

PARLIAMENTARY AND HEALTH SERVICE OMBUDSMAN
CONSTITUTION UNIT SEMINAR ON THE OMBUDSMAN
4 December 2006

The Ombudsman, the Constitution and Public Services: A crisis or an opportunity?

1. Introduction: crisis and opportunity

The theme I would like to explore tonight is the substantial constitutional role of the Parliamentary Ombudsman and the direction it might take as the Office approaches its 40th anniversary.

To begin with, I want to set out my vision for the future of the Office. I will also identify some possible obstacles and challenges which could stand in the way of the achievement of that vision.

As part of that, I would like to examine the evolving and often fruitful relationship between the Ombudsman and Parliament, government, the Courts and - last but not least - the person I am there to serve, the citizen and user of public services.

2. The Vision for 2017 - shared understandings

But first, why do we have Ombudsmen and what do they do? Where there are individual or systemic shortcomings in public service delivery and administration, Ombudsmen have a central role in judging whether maladministration and injustice have occurred. Their wide evidence base of complaints gives them the ability to make a credible contribution to a range of debates.

A report of a recent Law Commission seminar put it succinctly:

‘Ombudsman schemes ... seek to promote good administration by considering the standards to be expected of public authorities and framing their decision-making accordingly, as well as providing feedback and advice to ensure that errors are not repeated.’

How do we ensure that this work will continue on a firm constitutional and practical foundation? I hope you will forgive me if I use this occasion to attempt to look forward beyond the 40th anniversary, to the half-century of the Office which will be celebrated in 2017.

My vision for ten years’ time is that there will be clear agreement right across the public service about a number of key principles with significant constitutional implications. These can be expressed as a series of shared understandings:

One - a shared understanding of what makes for good public administration: the principles of good public administration.

Two - a shared understanding of what needs to be done when things do go wrong in public administration or public services: the principles of redress.

Three - a shared understanding of the respective roles of the Ombudsman, Parliament, government and the Courts in putting things right when they go wrong, including the key task of making sure lessons are learned by public services.

On all these issues, I am keen to play a positive role. I hope that this seminar and all the events surrounding the 40th anniversary will allow me to make clear where I am coming from - and where I hope we might be going to.

3. 40 years of challenges overcome

But before we consider how we can make the 50th anniversary vision a reality, it is first worth having a brief look at how the Office emerged.

Sweden has had an Ombudsman institution since 1809. The role of that Ombudsman is to ensure that public bodies (including the courts) comply with the law and fulfil their obligations in all other respects. The Ombudsman can prosecute officials (including judges) who he or she considers have broken the law or any other obligation to which they are subject. Other Scandinavian countries and New Zealand followed, but in the early 1960s Ombudsmen were still rare. However, pressure for the establishment of an Ombudsman in the UK was growing.

The 1954 case of Crichel Down, which concerned unfairness caused by the behaviour of government over compulsorily acquired land, revealed that there was little protection for the citizen against such official actions, or inactions. This famous case began a debate which was taken up by lawyers in JUSTICE, who pressed from the late 1950s onwards for the establishment of an Ombudsman. Despite persistent and persuasive work by JUSTICE, there was plenty of Whitehall scepticism, one Lord Chancellor's Department official being quoted as saying at the time: '*There is no place for an Ombudsman here*'.

However, Harold Wilson included a reference to an Ombudsman into the 1964 Labour manifesto and the new Government which took power in October that

year was committed. The Parliamentary Commissioner Act duly took effect from 1 April 1967.

As I look back, it is obvious to me that, when we consider present debates about the role of the Ombudsman, we can see that we have in many ways been here before - and the system has survived. Throughout the history of the Office there have been challenges which have tested the mettle of the Ombudsman and the robustness of the whole system. To put it another way, the constitutional sands may have been shifting for 40 years, but the building stands.

For one thing, there are advantages in the Act's very brevity and avoidance of prescription. As the Government made clear in the House at the time of the Bill's passage, it was always intended that the concept of maladministration would be informed by the experience of casework. The absence of any definition of maladministration allowed the Office to develop and grow, as my predecessors pushed pragmatically at the boundaries of what was meant by the term. The legislation and the early experience of the Office also formed the basis for the work of the other public sector Ombudsmen's offices which have been established in the UK, including Local Government Ombudsmen in England and Ombudsmen for the devolved institutions in Scotland, Wales and Northern Ireland. We work closely together to tackle issues that affect us all. This is a system that is inherently flexible and capable of evolutionary change.

So the foundations were, and remain, pretty strong.

Let me now briefly sketch how the Office has overcome the challenges in its relations with the main constitutional players and survived and thrived down the years.

Our dealings with **Parliament**, for instance, have been generally very positive, but not always untroubled.

At first, there was said to have been a feeling of disillusionment in Parliament about the 1967 Act, after some alleged 'overselling' of the idea before the 1964 General Election. There was for instance suspicion from MPs in the early years about the challenge to their constituency role supposedly posed by the work of the new Office. That was partly why it was envisaged as a mechanism which could be used primarily by MPs to assist them to hold the Executive to account and to add to the means by which MPs could seek redress for their constituents. I would say that, although they still surface from time to time, concerns about this issue have now been largely or completely overcome.

Other anxieties included a feeling that there were too many restrictions on the Office's remit. But here too, over time and with the occasional amendment to its remit, the Office has proved strong enough to meet the challenge.

A great deal of the success of the Office can be put down to its relationship with Parliament. The 1967 Act placed the new Office firmly in a Parliamentary context, with Officer of the House status for the postholder, a requirement that complaints should be made through an MP and a power for the Ombudsman to report to Parliament in cases where he or she decided that an injustice caused by maladministration had not been, or would not be, remedied.

This was seen as a system that was well adapted to the UK system of Ministerial responsibility and MP assistance to constituents - it was the shared understanding of the 1960s.

A particularly valuable feature of this understanding has been the existence of a Select Committee with a responsibility to 'examine' our work and a role in resolving disputes with government. This arrangement has assured us of a strong relationship with Parliament. However, since 1997 we have not had a Select Committee dedicated exclusively to our work, and the Public Administration Select Committee, with its tremendously broad remit, is understandably often busy with complex matters such as public service reform and cash for honours. This can provide a useful broader perspective and we very much value the Public Administration Select Committee's support in difficult times, but it can mean there are limited opportunities for parliamentary inquiry into specific cases or bodies.

In more recent years a relationship that has become ever more important is that with the **Courts**. Now we seem to be spending ever more time in dialogue with lawyers and judges. The number of applications for permission for judicial review of our decisions is increasing, although the courts generally reject them. More importantly, I believe that the judges who deal with administrative cases are increasingly aware of our role and presence. That is a good development, because all of us who deliver 'administrative justice' have our strengths and our weaknesses, whether we work through adversarial systems in courts and tribunals; inquisitorial systems, as the Ombudsmen do, or mediation, conciliation, arbitration or other systems of dispute resolution. We all need to understand each other's strengths and weaknesses and to keep closely in touch.

The important thing is that we should have a system of administrative justice that enables any individual dispute in the sphere to get to the place - Ombudsman, court, tribunal, mediator, regulator - where it has the best chance of being effectively resolved as quickly, and cost-effectively, as possible. In that way our customers will get the most effective service.

What of our relations with **government departments**? Several times in the past, my predecessors have raised issues that led to disputes with departments: I do not have time this evening to go into detail, but I will mention three especially prominent cases that are reminiscent of recent major cases handled by this Office - suggesting that here as elsewhere we have been here before:

- The **Sachsenhausen** case in the late 1960s involved the Foreign Office handling of a compensation scheme for suffering caused by Nazi persecution. The Foreign Office failed to take properly into account all the relevant factors when deciding the scope of the compensation scheme and gave insufficient weight to evidence that was uncomfortable to them.
- The **Court Line** case of the mid 1970s concerned the collapse of a company with the loss of tens of thousands of holidays. Complaints of maladministration centred on statements made by Ministers which suggested that the firm was more financially secure than it really was.
- The **Channel Tunnel Rail Link** case of the early 1990s centred on the inability of Kent householders to sell their properties because of the way the Department of Transport handled the project.

In these difficult and often long-running cases, and in every similar case of disagreement up to now, government has changed its mind, shown respect for the Office and remedied the injustice, at least to some extent.

However, these have been the hard, and highly unusual, cases. For the vast majority of upheld complaints over many years, departments have accepted that there has been maladministration leading to injustice and complied with our recommendations. This enduring consensus about the role and function of the Ombudsman forms the bedrock of our relationship with government and puts into perspective the rare occasions on which we disagree.

But - and this is seen by some as the *crisis* bit - there has been a recent unprecedented concentration and intensity of cases (actually only two but in a relatively short space of time and with some murmurings in the wings which somehow makes it feel like more than that) where I have been obliged to report to Parliament that there has been unremedied injustice which the Government does not intend to remedy.

This succession of departmental rejections of our findings, especially in our report on occupational pensions, suggests a problem with understanding of the constitutional principles and realities even at the top of government and the Civil Service.

But, as I said, we have been here before and the Office has often been strengthened by the experience.

Our relationship with the **citizen** has changed and become much more direct over the years. As public expectations of the accessibility, accountability and transparency of both public and private bodies have risen, we have had to respond. We can no longer get away with communicating only with the MP, and not directly with the complainant, in our Parliamentary cases; or sharing our draft reports only with the government department or NHS body complained about - and rightly too.

In 2004, we asked our stakeholders what they thought of our service. The public and those who advise them on complaints told us that they wanted us to be more proactive in initiating investigations and making sure that public bodies implement our recommendations. Complainants wanted us to communicate better and more regularly with them and to apply a more tailored approach to each complaint.

We listened to that message, and changed our approach, completely overhauling our processes and handling complaints in a new way from last year.

The key features of the new approach are:

- Clarifying with the complainant at the outset what outcome they are seeking.
- Keeping complainants regularly informed of progress on their complaint and sharing the drafts of our decisions with them as well as with the bodies complained against.

- Following up our recommendations more consistently to ensure that appropriate action has been taken and the complainant informed before closing the case.

There is evidence that people appreciate the new approach. Findings from our customer satisfaction survey indicated an overall level of 64% customer satisfaction, based on one year's data from 1,258 respondents whose complaints we had recently reported on; the main reasons for satisfaction were regular updates about the progress of the case and the helpful or competent service received.

However, we also hear some more worrying things about public reactions to us. In the light of the Government's negative response to our occupational pensions report, there is anecdotal evidence that some members of the public feel that, as I have no power to make my findings 'stick', there is little point in complaining to me. More worrying still is the feedback from the advice sector that, if government is going to ignore my recommendations, then they will advise their clients to take their disputes to the courts.

I hope that that will not become an established or widely held view. If it did (and there is no sign at the moment of any decrease in the size of my daily postbag), there would certainly be a need for urgent action.

4. Today's Opportunities - celebrating the 40th anniversary

Over 40 years, the spread of Ombudsmen across the world, the growing importance of European integration, the Human Rights Act, devolution and other developments have made the 1967 understandings appear somewhat out of date.

But given the flexibility of the framework, I am confident that the adaptations I have described earlier will continue in the future. As I indicated earlier, in this 40th year we are working on establishing a firm basis for a new settlement, with clear understandings on the principles of good administration and redress, and the role of the Ombudsman and others in putting things right when they go wrong.

On the **first** area for shared understanding, we have published for consultation a draft of Principles of Good Administration - an initiative which has brought a hearteningly positive initial response from the Government - I await their formal response in January.

On the **second**, there is still too little consistency between departments and in NHS bodies as to the right response when things go wrong. Indeed, the principles which govern redress - whether that means at one end of the scale simply saying sorry or at the other providing substantial sums in recompense for injustice - are very hazy right across public services. The issue will continue to be tricky - but I am convinced my Office can help government and the NHS to make progress here. We are therefore seeking to develop principles which would be aimed at making sure the principles of effective redress are properly understood; and that redress is provided more consistently both by government departments and NHS bodies.

On the **third**, our role in revealing, discussing and tackling systemic problems can lead to useful collaboration, such as we have developed, or are developing, with Her Majesty's Revenue and Customs; with the Department for Work and Pensions; and with the Department of Health and the NHS on continuing care. Sharing our knowledge and expertise in the principles of good administration and good complaint handling and helping departments and NHS bodies to understand how they can use feedback from complaints as a lever for improving the service they provide - and increasing customer and patient satisfaction.

But relationships with departments are very complex and government is often not well joined-up. There are periods when departments co-operate very well with us, followed by long stretches when relations are much more difficult.

Our exchanges with government departments on some recent cases suggests to me that there is a growing obsession these days with legal **liability**, when they might more usefully be concerned about the **reliability** of the service being provided to the citizen and the quality of the administration that underpins it.

Constructive engagement needs constant work. There are signs of optimism for the future in the ability of departments to close their ears to noises off and work with us. However, departments are still not good enough at learning lessons - or indeed culturally inclined to do so. We stand ready to help with that.

5. Conclusion

So, to sum up, the 21st Century Ombudsman will have to rely even more on keeping channels of communication open with government, Parliament, the Courts, voluntary bodies and of course the citizen and service user.

A new settlement, in particular a fresh reaffirmation from government of the key constitutional principles and understandings I have set out, may well be needed to ensure that our foundations are secure. That would be a nice 40th birthday present.

A few touches of modernisation to the basic structure would also be welcome: some greater clarity around the interface between the Ombudsmen and the Courts; a recognition that, post devolution, there is a need for Ombudsmen in Scotland, Wales, England and Northern Ireland to work together from time to time in the best interests of complainants. We might even feel courageous enough to allow citizens direct access to the Ombudsman in the 21st century. Pretty much everyone else in the world seems to be OK with that idea.

But do we need substantive new legislation? A Parliamentary Commissioner Act 2007? I doubt it very much.

I cannot, for instance, see a need for a power to make my recommendations legally enforceable. This is a system that relies on mutual confidence and a good grasp on all sides of some basic constitutional principles. The Courts are not the place to make this system work.

However, there is one proviso. If departments were ever to go down the road of regularly and systematically rejecting my findings, the balance could change and I might begin to see some role for legal enforceability.

The key is trust amongst the various constitutional players. With that trust - helped by a little knowledge of and respect for history - an active and positive Ombudsman can only be good for public administration and public services. Without it, we might just stumble into a quite unnecessary crisis.

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December 2006