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## **Public / Administrative: Time for a substitution?**

**Legal Update Specialist**

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*Ombudsmen: a substitute for litigation? Judith Farbey reports*

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### ***In Brief***

- Ombudsmen provide a non-litigious avenue for individuals to scrutinise the decisions of public bodies.

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In hard economic times and in the face of proposed changes to legal aid, alternatives to litigation may come into sharper focus. The Law Commission's recent consultation on "Public Services Ombudsmen" was therefore welcome.

The consultation paper (No 196) covered the Parliamentary Commissioner, the Local Government Ombudsman (LGO), the Health Service Ombudsman, the Public Services Ombudsman for Wales, and the Housing Ombudsman. These institutions provide a non-litigious avenue for individuals to call for the scrutiny of the decisions of public bodies. Each of the ombudsman schemes has a different statutory origin but all have features in common. The Law Commission's consultation paper highlights four shared features:

- the ombudsmen deploy investigatory procedures;
- they are independent;
- they make recommendations;
- and they focus primarily on administrative processes rather than the merits of decisions.

In each case too, an individual cannot in broad terms complain to the ombudsman if there are other available remedies including judicial review. Given the expansive reach of modern judicial review, the Law Commission rightly expresses concern that this limitation has favoured "confrontational litigation" in the Administrative Court over the ombudsmen schemes. The question nevertheless arises: are the powers of the ombudsmen an effective alternative for individuals wishing to vindicate their rights against public bodies?

## LGO powers

The powers of the LGO have been recently analysed by the Administrative Court in *R (Gallagher & McCarthy) v Basildon District Council* [2010] EWHC 2824 (Admin), [2010] All ER (D) 91 (Nov).

The claimants were travellers living on an unauthorised site. As part of the planning process for the site, they provided the council with medical and other personal information about their children. The information was included in a report for a council committee meeting which was in turn published as part of the agenda for the meeting. The agenda was publicly distributed and placed on the council's website. The claimants made a complaint to the LGO about the decision to publish the information. They sought a written apology and financial compensation.

## Administrative failing

The LGO's investigator reached the provisional view that the publication of the material amounted to an administrative failing and recommended that the council apologise and pay the claimants £300 each. The council agreed to apologise but not to pay compensation. The LGO then published a report making the same recommendation. The council remained willing to apologise but again refused to pay compensation. In a second report, the LGO repeated that compensation should be paid. The council continued to disagree.

The issue for the court was whether the council was entitled to reject the recommendation for compensation. The judge held that a local authority may lawfully decide to reject a recommendation of the LGO unless the rejection can be impugned on public law grounds, such as *Wednesbury* unreasonableness.

## Recommendations v fact

Recommendations are different from findings of fact. The relevant provisions of the Local Government Act 1974 did not stipulate that LGO recommendations were binding: if Parliament had intended them to have binding force, it would have said so in the statute. The sanction for failing to comply with LGO recommendations is publicity. Under the Act, the LGO may require the recommendations to be published in two editions of a local newspaper. Local electors will then decide whether the local authority has behaved appropriately.

The judge confirmed that recommendations must be distinguished from findings of fact. The latter are binding on local authorities. The LGO's findings will be made in the light of a thorough, independent investigation. Furthermore, the LGO is in a good position to make factual findings "by reason of his expertise, accumulated experience of local administration and panoramic view of the functioning (and malfunctioning) of local government". By contrast, recommendations are not hard-edged and there is room for genuine difference of opinion on how an injustice may or should be remedied. Local authorities are accountable to all their electors and must decide how to allocate scarce resources most fairly and efficiently. They are in the best position to assess the impact of recommendations on resources, and to decide whether a recommendation will have a disproportionate effect.

Finally the judge cited the Law Commission consultation paper which says that the public ombudsmen schemes each "rely on publicity...as the primary mechanism with which to encourage the implementation of reports...[T]he final weapon available to any of the ombudsmen is not a binding order or a declaration that

the public authority had acted in an illegal manner. Rather, it is the placement of their findings and recommendations in the public sphere".

The essential feature of the ombudsmen schemes is, on this analysis, political. When making a complaint to an ombudsman, citizens have resort to a political remedy: the public authority ignores the ombudsman's recommendations at its own political risk. By contrast, in judicial review proceedings, the remedy is one or more of the orders available under Pt 54 of the Civil Procedure Rules, which bind the defendant and provide immediate relief to the claimant.

## Politics & maladministration

The political nature of the ombudsmen is even clearer in the case of the Parliamentary Commissioner. Established by the Parliamentary Commissioner Act 1967, he may investigate any action of a government department or other authority to which the Act applies. The range of other authorities is very wide, including eg such diverse institutions as national museums, numerous advisory committees, and the Electoral Commission. In order to reach the Commissioner, a member of the public must make a complaint to his MP who refers it to the Commissioner. Under the Act, the Commissioner will investigate whether the complainant has "sustained injustice in consequence of maladministration". There is a statutory bar on investigating the merits of decisions taken without maladministration.

Lord Denning in *R v Local Commissioner for Administration for the North and East Area of England, Ex p Bradford City Council* [1979] QB 287 held that maladministration will cover "bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on". This list is "clearly open-ended, covering the *manner* in which a decision is reached or discretion is exercised; but excluding the *merits* of the decision itself". Lord Denning's list is ultimately taken from the so-called *Crossman Catalogue* named after Richard Crossman MP who had introduced the Bill on second reading in the House of Commons. The catalogue was used by the first Parliamentary Commissioner, Sir Edward Compton, and it appears to have stood the test of time.

After investigating a complaint, the Commissioner sends a report to the MP who referred it and to the department or authority that is the subject of the complaint. Two further kinds of report are possible:

- First, there is general provision for the Commissioner to lay an annual report before each House of Parliament on the performance of his functions. The Commissioner may also lay ad hoc reports before Parliament relating to his functions.
- Second, the Commissioner may lay a special report before each House of Parliament if it appears to him that injustice caused by maladministration has not been or will not be remedied.

In *Equitable Members Action Group* [2009] EWHC 2495 (Admin), [2009] All ER (D) 163 (Oct) it was noted that the Commissioner's special report in that case was only the fifth such report since the establishment of the office of ombudsman in 1967. The various reporting powers are nevertheless critical to the purpose of the 1967 Act. As cited in *R (Bradley) v Secretary of State for Work and Pensions* [2009] QB 114, the white paper that preceded the Parliamentary Commissioner Bill had emphasised that: "In Britain, Parliament is the place for ventilating the grievances of the citizen--by history, tradition and past and present practice. It is one of the functions of the elected Member of Parliament to try to secure that his constituents do not suffer injustice at the hand of the Government...We do not want to create any new institution which would erode the functions of Members of Parliament in this respect, nor to replace remedies which the British Constitution already provides. Our proposal is to develop these remedies still further. We shall give Members of Parliament a better instrument which they can use to protect the citizen, namely, the services of a Parliamentary Commissioner for Administration."

From a constitutional perspective, therefore, the ombudsman is an additional means for MPs to call the executive to account. As expressed by the Law Commission, the Commissioner is "an officer of the House of Commons". The Parliamentary Ombudsman Scheme therefore involves something more than, or different from, the vindication of individual rights. Cases such as *Equitable Life* demonstrate that a public body can only reject the Commissioner's findings of fact for "cogent" reasons. In that case, the Administrative Court held that the government's response to the Commissioner's findings of maladministration was in part unlawful. Recommendations, however, remain recommendations. They have no binding force and are only challengeable in the courts on grounds of irrationality.

## Engaging the public

The problem is how to encourage members of the public to use ombudsmen as opposed to courts but at the same time to ensure that public wrongs are properly righted by means of adequate remedies. The Law Commission has provisionally proposed two reforms that would appear to bear on this difficult issue. First, the consultation paper suggests that the courts should have the power to stay proceedings for cases to be transferred to the ombudsman if this is the most appropriate way of resolving the dispute. Second, it is suggested that ombudsmen should have power to refer a case to a court on a point of law. A reference procedure would usefully determine questions of the ombudsman's jurisdiction, thus reducing the risk of judicial review of an ombudsman's report.

These two provisional proposals should not be lightly dismissed. They would arguably simplify a citizen's means of obtaining redress against a public body by enabling a case to transfer into the appropriate forum at any particular time. But ombudsmen are not mini-courts or tribunals. There is an advantage both to the citizen and to government departments in knowing from the outset which track they are on and in keeping the two tracks separate. The Law Commission cites Sir Edward Compton's 1968 article in which he said that "the Parliamentary Commissioner and Whitehall are not adversaries: they are on the same side". Irrespective of whether the modern Civil Service would agree, the statutory scheme of the Parliamentary Commissioner Act is clear: the investigatory powers of the Commissioner are intended to assist the proper scrutiny of executive actions in the context of improving governance. Whether the time for change has come, and whether the ombudsmen and the courts should each have an eye on referring cases to the other in order to achieve the cheapest form of administrative review, will doubtless be debated in light of the Law Commission's final conclusions. Meanwhile, its consultation is timely and worthy of consideration by all those practising in the administrative law field.