more than a place 'on the outskirts of' administrative law. He should be welcomed 'as an important ally in the campaign for administrative justice, who will work alongside an independent judiciary and legal profession and supplement the rule of law

[26] JUSTICE–All Souls Review, *Administrative Justice* [10.3].
[27] JUSTICE–All Souls Review, *Administrative Justice* [5.5]; *The Citizen and the Administration* (London: JUSTICE) 1961.
[28] Rawlings, 'In the jungle' .
[29] J. Mitchell, 'The ombudsman fallacy' [1962] *PL* 24.

with the rule of administrative good sense and even of generosity' but he 'stands outside the field of administrative law'. They did, however, note that the PCA dealt with 'large numbers of substantial cases with great thoroughness and fairness'; it was unjust to see the ombudsman as dealing 'only with trivialities'.[30]

From a 'bottom-up' perspective, this landscape would be read very differently. Ombudsmen not only offer an informal, cost-free alternative to courts but also possess other advantages. Ombudsmen do not deal in rights; they are free to arbitrate and negotiate, qualities not generally recognised as features of adjudication.[31] And although ombudsmen are independent, they do not stand as impartial arbiters between equal adversaries but see it as part of their role to redress the balance of power between individuals and large institutions. We shall look more closely at this in Chapter 12. Other techniques of administrative justice can be re-situated on the landscape of ADR. Ministerial appeals, for example, acquire a certain logic if classified – as Robson saw them – as the concluding stage in an administrative decision-making process. The inquisitorial role of those who chair public inquiries is more acceptable if inquiries are something different from adjudication. This is indeed, the nub of the argument over inquiry procedure, as we shall see in Chapter 13.

The point we are making is that the core commitment of ADR is to extra-judicial forums for dispute-handling. These forums are not to be described as court substitutes but as *appropriate* and *proportionate* techniques for the handling of complaints: 'horses for courses', as one might say. Take the example of complaints to MPs, who handle as many as 3 million constituency letters annually. Their effectiveness is tacitly recognised by government departments, which have in place special arrangements for handling both MPs' and ombudsman inquiries. How should we categorise these complaints? A 'top-down' perspective focuses on the notorious 'MP filter' at which many incumbents of the office chafe, which provides that all complaints to the PCA must be submitted through an MP. This filtering function we might see as either a way of maintaining the workload of the PCA (the real dispute-resolution machinery) within manageable proportions, or as an obstacle to access to justice. A 'bottom-up' perspective would evaluate the MP's service as a complaints-handling system in its own right. It might then appear as an effective, cheap and accessible complaints system, providing quick, cost-free solutions for very ordinary people and taking the load from more formal dispute-resolution machinery. This, however, calls for empirical research. And complaints to MPs serve another crucial function; they keep the representatives of the people in touch with their constituents, helping to show them where the regulatory

[30] Schwartz and Wade, *Legal Control of Government*, pp. 64–6, 71.

[31] R. Gregory, 'The Ombudsman in perspective' in R. Gregory *et al., Practice and Prospects of the Ombudsmen in the United Kingdom* (Edwin Mellon Press, 1995), p. 11.

shoe pinches.[32] We shall find this theme appearing in managerial theories of complaints-handling.

We might in much the same way consider the provisions for conciliation and informal resolution in the police complaints system, which call for police complaints to be informally resolved at the police station, subject to the important proviso that (a) the complainant consents to this and (b) the conduct in question would not justify criminal proceedings or a disciplinary charge (s. 85 of PACE). Again, this provision is not merely a filter for trivial complaints; it operates also as an exercise in public relations, bringing police and people together. But is this how complainants see it? We simply do not know whether the provision discourages complainants; once again we need empirical research.[33] We might find that in practice the requirement undercuts effective dispute resolution and casts doubt on the legitimacy of the police complaints system. If so, should the system be reformed? Conciliation of this type is a function that a tribunal could not perform, though an ombudsman or mediator could. A tribunal might, on the other hand, seem more legitimate, at least if sufficiently independent.

A bottom-up approach to administrative justice, the present PCA has recently argued, starts with the citizen's first experience of the administration and extends to:

> the parts of the administrative justice system that tend to get overlooked, either because they seem remote from where the real judicial action is or because they appear as only a tenuous blip on the administrative radar screen. I might, of course, well say that Ombudsmen schemes figure high on the list, and I will return to the Ombudsman question shortly. I want, however, to start at a more basic level, not with courts, or tribunals or Ombudsmen or even with the users of the administrative justice system itself, but with those countless citizens who have no option but to be more or less regular recipients of the administrative decisions of the state, whether as claimants for welfare benefits, as users of the health and social care systems, as householders or tax payers or in countless other ways. And I want to start there because it is with the citizen as user of public services and decision-making that the administrative justice system must ultimately come to terms.[34]

(a) Bureaucratic justice

Like the 'access to justice movement', the 'bottom-up' approach to administrative justice first emerged as a subject of socio-legal scholarship in the United States. Mashaw's 'bottom-up' study of bureaucratic justice in welfare administration

[32] R. Rawlings, 'The MP's Complaints Service' (1990) 53 *MLR* 22.

[33] See M. Harris, 'The place of informal and informal review in the administrative justice system' in Harris and Partington (eds), *Administrative Justice in the 21st Century*.

[34] PCA, Speech at the launch of the AJTC (20 November 2007), available online.

was a seminal influence.[35] Defining 'administrative justice' in terms of 'the myriad of first-instance decisions rather than the much smaller number of an appeal or complaint', Mashaw was searching for:

> an 'internal law of administration' that guides the conduct of those who make routine decisions more effectively than the external controls so beloved of administrative lawyers, who look to courts and – to a lesser extent – to tribunals and other forms of accountability, such as ombudsmen, for judgments that will secure the achievement of administrative justice.[36]

Mashaw famously identified three separate models of administrative justice: *bureaucratic rationality*, a managerial model in which the primary goal is effective programme implementation and the legitimating values are accuracy and efficiency; the *professional treatment* model, which is interpersonal and based on service, and aims at client satisfaction; and the model of *moral judgement*, a legal model of fairness and due process, characterised by externality and independence. This was later redefined by Adler as a model of legality and the assertion of rights.[37] Mashaw argued that any dispute-resolution system is dominated by one of these models according to the culture of those who operate it. Others may of course be present as, for example, where a private ombudsman observes standards of natural justice. Although the models are competitive, there can be 'trade-offs' between them.

An equally influential study by Felstiner, Abel and Sarat of the way in which disputes originate focused on the transformation of grievances into disputes:[38]

- stage 1, **perception** (naming)
- stage 2, **grievance** (blaming)
- stage 3, **dispute** (claiming).

Perception, the first stage, is realisation of injury. To interpolate a modern British example, litigation by victims of the Iraq war started to reach the British courts when soldiers, accustomed to a regime of military discipline, first began to perceive that their status was not exceptional: they had 'rights' commensurate with those of the civilian population. A grievance emerges at the second stage of 'blaming', when the victim looks around for someone on whom to pin responsibility for his injury. Grievances are to be distinguished from grumbles

[35] J. Mashaw, *Bureaucratic Justice: Managing social security claims* (Yale University Press, 1983).

[36] M. Adler, 'Fairness in context' (2006) 33 *JLS* 615, 619.

[37] M. Adler, 'A socio-legal approach to administrative justice' (2003) 25 *Law and Social Policy* 324, where Adler's modified five-model structure was launched.

[38] W. Felstiner, R. Abel and A. Sarat, 'The emergence and transformation of disputes: Naming, blaming and claiming' 15 *Law and Society Review* 631 (1980-1).

('a complaint against no one in particular') by the fact that 'the injured person must feel wronged and believe that something might be done in response to the injury'. The third transformation occurs when someone with a grievance voices it to the person or entity believed to be responsible and claims redress. A claim is then transformed into a dispute when it is 'rejected in whole or in part. Rejection need not be expressed in words. Delay that the claimant construes as resistance is just as much a rejection as is a compromise or partial rejection or an outright refusal.'[39]

The authors are making three important and novel points:

- First, legal sociologists should pay more attention to the early stages of disputes and to factors that determine when and whether a claim will evolve into a grievance and emerge as a dispute.
- Secondly, the forum to which the grievance is assigned affects the way in which the dispute unfolds and may 'transform' it; courts in particular 'individuate' the idea of grievance (a point made earlier by us).
- Finally, the authors questioned the idea common in 'top-down' studies of dispute-resolution that the level of complaints was too high; 'a healthy social order is one that minimises barriers inhibiting the emergence of grievances and disputes and preventing their translation into claims for redress.'[40]

These were both 'bottom-up' studies but with different objectives. Mashaw's main concern was to avoid disputes altogether by procedures designed to get the primary decision right. The approach of the second study was to channel grievances into appropriate and proportionate means of resolution, in much the same way as K. C. Davis hoped to structure administrative discretion by a sophisticated structure of rules. This opens the way to a search for 'proportionate' dispute-handling mechanisms.

These new lines of inquiry were soon replicated in British socio-legal studies. Contributing a seminal study of government complaints-handling, Birkinshaw inverted the traditional 'top-down' approach. He set out to:

> establish what [departments] did in relation to grievances from the public affected by their administration, and to study what connections there were between these informal practices and the more formal procedures for complaint resolution or dispute settlement culminating with Ombudsmen and Courts of Law.[41]

Rawlings too set out to redress the balance, taking note of the finding that, 'even within the parameters of institutionalised complaining most people

[39] *Ibid*., pp. 635–6.
[40] *Ibid*.
[41] P. Birkinshaw, *Grievances, Remedies and the State*, 2nd edn (Sweet and Maxwell, 1994), p. xi.

seek informal redress'. [42] He blamed the top-down focus for ignorance of the 'unstructured, fluid and poorly publicised internal procedures which handle the great bulk of grievances ventilated by citizens against public bodies'. His own focus was on 'bottom-up studies of how people usually behave when seeking redress'; on non-judicial means of dispute resolution between citizens and administration; and on informal procedure for the redress of grievance. Similarly, Mulcahy and Tritter describe complaint systems as 'low level grievance procedure', which a modern state should know how to address:

> Complaints systems are important and should be recognised as needing as much attention as other systems for dispute resolution. The systems represent the mass end of a disputes market; systems which users may choose to access rather than the courts. In addition, we have an overloaded court system. Access to the courts and tribunals is severely limited by financial and procedural factors as well as those based on knowledge. As the expanding state produces more opportunities for injustice low level procedures represent a cheap, accessible and often more appropriate way to resolve disputes.[43]

This is an argument which needs to be considered carefully. Dispute resolution is the lawyer's trade; it is central to his function. It is natural for lawyers to see law in terms of their clients' interests and through the spectacles of dispute resolution; for the practitioner indeed, everything else could be said to be tangential. If this were the whole story, much of the content of earlier chapters – structuring through rule-making, regulation, etc. – would be peripheral to administrative law because it is not concerned with disputes and dispute resolution. As an explanation of lawyers' attitudes to ADR the statement is, however, helpful. Unless they work inside the administration, the lawyers' concern is essentially with the pathological. In red light theories of administrative law, the right of access to a court, common law adversarial procedures and the due-process rights that characterise them are the ultimate protections bestowed by the rule of law. This is why lawyers are so often guilty of 'squaring the circle' by reinstating them and why 'unmet need', the core concept of the access-to-justice movement, is conceived in terms of the extension of legal or quasi-legal services to new clients and new types of dispute. Administrative tribunals and the more visible and sophisticated forms of administrative justice can be fitted within a top-down, access-to-justice model, though the participation of lawyers will usually push them towards judicialisation. Internal machinery for complaints-handling is a way of protecting adjudicative machinery from

[42] R. Rawlings, *Grievance Procedure and Administrative Justice: A review of socio-legal research* (Economic and Social Research Council, 1987). And see L Mulcahy *et al*., *Small Voices, Big Issues: An annotated bibliography of the literature on public sector complaints* (University of North London Press, 1996).

[43] L. Mulcahy and J. Tritter, 'Rhetoric or redress? The place of the citizen's charter in the civil justice system' in Willetts (ed.), *Public Sector Reform and the Citizen's Charter* (Blackstone, 1996), p. 109.

a flood of complaints conceived as 'trivial'. The assumption here (which every lawyer knows to be mistaken) must be that every important dispute will reach a court and that every dispute that does reach a court is important. On this view, complaints are trivial; they constitute an administrative problem demanding administrative measures.

A bottom-up approach treats complaints very differently. A research study conducted for the Nuffield Foundation, for example, selected people who had experienced a 'non-trivial justiciable problem' and asked how they had dealt with these.[44] The conclusion was that individuals took action (i.e., moved from grumbling to grievance and dispute) if:

- the grievance was serious either because of its impact or because a vulnerable person (a child, the aged, or a person suffering from a disability) was involved
- there was an expectation of positive outcome
- the victim had knowledge of how to proceed and
- could access the right procedure
- had adequate personal and financial resources
- had previous experience of favourable outcomes.

This tells us how and to a limited extent why complainants fall off the complaints ladder. It does not, however, resolve the question where dispute-resolution mechanisms should kick in.

3. Complaints: Is anybody there?

(a) The Citizen's Charter

In Chapter 2, we saw that complaining formed an essential component of John Major's Citizen's Charter. The Charter was a manager's and public customers' charter, closely linked to market ideology. It aimed not only to raise the standards of public service delivery but also to empower the citizen when service delivery was substandard. It gave market citizens 'voice'.[45] The Charter adopted a 'stakeholder' approach to complaining and suggested a new function for complaints: the so called 'gift' function of informing managers of defects in the service.[46] The Charter advocated proper redress when things went wrong; 'at the very least the citizen is entitled to a good explanation, or an apology'. It called for better machinery for redress of grievances and adequate remedies,

[44] M. Adler *et al.*, *Administrative Grievances: A developmental study* (National Centre for Social Research, 2006). See also D. Leadbetter and L. Mulcahy *Putting It Right For Consumers: Complaints and redress procedures in the public services* (National Consumer Council, 1996).

[45] See A. Hirschman, *Exit, Voice And Loyalty: Responses to decline in firms, organizations and states* (Harvard University Press, 1970). And see M. Conolly, P. Mckeown and G. Miligan-Byrne, 'Making the public sector more user friendly? A critical examination of the Citizen's Charter' (1994) *Parl. Affairs* 1.

[46] See J. Barlow and C. Moller, *A Complaint is a Gift* (Berrett-Koehler, 1998).

including compensation where appropriate.[47] Significantly, however, the Charter steered clear of creating legal rights.

Shortly after the Charter was unveiled, a Citizen's Charter Task Force was set up to advise on complaints procedure. Its priorities were made clear in a series of discussion papers, culminating in a checklist for 'putting things right'.[48] The Unit recommended all public services to 'define a complaint. This definition needs to be understood by all staff and users of the service.' It underscored the principle of easy access, insisting that all public services should 'have in place formal written guidance on how to recognise and handle all complaints, whether they concern operational or policy matters'. Staff should be familiar with these and be trained to 'fulfil their role and responsibilities within them'. An effective complaints system should be:

- easily *accessible* and well-publicised
- *simple* to understand and use
- *speedy*, with established time limits for action, and keeping people informed of progress
- *fair*, with a full and impartial investigation
- *effective*, addressing all the points at issue, and providing appropriate redress
- *informative*, providing information to management so that services can be improved.

Appropriate redress, including financial compensation, should be offered and the Unit 'should take the lead in producing guidance on redress in public services'. Equating fairness with equality, the Task Force urged:

> All public services must be seen to be delivering their services on the basis of fair and equitable treatment of all their users. The same principle applies to the handling of complaints. All parties involved in a complaint – the users of services, those complained about, and others – must be assured that the complaint will be dealt with *even-handedly*. Users need to feel that they will be treated on an impartial view of the facts, and not on the basis of any irrelevant personal differences, discrimination or inherent resentment against them from having 'caused trouble'. Staff, and other parties involved, need to be assured that any complaint will be fairly investigated to establish whether there are grounds for complaint, and then responded to in an open and straightforward way. Demonstrably fair systems encourage people to complain and staff to respond positively, within the framework of policy.[49]

[47] G. Drewry, 'Citizen's Charters: Service quality chameleons', (2005) 7 *Public Management Review* 321. And see A. Page, 'The Citizens Charter and administrative justice' in Harris and Partington (eds), *Administrative Justice in the 21st Century*.

[48] *Effective Complaints Systems: Principles and Checklist* (Cabinet Office, 1993); *If Things Go Wrong. . .*, Discussion Papers 1–5 (Cabinet Office, 1994); *Putting Things Right* (Cabinet Office, 1995); *Good Practice Guide* (HMSO, 1995). And see C. Adamson, 'Complaints handling: Benefits and best practice' (1991) 1 *Consumer Policy Rev*. 196.

[49] *Putting Things Right*.

In contrast to lawyers, who stress independence, and ombudsmen, who highlight investigation, the managerial approach emphasises high-quality in-house complaints systems. The Task Force favoured conciliation and mediation by 'trained and independent' mediators but warned against closing off the possibility of further review. This would involve access to someone *outside line management* who should (i) be clearly independent of the public service concerned and (ii) be free from interference by the organisation about how they carry out any investigation, once the remit and powers are set.[50] This guide to good practice today forms the framework for complaints-handling throughout the public service.

Local authorities were at first slow to introduce complaints procedures. By 1992, however, the local ombudsman or CLA was reporting that the practice was on the increase as part of customer-care and quality-assurance programmes; some authorities were going further and appointing an internal ombudsman.[51] Like the Charter Unit, the CLA has always recommended a relaxed and non-adversarial attitude to complaints. In its first code of practice issued jointly with local-authority associations it advised that complaints should not be too narrowly defined:

> The definition should certainly cover the small minority of matters which are clearly complaints and may end as allegations of injustice caused by maladministration and be referred to a [local ombudsman]. It should also, however, cover those other approaches to authorities, whether for advice, information, or to raise an issue which, if not handled properly, could lead to a complaint.[52]

Because the emphasis is on improving services, the current version of the advice suggests that *any* 'expression of dissatisfaction' should be treated as a complaint. A council needs to demonstrate commitment to a good complaints system and the need for the system should be appreciated at all levels:

> A good complaints system is an opportunity for a council to show that it wants to be open and honest; that it cares about providing a good service; and that it genuinely values feedback on whether there are any problems which need attention. So staff who handle complaints need to be positive, understanding, open-minded and helpful; and they should let it be seen that the council takes complaints seriously and deals with them sympathetically.[53]

[50] *Good Practice Guide*, p. 29. There are seven more criteria concerning resources, access, publicity and expertise.

[51] CLA, *Annual Report for 1990/91* [5]. And see J. Greenwood, 'Facing up to the Local Ombudsmen: Are internal complaints procedures adequate?' (1989) 15 *Local Government Studies* 1.

[52] *Complaints Procedures: A code of practice for local government and water authorities for dealing with queries and complaints* (Local Authorities Association, 1978).

[53] CLA, *Guidance on Good Practice*, available on line. See also British and Irish Ombudsman Association, 'Principles of good complaint handling' (April 2007).

As the Public Administration Select Committee (PASC) has recently emphasised, the Citizen's Charter had a lasting impact on how public services are viewed in this country:

> The initiative's underlying principles retain their validity nearly two decades on – not least the importance of putting the interests of public service users at the heart of public service provision. We believe this cardinal principle should continue to influence public service reform, and encourage the Government to maintain the aims of the Citizen's Charter programme given their continuing relevance to public service delivery today.[54]

(b) New Labour: Towards PDR

The conception of complaints as a 'gift' to management was introduced with new public management (NPM). It sits very comfortably, however, with New Labour's nostrum of 'responsive government'. Equally, the 'bottom-up' view of complaining sits well with the New Labour commitment to 'inclusive government' and its deliberately egalitarian style. Complaints are taken seriously as a way to make contact with people and to encourage public participation. Every department and all local authorities should carry on their websites information about their complaints systems and, after the Freedom of Information Act 2000 (FOIA) came into force in 2005, on arrangements for access and complaints to the Information Commissioner. *Directgov*, the official government website, publishes practical information on how to make complaints about government, public bodies and the media, as does the OFT at consumerdirect.uk, a government-funded advice service with specially trained advisers, which gives practical advice on how to complain and resolve disputes. *Consumerdirect* stresses the advantages of ADR:

- It can lead to compensation (Other satisfactory outcomes may include a formal apology, a change in procedures, etc.).
- It may cost you less than a court procedure.
- It is confidential.
- It is less formal than going to court.

However, it also warns that resort to a mediator or arbitrator may end by depriving the consumer of his or her legal rights.

The government has consistently pushed departments to review and modernise elderly complaints systems, where possible simplifying systems and bringing them together. The Department of Health has, for example, undertaken major reviews of the complex complaints machinery for which it is responsible, resulting in a new mediated redress system for cases of clinical negligence[55] and

[54] PASC, *From Citizen's Charter to Public Service Guarantees: Entitlements to Public Services*, HC 411 (2007/8) Recommendation 1 and [17].

[55] See DH, *Making Amends* (2003); NHS Redress Act 2006.

currently a public consultation on a wider survey of social service complaints.[56] These bottom-tier arrangements were not enough, however, to satisfy the National Audit Office (NAO). Its survey of central-government redress systems was highly critical of complaint-handling mechanisms within departments, concluding that complainants often needed time, persistence and stamina to pursue their complaints to a satisfactory conclusion through the jungle of processes often difficult to access, understand and use.[57]

The NAO's motivation for wanting improvement was largely financial. Comparing the overall public expenditure costs of handling complaints and appeals, it estimated that each new complaints case cost on average £155; appeals cost £455, while an ombudsman investigation might cost as much as £1,500 to £2,000, a figure queried by the NAO on VFM grounds. The total cost to government of handling around 1.4 million cases annually was nearly £510 million without counting in further costs of at least £198 million incurred through legal aid in immigration, asylum and social security appeals – nearly 2 per cent of overall administrative costs. When, on the other hand, a complaint was settled by 'street level' personnel the cost was as low as £10 per case – a powerful motive for early settlement! The general conclusion of the report was that departments and agencies should ensure citizens had easy access to information about where to seek redress and that departments and agencies should actively manage their redress processes to provide accurate, timely and cost effective responses to those citizens. There were two main obstacles to achieving this goal: first, the complexity of segmented complaints systems organised and run by individual departments; secondly, the adversarial nature of appeals:

> Current redress systems are arranged in a 'ladder' or 'pyramid' format, which copies the arrangements of law courts, with a hierarchy of procedures. Basic cases are solved locally and informally, and higher tier procedures become progressively more formal and more expensive, as well as involving fewer cases. In a legal context this pattern reflects a fundamental assumption that two parties to an action will naturally behave in an adversarial manner. It is not clear that such a foundational assumption is appropriate in many areas of citizen redress . . . The aim now is to be able to assure citizens and senior managers and ministers alike that as much as possible administrative operations and decisions are 'right first time'. The most recent White Paper in this area . . . spells out this fundamental shift in government and public expectations of citizen-focused and actively managed redress procedures even more clearly.[58]

[56] DH, *Listening to People: A consultation on improving social services complaints procedures* (2000); DH, *Learning from Complaint: Social services complaints procedures for adults* (2008); *Making Experiences Count: The proposed new arrangements for handling health and social care complaints* (2008), available online.

[57] NAO, *Citizen Redress: What citizens can do if things go wrong with public services*, HC 21 (2004/5).

[58] *Ibid*. [4] [6]. For the White Paper, see below.

This passage epitomises the managerial, bottom-up approach to complaints-handling which focuses (like Mashaw and Adler) on procedures apt for getting the initial decision right.

In the New Labour context of responsive government, however, handling complaints effectively is not just about getting value for money. In an echo of the academic literature, PASC recently reminded us in a report that formed part of a wider inquiry into *Public Services: Putting people first* that 'crucially, it is about establishing a responsive relationship between the apparatus of the state and the people who use this apparatus'.[59] PASC chose to focus on:

- how citizens know what they can complain about and who they can complain to
- arrangements for handling complaints within departments
- how complaints are used by public services to address problems and inform service design and delivery
- whether there is a role for a central government body to issue guidance and hold departments to account for how they handle complaints.

PASC recommended a 'caseworker approach' to complaint handling so that complainants have an identifiable person to deal with. This would entail defining 'complaint' widely and setting in place complaints systems easy for people to identify, understand and use.

A recent White Paper underlines the present government's holistic approach to administrative justice:

> A good service delivery organization must be designed with [the legitimate needs of the user] in mind. To make this a reality the system has to have the following features:
>
> - the decision-making system must be designed to minimise errors and uncertainty;
> - the individual must be able to detect when something has gone wrong;
> - the process for putting things right or removing uncertainty must be proportionate – that is, there should be no disproportionate barriers to users in terms of cost, speed or complexity, but misconceived or trivial complaints should be identified and rooted out quickly;
> - those with the power to correct a decision get things right; and
> - changes feed back into the decision making system so that there is less error and uncertainty in the future.[60]

This leads on to PDR as the ambitious idea lying at the heart of an overall strategy for administrative justice:

[59] PASC, *When Citizens Complain*, HC 409 (2007/8). The first in the series was *Choice, voice and public services*, HC 49 (2004/5).

[60] DCA, *Transforming Public Service: Complaints, redress and tribunals*, Cm. 6243 (2004) [1.7].

Our strategy turns on its head the Department's traditional emphasis first on courts, judges and court procedure, and secondly on legal aid to pay mainly for litigation lawyers. It starts instead with the real world problems people face. The aim is to develop a range of policies and services that, so far as possible, will help people to avoid problems and legal disputes in the first place; and where they cannot, provides tailored solutions to resolve the dispute as quickly and cost effectively as possible. It can be summed up as **'Proportionate Dispute Resolution'**.

We want to:

- minimise the risk of people facing legal problems by ensuring that the framework of law defining people's rights and responsibilities is as fair, simple and clear as possible, and that State agencies, administering systems like tax and benefits, make better decisions and give clearer explanations;
- improve people's understanding of their rights and responsibilities, and the information available to them about what they can do and where they can go for help when problems do arise. This will help people to decide how to deal with the problem themselves if they can, and ensure they get the advice and other services they need if they cannot;
- ensure that people have ready access to early and appropriate advice and assistance when they need it, so that problems can be solved and potential disputes nipped in the bud long before they escalate into formal legal proceedings;
- promote the development of a range of tailored dispute resolution services, so that different types of dispute can be resolved fairly, quickly, efficiently and effectively, without recourse to the expense and formality of courts and tribunals where this is not necessary;
- but also deliver cost-effective court and tribunal services, that are better targeted on those cases where a hearing is the best option for resolving the dispute or enforcing the outcome.

4. Review, revision and reappraisal

(a) Internal review

A common way to ration judicial review is to require applicants to exhaust alternative remedies before coming to court. In Chapter 16, we shall see how this rule, originally applicable to tribunal hearings, has been extended to mediation and ADR. In similar fashion, complainants may be required – or permitted – before they move to the higher tiers of the complaints model to have recourse to internal review. Sometimes there is statutory provision for a reappraisal: ss. 9 and 10 of the Social Security Act 1998, for example, provide that decisions may be both 'revised' and 'superseded'. More commonly, reconsideration is a 'naturally occurring administrative procedure' which, without precluding rights of appeal, may do away with the need for adjudication: it is, in other words, a normal step in a complaints-handling procedure.

Top-down assessment of internal review might regard it, like the MP filter in the PCA system, merely as a device for filtering out trivial complaints. Or Wade's test of simpler, speedier, cheaper and more accessible justice than in ordinary courts might be applied. Sainsbury, in an early study of internal review in the social security system,[61] used criteria applied to the tribunals of speed, independence and impartiality, participation, costs and quality of decision-making. His conclusions were that internal review scored heavily on cost and speed but had the incidental effect of discouraging appeals to the upper tiers (tribunals and courts) of the complaints pyramid. He thought that internal review scored low on participation. 'What participants primarily want is to be able to participate in the process, to be treated with respect and dignity, to have an impartial decision-maker look at their case, and to receive a fair hearing.'[62]

Internal reviews are inherently quicker than tribunal hearings because neither the parties nor the tribunal need the comprehensive paperwork on which adversarial procedure depends. The system should also be more flexible and more responsive to sudden increases in demand or backlogs; staff can be moved temporarily or relatively junior temporary staff employed. We now know, however, that this is an optimistic assessment. If an administrative system goes badly wrong, as occurred with the infamous child support agency[63] and when tax credit payments were introduced (below), departments may be flooded with requests for reconsideration, bringing the system to a standstill. As we shall see in Chapter 12, ombudsmen can deal with this problem by setting up a group complaint. Appeals to tribunals, on the other hand, may have the unfortunate effect in practice of filtering out complaints from all but the most determined.

Internal review necessarily lacks independence, since the system is set up and managed by a government department or in the case of housing, local authorities; indeed a successful challenge of the Housing Benefit and Council Tax Benefit Review Board was mounted to the ECtHR on this very ground.[64] An empirical study of housing-benefit review suggests, however, that complainants may be less concerned with independence than lawyers like to think; only in the last resort are they greatly affected by the absence of independence, the lawyer's primary concern. Benefit applicants approach internal review in the light of a 'last-chance saloon' with a mixture of confidence in and scepticism of the system. The driving force to both review and appeal is necessity and desperation rather than conscious ideological preference, though a second strong motivation, to call bureaucracy to account, does suggest a need for externality and independence.[65]

[61] R. Sainsbury, 'Internal reviews and the weakening of social security claimants' rights of appeal' in Richardson and Genn (eds.), *Administrative Law and Government Action* (Clarendon Press, 1994), p. 288–9.

[62] Sainsbury, *ibid*., p. 306.

[63] See G. Davis, N. Wikeley and R. Young, *Child Support in Action* (Hart Publishing, 1998).

[64] *Tsfayo v UK* [2006] ECHR 981.

[65] D. Cowan and S. Halliday, *The Appeal of Internal Review* (Hart Publishing, 2003), pp. 118, 152, 170–4.

This introduces questions of principle for administrative lawyers, of which we have perhaps lost sight in the previous discussion of PDR. A PDR approach to internal review of decision-making would probably ask whether it plays an effective part in the overall system of bureaucratic rationality. Is it a useful and normal part of the administrative justice landscape? Lawyers are asking a rather different question. Do these types of complaint system measure up to the legal template of due process? Are their procedures fair and sufficiently independent?

Complaints systems come in all shapes and sizes; their structure, remit and procedures are very variable. We have selected three review systems for a closer look. The first is the internal review system set up by the Inland Revenue to investigate complaints about tax and valuation; this raises questions about independence and efficiency and merits comparison with the ombudsman and social fund inspectorate discussed in Chapter 11. Our second study is of the Press Complaints Commission, a self-regulatory system based, like private ombudsmen, on consent. We then turn to freedom of information, which allows us to contrast the very new statutory system set in place by the FOIA with the previous 'soft law' system policed by the PCA. A final section looks at the major ombudsmen systems in the United Kingdom, their functions and relations with the courts.

(b) Internal review: The Adjudicator's Office

The Adjudicator's Office (AO)[66] was devised as an independent 'middle tier' between internal procedure and the PCA, who regularly deals with large numbers of complaints over tax matters. It was introduced by the IR in 1993 specifically to encourage adherence to Citizen's Charter standards of service and complaints handling. No legislation was required; the office is contractual. The service is free to complainants.

The Adjudicator (RA) calls herself 'a fair and unbiased referee', works independently of the units she investigates and has an independent budget. The complainant must be fairly persistent; fortunately, however, the first RA (Elizabeth Filkin) devised a guide through the complex internal complaints machinery![67] Starting with a phone call to the person or office dealing with the case, the complainant moves up to the local complaints manager, then up again to review by a senior officer not involved in the case, before the RA is involved. Alongside, a complainant could turn to his or her MP or to the PCA, who will normally expect internal review to have been exhausted. Appeal also lies to a tribunal and judicial review may be a possibility, though here again internal remedies must normally be exhausted.

[66] The original title was Revenue Adjudicator, changed to Adjudicator when HM Revenue amalgamated with Customs as HMRC and the AO gained jurisdiction over the Valuation Office Agency (VOA). For convenience, we use RA and RI throughout.

[67] HMRC, *Complaints and Putting Things Right* (April 2007 version).

Essentially, the remit of the AO is maladministration. Like an ombudsman, she handles complaints about mistakes, unreasonable delays, poor or misleading advice, inappropriate staff behaviour and the use of discretion, comparing what has occurred against the IR's published standards and codes of practice. The AO cannot look at matters of government or departmental policy or 'matters which can be considered on appeal by independent tribunals', including disputes about matters of law or the amount of tax, etc., due from the complainant or the amount of tax credit awarded. The AO cannot deal with a complaint that has been or is being investigated by the PCA. Complaints involving requests for information and complaints under the FOIA or Data Protection Act go directly to the Information Commissioner (IC) (see p. 473 below). The AO's role is:

> to consider whether or not HMRC or the VAO have handled the complaint appropriately and given a reasonable decision. Where we think they have fallen short, we will recommend what they need to do to put matters right under the terms of their guidance on complaints. This may include making suggestions for service improvements where we think this could be of benefit to the wider public.
> We cannot require HMRC or the VAO to do anything outside the terms of their guidance on complaints . . . Nor can we ask them to act outside their current procedural guidance.[68]

Much has depended on the personality of the appointees. Elizabeth Filkin had a background in citizens' advice and was strongly committed to securing the independence of the scheme, actual and perceived. Describing herself as a 'mediator . . . striving to engineer and conciliate settlement', she sought to resolve claims through mediation.[69] Her methods were designed to be 'user-friendly', i.e. informal and reliant on telephone calls and personal interview. Again like an ombudsman, the RA has no powers of compulsion, though her recommendations have to date apparently been complied with. There is a high rate of adverse findings: of 1,615 and 2,581 complaints in the first two years (1993–5), 64 per cent and 51 per cent respectively were upheld. In 2004, 1,419 investigations were conducted (against 926 in the previous year), of which 46 per cent were successful. This temporary rise was explained by complaints over tax credits, where 56 per cent were successful; in 2007–8, however, when tax credits were still an issue, 2,017 cases were received, a rise of 1,419 over the previous year, suggesting a general rise in complaints. Seven hundred and fifty-seven (44 per cent) of complaints were upheld and 1,720 settled. In her last Annual Report Elizabeth Filkin recorded that, in her five years in office, she had 'seen a dramatic change' in the way the organisation dealt with the public. She named 1997 as a watershed year, when there was 'significant improvement' in how the IR dealt with complaints (in its partner,

[68] *Annual Report for 2006*, available online.

[69] E. Filkin, 'Mediation not confrontation', *Taxation Practitioner* (April 1994). Of 503 complaints completed and 233 upheld in 2002/3, 160 were handled by mediation.

the Contributions Agency, by way of contrast, a 'staggering' 80 per cent of complaints had been upheld).

In an early evaluation of the office, Morris, an academic observer, gave the AO high marks for openness, fairness and effectiveness. 'Taxpayers have been provided with a speedy, high level and effective complaints service under the direction of an individual who is obviously strongly committed to stimulating higher standards of administration throughout the Revenue'.[70] As we shall see, this has not been entirely borne out. The second AO, Dame Barbara Mills QC, was highly critical of the time taken by her predecessor to resolve complaints; 'the average age of open cases – at more than six and a half months – was simply unacceptable'.[71] By 2008, the AO had made inroads on its backlog; 98.43 per cent of complaints were settled in forty-four weeks and the average turn-around time was just over twenty-three weeks. This typifies the broadly managerial approach of the present RA, who previously headed her own department. She tells us that she wants 'to maximise opportunities to work constructively with the organisations in learning from complaints, to use 'our experiences with the few to make changes for the benefit of the many'.[72] And in a passage redolent of the 'complaints as gifts' attitude to complaints-handling, she has said:

> A key aspect of our work is helping the organisations to improve their service to the public. To ensure that mistakes are not repeated and that lessons are learned, we aim to monitor our results, identifying trends and particular areas of concern. We feed this information back to the organisations, prompting them to make improvements to their service.[73]

But is this the primary function of office, expressly established as a 'small claims' system?

The tone of the RA's remarks in dealing with mismanagement of the tax credit scheme nicely illustrates her approach. Early on she expressed her 'strong concerns' at an area said to make up 'the bulk' of complaints to the AO but chose to see things as 'going in the right direction'. Her reports consistently highlight progress made in bringing the problem under control.[74] In 2007–8, for example, when 80 per cent of her docket consisted of tax credit complaints and 48 per cent were upheld, she welcomed a softening of the rules on recouping overpayments from beneficiaries (COP 26), though she added:

> Despite the progress made over the last few years, there are still features of the tax credits system which cause a minority of claimants real difficulties; especially for those whose circumstances change frequently. There are also still a significant number of claimants

[70] P. Morris, 'The Revenue Adjudicator: The first two years' [1996] *PL* 309, 312, 315.
[71] *Annual Report for 1999*.
[72] *Annual Report for 2003*.
[73] *Annual Report for 2008*.
[74] *Annual Report for 2006* and *Annual Report for 2007*.

> with problems, the origins of which can be traced back to difficulties with the system they encountered in 2003/04. It is important all these claimants are treated properly and fairly; and having in place a fit for purpose COP 26 lies at the forefront of achieving this. For these reasons, it is also important [the IR] continue to improve their complaints handling for tax credits claimants . . . Securing such improvements will be a challenge.[75]

This 'softly, softly' approach to administrative practices that for *five long years* have caused great hardship before concessions were finally worked out can be contrasted with the more forthright findings of the PCA. After working with the PCA on complaints-handling, the IR introduced a caseworker system for tax credit complaints whereby each complaint was allocated to a dedicated caseworker whose name and contact details were given to the customer. The PCA's Special Report on tax credits contained twelve hard-hitting recommendations, two very broad in character:

- Consideration should be given to writing off all excess and overpayments caused by official error which occurred during 2003-04 and 2004-05.
- Consideration should be given to the adoption of a statutory test for recovery of excess payments and overpayments of tax credits, consistent with the test that is currently applied to social security benefits, with a right of appeal to an independent tribunal. [76]

It would seem that these recommendations had not been followed. Perhaps this is one reason why the PCA's Revenue caseload remains so high. In 2007–8, the IR occupied second place on the list of most-complained-about departments, with 1,791 complaints, of which 82 involved tax credits and 60 per cent were upheld. It is a matter for concern also that 512 of the total complaints were against the AO, of which 68 were accepted for investigation and 15 per cent fully upheld,[77] perhaps because the IR is the first-tier appeal.

The first three-year term of office brought criticism of a 'substantial and worrying independence deficit'. Despite the fact that the IR's contract with the RA can only be terminated for gross inefficiency or serious misconduct, this is sufficient to exclude the office from the Association of Ombudsmen. Morris, evaluating the early years, paid tribute to the reputation of the first AO as 'an independent and impartial complaints-handler' but nonetheless saw the AO scheme as 'clearly flawed in terms of perceived independence and accountability'. Complainants themselves seem less concerned with independence than with outcome: the percentage of those 'very satisfied' with the service has fallen from 41% in 2003–4 to 36% and 29% in the last two years, though those not

[75] *Annual Report for 2007/8.*

[76] The PCA reports, *Tax credits: Putting things right*, HC 124 (2004/5); *Tax credits: Getting it wrong?* HC 1010 (2006/7) are discussed below at p. 541. The citation is from HC 124 [5.61] [5.65]. The Annual Report for 2006/7 showed that tax credits remained a major source of complaint: in all there were 1,142 PCA complaints, 828 in all areas except tax credits, where 120 new complaints came in, of which 15 were summarily closed.

[77] PCA, *Annual Report for 2007/8*, HC 1040 (2007/8).

satisfied remained at 33%.[78] Yet 84% of 249 surveyed in 2004 thought it important that the office existed while 65% saw it as 'fairer than the office complained about'. They were, however, not asked the direct question whether they would prefer an *independent* adjudicator. And perhaps they had already voted with their feet, turning to the more obviously independent PCA.

(c) Self-regulation: press complaints

The present system of press self-regulation dates from the early 1990s and rests on the twin pillars of the *Editors' Code of Practice* and the Press Complaints Commission (PCC) as grievance machinery.[79] The self-regulatory system has often come under attack and been recommended for abolition and replacement by a statutory tribunal with powers to restrain publication and fine newspapers.[80] Despite considerable pressure, successive governments have so far managed to avoid this outcome in favour of perseverance and strengthening of the system.[81]

The rationale for self-regulation is a powerful one: 'to maintain the freedom of the press – vital in an open and democratic society – the industry has to regulate itself; otherwise the door is open to Government influence, censorship, even control'.[82] And we must not forget the background against which the struggle for autonomy rages; there is a long history of censorship of all forms of self-expression, including books, theatre and cinema in Britain. The present self-regulatory system operates on a most sensitive interface between openness and secrecy and, in human rights terms, between the right to respect for private and family life (ECHR Art. 8) and the right to freedom of expression and 'to receive and impart information' (ECHR Art. 10).[83] Thus, as the preamble to the Code puts it:

> It is essential that an agreed code be honoured not only to the letter but in the full spirit. It should not be interpreted so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it constitutes an unnecessary interference with freedom of expression or prevents publication in the public interest.

[78] P. Morris, 'The Revenue Adjudicator', 321. Contrast D. Oliver, 'The Revenue Adjudicator: A new breed of ombudsperson?' [1993] *PL* 407, who believes accountability to be secured by the possibility of complaint to the PCA and PASC.

[79] The first Press Council, established on a trial basis in the face of widespread calls to rein in 'media excesses', was set up in 1953: see R. Shannon, *A Press Free and Responsible: Self-regulation and the Press Complaints Commission 1991-2001* (John Murray, 2001), p. 11.

[80] See the recommendations of the two Calcutt Committees: *Report on Privacy and Related Matters*, Cmnd 1102 (1990); *Review of Press Self-Regulation*, Cmnd 2135 (1993).

[81] *Privacy and Media Intrusion*, Cmnd 2918 (1995).

[82] Culture, Media and Sport Committee (CMSC), *Privacy and Media Intrusion*, HC 458 (2002/3), p. 24; *Government response*, Cm. 5985 (2002/3); and *CMSC reply*, HC 213 (2003/4).

[83] See *von Hannover v Germany* (2005) 40 EHRR 1. And see H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006).

The Code must naturally be read in the context both of market forces and of media law more generally. We should note the strong contrast too with the more modern media: broadcasting, film and television have always been subject both to censorship and licensing and are today regulated by a statutory regulator, Ofcom, which has a remit to see that people who watch television and listen to the radio are protected from harmful or offensive material, from being treated unfairly in television and radio programmes and from having their privacy invaded. (Ofcom publishes a code of practice, has investigatory powers and a complaints-handling service available online). We need to bear in mind also that responsibility is shared with the formal legal system. 'The press', as the PCC keenly reminds us, 'is subject to plenty of different pieces of legislation as well . . . A complex mesh of criminal and civil law . . . restrains newspapers' investigation, newsgathering and publication, in print or online'.[84] Historically, English courts have been very slow to recognise privacy as an interest worthy of protection[85] and only in the last few years are embryonic forms of liability beginning to emerge. A recent case brought by Max Mosley strikes a warning note however; in an action based on breach of confidence and human rights, a judge awarded damages of £60,000 for publication of material concerning the plaintiff's sexual habits.[86]

The Code itself remains firmly in the ownership of the industry. While subject to ratification – 'sanctioning' – by the PCC, it is framed and revised by a committee made up of independent editors of national, regional and local newspapers and magazines. It can thus plausibly be presented as 'the cornerstone of the system of self-regulation to which the industry has made a binding commitment'. More particularly, 'it is the responsibility of editors and publishers to implement the Code and they should take care to ensure it is observed rigorously by all editorial staff and external contributors'. There is also a role for contract; the Code is now routinely incorporated in editors' and journalists' contracts of employment, so opening the way to internal disciplinary proceedings. This form of 'tertiary rule' has a status of its own under the Human Rights Act (HRA). Section 12(4) provides that, in proceedings relating to 'journalistic, literary or artistic' material, the court 'must have particular regard' to 'any relevant privacy code' (statutory or otherwise).[87] Like the self-regulatory system, the exception was the product of heavy industry lobbying.

The Code contains three types of provision. There are cross-cutting requirements of accuracy in reporting and respect for privacy; there is a range of highly specific clauses; and last but not least there are public interest

[84] PCC, Evidence to CMSC, *Self-regulation of the Press*, HC 375 (2006/7). And see generally, G. Robertson and A. Nicol, *Media Law*, 5th edn (Sweet and Maxwell, 2007).

[85] *Malone v Metropolitan Police Commissioner* [1979] Ch 344. And see Lord Bingham, 'Tort and human rights' in P. Cane and J. Stapleton (eds), *The Law of Obligations: Essays in celebration of John Fleming* (Clarendon Press, 1998).

[86] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777. And see *Campbell v MGN* [2004] UKHL 22; *OBG Ltd v Allan, Douglas v Hello* [2007] UKHL 21.

[87] *Sugar v BBC* [2009] UKHL 9.

qualifications – 'the right to know'. The Code leaves much space for 'judgement discretion'.

> 1. **Accuracy**
>
> (i) The press must take care not to publish inaccurate, misleading or distorted information, including pictures
> (ii) A significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and – where appropriate – an apology published . . .
>
> . . .
>
> **3. Privacy**
>
> (i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. Editors will be expected to justify intrusions into any individual's private life without consent.
> (ii) It is unacceptable to photograph individuals in a private place without their consent.

'Private places' are defined as 'public or private property where there is a reasonable expectation of privacy'. The Code provides for exceptions to the privacy restrictions where they can be demonstrated to be in the public interest and this term is defined:

> 1. The public interest includes, but is not confined to:
>
> (i) Detecting or exposing crime or serious impropriety
> (ii) Protecting public health and safety
> (iii) Preventing the public from being misled by an action or statement of an individual or organisation.
>
> 2. There is a public interest in freedom of expression itself.

Illustrating the inherent flexibility of self-regulation, the Code is very much 'a living document'. It 'cannot stand still. It must keep pace with changing society. That is one of its strengths.'[88] It has in fact been amended some thirty times, usually with a view to deepening or widening the regulation. A major shock to the system, the death of Diana, Princess of Wales, generated a raft of amendments such as a ban on material obtained by 'persistent pursuit' and an extension of children's protection. Again, the HRA prompted some careful redrafting, illustrated in the privacy clause cited above. Better to reflect the lessons of PCC adjudications, the Code is now subject to annual review and a readily updated 'Editor's Codebook' has recently been produced, fleshing out the regulation with details of relevant rulings and interpretations.

[88] PCC, *Annual Review 2005*, p. 17.

Tasked with dealing with complaints, the PCC is neatly characterised by current chairman Sir Christopher Meyer as being in a state of 'permanent evolution'[89] in response partly to the ongoing injection of good governance values into self-regulatory systems (see Chapter 7), especially in the form of institutional 'checks and balances'; partly to pressure from a series of parliamentary inquiries, such as a Culture, Media and Sport Committee (CMSC) report emphasising the importance of better-regulation-type measures in commanding the confidence of government, Parliament, and, crucially, the public.[90] Funded in the usual way at arm's-length from the industry, the PCC today has both a permanent staff and a clear majority of Board members who are not journalists. 'This amounts to a degree of structural independence that is unsurpassed in any press self-regulatory body throughout the world.'[91] Flanking developments include an independent 'charter commissioner', whereby the PCC's handling of a complaint can be challenged on judicial-review-type grounds; and an independent 'charter compliance panel', empowered retrospectively to examine complaints files and to report generally on quality of service. In practice, most PCC casework concerns the accuracy of articles, with a further substantial wedge related to issues of privacy (see below). Happily, the panel finds 'much to praise, not least in the care and patience the complaints officers show in dealing with individual complaints, and in negotiating the satisfactory resolution of complaints'.[92] As we shall see, not everyone agrees!

'Free, fast and fair' is the PCC mantra. From the complainant's standpoint, a key advantage of the self-regulatory system is that 'it costs nothing . . . you do not need a solicitor or anyone else to represent you'.[93] Notably, of the several thousand complaints the PCC handles each year, over 90 per cent are classified as being from ordinary members of the public. The PCC also prides itself that, 'excluding complaints where no breach of the Code is established, or no further action is required, nine out of ten complaints are resolved; and it only takes us, on average, just 25 working days to do so'.[94] Approximately 50 per cent of complaints (about 3,600 annually) fall outside the scope of the Code, in which case a letter is sent to the complainant and the case is merely recorded; of the rest, an apparent breach is found in about 65 per cent. The PCC then contacts the editor who may offer to resolve the complaint by mediation through the PCC. Remedies secured through conciliation may include a published or a private apology, undertakings about future conduct, confirmation of internal disciplinary action, *ex gratia* payments or donations to charity.

It seems that between 20–25 per cent of all complaints received are not resolved through conciliation. Unless the PCC deems that a major principle

[89] PCC, *Annual Review 2003*, p. 7.
[90] CMSC, HC 458, p. 3.
[91] PCC, Evidence, HC 458-ii.
[92] Charter Compliance Panel, *Annual Report 2006*, p. 2.
[93] PCC, *Key Benefits of the System of Self-Regulation* (2006), p. 1.
[94] PCC, *Annual Review 2005*, p. 4.

is at stake, it lets them go; otherwise, it moves on to a formal adjudication. Questions are raised by the fact that formal adjudications have slackened off in recent years, a phenomenon explained away by the PCC as the consequence of a maturing system with less need for 'precedents.'[95] It could equally be explicable in terms of lack of public confidence in the system, fuelled by the presence on the PCC of a minority of members drawn from the industry, creating an institutional or structural bias, though this is not entirely confirmed by Annual Reports. The number of complaints is rising. So is the number resolved satisfactorily and, surveyed regularly by the PCC, complainants seem to be satisfied: 82% of those surveyed in 2007 thought the investigations thorough, 76% expressed overall satisfaction and 81% thought the review sufficiently fast (compare the Information Commissioner, below, p. 477).[96] But noting that around 70–80% or more of complaints never reach adjudication (as in 2001, when only 41 out of 3,003 complaints were adjudicated and only 19 upheld) the Campaign for Press and Broadcasting Freedom in evidence to the CSMC took a rather different view. This appalling 'wastage of complaints' was entirely in line with the record of the Press Council and PCC, which had 'never had the power to make their judgments stick'. Both had acted as 'little more than lightning conductors, taking the strain when press behaviour has provoked the public and politicians to despair'.[97]

The effectiveness of its non-adversarial conciliation techniques lies at the heart of the PCC's defence of self-regulation:

> The overwhelming majority of breaches of the Code are either the result of an oversight or mistake, or a professional decision made in good faith that falls on the wrong side of the line. It is very rare in the Commission's experience for journalists or editors deliberately to flout the rules . . . The question for the Commission is not how to achieve perfection but how to raise standards and how to deal with the breaches of the Code that will inevitably arise. Over the years, [the Commission] has developed a wide range of remedies. In the context of privacy intrusion, these include the removal of offending material from websites . . . the publication of apologies [and] undertakings about future conduct . . . In addition, following negotiation the Commission also sometimes secures *ex gratia* payments [or] donations to charity . . . Conciliated settlements such as these are popular because, in addition to them being meaningful, they are quicker to achieve either than formal rulings or certainly action through the courts . . . They are discreet and do not involve public argument . . . There is limited risk – there is not a 'winner takes all' outcome where the complainant may end up with nothing . . . The process is designed to be harmonious and to take the heat out of a situation.[98]

[95] *Ibid*., p. 9. For the full statistics, see the Table at HC 458 [12].

[96] PCC, *Annual Review for 2007*, available online. There were 4,340 complaints (a 70% increase) in 2007, with 1,229 rulings, 822 investigations and 245 privacy rulings.

[97] Campaign For Press and Broadcasting Freedom, Submission to the Culture Media and Sport Committee of the House of Commons in relation to their inquiry on 'Privacy and Media Intrusion' (7 February 2003).

[98] PCC, Evidence, HC 375, pp. 16–20.

There will be times when conciliation is not appropriate. The publication may refuse to make an offer; the complaint may in the PCC's judgement involve 'an important matter of principle that requires amplification and publicity throughout the industry'. Should the complaint then be upheld on the basis of a formal adjudication, the PCC's power of sanction is triggered: the publication must print its criticisms, according to the Code, 'in full and with due prominence'. But what is the value of the word 'must' in a system without sanctions? And what amounts to 'due prominence' is a running sore in the system, despite a more generous attitude by editors since 2007. The litany of complaints also includes the 'opaque procedures' associated with conciliation and the absence of any substantive right of appeal or further review by (e.g.) an ombudsman.[99] This contrasts unfavourably with the FOI system discussed below.

The PCC has come to recognise the need to be more proactive or 'regulatory'; better to draw together the system's two functions in a sustained and focused control. While it has no powers of prior restraint, urging self-restraint on editors behind the scenes is now considered a vital aspect of the work, as is advice and assistance to those at the centre of high-profile stories. Time is also spent on self-promotion ('visibility'); training and education for the industry; and – of course –networking on the international plane; the PCC is a leading player in the Alliance of Independent Press Councils of Europe. Even so, this essentially complaints-based system remains vulnerable to the criticism of being structurally too limited. Where are the audit functions that a regulator would surely exercise?

Equally, the PCC is weak on accountability, partly because the courts, on the rare occasions when judicial review has been sought against the PCC, have proved reluctant to become involved. The *Anna Ford* case concerned a challenge by the well-known TV presenter after her complaint over publication of photographs of her and her partner on a public beach had been rejected (Code 3(ii), see p. 464 above). Assuming that the matter came within his jurisdiction, Silber J emphasised that the PCC should enjoy broad discretion when interpreting the words 'a reasonable expectation of privacy' in the Code. This standard judicial policy of light-touch review in the regulatory field is duly couched in the language of 'deference' – though it may of course owe something to the general weakness of the law relating to privacy:

> The type of balancing operation conducted by a specialist body, such as the Commission is still regarded as a field of activity to which the courts should and will defer. The Commission is a body whose membership and expertise makes it much better equipped than the courts to resolve the difficult exercise of balancing the conflicting rights of Ms. Ford . . . to privacy and of the newspapers to publish . . . So the threshold for interference by the courts is not low as it must be satisfied that it is not merely desirable but clearly desirable to do so.[100]

[99] J. Coad, 'The Press Complaints Commission: Are we safe in its hands?' (2005) 16 *Entertainment Law Review* 167.

[100] *R (Ford) v Press Complaints Commission* [2001] EWHC 683 Admin [28].

For its part, the PCC as chief agent of the self-regulatory system must not only pay heed to the many calls for a statutory privacy law but also carefully navigate the gap between a gently expansionary Strasbourg jurisprudence, a reluctant legislature and a judiciary unwilling to fill legislative gaps. Perhaps then it is not surprising to learn that, moving on from the Anna Ford imbroglio, the PCC is keener than ever to stress its role as 'protector of privacy'.[101]

Given its origins, the system may, in one sense, be accounted a huge success: effectively staving off statutory regulation for some two decades. Thus, reviewing the work of the PCC in 2003, the CMSC once more felt able to conclude that 'overall, standards of press behaviour, the Code, and the performance of the PCC have improved over the past decade'.[102] Elsewhere, however, the PCC has had a poor press, especially amongst lawyers. Robertson and Nicol feel that 'the PCC has failed to demonstrate many virtues in self-regulation. It has designed an ethical code which it declines to monitor, and its decisions are accorded a degree of cynicism, bordering on contempt, by editors.'[103] And the Campaign for Press and Broadcasting Freedom sees self-regulation as 'manifestly devised to protect the proprietors from independent regulation of standards':

> The most important problems with the PC and the PCC have related to their lack of independence. These bodies have relied almost exclusively since the early 1980s on monies from the newspaper proprietors. They have therefore never acted in a manner which is truly independent of the interests of those proprietors . . . [T]his lack of independence has been exhaustively documented. So too has the fundamental weakness of self regulation, that is the PCC's unwillingness to develop a system of penalties that will make its judgments meaningful. The Press Complaints Commission has survived because of the political power that the press wields and not because it is impossible to devise a workable alternative.[104]

Perhaps lawyers should look to the performance of their own profession, as Sir Stephen Sedley did recently in a highly critical review of the courts' performance in the areas both of privacy and defamation. He too thought statutory regulation essential. Appointing a regulator would have the effect of 'getting the inflationary and punitive elements out of the courts' which, he implied, having made a mess of actions for libel were 'now going to be trying actions, under whatever name, for invasion of privacy'. If it were empowered to impose penalties, a regulatory body would need to 'observe appropriate standards of due process' but this could be done without 'mimicking trial procedures':

[101] PCC, *Annual Review 2005*, p. 5.
[102] CMSC, HC 458, p. 3.
[103] Robertson and Nicol, *Media Law*, p. 676.
[104] CMSC, HC 458-ii, Annex 55.

> All one can safely say is that there is no serious case for preserving anything of the Press Complaints Commission, the industry's voluntary self-regulator, except its Code of Practice, which – as often happens – sets out admirable principles which the more aggressive of its subscribers seem to have very little difficulty in circumventing.[105]

Giving the watchdog more 'bite', such as a power to fine publications for breaches of the Code, would encourage a firmer line in the face of an industry driven by commercial considerations and be consistent with the recommendations of the Macrory review on regulatory sanctions generally (see p. 262 above). But this apparently modest reform goes to the very nature of the present system. Echoing recent controversy over the powers of ombudsmen, the PCC expressed its resolute opposition:

> Introducing the power to fine would in fact be significantly counter-productive . . . It would seriously undermine the Commission's main work as a dispute resolution service . . . At the moment, there are many borderline cases that are resolved to the complainant's satisfaction thanks to the goodwill of the editor because of the conciliatory nature of the system . . . Such cases would fall by the wayside . . . The worst features of a compensation culture would inevitably be imported, with lawyers coming between the complainant and the newspaper to prevent a speedy and common-sense resolution to a complaint in search of more money . . . The Commission's authority would be seriously undermined if a publication refused to pay a fine. Without legal powers to demand payment, the Commission would be powerless to act in such circumstances. With legal powers, the system would no longer be self-regulatory. The current structure would have to be dismantled.[106]

A recent CMSC report followed three scandals that cast grave doubt on the credentials of the press for self-regulation: the persistent harassment by photographers of Kate Middleton amidst speculation that an engagement to Prince William was about to be announced; the conviction and sentencing of Clive Goodman, a *News of the World* reporter, for conspiracy to intercept communications without lawful authority; and the release by the Information Commissioner of a list of publications employing journalists who had had dealings with a particular private investigator known to have obtained personal data by illegal means.[107] Not surprisingly in these circumstances, the report was highly critical of the press. Why then did it once again recommend retention of the present scheme?

> To draft a law defining a right to privacy which is both specific in its guidance but also flexible enough to apply fairly to each case which would be tested against it could be almost impossible. Many people would not want to seek redress through the law, for reasons of

[105] S. Sedley, 'Sex, libels and Video-surveillance', the Blackstone Lecture 2006, available online.
[106] PCC, Evidence, HC 458-ii.
[107] IC, *What Price Privacy?* HC 1056 (2005/6); *What Price Privacy Now?* HC 36 (2006/7).

> cost and risk. In any case, we are not persuaded that there is significant public support for a privacy law.
>
> We do not believe that there is a case for a statutory regulator for the press, which would represent a very dangerous interference with the freedom of the press. We continue to believe that statutory regulation of the press is a hallmark of authoritarianism and risks undermining democracy. We recommend that self-regulation should be retained for the press, while recognising that it must be seen to be effective if calls for statutory intervention are to be resisted.[108]

No doubt with relief, the PCC welcomed the 'numerous constructive comments and suggestions' contained within the report. No doubt gratefully, the Government agreed the report's conclusion that self-regulation of the press should be maintained. There was no case for statutory regulation. A free press is a 'hallmark of our democracy'.[109] So that's all right!

(d) Freedom of information: 'The full Monty'

Before the Act

Discussing transparency in Chapter 2, we described official secrecy as deeply embedded in our political culture. For nearly a century, government had been regulated by official secrets legislation, which put government firmly in control of what official information was released into the public arena.[110] Some concessions had been wrung from reluctant governments and a generally unwilling civil service over the years: some specific legislation gave rights of access, for example, to personal files, health and safety information and local government documents.[111] But the first real inroad on the culture of secrecy came through 'soft law' in the shape of the 1977 'Croham Directive', an internal civil-service instruction authorising publication of limited, factual materials, which significantly restricted policy matters and advice to ministers.[112]

John Major took a further step in the direction of openness to which he was personally committed but, for reasons of expense and because he had to compromise with Cabinet and civil service, chose to act through 'soft law'.[113] A White Paper published in 1993 proposed an informal Code of Practice on government information.[114] Asserting that 'Open Government is part of

[108] CMSC, *Self-regulation of the Press*, HC 375 (2006/7) [53–4].

[109] CMSC, *Self-regulation of the Press: Replies to the Committee's Seventh Report of Session 2006-07*, HC 1041 (2007/8).

[110] The Official Secrets Act 1911 and later Acts were revised by the Official Secrets Act 1989.

[111] See generally, P. Birkinshaw, *Freedom of Information*, 3rd edn (Cambridge University Press, 2001).

[112] See R. Austin, 'Freedom of information: The constitutional impact' in Jowell and Oliver (eds.), *The Changing Constitution*, 3rd edn (Clarendon Press, 1994).

[113] B. Worthy, 'John Major's information revolution? The Code of Access ten years on', Online Journal Of Open Government vol. 3, no. 1 (2007).

[114] *Open Government*, Cmnd 2290 (1993) [1.7].

an effective democracy', the White Paper tried to restrict access only where there were 'very good reasons for doing so'. It aimed at 'a more disciplined framework for publishing factual and analytical information about new policies, and reasons for administrative decisions'. The new Code[115] applied to all departments, agencies and authorities falling within the jurisdiction of the PCA. The Code was non-justiciable, though non-disclosure could be the subject of complaint to the PCA, causing Hazell to comment that the PCA was 'ill equipped to carry out a judicial function'.[116] One might equally argue that the PCA's investigatory procedure, his investigators' familiarity with civil service methods and attitudes and assured access to documents and files in practice made his office the most appropriate method of dispute resolution.

The scheme was dismissed by Birkinshaw as 'part of a wider conspiracy to protect secrecy', though he did admit elsewhere both that the arrangements had procedural advantages and that the PCA had set about this work in a 'spirited fashion'.[117] But although rejected as 'a last-ditch attempt' to forestall Freedom of Information legislation,[118] the soft law scheme was a sure sign that the climate of secrecy was, albeit slowly, thawing. It brought into the public domain much previously secret information. On the other hand, it contained a warning sign in the shape of a long list of protected areas.

A minor change was made to the PCA's normal competence: in freedom-of-information cases, to show that maladministration had caused injustice was unnecessary, it would be enough that information had not been given out in accordance with the Code.[119] Even so, the number of complaints was small: over the years 1994–2005, 208 complaints were investigated, of which 152 were at least partially upheld.[120] The PCA expressed disappointment at the public's minimal use of the new facility and surprise at the small use made by the press of the arrangements. The Select Committee blamed absence of publicity and delay on the PCA's part in investigating complaints;[121] the PCA blamed departments, which were 'sometimes unwilling to allow him to see the disputed information in the first place or to accept his verdict if he recommended that this information should be released: sometimes it was a case of both.'[122] The Office of Public Service, speaking for departments, retorted that most requests received a favourable response: of 2,600 requests received by

[115] *Open Government: Code of practice on access to government information*, 2nd edn (Cabinet Office, 1997).

[116] R. Hazell, 'Freedom of information: The implications for the Ombudsman' (1995) 73 *Pub. Admin.* 263.

[117] P. Birkinshaw, 'I only ask for information' [1993] *PL* 557, 563.

[118] R. Austin, 'The Freedom of Information Act 2000: A sheep in wolf's clothing?' in Jowell and Oliver (eds.), *The Changing Constitution*, 6th edn (2007), p. 404.

[119] Cmnd 2290 [4.19].

[120] PCA, *Access to Official Information: Monitoring of the non-statutory codes of practice 1994–2005*, HC 59 (2005/6), Annex 4.

[121] Select Committee on the PCA, *Open Government*, HC 84 (1995/6).

[122] PASC, *Your Right to Know: The government's proposals for a Freedom of Information Act*, Cm. 3818 (1997).

central government departments, only 89 had been rejected in whole and 21 in part.

By the year 2000, things had begun to change. Journalists had realised the Code's potential and MPs and campaigners had begun to use it. Conflicts arose. Things came to a head when the PCA (Sir Michael Buckley) clashed with the Home Office and Cabinet Office over their protracted refusals to provide information in two highly political cases. He had to issue a draft report saying that 'lack of co-operation from the two departments had effectively made it impossible for him to carry out his work properly' before the documentation was produced.[123] An inquiry by the Select Committee led to a truce, with the Cabinet Office signing a memorandum of understanding. This, according to the PCA, 'helped in general to produce a more consistent level of response from departments, [but] continued to fail to have much impact in those cases involving the politically sensitive areas of Ministerial interests and the Ministerial Code of Conduct'.[124]

The truce was short-lived. Ann Abraham, the new PCA, was soon mired in fresh conflict in a case involving the ministerial code of conduct and gifts to ministers. The Cabinet Office had delayed for nearly sixteen months to advise departments how to handle requests, finally advising them to refuse disclosure claiming exemption 12 of the Code (personal privacy).[125] Although the PCA disagreed, the Cabinet Office did not concede, making this the second case of refusal to release information in accordance with a PCA recommendation. Two further cases involving *The Guardian* newspaper followed, cover ministers' financial interests and the Attorney-General's advice on the legality of the Iraq war. On both occasions it was claimed that 'disclosure of that document or information, or of documents or information of that class, would be prejudicial to the safety of the state or otherwise contrary to the public interest' (s. 11(3) of the Parliamentary Commissioner Act 1967), resulting in the investigation being dropped (though on the first occasion the Government backed down, quashing the certificate in the face of a threatened judicial review).[126]

Surveying ten years' experience of FOI complaints, Ann Abraham concluded:

> During the decade or so of its existence the Code, and the Ombudsman's policing of it, resulted in a significant enlargement in the kind of information that was routinely released into the public domain . . . But it was not a smooth process and, although the Ombudsman frequently dragged departments to water, departments often showed a marked reluctance

[123] PCA, *Access to Official Information: Declarations made under the Ministerial Code of Conduct*, HC 353 (2001/2); PCA, *Investigations Completed February-April 2002*, HC 844 (2001/2).

[124] HC 59 (2005/6) [26]. And see PASC, *Ombudsman Issues: Third Report,* HC 448 (2002/3); Government Response, Cm. 5890 (2003).

[125] PCA, *Investigations Completed November 2002-June 2003*, HC 951 (2003/4), Case A/703.

[126] HC 59 (2005/6) [27].

> (or outright refusal) to drink. This manifested itself most noticeably through delays in responding to the Ombudsman; very often this was in response to statements of complaint and draft reports but sometimes showed itself in a refusal to even provide the Ombudsman with relevant papers.[127]

She warned of the implications for the statutory regime, now imminent. We were about to test a second, statutory model.

After the FOIA

Two modern statutes are relevant to access to information: the FOIA 2000 (below) and the Data Protection Act (DPA) 1998. The DPA governs the use and retention of personal information. It provides that information is processed 'fairly and lawfully' for specified purposes and not further processed or retained 'in any way that is incompatible with the original purpose'. The DPA is more extensive than the FOIA as it extends into the private sector, while the FOIA covers only public authorities as defined in the Act. Environmental information is covered by a different regime. The Aarhus Convention, to which the EU is a signatory, was implemented by an EU Directive and transposed into British law by the Environmental Information Regulations 2004.[128] The difference is significant. Exemptions from disclosure under Aarhus are narrower than those in the domestic FOIA. In Scotland too, where freedom of information is a devolved responsibility, the legislation passed by the Scottish Parliament in 2002 is in some ways more open than the FOIA.[129]

The role of Data Protection Commissioner under the 1998 Act is now combined with that of Information Commissioner (IC), who has the twin functions of promoting access to official information and protecting individuals. This dual role of promoting openness while at the same time ensuring privacy has been called 'a major contradiction at the heart of the [scheme].'[130] The IC believes, however, that the twin functions are compatible. Moreover, their combination is essential to a proper balancing of the two opposing values, more especially in the information age, which augments the risks and challenges.[131]

[127] *Ibid*. [34].

[128] Directive 2003/4/EC on public access to environmental information implemented by the Environmental Information Regulations, SI 2004/3391. And see the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June 1998) noted in P. Coppel, 'Environmental information: The new regime' [2005] *PL* 12.

[129] See Freedom of Information (Scotland) Act Environmental Information (Scotland) Regulations, SI 2004/520.

[130] HL Deb, col. 431 (25 October 2000) (Earl of Northesk).

[131] IC, *Annual Report for 2005/6*, p. 2. And see P. Kleve and R. de Mulder, 'Privacy protection and the right to information: In search of a new symbiosis in the information age', *Information Abstracting Privacy Law Journal* (2 June, 2008), available online.

Section 1 of the FOIA entitles any person making a request for information to a public authority:[132]

- to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- if that is the case, to have that information communicated to him.

Applications must be made in writing or electronically (s. 8(1)) and an effort must be made to identify the information requested; 'fishing expeditions' are discouraged.

The FOIA imposes three different types of exemption from disclosure:

- absolute or 'class-based exemptions', such as the exception for security matters in s. 23
- public interest exemptions based on prejudice to the public interest, such as that in s. 36 for information likely to prejudice 'the effective conduct of public affairs'
- qualified exemptions subject to the *double* public interest test set out in s. 2(2)(b) that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.[133]

One constant user of access to information machinery, David Hencke of *The Guardian* newspaper, has called the Act 'a useful tool enabling our journalists to put into the public domain material which should indeed be there'.[134] In fact, the twenty or so exemptions from disclosure spelled out in the FOIA make this one of the world's more restrictive pieces of information legislation.[135]

The restrictive character of the scheme, the numerous exemptions, the prevailing civil-service 'culture of secrecy and partial disclosure' and the complex and occasionally obscure text of the Act all mean that decisions under the FOIA are highly likely to be contested. It has indeed been argued that disputes will escalate as the players learn how to manoeuvre within the rules.[136] And, as we shall see, the PCA's experience with ministerial certification has been repeated; a ministerial certificate can bar access and stands as 'conclusive

[132] For the purposes of the Act, a 'public authority' is an authority listed in Sch. 1 or designated by ministerial order made under s. 5 as exercising functions of a public nature or under contract; the term extends to publicly owned companies.

[133] See IC, *Awareness Guidance No. 3: The public interest test* (April, 2006).

[134] Quoted by the Constitution Committee, *Freedom of information: One year on*, HC 991 (2005/6) [9–10]. See also A. MacDonald, 'What hope for freedom of information legislation in the UK?' in Hood and Heald (eds.), *Transparency: The key to better governance?* (Oxford University Press, 2006), p. 143.

[135] Austin, 'The Freedom of Information Act 2000: A sheep in wolf's clothing?', p. 409. And see Constitution Unit, *Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000* revised May, 2006, available online

[136] A. Roberts, 'Dashed expectations: Governmental adaptation to transparency rules' in Hood and Heald (eds.), *Transparency*.

evidence' of the fact that non-disclosure is 'required for the purpose of safeguarding national security'.[137] This provision in particular is unlikely to go unchallenged.

The IC is an independent Officer of the Crown directly answerable to Parliament. The second incumbent is Richard Thomas, a lawyer who has worked for the National Consumer Council and Office of Fair Trading. His office, funded by the Department for Constitutional Affairs, is best described as a multi-tasked regulatory public body; its work is 'more like an ombudsman on our Freedom of Information work and more like a regulator on the data protection work'. The IC takes his data-protection functions seriously, regularly commenting on plans for identity cards, plans to fingerprint all passengers using Heathrow airport and – all too frequently – on loss of data held by government departments. He has warned too of the dangers of 'sleepwalking into a surveillance society' as large and very vulnerable data banks are set up by national governments and made available to transnational bodies.[138] (The IC is our representative on the EU group of data supervisors).

The IC possesses rule-making functions, which take the shape of Codes of Practice for public authorities, on which he must be consulted by the Lord Chancellor (ss. 45 and 46 FOIA). Guidance may also be issued to public authorities and to data protection individuals and commercial concerns. To these rule-making powers are added investigatory functions with powers of entry and inspection and enforcement functions with powers of sanction. Enforcement powers to improve compliance with the Act include:

- power to issue decision notices
- 'good practice recommendations' where an authority's practices do not conform to the codes of practice
- 'information notices' requesting information to assist complaint investigations and (a sharp contrast here to the PCA)
- enforcement notices directing an authority to amend its practices.

If an authority fails to comply with a decision notice, it is enforceable as a contempt of court. After the episode when 35 million IR records went missing (see p. 79 above) the Government moved swiftly to enhance the IC's investigatory powers, empowering him 'to carry out inspections of organisations which collect and use personal information and to put in place new sanctions for the most serious breaches of data protection principles'. We need to question whether these roles are compatible with the IC's adjudicatory functions.

[137] Technically, under s. 53 FOIA, the certificate must come from a department's 'accountable person' but s. 8 ensures that this will be a Law Officer, Minister of the Crown or Welsh Assembly First Secretary.

[138] See ICO, Surveillance Studies Network, *A Report on the Surveillance Society: Full Report* (September 2006). And see now, Constitution Committee, *Surveillance: Citizens and the State*, HL 18 (2008/9).

(e) Handling complaints

The FOIA replaces complaint to the PCA (who retains competence in complaints about management of the Commissioner's office) by a new four-level complaints-handling system, a structure carefully chosen because 'systems supervised by a Commissioner can be operated with a greater degree of informality and more cheaply than can a system under which courts adjudicate':[139]

- Level 1 is a request to a department for internal review. This step, which is compulsory, has itself generated complaints of delays. Expressing itself as troubled and dissatisfied, the Commons Constitution Committee has welcomed the IC's commitment to put pressure on public authorities to complete internal reviews more quickly.[140]
- Level 2 is appeal to the IC, who may issue a decision notice stating that an authority has made a wrongful decision, or an enforcement notice, which is served on authorities that fail or decline to make a decision or refuse to comply with the IC's decisions. The notice must be reasoned and mention the right of appeal to the Information Tribunal (Level 3).
- Level 3 is the Information Tribunal (IT). The IT consists of a legally qualified chair with two lay members with expertise in the subject, representing the interests of applicants and public authorities. A separate National Security Appeals Panel hears appeals against 'ministerial override certificates'. The IT can conduct its proceedings on paper or, if requested, with a hearing. It may in the course of the hearing review the IC's findings of fact. This places the IC in an unusual and ambivalent position; he is at one and the same time the subject of the appeal and respondent in the proceedings. The IT may substitute a new decision notice for one that it finds to be unlawful, taking into consideration the public interest (s. 58 FOIA). As we shall see, it issues mandatory orders. Disobedience is a contempt of court.
- Level 4 is the High Court, which deals with appeals from the IT.

As the IT is *not* a complaints system, it cannot handle complaints about the IC's performance, of which there have been many.

A managerial (NPM) approach to evaluation of this system would be statistical: delays, throughput, compliance with targets and consumer satisfaction can all be measured and evaluated. Here the system would not score well. The FOIA came into force with a serious backlog of (data-protection) complaints for which the office was clearly unready; it was indeed thought that more than eight years might be needed to clear the backlog. After one year, witnesses were telling the Constitution Committee that some had 'waited months' for the IC to start investigating their complaints and felt too that the quality of

[139] J. Wadham and J. Griffiths, *Blackstone's Guide to the FOIA 2000*, 2nd edn (Oxford University Press, 2005), p. 129.

[140] HC 991 [20-4]. And see H. Brooke, 'The UK's openness watchdog lacks teeth and transparency', *Open Government, the Online Information Journal*, vol. 3, issue 1 (2005).

investigation and information provided in the decision notice were inadequate. Only 135 decision notices had been issued by an apparently reluctant IC (Elizabeth Filkin). The office of the IC was not itself open.

The IC apologised and introduced a new policy: only complaints where 'a useful purpose would be served' by a decision notice would in future be investigated, unless there were reasonable grounds to suspect deliberate wrongdoing or conduct requiring censure, the case involved principle, or 'it would be manifestly unreasonable in the particular circumstances not to proceed with the case'.[141] Note how a complaints-handling system can be flexible; a tribunal would find it hard to abandon trivial complaints in this way.

One year on again and things were perhaps improving. The annual workload remained high: almost 6,000 FOI complaints were received in 2006–7. Review now averaged eighteen days with 53% of FOI cases resolved within one month. Three hundred and thirty-nine decision notices (13% of cases) had been served and published. Perhaps more important, the Annual Report confirmed that the authority took remedial action in 78% of successful cases. But customer satisfaction was low, with only 42% of individuals recording satisfaction and there were ninety-two appeals to the IT. We should not read too much into these bare statistics, though they do lend tentative support to the view that the IC is in danger of being overwhelmed by complaints.

Two high-profile cases show how determined campaigners can use the new institutions to drag information into the public sphere. The first concerns attempts to view the Attorney-General's advice to the Government concerning the legality of the Iraq war.[142] We saw how a request for information and complaint to the PCA made under the Code of Practice was blocked by recourse to the security exemption in the Parliamentary Commissioner Act 1967. Once the FOIA was in force, campaigners could try again. They took their unsuccessful request for disclosure to the IC, who issued an enforcement notice to the Law Officers.[143] Once again, the Cabinet Office refused to disclose the Opinion and the case returned to the IC for a determination of 'the public interest'.

The IC summarised the Cabinet Office claim to exemption as a 'class claim'. It was based first on the need to be free to consider important and sensitive policy issues without inhibition and also on the importance of maintaining the convention of Cabinet collective responsibility. In a careful and thorough balancing exercise, the IC weighed the pros and cons of non-disclosure against his own chosen public-interest criteria in favour of publication and openness, which were:

- participation in public debate on issues of the day
- gravity and controversial nature of the subject matter
- accountability for government decisions

[141] IC, 'A robust approach to FOI complaint cases' (May 2006), available on IC website.
[142] See P. Sands, *Lawless World* (Allen Lane, 2005), p. 196 on legality.
[143] Enforcement Notice to Legal Secretariat of Law Officers (25 May 2006).

- transparency of decision making
- public government decisions

The IC ruled in favour of disclosure though he did add a caveat that disclosure would not necessarily set a precedent in respect of other Cabinet minutes. Perhaps controversially he added:

> The Commissioner considers that a decision on whether to take military action against another country is so important, that accountability for such decision making is paramount. Though not strictly relevant, acceptance by the current Prime Minister that decisions to go to war should ultimately be referred to Parliament reinforce arguments flowing from the gravity of subject matter.[144]

Amongst factors that the IC took into consideration were promoting accountability for their actions by public authorities and furthering understanding of and participation in 'issues of the day'. But were these factors truly present? The decision to make war had been discussed in every imaginable public forum, including the Hutton and Butler Inquiries (see p. 601 below) on which opponents of the war had pinned their hopes. What followed was a rudimentary proportionality test. It is at least arguable that the public interest in disclosure should not in the instant case have outweighed a public interest in Cabinet solidarity and free discussion; or, under the rubric of legal privilege, in fearless and frank legal advice from the Law Officers of the Crown.[145]

The second case is set against the background of allegations of abuse of MPs' allowances. We know from Chapter 2 that written, though non-justiciable, codes of practice now govern the behaviour of ministers, that the Committee on Standards in Public Life is now a standing committee, that there is a code of conduct for MPs and that a Parliamentary Commissioner for Standards (PCS) has been appointed. In the case of Derek Conway MP, the Committee on Standards and Privileges found a 'serious breach of the rules' in respect of payment of allowances to his son for work that had not been carried out. It recommended a ten-day suspension and demanding an apology to the House. It asked the PCS to investigate and published a wider report recommending to the House a new scheme for the employment of family members supported by a new register.[146]

The IC was now asked to investigate a set of cases where a request for details, including invoices, of expenditure by Tony Blair and other Members had been refused by the House of Commons.[147] The Speaker claimed that the

[144] IC, Decision Notice of 19 February 2008, Ref FS50165372.

[145] The Justice Secretary promptly issued a ministerial certificate vetoing publication: HC Deb., col. 153 (24 Feb. 2008). The Foreign Secretary subsequently confirmed an inquiry into the Iraq War: HC Deb., col. 312 (25 Mar. 2009).

[146] CSP, *Conduct of Mr Derek Conway*, HC 280 (2007/8); CSP, *Employment of Family Members through the Staffing Allowance*, HC 436 (2007/8).

[147] IC, Decision Notice, FS50083202 and FS50134623 (16 January 2008).

information was personal data protected by the DPA, that disclosure would be unfair and, because it involved publication of addresses, presented a security risk. The IC issued an Information Notice requiring the House to make the requested information available for his examination. Confirming that much of the information was covered by the DPA and acknowledging a right to some privacy, the IC's decision was that the House had 'failed to communicate to the complainant such of the information specified in his request as did not fall within any of the absolute exemptions from the right of access nor within any of the qualified exemptions under which the consideration of the public interest in accordance with s. 2 would authorise the House to refuse access'. He therefore required the House to disclose aggregate monthly sums including the number of staff members 'but excluding any reference to named staff members'. Instantly, the House of Commons appealed to the tribunal.

The IT held an oral hearing at which evidence was given on oath. Drawing on its own earlier precedents, it substituted a decision that 'all the information held by the House which falls within each complainant's request or requests must be disclosed to that complainant' subject to exceptions for sensitive personal data, which could be edited out. In the course of the judgment, the IT said:

> It is not our function to say what system ought to be operated by the House. But we cannot avoid making some assessment of the existing system, since we cannot decide the issues which are before us without arriving at a view on the effectiveness of the existing controls. The laxity of and lack of clarity in the rules for [Additional Claims Allowance] is redolent of a culture very different from that which exists in the commercial sphere or in most other public sector organisations today . . . Moreover the [published] information . . . does not match the system as actually administered, and hence as actually experienced by MPs. In our judgment these features, coupled with the very limited nature of the checks, constitute a recipe for confusion, inconsistency and the risk of misuse. Seen in relation to the public interest that public money should be, and be seen to be, properly spent, the ACA system is deeply unsatisfactory, and the shortfall both in transparency and in accountability is acute.[148]

A further appeal followed.[149] Scrutinising the tribunal judgment with approval, the High Court concluded that it could not interfere with its decision 'on the basis of what the appropriate outcome might be if the Tribunal were not addressing the deeply flawed system which the Tribunal believed had "so convincingly established" the necessity of full disclosure'. Not before time, and in the face of the High Court, the Speaker conceded. Nonetheless, the affair casts

[148] IT Appeals Nos. EA/2007/0060, 0061, 0062, 0063, 0122, 0123, 0131, *Corporate Officer of the House of Commons v Information Commissioner and Dan Leapman et al.,* on appeal from IC FS50070469, FS50051451, FS50079619, FS50124671, 26 February 2008, available online.

[149] *Corporate Officer of the House of Commons v Information Commissionerand Others* [2008] EWHC 1084 Admin.

light on the question we asked earlier concerning the combination posts of IC and DPC.

We would not of course wish to imply that the FOIA and its supporting machinery can be evaluated by its performance in a couple of high-profile cases. Some important questions are, however, raised. First and foremost we would put the extent of the IC's discretion. In the House of Lords debates on the FOIA, a speaker asked whether the IC would be 'bound by strict rules'.[150] There are no such rules, though guidance has, as we saw, been issued by the IC himself. Secondly, we asked if the dual role of IC and DPC creates a fundamental clash of interests. Typically, the cases show the IC having to balance conflicting interests in privacy and openness both of which he is supposed to represent. This must cast doubt on his objectivity; indeed, his own preferences are often obvious. Finally, we remarked on the IC's ambiguous status, describing the office as a regulatory agency with a complaints-handling capacity and adjudicative capacity. His adjudicative decisions are subject to a series of appeals. Otherwise, in common with many regulators, the IC is barely accountable; he is not like the PCA, a parliamentary officer, accountable to a select committee. This suggests structural defects with the multi-faceted model, which have not really been resolved.

5. Ombudsmania

The work of our first ombudsman, the PCA, is surveyed in Chapter 12. In this chapter, we want to look at the rapid spread of the ombudsman technique as a method of complaints-handling. The technique has established itself as a central component of administrative justice and ombudsmen have spread widely in the private sector.[151] Their inquisitorial and largely documentary procedure (though ombudsmen occasionally hold hearings) can help to resolve disputes informally in a quick and effective fashion. For the complainant, the ombudsman service is relatively trouble-free; all he has to do is complain. No expensive lawyers are necessary, no evidence has to be amassed, no case has to be proved; the ombudsman takes over control of the investigation. Ombudsmen normally have power to trawl through (government) documents and offices and question officials informally and the possible disadvantage that recommendations – never judgments – of public ombudsmen are not usually enforceable is offset by the fact that they are usually obeyed; some may even be indirectly enforceable on application to a court.[152] Private ombudsmen

[150] HL Deb, col. 224 (14 November 2000) (Viscount Colville).

[151] M. Seneviratne, *Ombudsmen Public Services and Administrative Justice* (Butterworths, 2002); M. Harris, 'The Ombudsman and administrative justice' in Harris and Partington (eds), *Administrative Justice in the 21st Century*.

[152] As, e.g., with the Northern Ireland Commissioner for Complaints: see The Commissioner for Complaints (Northern Ireland) Order 1996, SI No. 1297/1996 (NI 7); The Public Services Ombudsman (Wales) Act 2005. The Widdecombe Report, *The Conduct of Local Authority Business*, Cmnd 9800 (1986) recommended similar powers for the CLA in England and Wales.

operate in a framework of self-regulation and, like the PCC, are responsible to the industries which set them up and fund them. The schemes are usually contractual with the terms contained in a Code of Practice and operate as an 'alternative' to courts. The fact that a complainant could go to court is therefore not a bar to an ombudsman investigation as it is with most public ombudsmen. Again, public-sector ombudsmen investigate maladministration, while some private-sector schemes allow their ombudsman to look at the merits of a decision as well as the way in which it was taken. The decisions of private ombudsmen may, for contractual reasons, be binding on the body against which the complaint has been made.

The reader will not be surprised to learn that there is little rhyme or reason in the existing system; it just 'growed up'. A Health Services Commissioner (HSC) was appointed in 1973, an office today held by the PCA;[153] in 1974, a local ombudsman service, the CLA, was appointed on a three-member regional basis.[154] The ombudsman idea was taking off. Today there are ombudsmen for Scotland and Wales, where the systems were rationalised on devolution,[155] and Northern Ireland has several ombudsmen. There are ombudsmen for prisons and probation. Statutory ombudsmen have been created for financial and legal services, replacing previous self-regulatory systems.[156] A Pensions Ombudsman was installed by the Social Security Act 1990. Ombudsmen have also spread widely in the private sector, with ombudsmen for building societies, estate agents and many more, achieving wide acceptance and popularity as an all-purpose complaints-handling technique.[157] To help complainants through the maze, the British and Irish Ombudsmen Association (BIOA) lists hundreds of ombudsmen and other complaint-handling bodies who may be able to help with complaints. Nonetheless, citizens find it hard to navigate.

There are other strong reasons for rationalisation, as recommended by the Colcutt report in 2000.[158] The split competences leave cracks into which complaints may fall. In the notorious Balchin case, for example, Mr and Mrs Balchin complained of maladministration by the DoT in confirming road orders in respect of a bypass without seeking an assurance from Norfolk

[153] National Health Service (Reorganisation) Act 1973. The Health Service Commissioners Act 1993 consolidates the legislation governing the three separate health service ombudsmen for England, Scotland and Wales.

[154] Local Government Act 1974 now updated and replaced by the Local Government and Public Involvement in Health Act 2007.

[155] Scottish Public Services Ombudsman Act 2002; Public Services Ombudsman (Wales) Act 2005; M. Seviratne, 'A new Ombudsman system for Wales' [2006] *PL* 6.

[156] The Financial Ombudsman Service, set up by the Financial Services and Markets Act 2000, combines ombudsman services for banking, insurance, personal pensions and private finance. For legal services, see ss. 21-6 of the Courts and Legal Services Act 1990; R. James and M. Seneviratne, 'The Legal Services Ombudsman: Form versus function?' (1995) 58 *MLR* 187.

[157] R. James, *Private Ombudsmen and Public Law* (Ashgate Publishing, 1997).

[158] *Review of the Public Sector Ombudsmen in England: A Report by the Cabinet Office* (HMSO, 2000). And see M Elliott, 'Asymmetric devolution and ombudsman reform in England' [2006] *PL* 84.

County Council that they would be given adequate compensation for the impact of the bypass on their home. They approached the CLA but the CLA declined competence. Three successive PCA reports followed, each of which was successfully reviewed by the High Court.[159] Finally, investigations run in parallel by the two ombudsmen services produced an apology and compensation for events that went back nearly twenty years. The unhappy saga led the PCA to comment in her fourth report on the problems caused by cases that crossed more than one Ombudsman jurisdiction:

> Whilst the Local Government Ombudsman and I have collaborated closely throughout our respective investigations, the restrictions on our ability to work together have nevertheless meant that we have not been able to provide the sort of fully-joined up and coherent service for Mr and Mrs Balchin that we should be able to provide to all citizens who have such complaints.[160]

The new legislation advised by Colcutt has never been forthcoming, though the problem has been to a limited extent alleviated by a Regulatory Reform Order.[161]

One would perhaps assume that ombudsman systems were not amenable to judicial review. They are, after all, an alternative mode of dispute resolution based on inquisitorial procedure and accountable to democratically elected bodies. But there has in fact been a creeping spread of judicial review, with courts showing themselves increasingly willing to review procedures and lay down conditions for exercise of the discretionary powers to investigate.[162] Typically, the challenges ask for compliance with the rules of natural justice established by the courts in judicial review – a further illustration of the strength of the common law, adversarial template. In *Seifert and Lynch*, for example, a finding of maladministration by the Pensions Ombudsman was attacked on the grounds that a relevant letter had not been disclosed to the applicants who had therefore had no opportunity to comment on it. It was held that the PO must follow not only the statutory procedure but also the rules of natural justice. In justification, Lightman J explained:

> A determination by the ombudsman can damage or destroy reputations, as well as impose financial penalties . . . It is not open to the ombudsman to make a determination save in

[159] *R (Balchin and Others) v Parliamentary Commissioner for Administration* [1996] EWHC Admin 152; [1999] EWHC Admin 484.

[160] PCA, *Redress in the Round: Remedying maladministration in central and local government*, Case No. C.57/94 (2005).

[161] Regulatory Reform (Collaboration etc. between Ombudsmen) Order 2007 (SI 2007/1889). Around 10 joint inquiries have since been started.

[162] E.g., *R v Local Commissioner for Administration, ex p. Bradford MCC* [1979] QB 287; *R v Local Commissioner for Administration, ex p. Eastleigh Borough Council* [1988] QB 855; *R v Local Commissioner for Administration ex p. Croydon London Borough Council* [1989] 1 All ER 1033.

> respect of the allegations in the complaint . . . of which he has given notice to the appellants. It is highly desirable that the ombudsman, rather than simply transmitting copies of his correspondence with the complainant, (save in simple and obvious cases) expresses in his own words in plain and simple language what he perceives to be the substance of the allegation . . . The respondents must know at least the gist of what he has learnt, so as to enable them to have a fair crack of the whip and a fair opportunity to provide any answer they may have. Whilst the procedure before the ombudsman is intended to be quick, inexpensive and informal, these are the minimum requirements for fairness and accordingly for a decision that can be allowed to stand.[163]

We return to ombudsmen in Chapter 12.

6. Administrative justice?

The traditional top-down view of courts as the standard machinery for dispute-resolution within the state, and tribunals as court substitutes, had certain advantages. It helped to control numbers: litigation is costly and slow and requires persistence – a paradigm rationing device though a cause of concern to the access to justice movement. Perhaps more important, clashes of values were largely avoided. It was surely reasonable, if tribunals were court substitutes, to submit them to trial-type procedures and require due process principles to be observed.

The new bottom-up approach of administrative lawyers has spawned a new discipline, which acknowledges no strict distinction between administration and adjudication but embraces within its frontiers 'all official decision-taking procedures which directly affect the individual citizen'.[164] This already broad remit is complicated by the view of administrative justice as a set of values, which far exceed the simple Franks formula of openness, fairness and impartiality. There is a set of public-service standards culled from the Citizen's Charter: information and openness, choice and consultation, courtesy and helpfulness, putting things right and value for money. There are modern good-governance values such as confidentiality, transparency, secrecy, fairness, efficiency, accountability, consistency, participation rationality, equity and equal treatment. There is the ever-extending catalogue of human rights. These often conflicting values set an impossibly wide agenda.

The 'complaints-are-gifts' ideology of contemporary public administration has brought into view a plethora of new material for administrative lawyers to work on. This has arguably resulted in blurring an important line between *disputes* – the traditional stuff of administrative law – and the *grievances*, complaints, gripes, grumbles, moans, comments and observations which belong on the other side of the line. This in turn blurs a second distinction between

[163] *Seifert and Lynch v Pensions Ombudsman* [1997] 1 All ER 214.

[164] M. Partington, 'Restructuring administrative justice? The redress of citizens' grievances' (1999) 52 *Current Legal Problems* 173, from which the list of values in the text is taken.

the 'redress mechanisms' that come into play when someone unhappy with the outcome of a decision seeks to challenge it, and the view that administrative justice starts at the bottom with primary decision-making. On this view, fairness could be premised (as both Mashaw and Adler argue) on one of several models. Staff training, standard-setting, audit – all the machinery of NPM – would be more important than due-process values.The most appropriate form of dispute-resolution would likely be internal review and/or an ombudsman, rather than a tribunal or court. This divergence of goals is summed up in the idea of proportionate dispute resolution.

PDR is, according to the present government, a flexible vision of administrative justice, which aims at better ground floor decision-making and early and appropriate advice to minimise the risk of legal problems. The Government aims to:

- promote the development of a range of tailored dispute resolution services, so that different types of dispute can be resolved fairly, quickly, efficiently and effectively without recourse to the expense and formality of courts and tribunals where this is not necessary
- but also deliver cost-effective court and tribunal services, that are better targeted on those cases where a hearing is the best option for resolving the dispute or enforcing the outcome.[165]

The institutions, processes and procedures that we have studied in this chapter do not suggest that this is happening. Choice and allocation of machinery is random, encouraging the growth of a complaints industry and culture that, the NAO suggests, absorbs an inordinate amount of public expenditure – perhaps as much as £830 million annually.[166] There are issues as to coherence. Either the systems are too fragmented or, if joined up, as with the Information and Data Protection Commissioners, overloaded. Could the outcome be more rational? Yes, but only if disputes were more restrictively defined.

Towards the end of her speech made at the launch of the AJTC, Ann Abraham described administrative justice as lying at the heart of the compact between citizens and their administration:

> It is after all in the daily encounters between citizen and state that most people experience the Executive at first hand. It is in those encounters that most people get a sense of the sort of administration they are dealing with. It is in the quality of those encounters that most people either detect, or more often fail to detect, signs that they are viewed by the state as persons not cogs, citizens not ciphers.[167]

[165] *Transforming Public Services: Complaints, redress and tribunals*, Cm. 6243 (2004), p. 6.
[166] LSE Public Policy Group, Evidence to PASC: PASC, *From Citizen's Charter to Public Service Guarantees*.
[167] PCA, Speech at the launch of the AJTC (20 November 2007).

Like the PCA, the Administrative Justice and Tribunals Council, whose work we describe in the next chapter, sees improvements in the area of administrative justice as crucial to good governance.[168] They 'serve to strengthen the compact between the citizen and the state by helping to entrench principles of fairness and transparency in relationships between decision makers and those whose interests they serve'. The Administrative Justice and Tribunals Council welcomes the idea of a 'right' to administrative justice. PASC too has welcomed the news that the Ministry of Justice is considering administrative justice as a 'candidate for inclusion in a British Bill of Rights':

> The right to fair and just administrative action is arguably one of the common law's greatest achievements, and in other countries which have recently adopted a Bill of Rights it has been accorded constitutional status . . . **We agree that this right is a strong candidate for inclusion in a UK Bill of Rights as a nationally distinctive right.**[169]

[168] AJTC, *Annual Report for 2007/8*, available online.

[169] PASC, *A Bill of Rights for the UK?* HC 165 (2007/8) [128]. Ministry of Justice, *Rights and Responsibilities: Developing our constitutional framework* (Cm 7577, 2009) [3.39–3.46].