



## The Ombudsman- the developing role in the UK

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This Note is designed to provide background on the work of the Ombudsman, and examines recent developments in the role. It summarises the changes since devolution, and provides a commentary on current relationships with Parliament, the executive and the judiciary. See also Standard Note 3079 [Parliamentary Ombudsman: Right of Appeal](#) and Standard Note 5181 [The Parliamentary Ombudsman and the MP Filter](#). These issues are not dealt with in this Note, to avoid duplication.

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## 1 Introduction and background

The post of parliamentary ombudsman was established in 1967 in the *Parliamentary Commissioner Act* as a new type of public official who could investigate complaints of citizens about maladministration by government officials. The statutory office holder was given statutory powers to have access to information, to require the attendance of witnesses and absolute privilege to protect his reports. What 'maladministration' included, in the words of cabinet minister Richard Crossman when introducing the legislation in 1966, was: 'bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on'.<sup>1</sup> At the time of its introduction the concept was attacked as a constitutional innovation which could not be reconciled with ministerial accountability to Parliament, and which usurped an MP's traditional role of pursuing the grievances of constituents. Partly as an answer to such criticism, the new scheme required that all complaints were to be channelled through MPs who could pass them on to the ombudsman, the 'MP filter'.

The office of Health Service Ombudsman was created in the *NHS Reorganisation Act 1973* following pressure for an effective resolution of grievances, given the exclusion of the NHS from the 1967 *Parliamentary Commissioner Act*, as outside the direct responsibility of the then Minister for Health. It was subsequently modified by the *Parliamentary and Health Service Commissioners Act 1987*, the *Health Service Commissioners Act 1993* and the *Health Service Commissioner (Amendment) Act 1996*. This last Act considerably broadened the scope of the investigations by enabling the HSC to investigate all aspects of NHS care and treatment, including clinical judgement. It was designed to place the Ombudsman at the top of the new unified NHS complaints procedure.

Until devolution, the parliamentary ombudsman was chosen by convention as Health Service Ombudsman for each constituent part of the UK, except for Northern Ireland. Currently, the post is combined with Health Service Ombudsman for England, as separate arrangements apply in Scotland, Wales and Northern Ireland. There is no MP filter for the Health Service Ombudsman.

The parliamentary ombudsman's office today continues to investigate cases of maladministration in government departments and agencies and other public bodies. The current Ombudsman is Dame Julie Mellor. Her predecessor, Ann Abraham, retired in January 2012. The Public Administration Select Committee monitors the work of the Parliamentary and Health Services Ombudsman through regular hearings and support. It is due to take oral evidence from Dame Julie in December 2012.

The Ombudsman is an appointment made by the Crown under the terms of the *Parliamentary Commissioner Act 1967*. The Act now specifies a seven year term.<sup>2</sup> In practice, an open competition is held for the post, and an interview panel makes the final selection. The chairman of the Public Administration Select Committee participates in the process and the panel has an external assessor from the Public Appointment Commissioner's office to ensure that the appointment is made fairly according to the Commissioner's Code of Practice.

To indicate the constitutional importance of the Ombudsman, the salary is paid from the consolidated fund, standing services, in the same way as a High Court judge. The

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<sup>1</sup> HC Deb 18 October 1966 vol 734 c 51

<sup>2</sup> Subsections 2A and 2b of the *Parliamentary Commissioner Act 1967*, as inserted by Schedule 8 of SI 2006/1031

parliamentary ombudsman's office is funded via a parliamentary vote. In short, it is funded out of government resources, which are approved by Parliament.

The Ombudsman is responsible for:

1. providing the Treasury with a 3 Year Funding Settlement Submission as required;
2. providing the Treasury with a Main Estimate of resources, capital and cash requirements, including pay, for the following financial year in accordance with the published timetable;
3. ensuring that such Estimates are scrutinised and approved by the Executive Board with due regard to the need for economy, efficiency and effectiveness in the request for and use of resources; and, for pay, ensuring that full account is taken of the need for broad comparability with the Civil Service.<sup>3</sup>

Staff are crown servants recruited separately by the Ombudsman's office.<sup>4</sup> A full history of the office, including the Health Service Commissioner is given in a recent book, *The Ombudsman, the Citizen and Parliament* (2002) Roy Gregory and Philip Giddings. The most recent annual report for 2011-12 is available online at <http://www.ombudsman.org.uk/annual-report-2011-12/looking-ahead/the-challenges-ahead>

The office also has a non statutory advisory board, established in 2004, to act as a critical friend, providing advice and support. An executive board, chaired by the Ombudsman, exercises management functions. Further information is in the most recent annual report at <http://www.ombudsman.org.uk/about-us/our-role/governance/governance-statement>  
[http://www.ombudsman.org.uk/\\_\\_data/assets/pdf\\_file/0015/4263/Annual-Report-2009-10-low-res-with-appendix-as-spread.pdf](http://www.ombudsman.org.uk/__data/assets/pdf_file/0015/4263/Annual-Report-2009-10-low-res-with-appendix-as-spread.pdf)

## 1.1 Judicial review

Library Standard Note no 3079 *Ombudsman decisions-right of appeal* explains that there is no right of appeal against her decisions, apart from the use of judicial review. A judicial review case in 1994, *ex p Dyer*<sup>5</sup> rejected the argument that the Ombudsman was amenable only to control by Parliament and not subject to review by the courts. In the period 1994-2002, there were three reported cases in which the Ombudsman has been subjected to judicial review.<sup>6</sup>

In April 2004, the High Court gave representatives of the Equitable Members Action Group leave to challenge the Ombudsman's decision in the case concerning the regulation of Equitable Life. However, in December 2004 EMAG announced that it had dropped its judicial review proceedings following the decision of the Ombudsman to conduct a further investigation into the matter. The Court of Appeal judgement in February 2008 in respect of the Ombudsman's recommendation on final salary scheme pensions is discussed below.

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<sup>3</sup> Further details are given in a Statement of responsibility between the Parliamentary and Health Service Ombudsman and the Cabinet Office, HM Treasury, the Department of Health and the Ministry of Justice at <http://www.ombudsman.org.uk/about-us/our-role/governance/statement-of-responsibility>

<sup>4</sup> Public Administration Select Committee *Ethics and Standards: The regulation of conduct in public life* HC 121, Appendix 1

<sup>5</sup> *R v Parliamentary Commissioner for Administration ex p Dyer* (1994) All ER 375

<sup>6</sup> *The Ombudsman, the Citizen and Parliament* by Roy Gregory and Philip Giddings Politico's, 2002

## 2 Devolution and ombudsmen

The advent of devolution in Scotland, Wales and Northern Ireland led to adjustments and developments of the ombudsman schemes in each constituent part. The parliamentary ombudsman still deals with reserved matters in relation to Wales, Scotland and Northern Ireland as well as complaints about maladministration in Government departments, their agencies and some other public bodies in the UK in relation to England. So it has a mix of jurisdictions; some UK wide, some GB wide, some simply English and some NI only. The full list of bodies is available on the website.<sup>7</sup>

### 2.1 Scotland<sup>8</sup>

Scotland took the lead in merging the former ombudsmen's offices of the Scottish Parliamentary and Health Service Commissioners, the Commissioner for Local Administration in Scotland (Local Government Ombudsman for Scotland) and the Housing Association Ombudsman for Scotland in 2002, creating the Scottish Public Services Ombudsman (SPSO).

The *Scottish Public Services Ombudsman Act 2002* had cross party support in the Scottish Parliament. Key changes made by it included:

- ◆ removing the need for complaints to go through MSPs (the 'filter') relevant for the Scottish parliamentary ombudsman cases;
- ◆ greater accessibility to the Ombudsman including provision for a person to authorise a representative to complain on their behalf, and to allow oral complaints to be accepted in special circumstances;
- ◆ publication of all investigation reports;
- ◆ empowering the Ombudsman to publicise cases where an injustice has not been remedied;
- ◆ appointment of the Ombudsman and deputies by the Monarch on the nomination of the Parliament.<sup>9</sup>

The SPSO is appointed by the Monarch on the nomination of Parliament for a 5 year renewable period and may be removed following a resolution passed by more than two-thirds of all MSPs. Salary, expenses and allowances are determined and provided by the Scottish Parliamentary Corporate Body. SCPB also approves the appointment of staff by the SPSO. Unlike the UK Ombudsman and the UK Parliament, the Scottish Parliament (through the SPCB) is within the SPSO's jurisdiction.

The SPSO must lay an Annual Report before Parliament. He or she may also lay any other reports with respect to the exercise of the office's functions and must lay copies of any reports on its investigations before Parliament. Investigation reports must also be sent to the Scottish Executive.

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<sup>7</sup> <http://www.ombudsman.org.uk/make-a-complaint/if-we-cant-help/useful-links>

<sup>8</sup> The information on ombudsmen in Scotland, Wales and Northern Ireland is taken from the National Assembly for Wales *Officers of the Assembly* 06/44 September 2006

<sup>9</sup> SPICe Briefing, *Regulatory and Investigatory Bodies created by the Parliament since devolution*, 06/16, 1 March 2006. <http://www.scottish.parliament.uk/business/research/briefings-06/SB06-16.pdf>

## 2.2 Northern Ireland

The title of Northern Ireland Ombudsman is a popular name for two offices which are currently held by the same person:

The Assembly Ombudsman for Northern Ireland; and

The Northern Ireland Commissioner for Complaints.

This Office was originally established in 1969, but the current powers and responsibilities are laid down in the *Ombudsman (Northern Ireland) Order 1996* and the *Commissioner for Complaints (Northern Ireland) Order 1996*. On 1 December 1997 these were extended, by the *Commissioner for Complaints (Amendment) (Northern Ireland) Order 1997*, to include complaints about doctors, dentists, pharmacists and optometrists (ophthalmic opticians) providing family health services and by other health care professionals in health and personal social services.

The Northern Ireland Ombudsman investigates complaints from people who claim to have suffered injustice because of maladministration by the bodies which are specified in the legislation. This includes all local councils, education and library boards, health and social services boards and trusts, as well as all government departments and their agencies. The Northern Ireland Ombudsman currently provides an investigatory service to the Committee on Standards and Privileges of the Northern Ireland Assembly in respect of cases of complaint against Members of the Assembly. This service is operated on a case by case basis and investigatory action is initiated by the Committee. Complaints about Members of the Assembly are directed to the Clerk of Standards in the Northern Ireland Assembly and not to the Northern Ireland Ombudsman.

The Northern Ireland Ombudsman is independent of the Northern Ireland Assembly and of the government departments and public bodies which can be investigated. The Northern Ireland Ombudsman is appointed by the Monarch, and reports to the Northern Ireland Assembly.<sup>10</sup>

## 2.3 Wales

The *Public Services Ombudsman (Wales) Act 2005* merged four ombudsman services into a single Public Services Ombudsman for Wales (the "Ombudsman").<sup>11</sup> The four services were the Welsh Administration Ombudsman, the Local Government Ombudsman for Wales, the Health Service Ombudsman for Wales and the Social Housing Ombudsman. The Ombudsman also enforces the Code of Conduct for Local Councillors in Wales. The Act came into force on 1 April 2006. The functions of the office are carried out on behalf of the Crown and the Ombudsman is a Crown servant but not part of the civil service.

S.24 of the 2005 Act sets out the required procedure if a special report is made by the Ombudsman in a case where a complaint was made in respect of the Assembly. The First Minister must lay a copy of the report before the Assembly and, unless the required action has already been taken, give the Assembly notice of his or her intention to move that the Assembly resolve to approve the recommendations contained in it. Standing Orders should

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<sup>10</sup> Northern Ireland Ombudsman's website

<http://www.ni-ombudsman.org.uk/index.htm>

<sup>11</sup> *Public Services Ombudsman (Wales) Act, 2005.*

<http://www.opsi.gov.uk/ACTS/acts2005/20050010.htm#aofs>

specify that these actions should be taken as soon as reasonably practicable after the Ombudsman has made his or her recommendations.

The Ombudsman is currently appointed by the Monarch, on the recommendation of the Secretary of State following consultation with the Assembly. During the passage of the *Government of Wales Bill 2005-6* this method of appointment was questioned. For example, during the second reading in the Lords, Lord Roberts of Llandudno asked, with 'increasing emphasis on devolution and democratic appointments, is this not an opportunity for the Government to allow the Assembly to make the appointment?'<sup>12</sup> The *Government of Wales Act 2006* amends the 2005 Act so that the Ombudsman is to be appointed by the Monarch on the nomination of the Assembly.<sup>13</sup>

The Ombudsman is appointed for a non-renewable 7 year term and can resign by requesting that the Monarch relieves him or her from office. The Monarch can also dismiss the Ombudsman if he or she is medically incapable of performing the functions of the office or on the grounds of misbehaviour. Under the 2005 Act the Secretary of State is required to consult the Assembly before recommending the dismissal of the Ombudsman. The *Government of Wales Act 2006* amends the 2005 Act so that this can only be done following a resolution passed by at least two thirds of the total number of Assembly Members.<sup>14</sup>

The Public Services Ombudsman's Annual Report is required to be laid before the Assembly. Standing Order 6.6. requires that time shall be made available in Plenary, in each twelve month period, to discuss the Report. The Ombudsman can also present extraordinary reports to the Assembly if he or she wishes.

Following separation of the Assembly into two constituent parts in the *Government of Wales Act 2006*, the financial independence of the Ombudsman has been strengthened as the office is now funded from the Welsh Consolidated Fund through the Assembly, rather than the Assembly Government.

### **3 Reform proposals for UK Parliamentary Ombudsman**

A number of criticisms of the parliamentary ombudsman system have been identified over the years, summarised below in a series of short bullet points to indicate the pressures for reform:

- The large number of complaints rejected by the Ombudsman's office as inappropriate for investigation may illustrate confusion about his role and remit.
- The MP filter probably reduces the number of complaints received by the Ombudsman, so that the overall volume of work does not compare well with Ombudsman in other jurisdictions.
- There may be too many different ombudsmen with entirely separate jurisdictions, requiring a more collegiate approach - with citizens having a common access point to put a complaint - and the task of allocating the appropriate avenue for redress falling on the ombudsmen.

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<sup>12</sup> HL Debates, 16 December 2004, c.1436.

<sup>13</sup> *Government of Wales Act 2006*, Schedule 5.

<sup>14</sup> Ibid.

- The proliferation of adjudication systems within departments and agencies adds to confusion about resolution of complaints. Many departments now have their own independent complaints examiner or adjudicator. These were encouraged by the Citizen's Charter Complaints Taskforce in 1995, which recommended that 'all public services providing a service direct to members of the public establish an external review mechanism appropriate to their own circumstances and their existing complaints handling arrangements'.<sup>15</sup>
- A number of findings by the Ombudsman have been rejected by Government departments, notably allegations of mishandling of pension advice.
- The existing statutory bar, preventing the Ombudsman from investigating a case where the complainant has recourse to the courts, requires modification due to the growth in administrative law.<sup>16</sup>

A fundamental question about the Ombudsman's role and workload was asked by the former Ombudsman, Sir Michael Buckley, in March 2002, giving evidence to the Public Administration Committee, at which he said:

... if one looks at the history of the office over its 35 years of history, on average it has received about one and a half complaints per Member per year. Since, for most of its history, the only way of dealing with a complaint, taking positive action on a complaint, was to issue a statutory report—and there were lots of those—on average a Member of the House of Commons has received a report perhaps once every three years. It does seem to me that if Richard Crossman had been asked that question 'What is the workload of the office?' and had a good crystal ball with him and had said what I have just said, he would have been laughed out of the chamber.<sup>17</sup>

Sir Michael had succeeded in increasing the throughput of cases during his tenure of the office, and his successor, Ann Abraham, has achieved further increases. However, as the 2009-10 annual report indicates, overall numbers of cases for the parliamentary ombudsman (including health service work) remain small by international standards:

6,533 enquiries were resolved through detailed further assessment; 321 enquiries resolved by resolution through intervention; 322 investigations concluded.<sup>18</sup>

Under Ann Abraham the office developed a system of interventions – a category of complaints where the ombudsman seeks to achieve a resolution without a full investigation. The underlying rationale was to achieve a satisfactory and more flexible response to a complaint.

Compliance with the Ombudsman's recommendations remains almost universal, although the Ombudsman's recommendations are not binding.

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<sup>15</sup> *Putting Things Right*, Citizen's Charter Complaints Task Force, June 1995, para 3.87 Examples of these mechanisms include: the Adjudicator (Covering the Inland Revenue, the Valuation Office Agency, the Contributions Agency and Customs and Excise); the Independent Case Examiner for the Child Support Agency; the Prisons Ombudsman; the Independent Complaints Reviewer to HM Land Registry, and others.

<sup>16</sup> Section 5(2) of *Parliamentary Commissioner Act 1967*

<sup>17</sup> HC563-ii 2001-02 *ibid*

<sup>18</sup> [Parliamentary and Health Service Ombudsman Annual Report 2009-10](#) p9



### 3.1 Time line of reform proposals

A summary of recent reform initiatives is set out below.

**November 1993** Select Committee on the Parliamentary Commissioner for Administration recommends radical reform of the 1967 Parliamentary Commissioner Act, but not the removal of the MP filter.<sup>19</sup>

**June 1994** Government response accepted in principle a more independent form of appointing and funding the Ombudsman's office, but rejected major reform in its powers, and in particular, removal of the MP filter.<sup>20</sup>

**Oct 1998** The public sector ombudsmen (the Local Government Ombudsmen for England and the Parliamentary and Health Service Ombudsmen) submit joint paper to Ministers proposing a comprehensive review of the organisation of the public sector ombudsmen in England, recommending a single commission for public administration.<sup>21</sup> They suggest moving the focus from cases of 'maladministration' to 'hardship'.

**April 2000.** Cabinet Office report 'Review of the Public Sector Ombudsmen in England' by Philip Collcutt and Mary Hourihan ('The Collcutt report') published. Its remit was to consider whether the present arrangements 'were in the best interest of complainants and others against a background of moves towards the more integrated provision of public services; and whether those arrangements hindered achieving better value for money.'<sup>22</sup> (See Annex A for full recommendations)

**June 2000** Government consultation exercise launched.<sup>23</sup>

**July 2001** Responses to the Consultation Paper 'Review of the Public Sector Ombudsmen in England' published.

**August 2005** Pressure on legislative time had meant the primary legislation to implement the Collcutt proposals was not forthcoming. Plans to reorganise ombudsman services under the regulatory reform order procedures were announced August 2005 with a consultation paper on reform of public sector ombudsman services in England.<sup>24</sup>

The main proposals were to:

Enable the ombudsmen to consult each other and work together on cases and issues that are relevant to more than one of them.

Give the ombudsmen powers to seek the resolution of a complaint through more informal means without having to conduct a formal investigation.

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<sup>19</sup> First Report Select Committee on Parliamentary Commissioner for Administration 1993-94 HC 33

<sup>20</sup> Fifth Report Select Committee on Parliamentary Commissioner for Administration 1993-4 HC 619

<sup>21</sup> Collcutt, Philip & Mary Hourihan *Review of the public sector ombudsmen in England* (Cabinet Office, April 2000) pp 5-6,

[http://www.cabinetoffice.gov.uk/media/cabinetoffice/propriety\\_and\\_ethics/assets/ombudsmenreview.pdf](http://www.cabinetoffice.gov.uk/media/cabinetoffice/propriety_and_ethics/assets/ombudsmenreview.pdf).

<sup>22</sup> *Review of the Public Sector Ombudsmen in England: A report by the Cabinet Office*, 13 April 2000

<sup>23</sup> Press Notice Cab 223/00 15 June 2000

<sup>24</sup> Cabinet Office, *Reform of public sector Ombudsman services in England*, Consultation Paper, August 2005  
[http://apps2.suffolk.gov.uk/cgi-bin/committee\\_xml.cgi?p=doc&id=1\\_7470&format=pdf](http://apps2.suffolk.gov.uk/cgi-bin/committee_xml.cgi?p=doc&id=1_7470&format=pdf)

Provide powers for the Ombudsmen to issue advice and guidance on good administrative practice to those who deliver our public services.<sup>25</sup>

**November 2005** The consultation closed. The proposed changes to legislation were to be implemented by way of a Legislative Reform Orders under the *Legislative and Regulatory Reform Act 2006*. The government confirmed that the proposals would not include plans to remove the "MP filter" despite support for its ending from the current Parliamentary Ombudsman, Ann Abraham. The reason given by the Government was that the Regulatory Reform Order was not the appropriate vehicle for ending the "filter".<sup>26</sup>

**March 2007** The ombudsman published her *Principles of Good Administration* designed to be a broad statement of what public authorities should be doing to deliver good administration and customer service. The principles can be seen as an attempt to develop the role of the ombudsman from a concentration on individual complaints to diagnosing systemic failures through patterns of maladministration disclosed by a sequence of complaints. Her *Principles for Remedy* was also published in 2007, followed by *Principles of Good Complaint Handling*.<sup>27</sup>

**June 2007** The *Regulatory Reform (Collaboration etc between Ombudsmen) Order 2007* was passed by both Houses. It provided for increasing the collaboration between the parliamentary ombudsman and the local government ombudsman by sharing information, conducting joint investigations and issuing joint reports.<sup>28</sup> It also enables ombudsman to appoint mediators to assist in investigations. It made no change to the MP filter.

**July 2008** The Law Commission published a consultation paper *Administrative Redress: Public Bodies and the Citizen*.<sup>29</sup> This noted the importance of the public sector ombudsmen, commenting that "While internal complaint mechanisms resolve a huge amount of individual cases, the ombudsman can undertake large scale investigations into systemic issues and make findings and recommendations that can effect widespread administrative change". The Law Commission recommended a new power encouraging claimants to submit suitable claims to the ombudsmen before attempting to obtain a legal remedy through the courts. It also recommended the removal of the MP filter, as depressing the Ombudsman's caseload.

**July 2011 Open Public Services White Paper** In launching this white paper, Oliver Letwin, Minister of State at the Cabinet Office said: "we will provide a new system of redress, through beefed-up powers of the ombudsmen to step in when a choice to which people have a right is denied."<sup>30</sup> The **Open Public Services** white paper<sup>31</sup> The context was a decision to support and enable new providers to deliver public services, and to remove barriers to their so doing. The Paper stated:

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<sup>25</sup> Cabinet Office, *Consultation launched today on reform of public sector Ombudsman services*, Press Release, 2 August 2005.

[http://collections.europarchive.org/tna/20061004085342/http://cabinetoffice.gov.uk/newsroom/news\\_releases/2005/050802\\_psombudsman.asp?ID=93](http://collections.europarchive.org/tna/20061004085342/http://cabinetoffice.gov.uk/newsroom/news_releases/2005/050802_psombudsman.asp?ID=93)

<sup>26</sup> Op.cit., Cabinet Office, August 2005, p.14

<sup>27</sup> For further information, see Ann Abraham *Good administration: why we need it more than ever* 16 June 2008 [http://www.ombudsman.org.uk/about\\_us/FOI/whats\\_available/documents/speeches/constitution\\_unit\\_2008.html](http://www.ombudsman.org.uk/about_us/FOI/whats_available/documents/speeches/constitution_unit_2008.html)

<sup>28</sup> SI 2007/1889 For background, see HL Deb 21 June 2007 c403

<sup>29</sup> Consultation Paper no 187 [http://www.lawcom.gov.uk/docs/cp187\\_web.pdf](http://www.lawcom.gov.uk/docs/cp187_web.pdf)

<sup>30</sup> HC Deb 11 July 2011 c26

<sup>31</sup> Cm 8135 July 2011

6.21 Whether services are open to alternative provision remains a decision for democratically accountable politicians, but where it has been decided to open up services to competing providers we want to ensure that the full range of organisations of any size and from any sector are able to participate. We will consult on whether providers should have a right to appeal to an independent figure or organisation when they feel that they have been unfairly precluded from a commissioning process. This is already the case in the NHS, where providers can seek intervention from the Co-operation and Competition Panel. We will consult on a sector-by-sector basis on whether it is appropriate to have an independent body to consider complaints from alternative providers in areas other than the NHS and, if so, what framework or principles and rules should apply and who might fulfil this role, including a relevant Ombudsman.<sup>32</sup>

A Cabinet Office follow-up to the 2011 white paper in 2012 found that there had been some work on this area, but it was not yet complete:

The new choice frameworks for individual services will include a section explaining what people can do if their right to choose is not met. Local complaints procedures will be the first port of call to resolve issues with choice. If a complaint about choice cannot be resolved locally, there should be a clear and simple process to escalate the complaint to the relevant independent complaints body, such as the ombudsmen. We are working with the ombudsmen to examine ways in which they can play an effective role, including ways in which they can:

- improve awareness and understanding of the role of ombudsmen in ensuring effective redress, as the final resort when people do not receive their right to choose;
- use their 'name and shame' power more effectively; and
- communicate unresolved issues to the relevant elected body, for instance to local councils in the case of the Local Government Ombudsman.

<sup>33</sup> Ann Abraham gave a cautious response to the proposals on behalf of the parliamentary and health ombudsman, the local government ombudsman, the public services ombudsman for Wales and the housing ombudsman, emphasising that the services were not regulators, but that the White Paper offered an opportunity for a broader review:

In short, we view this as an opportunity for the fundamental review of design called for by the Law Commission and for the clarification of future policy development on ombudsmen, as well as of any resource implications of a change of role. We would be pleased to discuss further the terms of reference for such a review.<sup>34</sup>

The Communities and Local Government Select Committee report into the Local Government Ombudsman in July 2012 was concerned that developing a role in upholding the right to choice risked diverting the Ombudsman service from its main work to 2015: the handling of complaints and implementing reorganisation.<sup>35</sup>

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<sup>32</sup> Ibid

<sup>33</sup> [Open Public Services 2012](#) Cabinet Office, chapter 4 p85

<sup>34</sup> [Joint Response to the Open Public Services White Paper](#) from Ombudsman services of England and Wales 30 September 2011

<sup>35</sup> DCLG Select Committee [The work of the Local Government Ombudsman](#) HC 431 2012-13 para 45

### 3.2 Future directions for reform

In an article for *Parliamentary Affairs*, Ann Abraham commented on the absence of the parliamentary ombudsman in the *Governance of Britain* green paper published by Gordon Brown in July 2007, apart from a commitment to hold pre-appointment hearings.<sup>36</sup> She asked whether the ombudsman was essentially ‘an adjunct of representative democracy’ or an ‘agent of more direct accountability to the people.’ Her answer inclined towards the latter.<sup>37</sup>

In her article, Abraham drew attention to her role in the tax credits investigation and argued for a public policy role in identifying systemic maladministration:

On top of investigating individual complaints (which at one stage accounted for a quarter of all complaints referred to my Office), I made twelve detailed recommendations aimed at improving the administration of the system in its entirety. But I did not stop there: instead I felt compelled to ask the bigger policy question of whether a financial support system which included a degree of inbuilt financial insecurity could ever in practice meet the needs of very low-income families and earners. Now nearly two years later, in a second follow-up report published on 9 October 2007, I have drawn attention to the impact of that financial insecurity on that especially vulnerable client group and to how it is leading to confusion and hardship, and in some cases even to a desire to opt out of the tax credits systems altogether....The design of the tax credits system is in the end a matter for Government and Parliament, not for me. It is certainly not the place of the Ombudsman to usurp the function of the legislature and the Executive. It is however very much the role of the Ombudsman, as the purveyor of public benefit, to invite further reflection on the empirical evidence disclosed by complaints that these unintended but nevertheless adverse consequences continue to occur and must be recognised in future policy development.

#### ***Relationship with the executive***

An issue which Ann Abraham highlighted in *Parliamentary Affairs* was the potential for tension with the executive:

The tension is historical: from the Sachsenhausen case in the later 1960s involving the Foreign Office handling of a compensation scheme for suffering caused by Nazi persecution, through the Court Line case of the mid 70s concerning the collapse of a company with the loss of tens of thousands of holidays and the Channel Tunnel Rail Link case of the early 1990s which centred on the inability of Kent householders to sell their properties because of the way the Department of Transport handled the project, to the more recent occupational pension report and its findings of maladministration on the part of the Department of Work and Pensions, the pattern of occasional conflict when the going gets tough is well established.<sup>38</sup>

Since the late 1980s, there have been some major stand-offs between Ombudsman and Government over the refusal of individual departments to accept recommendations. These include:

- the case of the Rochester Way part of the A2 in Kent, *Rochester Way, Bexley: refusal to meet late claims for compensation*.<sup>39</sup>

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<sup>36</sup> For general background, see Library Research Paper 07/72 *The Governance of Britain Green Paper*

<sup>37</sup> “The Ombudsman as part of the UK Constitution: A Contested Role” in *Parliamentary Affairs* January 2008

<sup>38</sup> “The Ombudsman as part of the UK Constitution: A Contested Role?” *Parliamentary Affairs* January 2008

<sup>39</sup> HC 598, 1977-78.

- the report into the Barlow Clowes affair (a financial investment firm which became insolvent), in which the Government stated its disagreement with the Ombudsman's conclusions, but accepted them nonetheless.<sup>40</sup>
- the report on the Channel Tunnel link, entitled *The Channel Tunnel rail link and blight*.<sup>41</sup>
- the administration of the *ex gratia* payment scheme to former prisoners-of-war of Japan, *A debt of honour: the ex gratia scheme for British groups interned by the Japanese during the Second World War*.<sup>42</sup>

In addition, the Government eventually gave ground in response to further pressure, often from the relevant select committee.

In a case on alleged misleading official information about final salary pension schemes, *R ex p Bradley v Secretary of State for Work and Pensions* (Court of Appeal 7 February 2008), the Court of Appeal concluded that:

- The findings of the Ombudsman that maladministration has occurred are not binding on the Secretary of State. Both sides accepted that the *recommendations* of the Ombudsman are not binding.
- However, the judgement concluded that it was not sufficient for the Secretary of State to simply reject a finding of maladministration- the decision to reject had to be rational. The court found that the Secretary of State had not provided sufficient reasons to show why he had decided to reject the maladministration finding and therefore, the judgment in the High Court that the rejection was irrational should stand.<sup>43</sup>

The Ombudsman appeared at the hearings as an interested party because she had concerns that the case raised constitutional issues regarding the relationship between the Ombudsman and the bodies which she investigates. The Government initially indicated that it would seek leave to appeal to the House of Lords against the judgment that the rejection of the Ombudsman's findings was irrational.<sup>44</sup> Subsequently it decided against appeal.<sup>45</sup>

The judgement would appear to be relevant for the Equitable Life case, where the Ombudsman's finding of maladministration has also been challenged by the Government. The background is set out in Library Standard Note 2953 *Penrose and beyond*.<sup>46</sup> The Equitable Members Action Group commented in February 2008 on the implications of the Court of Appeal's judgment as follows:

The DWP had failed, even in the two subsequent Court hearings, to provide any reasonable rebuttal, which is why they lost on the PO's first finding in this case. Notwithstanding, the Court of Appeal has tipped the balance of power firmly towards the Government at the cost of the authority of the PO. A department of state found

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<sup>40</sup> *Barlow Clowes affair*, HC 76, 1989-90. Background in these cases is available in *The Ombudsman, the Citizen and Parliament* (2002) Roy Gregory and Philip Giddings

<sup>41</sup> HC 193, 1994-95, 8 February 1995.

<sup>42</sup> HC 324, 2005-06, 12 July 2005.

<sup>43</sup> [2008] EWCA Civ 36 <http://www.bailii.org/ew/cases/EWCA/Civ/2008/36.html>

<sup>44</sup> "Court maintains pensions verdict" 8 February 2008

*BBC News* <http://news.bbc.co.uk/1/hi/business/7232410.stm>

<sup>45</sup> "The Ombudsman and the Executive: the road to accountability" July 2008 *Parliamentary Affairs* p537

<sup>46</sup> [http://10.160.3.10:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY\\_OTHER\\_PAPERS/S TANDARD\\_NOTE/snbt-02953.pdf](http://10.160.3.10:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY_OTHER_PAPERS/S TANDARD_NOTE/snbt-02953.pdf)

guilty of maladministration in a PO report is apparently under NO obligation to judicially review it where it contests the findings. This is a disaster. This makes a mockery of the no-cost Alternative Dispute Resolution (ADR) service that the PO is meant to provide, since to prevail against a reluctant Government will require a hugely expensive formal Judicial Review, with all the risks entailed.<sup>47</sup>

The Ombudsman however commented that she considered that the constitutional role of the Ombudsman had been properly observed:

What was at stake here was the ability of Parliament to ensure that the Ombudsman was free to discharge its key role of alerting Parliament to an injustice that has occurred through maladministration. Indeed, the Court urged me to pursue vigorously before Parliament any cases where remedies have not been provided. However, subject only to the basic lawfulness of the Ombudsman's acts and those of the government in responding, the provision of remedy then rests ultimately with Parliament itself.<sup>48</sup>

The Ombudsman also expressed concern about the implications of the Open Public Services White Paper when giving evidence to the Public Administration Select Committee in 2011. The Committee agreed with her:

153. The role of Parliament's Ombudsman is primarily a matter for Parliament, and is not an instrument for particular government policies. We share the Ombudsman's concern that it is not the role of her office to be an advocate for the Government's choice agenda.<sup>49</sup>

### ***Relationship with the wider public sector***

Peter Tyndall, the Public Services Ombudsman for Wales, commented in a guest blog for Governance International that the diversity of public sector provision was having an impact on the ombudsman sector:

Since 1979 many services formerly in the public sector have been privatised – power companies, water, phones and public transport amongst them, sometimes collectively referred to as the networked services. Under successive governments we have seen a large proportion of council housing sold to its tenants or transferred to housing associations and parts of the state healthcare sector being outsourced to private companies. In England many schools are now outside of local government control. Most residential homes for older people are now privately provided, whereas in the past many were provided by councils.

What's this got to do with ombudsmen you might ask? Well, while all services are provided by the state, there is little issue about access to redress. However, when services are privatised, then access to redress can be lost. In some ways, you can argue, that it begs a question – if the railways, for example, are run by a private company, do they stop being a public service?....

It is evident that the boundaries of the state are becoming more porous. In health, where the state commissions private or independent sector providers, the services they deliver are within the remits of the public sector ombudsmen. This principle has been described as following the public pound. In social care, while many older people in residential homes have their care paid for by local councils, for those people who

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<sup>47</sup> "The Court of Appeal ruling, finally" 9 February 2008 EMAG News  
<http://www.emag.org.uk/news.php?year=2008>

<sup>48</sup> "The Ombudsman and the Executive: the road to accountability" July 2008 *Parliamentary Affairs* p538

<sup>49</sup> Public Administration Select Committee [The Big Society](#) HC 902 2010-12 para 153



can meet the cost of their own care, there is no subsidy. The Local Government Ombudsman service in England has had its remit extended so that people who pay for their own care can still complain to the ombudsman if they cannot resolve their concerns locally and I expect my own remit to be extended in this way soon. This is an example where an entirely privately funded service is within the remit of a public services ombudsman.

The net effect of all of these developments is a far more complex network of ombudsmen spanning both existing public services, and former ones, funded by a mixture of grant and levies. Some sectors now have more than one ombudsman, while others such as transport, now have no access to an ombudsman at all....

In the UK, it is also the case that in general, public services ombudsmen make recommendations and do not have binding powers, while private sector ombudsmen do. In a hybrid model, it is likely that binding powers, at least in respect of private providers, will be necessary<sup>50</sup>

### **Relationship with Parliament**

The 1967 legislation enables the Ombudsman to publish special reports to Parliament in cases where an injustice has not been, or will not be, remedied; There are two kinds: one where the Ombudsman raises matters of special importance and one where there remains significant unremedied injustice...<sup>51</sup> These reports enable the relevant select committee to add their voice to that of the Commissioner. The Ombudsman has had a generally positive relationship with the select committee. Until 1997, there was a separate select committee for the Ombudsman, but in summer 1997 it was merged with the Select Committee on the Public Service to create the Public Administration Select Committee (PASC). The broader remit means that there are fewer opportunities for the Ombudsman to give evidence in person. PASC undertakes a promotional and support role, backing up the office in disputes with the Government. This role has been noticeable in relation to the recommendations on pensions from the Ombudsman.<sup>52</sup> It held its latest evidence session with Ann Abraham in October 2007 where these issues were discussed.<sup>53</sup>

In written evidence to the Joint Committee on the draft Constitutional Renewal Bill in June 2008, Ann Abraham highlighted the important role that Parliament should play in the development of the office:

10. In short, I believe that Parliament in general and MPs in particular should be encouraged as part of the scrutiny of the Constitutional Renewal Bill to reflect carefully upon the resource made available to them by the Office of Parliamentary Ombudsman. When we talk about democratic deficit and the desirability of deliberative democracy, I suggest we should keep in mind the apparatus that Parliament itself, with more than a little foresight, put in place in 1967 to contribute precisely to the process of humanising the administration of the state that remains

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<sup>50</sup> ["A case for administrative simplicity: the proliferation and complexity of ombudsman schemes"](#) *Governance International* blog 4 July 2012

<sup>51</sup> These are laid under section 10(3) and section 10(4) of the *Parliamentary Commissioner Act 1967* and can be found online at [http://www.ombudsman.org.uk/improving\\_services/special\\_reports/pca/index.html](http://www.ombudsman.org.uk/improving_services/special_reports/pca/index.html)

<sup>52</sup> *Pensions Bill: Government undertakings relating to the Financial Assistance Scheme* Fifth Report 2006-7 May 2007 HC 523 <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmpublicadm/523/52302.htm> *The Ombudsman in Question: the Ombudsman's report on pensions and its constitutional implications* (Sixth Report of Session 2005-06 <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpublicadm/1081/108102.htm> HC 1081, July 2006).

<sup>53</sup> PASC Select Committee Minutes of Evidence Ann Abraham 18 October 2007

as urgent as ever and is a critical constituent of the reinvigorated democracy that *The Governance of Britain* wishes to promote.<sup>54</sup>

Ann Abraham's article in *Parliamentary Affairs* July 2008 sought to promote the distinctive role of the Ombudsman in as an assistant to Parliament in holding the executive to account.<sup>55</sup>

### ***Relationship with courts and tribunals***

Ann Abraham commented in an article for *Public Law* on the developing relationship with courts and tribunals.<sup>56</sup> Under the 1967 Act, the Ombudsman is barred from investigating any action in respect of which "the person aggrieved has or had a remedy by way of proceedings in any court of law", except where it is unreasonable for the person to resort to legal remedies.<sup>57</sup> However, the Ombudsman can accept cases where the relevant statutory appeals process or court proceedings could not have addressed the injustice in question.

The Ombudsman supported a change in the 1967 legislation to allow more co operation between courts and ombudsman, arguing that ombudsmen in general deserve to be seen as a system of justice in their own right, complementary to courts and tribunals. However, few effective mechanisms exist for ensuring that courts and tribunals refer suitable cases to ombudsmen. She called for some strategic thinking to direct the future growth of ombudsman services in the area of appropriate dispute resolution. The Law Commission consultation paper of July 2008 (see above) recommended modifying the statutory bar which prevents recourse to the ombudsman where an applicant has or had recourse to a legal remedy before a court or tribunal.

In an article in *Parliamentary Affairs* in July 2008, Ann Abraham reflected on the changing perception of the office:

If the Ombudsman is cast in the role of inferior court or source of alternative adjudication, it is not surprising that the executive should see it as acceptable to dismiss the Ombudsman's findings out of hand when they do not fit its agenda. Similarly, if Parliament regards the Ombudsman as an institution quite external to its own work whose reports have no special status, it is unlikely to give much weight to the intelligence gathered on its behalf and on behalf of its constituents.<sup>58</sup>

She considered that the emergence of administrative law since 1967 had helped to cast the Ombudsman as a 'support act for judicial review'<sup>59</sup>. New thinking on the appropriate constitutional role of the office was required from Parliament at a time when discussion on the accountability of the executive had come to the fore.

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<sup>54</sup> HL Paper 166-II/HC Paper 551-II Evidence 32

<sup>55</sup> "The Ombudsman and the Executive: the road to accountability" July 2008 *Parliamentary Affairs* p540

<sup>56</sup> "The Ombudsman and 'paths to justice': a just alternative or just an alternative?" *Public Law* Spring 2008

<sup>57</sup> *Parliamentary Commissioner Act 1967* section 5

<sup>58</sup> "The Ombudsman and the Executive: The road to accountability" July 2008 *Parliamentary Affairs* p536

<sup>59</sup> *Ibid*, p541