

LIABILITY AND ACCOUNTABILITY

(Ombudsman)

ANNUAL REPORT - 2011 - UK

(July 2011)

Dr Richard KIRKHAM¹

INDEX

1. OMBUDSMAN SCHEMES IN THE UK

- 1.1 The different ombudsman schemes*
- 1.2 The roles of the ombudsmen*
- 1.3 Powers to recommend redress*
- 1.4 The implementation of redress*

2. DEVELOPMENTS IN 2010/11- LEGISLATIVE REFORM

- 2.1 The reform work of the Law Commission*
- 2.2 The expanded role of the Scottish Public Services Ombudsman*
- 2.3 Consultation in Northern Ireland*

3. DEVELOPMENTS IN 2010/11- SOME SIGNIFICANT EVENTS

¹ Senior Lecturer in Public Law, University of Sheffield

3.1 The proposed abolition of the Administrative Justice and Tribunals Council

3.2 Equitable Life

3.3 Using the courts to force public authorities to reconsider their response to the ombudsman

4. WEB SITES

1. OMBUDSMAN SCHEMES IN THE UK

The first statutory ombudsman scheme in the UK to be established was the Parliamentary Commissioner for Administration in the Parliamentary Commissioner Act 1967. The idea has become firmly embedded within the UK's constitutional arrangements since that point, with an array of ombudsman schemes established in both the public and private sectors. The result is that a significant amount of redress is achieved through ombudsman schemes, but there is no one clear model or structure of ombudsman, or even agreed nomenclature.² Indeed, if one broadens one's concept of an ombudsman somewhat, the UK also possesses a wide range of ombudsman-like bodies that perform, at least partially, some of the roles normally attributed to an ombudsman.

1.1 The different ombudsman schemes

The oldest form of ombudsman in the UK are the public services ombudsmen. A number of ombudsman schemes have been introduced as the idea gradually spread across different branches of the public sector and account was taken of the different nations within the UK and their corresponding different layers of devolved government. The ombudsman

² Reference is frequently made to 'Commissioners' or 'Commission' or 'Adjudicator'.

schemes set up more recently are supported by more thorough supporting legislation. The powers and remit of the older ombudsman schemes have been or are in the process of being updated to reflect more clearly the practice of the ombudsman today.

Public services ombudsman schemes can be loosely categorised into two branches – (i) ombudsmen schemes that are responsible for investigating a broad spectrum of government activity and which have full autonomy from the executive, a design feature emphasised through a strong parliamentary connection, and (ii) ombudsman schemes with more confined and specialised jurisdictions and which generally are not fully independent of the executive and which do not necessarily report to Parliament.

Of the ombudsmen generally considered to operate with full independence, the post of Parliamentary Commissioner for Administration (capable of dealing with complaints about most central government activity) has, since 1973, always been jointly held by the Health Service Commissioner for England. The joint post is generally referred to today as the Parliamentary and Health Service Ombudsman. Separately in England there is a Local Government Ombudsman for England (which has a weak relationship with parliament), while in Northern Ireland there are two ombudsman schemes (the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints), although again the posts are in practice held by the same individual. In both Scotland and Wales there is an ombudsman scheme linked to a local democratic chamber, with general responsibilities for public service issues.

Within the ‘non-parliamentary’ category of ombudsman schemes there is much variety. Generally the posts have been established in response to a specific need in a particular area of public sector activity. Hence within the UK, there is more than one specialised ‘ombudsman-like body’ operating in the fields of prison and probation, the

police, housing and higher education. Other schemes perform some of the services one might expect an ombudsman to perform, although by no means all, such as the Children's Commissioner for Wales. The specialised role of the Information Commissioners in the UK should also be noted as their existence means that an ombudsman does not perform the function of dealing with complaints in this area. Unlike an ombudsman, the Information Commissioners operate more in a quasi-judicial capacity and their operation is more clearly integrated into the legal system (namely notices/decisions issued by the Information Commissioners can be appealed).

Most of the public services ombudsmen and ombudsmen-like bodies in the UK are members of the British and Irish Ombudsman Association (BIOA), along with a number of ombudsmen from the private sector. Details of all these institutions can be found on the association's website (see below, Part 4).

1.2 The roles of the ombudsmen

The specific roles of ombudsmen in the UK are generally detailed in statute. The dominant role of an ombudsman is as a complaint handler within a defined jurisdiction, although the expectation is that the scheme will also assist in the process of improving the quality of administration through the recommendations that it makes and the provision of guidance (this latter role is not always specified in legislation). Other roles of the ombudsman can be identified. In particular, the ombudsman has often become a source of information and guidance about the administrative justice sector as a whole for citizens that find it difficult to negotiate the complaints system.

1.3 Powers to recommend redress

The exact legal description of the ombudsman's powers varies from scheme to scheme, but the most common denominator is the power to make recommendations where, after an investigation, the ombudsman is satisfied that an injustice has occurred as a result of maladministration. In addition, a number of ombudsman schemes now refer to 'service failure' as a ground for making a recommendation.

Ombudsmen in the UK do not operate on the basis of precedent nor does legislation or case law detail the meaning of the tests of either 'maladministration' or 'service failure'.

The range of recommendations that the ombudsman can make in the UK is considerable. The main limitations on the recommendations an ombudsman can make are twofold. First, ombudsmen cannot make a remedy that requires the enforcement of a court eg injunction, declaration or a quashing order. Second, the ombudsman is required to consider the legal and practical ability of the public body involved to implement the recommendation. Subject to these qualifications, in principle, the ombudsman can recommend any remedy that is suitable to the needs of the situation, including financial compensation.

1.4 The implementation of redress

With one exception, the Commissioner for Complaints for Northern Ireland, there is no power to enforce in the courts the recommendations of the ombudsmen in the UK. The success of ombudsman schemes, therefore, is dependent on a range of factors, including (i) the respect in which ombudsman schemes are held by the bodies that they investigate; (ii) the potential for public embarrassment that a refusal to implement an ombudsman's recommendations might lead to; (c) the ability of the ombudsman scheme to

obtain support for its work from its associated democratic assembly; (d) the potential for the aggrieved complainant to judicially review the decision of the public body not to implement the ombudsman's recommendations.

2. DEVELOPMENTS IN 2010/11 – LEGISLATIVE REFORM

There have been a series of interesting moves during the year to reform the legislative basis of the ombudsman schemes in the UK.

2.1 The reform work of the Law Commission

The Law Commission in England and Wales has for several years been developing proposals to reform the law on redress in the public sector.³ The conclusion of the review was that no concrete proposals were recommended by the Law Commission, but it did undertake to carry out a further review of one particular aspect of the system of redress in England and Wales – the work of the public sector ombudsmen.

The review of the public service ombudsmen is ongoing, with the aim to publish a final report in the summer 2011. Some of the likely proposals can be anticipated as they have been trailed in the previous work of the Law Commission. Thus it is probable that the Law Commission will make recommendations in the following areas:

³ Law Commission. 2010. *Administrative Redress: Public Bodies and the Citizen*. Law Com 322. London: Law Commission.

- The appointment arrangements for the Parliamentary Ombudsman
- Allowing for a more flexible process of submitting complaints – this will include the removal of the MP filter from the Parliamentary Ombudsman scheme
- Amending legislation to facilitate a more flexible distribution of cases between the courts and the ombudsmen
- Clarifying the process by which complaints are closed
- Harmonising the reporting arrangements for the ombudsman

In addition to these potential reforms, the Law Commission have been looking at some more contentious issues. In particular, the Law Commission has been looking at the legal status of ombudsman reports (for s further discussion, see below, 3.3).

2.2 The expanded role of the Scottish Public Services Ombudsman

A feature of the evolution of the work of ombudsmen in the UK over the last ten years has been the enhanced emphasis that has been placed on the relationship between lower level complaints processes and the ombudsman. The importance and nature of this relationship has recently been clarified in Scottish law. The *Public Services Reform (Scotland) Act 2010*, section 119 has given the Scottish Public Services Ombudsman a new statutory responsibility for publishing a Statement of Principles concerning complaint handling procedures for certain public authorities and reporting on the compliance of those authorities with the Principles.

The remit of the Scottish Public Services Ombudsman has also been expanded during the year as a result of legislative reform aimed at rationalising the complaints handling system in Scotland. As a result, the functions of the Scottish Prisons Complaints

Commission has been transferred to the Ombudsman, as has the complaints handling function of Waterwatch.

2.3 Consultation in Northern Ireland

The legislative arrangements for the ombudsmen in Northern Ireland are amongst the oldest in the UK. For some years the benefits of updating those arrangements have been debated and proposals have now been put forward by a Committee of the Assembly and a consultation process undertaken. The outcome of that process should be announced shortly, with the likelihood that legislative reform will be recommended.⁴ The reforms that are currently being considered include proposals on:

- The merger of the two ombudsman schemes
- The appointment and funding of the ombudsman
- Facilitating joint work with other public bodies
- Enhancing the links with the Northern Ireland Assembly
- A specific power to issue guidance
- Extending the jurisdiction to cover all bodies that spend public money
- Considerations of professional judgments in social care
- Allowing for a more flexible process of submitting complaints – this will include the removal of the filter from the Assembly Ombudsman scheme
- Removal of the power to enforce in the courts a recommendation of the Commissioner for Complaints

⁴ For a summary of developments in Northern Ireland, see Northern Ireland Assembly, Research and Library Service. 2011. *Research paper: The office of the Northern Ireland Assembly*. NIAR 145-11 (Paper 43/11).

- Allowing for enhanced openness in ombudsman reports as to any individuals investigated, provided they were given a right of reply

3. DEVELOPMENTS IN 2010/11 – SIGNIFICANT REPORTS ETC.

3.1 The proposed abolition of the Administrative Justice and Tribunals Council

Under the Public Bodies Bill currently being considered by Parliament, the Government are proposing to abolish the Administrative Justice and Tribunals Council. The Parliamentary and Health Service Ombudsman is a member of the Council, which has a remit to oversee, to report on and commission research upon the administrative justice system.

The abolition of the Council will have three main knock-on effects for the public sector ombudsmen. First, it will remove from the system a body that is currently, to a degree, capable of asking searching questions of the operation of ombudsman schemes in the UK. Second, it will reduce the potential for the administrative justice system to be coordinated in a coherent, effective and efficient fashion. At present in the UK there exists a highly complex network of dispute resolution options for potential complainants to choose from. The extent to which this system is appropriately designed for purpose or understood by users is uncertain. Nor is it clear that in the absence of the Administrative Justice and Tribunals Council any single government agency will be equipped to take on board an equivalent role. Finally, the abolition of the Council will make it more likely that complainants will continue to use the ombudsman partially as an information service to navigate their way around the administrative justice system, even when their grievance is not within the jurisdiction of the ombudsman.

3.2 The Equitable Life investigation

One of the largest, longest running and politically difficult investigations that the Parliamentary Ombudsman has ever had to undertake looks like it has come to an end, at least as far as the Ombudsman is concerned. The Ombudsman's investigation into the regulation of Equitable Life Assurance Society started in 2001, and has seen her produce more than one report. In 2008 the Ombudsman issued a report which found maladministration in the form of 'serial regulatory failure' on the part of the Government and recommended that an apology should be made and that the 'Government should establish and fund a compensation scheme with a view to assessing the individual cases of those who have been affected by the events covered in this report and providing appropriate compensation'.⁵

For over a year the Government refused to accept in full the recommendations of the Ombudsman, noting that the potential compensation involved was likely to amount to billions of pounds, by far the largest compensation package ever recommended by the Ombudsman. The Ombudsman did not accept the Government's response and a successful legal challenge to the response was brought by a group of affected complainants against the Government. This legal challenge obliged the Government to reconsider its position.⁶ Following the General Election of 2010, the new Coalition Government accepted all ten findings of maladministration made by the Ombudsman in the original report. Parliament then passed the Equitable Life (Payments) Act 2010 with a view to putting in place a compensation scheme to implement the Ombudsman's recommendations.

⁵ Parliamentary Ombudsman, *Equitable Life: a decade of regulatory failure (HC 815 (2007/08))*.

⁶ *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495.

Whether or not the established compensation scheme will satisfy the grievances of the complainants is a matter over which the Government and the complainants remain divided. The Ombudsman herself has said:

‘Whilst I recognise that some of the people who complained to me will be extremely disappointed by the Government's decisions on affordability and eligibility, I cannot say that those decisions are incompatible with the recommendations in my report.’⁷

Thus, with the matter having been debated and legislated on by Parliament, the Ombudsman has taken the view that for her part, the matter is now closed. Given the scale, complexity and contentious issues involved in this investigation, this represents a very positive conclusion to the Equitable Life investigation and retains the extremely successful record of the Parliamentary Ombudsman in obtaining redress for complainants once a recommendations has been made. It is very difficult to identify a single investigation of the Ombudsman that has not eventually led to a positive response from Government, but the Equitable Life affair thoroughly tested the constitutional relationship between the Executive and the Parliamentary Ombudsman.

3.3 Using the courts to force public authorities to reconsider their response to the ombudsman

⁷ Parliamentary Ombudsman, *Letter to the All-Party Parliamentary Justice for Equitable Life Group*, 16 December 2010.

Ombudsman schemes are well known to differ from most other dispute resolution mechanisms in that the ombudsman cannot enforce their recommendations. Finding effective ways in which to force public authorities to respond appropriately to ombudsman reports, therefore, is an important public law issue. The case of *R (on the application of Gallagher & Anor) v Basildon District Council* [2010] EWHC 2824 (Admin) (*Gallagher*) represents the latest in a growing line of cases in which the courts have been prepared to rule the decision of a public authority to reject the recommendations of an ombudsman unlawful. The Administrative Court based the ruling on the failure of the local authority involved to take into account relevant considerations when the decision was made.

This approach to tackling ombudsman disputes will not always be easily available to complainants given the cost of bringing a judicial review challenge. However, it has so far proved effective in encouraging public authorities to respond in a more constructive manner which recognises the legitimacy of the ombudsman's findings and recommendations.⁸ Fortunately, the occasions when this route will be necessary are few, but this development in law is an interesting and important legal addition to the ombudsman format.

4. WEB SITES

<http://www.bioa.org.uk/> - British and Irish Ombudsman Association

⁸ Basildon District Council (06/A/16993 + two others), Local Government Ombudsman website.

<http://www.lgo.org.uk/> - Local Government Ombudsman for England

<http://www.ombudsman.org.uk/> - Parliamentary and Health Service Ombudsman