§ Law in Context

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12

The Parliamentary Ombudsman: Firefighter or fire-watcher?

Contents

1. In search of a role

In Chapter 10, we considered complaints-handling by the administration, settling for a 'bottom-up' approach. This led us to focus on proportionate dispute resolution (PDR) and machinery, such as internal review, by which complaints can be settled before they ripen into disputes. In so doing, we diverged from the 'top-down' tradition of administrative law where tribunals are seen as court substitutes. We returned to the classic approach in Chapter 11, looking at the recent reorganisation of the tribunal service and its place in the administrative justice system. We saw how the oral and adversarial tradition of British justice was reflected in tribunal procedure and considered the importance attached to impartiality and independence, values now protected by ECHR Art. 6(1). We,

however, argued that recent reshaping of the tribunal system left unanswered key questions about oral and adversarial proceedings and whether they are always the most appropriate vehicle for resolving disputes with the administration. Would we be better served by inquisitorial and investigatory procedure such as is used by the ombudsman? We looked briefly at ombudsman systems within the UK in Chapter 10, noting an unfortunate degree of fragmentation and considering their relationship with courts. Now we want to look more closely at the way in which ombudsmen work, focusing on the Parliamentary Commissioner (PCA), with whose office truly inquisitorial and investigatory procedure first reached our shores in 1967.

An 'ombudsman' is literally a 'complaints man', a title suggesting a general grievance-handling function; alternatively, he may be described as a 'mediator' (the French title) because he aims at negotiated solutions. Ombudsmen have common characteristics, which the International Ombudsman Institute, to which most ombudsman offices belong, has listed in an effort to protect against dilution by the plethora of quasi- or pseudo-ombudsmen that today litter public and private space.[1] For Gregory and Giddings, the essence of the office is:

- an expert, independent and non-partisan instrument of the legislature established by statute or in the constitution;
- clearly visible and readily accessible to members of the public;
- responsible for both acting on its own volition and for receiving and dealing impartially with specific complaints from aggrieved citizens against alleged administrative injustice and maladministration on the part of governmental agencies, officials or employees.[2]

There is a good fit with a British and Irish Ombudsman Association (BIOA) list of criteria for good complaints-handling, namely clarity of purpose; accessibility; flexibility; openness and transparency; proportionality; efficiency and quality outcomes.[3] There is much similarity too with the views of the European Union Ombudsman (EO), expressed in a speech made to the ombudsmen of the twenty-seven Member States.[4] He sees as essential:

- a personal dimension to the office, with a publicly-recognised office-holder
- independence
- free and easy access for the citizen

[1] IOI, *Ombudsman newsletter*, vol. 29, no. 1 (March 2007). See also R. Gregory and P. Giddings, *Righting Wrongs: The ombudsman in six continents* (Amsterdam: IOS Press, 2000).

[2] R. Gregory *et al*., *Practice and Prospects of the ombudsmen in the United Kingdom* (Edwin Mellon Press, 1995), p. 2. See also G. Caiden *et al*., 'The institution of ombudsman', in G. Caiden (ed.), *International Handbook of the Ombudsman: Evolution and present function* (Greenwood Press, 1983).

[3] BIOA, *Guide to Principles of Good Complaints Handling: Firm on principles, flexible on process* (April 2007) available online.

[4] N. Diamandouros, Speech to fifth seminar of the national ombudsmen of the EU member states (12 September 2005) available on the EO website.

- primary focus on the handling of complaints, whilst having the power to recommend not only redress for individuals but also broader changes to laws and administrative practices
- use of proactive means, such as own-initiative inquiries and providing officials with guidance on how to improve relations with the public
- effectiveness based on moral authority, cogency of reasoning and ability to persuade public opinion, rather than power to issue binding decisions.

Special stress is rightly laid on the fact that the office is furnished with practically unrestricted access to official papers, empowered to investigate, form judgements, criticise or vindicate, make recommendations as to remedies and corrective measures, and report on but not reverse, administrative action. We might add that in contrast to courts, which normally administer justice publicly, PCA procedure is private, a factor that undoubtedly facilitates full access to documents. Nor do the anonymised reports name individuals.

The procedure of British ombudsmen resembles that of courts in that neither has power to open 'own-initiative' investigations. They must await a complaint (although in practice they may be able to arrange one.) In this respect, the office is not inspectorial nor does it form part of the regulatory machinery of government, though there are certain parallels with the work of auditors, in that government acknowledges a general 'fire-watching' brief for ombudsmen in matters of good administration. But the ombudsman neither possesses the powers of a regulator nor does he act as an 'inspector-general' of state services. As the EO once put it, ombudsmen are concerned not only with redress for individuals but also with 'broader changes to laws and administrative practices'. They are properly fire-watchers as well as firefighters.[5] This is, however, a role that the PCA is trying to build.

2. The PCA's office

Established by the Parliamentary Commissioner Act 1967, the PCA is an officer of the House of Commons, appointed by the Crown on the advice of the Prime Minister. In practice, after some wrangling, appointments are made with the approval of the Leader of the Opposition after consultation with the chairman of the Public Administration Select Committee (PASC). In practice, two terms of five years has been the maximum but this has recently been reduced to a single seven-year term. The desirability of change to a more secure statutory basis has been acknowledged by the government but the change has never been made.[6] Like High Court judges, however, the PCA's tenure is secure: s/he holds office during good behaviour. Appointment through patronage together with the fact that the majority of Commissioners have come from

[5] *Ibid*. And see C. Harlow, 'Ombudsmen in search of a role' (1978) 41 *MLR* 446.

[6] Select Committee on the PCA, *Powers, Work and Jurisdiction of the Ombudsman*, HC 33 (1993/4) [31]. For the government response, see HC 619 (1993/4).

within the public service,[7] have not unnaturally helped to cast doubt on the independence of the office. Thus JUSTICE has campaigned unremittingly for the appointment of a lawyer or someone external to the Civil Service. As argued earlier, however, independence can be distinguished from impartiality. Arguments over independence are moreover often arguments over different values: a lawyer-ombudsman might, for example, be expected to share the values and practices of his profession.

Although different individuals have in fact perceived their role differently, the PCA has invariably seen the office as impartial. PCAs appointed from inside the civil service have not shown particular leniency to their erstwhile colleagues (see the *Channel Tunnel* case, below) while some of the most restrictive interpretations of jurisdiction have been made by lawyer-ombudsmen.[8] Later in this chapter we shall find cases where the PCA has acted more independently and more effectively than a lawyer appointed to hold a ministerial inquiry (*Barlow Clowes*, below); in other cases too PCAs have acted more courageously and more generously than courts.[9] But the view of the office as quasi-judicial has constrained the PCA from acting as 'citizen's advocate' (though it may be felt after reading this chapter that in recent years the position has shifted, perhaps because of the appointment of a Commissioner from NACAB). Civil servants, however, need impartiality; a key administrative benefit of the scheme was that individual civil servants, falsely accused, should be able to clear their name.

The PCA's first office was staffed by ninety or so people and is still not large in civil service terms.[10] At first a handful of lawyers reinforced a staff of career civil servants seconded from central-government departments. From the standpoint of independence this was a controversial practice, though it proved highly effective, providing a built-in understanding of civil service procedure. Today, when recruitment is open and job opportunities, including ombudsman appointments, advertised on the office website, a high proportion of those appointed continue to come from public-service posts.

[7] Sir Edmund Compton, previously Comptroller and Auditor-General, was followed by Sir Alan Marre and Sir Idwal Pugh, both Permanent Secretaries; then came two lawyers, Sir Cecil Clothier and Sir Anthony Barrowclough; Sir William Reid, a Permanent Secretary from the Scottish Home and Health Department; and Sir Michael Buckley, a local government official who had chaired an NHS trust. A break with the past came with the appointment of Ann Abraham in 2002. She had previous ombudsman experience as chair of the BIOA and Legal Services Ombudsman; prior to this, however, she was chief executive of NACAB, the National Association of Citizens Advice Bureaux.

[8] A. Bradley, 'The role of the ombudsman in relation to the protection of citizens' rights' [1980] 39 *CLJ* 304; R. Rawlings, 'The legacy of a lawyer-ombudsman', (June 1985) *Legal Action* 10.

[9] Compare *First Report of the PCA*, HC 20 (2001/2) Case C557/98 (compensation recommended) with *Reeman v DoT and Others* [1997] 2 Lloyds Rep. 648 (no liability in tort for negligent inspection in the same case).

[10] In 2006-7, the offices of PCA and HSC employed around 293 staff, five in senior management. Expenditure on the two offices is currently agreed at £24,026 million, by no means a trivial sum, of which £12,209,000 was spent on handling PCA complaints: see *Resource Accounts 2006/7*, HC 839 (2006/7).

The function of the PCA is to investigate complaints referred by an MP on behalf of individuals or private concerns that have suffered maladministration.[11] In other words, the office is at the disposal of the *general* public; it cannot be used to sort out disputes between public bodies or between public servants and the Government as employer. To succeed, a complainant must satisfy a two-pronged test of 'injustice' caused by 'maladministration' (see p. 534 below). The complainant is required to be someone 'directly affected' by maladministration resident in the UK, or relating to rights and obligations accruing in the UK (s. 6(1)); a complainant cannot act as public advocate to notify the PCA of departmental incompetence. In practice, as we shall see, this rule is mitigated by the office blocking-up frequent complaints into a single investigation or by MPs coming together to refer group complaints. In this type of case, the modern practice is to select around four sample cases, 'parking' the rest and absorbing them into a Special Report laid under s. 10(3).[12] This is something courts cannot easily do.

The 1967 Act offset flexibility with complex limitations. The PCA's jurisdiction covered only central government departments and other public bodies *specifically listed* in Sch. 2 of the Act. Schedule 3 exempted from investigation some key governmental concerns, including all commercial transactions and civil service personnel matters and, originally, all official action taken abroad (this has now been modified to include consular staff). There have since been many changes. Today over 250 bodies are listed, including all central government departments, an odd assortment of quangos, and some privatised bodies.[13] This method of proceeding is hardly transparent and it may help to explain why so many complaints to the PCA fall outside his jurisdiction.

The distinguishing characteristic of the PCA is his close relationship with Parliament. This restricts his remit. The Act provides that only an MP can lay a complaint before the PCA. This 'MP filter' has provoked much criticism, though successive PCAs have in practice learned how to circumvent it.[14] It is true that, in 1967, many MPs agreed with the main Opposition spokesman that the office would be a threat to a system where, it was said, a key feature of our parliamentary democracy was that MPs provided an 'efficient and relatively sophisticated grievance machinery'.[15] JUSTICE on the other hand has always

[11] Health service complaints are made first to the body concerned for resolution; if dissatisfied, the complainant goes directly to the HSC.

[12] Sir Michael Buckley, *Oral Evidence to Select Committee*, HC 62-ii (2001-2) Questions 23, 24.

[13] Sch. 1 of the Parliamentary and Health Service Commissioners Act 1987 expanded the list to more than 100 bodies and allowed for change to be made by a statutory instrument, in practice made almost annually. See also the Health Services Commissioner Act 1993 and the Deregulation and Contracting Out Act 1994.

[14] *Review of Access and Jurisdiction,* HC 615 (1977/8) [10]. The PCA had invented a circuitous way to deal with complaints referred directly by the public by sending them on to the constituency MP to decide whether to refer the complaint back formally. The current website helps complainants to locate their MP but makes no suggestion how to proceed if the MP does not refer, e.g., by contacting another MP.

[15] HC Deb., vol. 734, col. 65. And see G. Drewry and C. Harlow, 'A "cutting edge"? The Parliamentary Commissioner and MPs' (1990) 53 *MLR* 745.

maintained that direct access is essential 'if the Commissioner is properly to fulfil the role of providing redress for citizens with complaints against central administration, and of acting as watchdog against administrative abuse'.[16] This view is beginning to predominate. Over the years, the relationship between MPs and the PCA has changed radically. Hard-worked constituency MPs seem better informed about the office and more willing to use the machinery and there are many high-profile examples of group complaints (below). Defensive attitudes have also changed; a Cabinet Office Review in 2000 found 'almost universal dissatisfaction with the arrangements for access to the PCA via an MP.'[17] Ann Abraham has joined her predecessors in saying that the MP filter acts as a barrier to transparency; removal would help the office in its efforts to become more accessible. PASC has recommended removal.[18] The Government seems to accept the need for change. But legislation is still awaited.

The PCA's remit is maladministration and s. 12(3) of the 1967 Act reads:

> It is hereby declared that nothing in this Act authorises or requires the Commissioner to question the merits of a decision taken without maladministration . . . in the exercise of a discretion vested in [a] department.

At an early stage, however, the Select Committee (SC) encouraged the first PCA, Sir Edmund Compton, to interpret this provision generously so as to encompass 'bad decisions' and 'bad rules', a line followed by subsequent Commissioners.[19] Nonetheless, disputes over discretion and the merits of decisions have arisen on many occasions, especially where decisions complained of are those of a minister, as in the early *Sachsenhausen* and *Court Line* investigations.

Announcing the appointment of a former Comptroller and Auditor-General to an office not yet in being, the minister (Mr Crossman) soothingly explained, 'It is a Parliamentary officer that we want, and Sir Edmund Compton is a most distinguished Parliamentary officer already.'[20] Successive PCAs have set great store by their status as parliamentary officials, a relationship at once an advantage and disadvantage. The PCA is responsible to a Select Committee of the Commons – currently PASC – to which regular reports are made. He lays his reports as parliamentary papers and dispatches individual findings to the referring MP. The Committee follows investigations, summons witnesses and issues its own reports on matters arising. Very occasionally, as in the *Occupational*

[16] JUSTICE, *Our Fettered Ombudsman* (JUSTICE, 1977), pp. 1, 16–19. See also JUSTICE–All Souls Review, *Administrative Justice: Some necessary reforms* (Clarendon Press, 1988), Ch. 5.

[17] R. Kirkham, *The Parliamentary Ombudsman: Withstanding the test of time*, HC 421 (2006/7), p. 11 reports that 66% of MPs surveyed by the office favoured removal. See also the *Colcutt Review of the Public Sector Ombudsmen in England: A report by the Cabinet Office* (HMSO, 2000), p. 20.

[18] See PASC, *4th Report of the Parliamentary Ombudsman for 1998-1999*, HC 106 (1999/2000) [6I] and for the PCA's views, memo to PASC, *ibid*.

[19] *Select Committee on the PCA*, HC 350 (1967/8).

[20] HC Deb., vol. 734, col. 54.

Pensions affair described below, reports are debated on the floor of the House.[21] On the credit side, this lends muscle to the PCA; the powerful Select Committee looming over the PCA's shoulder is usually sufficient to secure compliance. On the debit side, the relationship has sometimes acted as a restraint. The PCA has to be a particular type of person capable of walking a tightrope between government and Parliament. Sir Cecil Clothier, a notably compliant lawyer, once questioned whether he should investigate complaints which Parliament had debated, on the ground that 'Parliament would not tolerate to be corrected by my subsequent investigation if I should arrive at a different conclusion'.[22] Other PCAs have fallen into a cosy relationship with their Select Committee (and vice versa). Thus in one sense the link threatens independence, perhaps the most crucial factor in legitimating complaints machinery; on the other hand, the *Occupational Pensions* case shows how a good relationship to the strongly chaired PASC lent strength to an embattled PCA.

3. From maladministration to good administration

Deliberately, the 1967 Act did not define maladministration, though the Government spokesman, Richard Crossman, described it during debates on the bill as including 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on'.[23] The term has proved elastic. In some cases the two-pronged test of 'maladministration causing injustice' has been glossed by PCAs anxious to extend their competence. Findings not strictly maladministration or maladministration causing injustice have been used to prod departments into action through references to 'errors' or phrases such as 'I was critical of' or 'left with a feeling of unease'. In his Annual Report for 1993, the PCA (William Reid) proposed updating the 'Crossman Catalogue' to give a clearer indication in the language of the 1990s of what was expected of departments. To Crossman's list, Reid added examples with a notably more bureaucratic flavour:

- rudeness (though that is a matter of degree);
- unwillingness to treat the complainant as a person with rights;
- refusal to answer reasonable questions;
- neglecting to inform a complainant on request of his or her rights or entitlement;
- knowingly giving advice which is misleading or inadequate;
- ignoring valid advice or overruling considerations which would produce an uncomfortable result for the overruler;
- offering no redress or manifestly disproportionate redress;
- showing bias whether because of colour, sex, or any other grounds;
- omission to notify those who thereby lose a right of appeal;

[21] See R. Gregory, 'The Select Committee on the Parliamentary Commissioner for Administration 1967–1980' [1982] *PL* 49.

[22] C. Clothier, 'Legal problems of an ombudsman' (1984) 81 *Law Soc. Gaz.* 3108.

[23] HC Deb., vol. 734, col. 51 (Mr Crossman). And see G. Marshall, 'Maladministration' [1973] *PL* 32.

- refusal to inform adequately of the right of appeal;
- faulty procedures;
- failure by management to monitor compliance with adequate procedures;
- cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use a service;
- partiality; and
- failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly unequal treatment.[24]

The advent of 'new public management' (NPM) and the later Citizen's Charter faced the PCA with the question whether departure from standards and performance indicators should constitute maladministration. After discussion, the Committee agreed that the PCA ought to have regard to charter assurances when investigating complaints but should not consider himself bound; 'they leave the Parliamentary Commissioner . . . unfettered in his discretion to determine whether or not maladministration has taken place'. The PCA would help to provide 'independent validation of performance against standards' but departmental standards were not to be the benchmark of maladministration.[25] Ann Abraham's approach is somewhat different. Stressing her fire-watching function, she has spoken of 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:[26]

- a shared understanding of what makes for good public administration: the principles of good administration
- a shared understanding of what needs to be done when things go wrong in public administration or public services: the principles of redress
- 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, she was keen to play a positive role.

On the fortieth anniversary of the office, with a view both to transparency and the promotion of good administration, the PCA issued her key *Principles of Good Administration*. Stressing that they were neither a checklist nor 'the final or only means' by which to assess and decide individual cases, she urged public bodies to use their judgement in applying them 'to produce reasonable, fair and proportionate results in the circumstances'. The Principles would be 'broad statements of what we believe public bodies within jurisdiction should be doing to deliver good administration and customer service. If we conclude that a public body has

[24] *Annual Report for 1993*, HC 290 (1993/4) [7].

[25] *The Implications of the Citizen's Charter for the Work of the Parliamentary Commissioner for Administration*, HC 158 (1992/3), evidence at pp. 12–13 (Mr Reid).

[26] PCA, 'The Ombudsman, the constitution and public services: A crisis or an opportunity?' Speech to Constitution Unit Seminar (4 December 2006).

not followed the Principles, we will not automatically find maladministration or service failure. We will apply the Principles fairly and sensitively to individual complaints, which we will, as ever, decide on their merits and in all the circumstances of the case.'[27] The short text is managerial but consumer-oriented:

Principles of Good Administration

Good administration by a public body means:

1 Getting it right
2 Being customer focused
3 Being open and accountable
4 Acting fairly and proportionately
5 Putting things right
6 Seeking continuous improvement

Each of these headings is then broken down and fleshed out in guidance. 'Getting it right' means:

- acting in accordance with the law and with due regard for the rights of those concerned
- acting in accordance with the public body's policy and guidance (published or internal)
- taking proper account of established good practice
- providing effective services, using appropriately trained and competent staff
- taking reasonable decisions, based on all relevant considerations.

The supporting text fleshes out each principle. Thus 'getting it right' reflects a wider context of management and risk assessment:

1. Getting it right

- All public bodies must comply with the law and have due regard for the rights of those concerned. They should act according to their statutory powers and duties and any other rules governing the service they provide. They should follow their own policy and procedural guidance, whether published or internal.
- Public bodies should act in accordance with recognised quality standards, established good practice or both, for example about clinical care.
- In some cases a novel approach will bring a better result or service, and public bodies should be alert to this possibility. When they decide to depart from their own guidance, recognised quality standards or established good practice, they should record why.
- Public bodies should provide effective services with appropriately trained and competent staff. They should plan carefully when introducing new policies and procedures. Where public bodies are subject to statutory duties, published service standards or both, they should plan and prioritise their resources to meet them.

[27] PCA, *Principles of Good Administration* (March, 2007) available online.

- In their decision making, public bodies should have proper regard to the relevant legislation. Proper decision making should give due weight to all relevant considerations, ignore irrelevant ones and balance the evidence appropriately.
- Public bodies necessarily assess risks as part of taking decisions. They should, of course, spend public money with care and propriety. At the same time, when assessing risk, public bodies should ensure that they operate fairly and reasonably.

The text looks to the 'Seven Principles of Public Life' set out by the Nolan Committee, the BIOA Guide (see p. 529 above) and the values and practices of the Civil Service Code.[28] Its general tone is one of fire-watching. The need for personal initiative, responsibility and discretion is stressed.

4. Firefighting or fire-watching?

There has never been full agreement over the PCA's role and functions. The office has an adjudicative and an inspectorial role, in which 'firefighting' and 'fire-watching' are combined. The two functions have seemed on occasion to be pulling it apart.

(a) The small claims court

The perception of ombudsmen as firefighters infused the influential report *The Citizen and the Administration*,[29] which lay behind the legislation. The lawyerly emphasis was not surprising; the report under the direction of Sir John Whyatt, a former judge, was drawn up for JUSTICE, a pressure group of lawyers dedicated, according to its constitution, to the 'preservation of the fundamental liberties of the individual'. Whyatt contended that traditional controls left a gap. Judicial review was too limited, leaving much maladministration (e.g., rudeness or delay) un-redressed and too expensive to challenge save in the exceptional case. Equally, parliamentary procedures were ineffective; adjournment debates and parliamentary questions were uneven contests because only the executive possessed all the relevant information. Ad hoc inquiries were little-used Rolls-Royce machinery unsuited to everyday matters. Into the gap, an ombudsman should be inserted. Directed as it was towards redress of grievances, the Whyatt report did not consider fire-watching functions; the identification of administrative inefficiency with a view to its eradication passed the committee by. Effectively, the role envisaged by the Whyatt report was an administrative small claims court or court substitute, decisively oriented towards small claims. Neither JUSTICE nor the House of Commons

[28] The very different text of the EO, *The European Code of Good Administrative Behaviour* 2005, available online is consonant with the more legalistic definition of maladministration in the EO's Annual Report for 1997 as occurring 'when a public body fails to act in accordance with a rule or principle which is binding upon it'.

[29] JUSTICE, *The Citizen and the Administration* (1961).

analysed the general consequences for administration although, in advocating informal investigatory techniques designed to minimise administrative disruption, JUSTICE did recognise that departments expend resources in investigations. They envisaged the new office as a sort of standing inquiry able to go behind the anonymity of ministerial responsibility. Perhaps it was not surprising that, at a time before departmental select committees became operative, and well before the audit culture had come into being, the PCA was not viewed as an auditor-general or government inspector.

This perception infuses all JUSTICE's later work on the office. Consistent with its initial position, the question of direct access to the PCA has been a constant source of concern to JUSTICE, which has, as already indicated, consistently lobbied for open access, criticised the tendency to appoint career civil servants to the post and campaigned on grounds of independence for the appointment of a lawyer.[30] Its only concession to problems of overload has been that, while elaborate investigations were appropriate for difficult cases, informal methods would produce immediate redress in routine cases. In practice, however, the problem of overload did not arise. It was not until 2000 that a population of over 50 million potential complainants produced 2,000 complaints in a single year. This is surprising. Compare the figures with, say, social security appeals (see p. 487 above); complaints to the Information Commissioner (see p. 477 above); or even to the Revenue Adjudicator (see p. 459 above). Although complaints have risen gradually until they average around 4,000 annually, we must remember that the PCA's jurisdiction has altered substantially, expanding to include new agencies but in other ways retracting as competences have been ceded to regional government and regional ombudsmen. Critics blame the MP filter.

It could be argued from a PDR standpoint that the MP filter helps to get disputes settled at the earliest possible stage. The flaw in this argument lies at the bottom of the pyramid, where the response of MPs to their complaints function and their use of the PCA is unmonitored, unstructured, uncontrolled and sporadic.[31] While some regard themselves as 'statutory pillar boxes', others exercise independent discretion and refuse to pass on complaints. Nor is there any machinery whereby the PCA can rid his office of trivial complaints; he would indeed probably be loath to do this, as trivial complaints occasionally trigger a complex and demanding investigation.

(b) Ombudsmen and courts

Despite the fact that Richard Crossman, the bill's promoter, voiced traditional Labour Party aversion to courts, the Labour Government did not allow the PCA to supplant existing machinery for redress.[32] The statutory solution

[30] See n. 16 above.

[31] See R. Rawlings, 'The MP's Complaints Service' (1990) 53 *MLR* 22, 149; Harlow and Drewry, 'A "cutting edge"? The Parliamentary Commissioner and MPs'.

[32] s. 5(2) of the Parliamentary Commissioner Act 1994.

represents a modest attempt to avoid overlapping remedies. It provides that where a complaint relates to a matter giving rise to a right of appeal to a tribunal or to a court remedy, the PCA shall not investigate unless 'satisfied that in the particular circumstances it is not reasonable to expect [the complainant] to resort or have resorted to it'. But the PCA possesses an overarching discretion, giving him considerable freedom of manoeuvre; s. 5(5) provides that in determining whether to initiate, continue or discontinue an investigation, the PCA shall 'act in accordance with his own discretion'. This discretion has at various times been exercised in very different ways. Sir Idwal Pugh, a former civil servant, used it generously, inaugurating a practice (of doubtful legal validity) of extracting from complainants a promise to refrain from legal action. Sir Cecil Clothier, a lawyer, was also generous, saying:

> Where there appears on the face of things to have been a substantial legal wrong for which, if proved, there is a substantial legal remedy, I expect the citizen to seek it in the courts and I tell him so. But where there is doubt about the availability of a legal remedy or where the process of law seems too cumbersome, slow and expensive for the objective to be gained, I exercise my discretion to investigate the complaint myself.[33]

Less generously, another lawyer, Sir Anthony Barrowclough, refused to investigate a dispute as to whether a claim form had been received by a department, a typical ombudsman matter, disingenuously advising that recourse to a civil action would be 'a relatively simple and inexpensive matter'.[34] Closer co-operation between courts and the statutory ombudsmen has been suggested;[35] perhaps, however, it is this restriction rather than the MP filter that needs to be lifted.

(c) Fire-watching: Inspection and audit

Ten years after the office had been established, Harlow argued that the PCA had yet to identify a distinctive role. A PCA investigation cost a government department about eighty hours of staff time and the expensive machinery was wasted if treated merely as a small claims court. The Swedish Ombudsman could act without complaints, either by initiating his own investigations, for example after adverse press reports, or by inspecting institutions within his jurisdiction; Harlow argued that the PCA needed similar powers:

> His *primary* role should be that of an independent and unattached investigator, with a mandate to identify maladministration, recommend improved procedures and negotiate their implementation. Changes in his jurisdiction and procedures should be made only if they facilitate the execution of this task. If this is right, the individual complaint is primarily a mechanism which draws attention to more general administrative deficiencies . . . [And]

[33] HC 148 (1980/1), p. 1.
[34] Complaint 45/88, *Annual Review 1988*, HC 480 (1988/9), p. 17.
[35] Law Commission, *Administrative Redress: Public bodies and the citizen, a consultation paper*, CP No. 187 (2008), pp. 99–116.

> the essential question with regard to access is whether the PCA should be given power to intervene of his own initiative. It is submitted that he should.[36]

Acknowledging the function of MPs in filtering simple and trivial complaints, Harlow argued for a strategic role for the PCA. The PCA should concentrate on quality rather than quantity, developing his fire-watching characteristics.

In its ten-year review of the PCA's office,[37] the SC took faltering steps towards a fire-watching function. It recommended that the PCA should, subject to the Committee's approval, be able to mount a systemic investigation where he believed on the basis of previous complaints that a particular department was working inefficiently, with a view to making recommendations for putting things right. Although Sir Idwal Pugh, then PCA, thought this the most important of the recommendations, the Government rejected the idea of an inspectorial power as 'unnecessary and undesirable':

> It would place a heavy burden on the Commissioner if he were required in effect to 'audit' the administrative competence of government departments and would distract him and his staff from *their central purpose of investigating complaints* . . . Where the Commissioner investigates a series of complaints relating to a particular area of administration he is . . . able to form a clear view of the procedures in force there and to make recommendations . . . Any lessons to be drawn from investigations by the Commissioner are already studied by departments and acted upon . . . It should be for Ministers and their departments to decide what action is necessary to prevent further maladministration by a particular branch or establishment, and to be answerable to Parliament for the adequacy of the action . . . taken.[38]

Arguably, a crucial opportunity was lost to put the PCA on a level with the Auditor and Comptroller-General, and his select committee on a level with the far more influential Public Accounts Committee.

In 1993, in a review of competence and functions, the SC again recommended change to allow the PCA both to conduct audits of bodies within his jurisdiction and also to carry out own initiative inquiries at the SC's request but although the Government broadly favoured the recommendations, no steps were taken to implement them.[39] Successive PCAs have, however, found ingenious ways to circumvent the restriction. William Reid, for example, used his power under s. 10(3) of the 1967 Act to group together cases that seemed to suggest endemic maladministration in a particular area, as he did with complaints concerning poor performance in the Child Support Agency (below). He then made general recommendations that were presented to Parliament as special reports. This went some way to fill a glaring jurisdictional gap.

[36] C. Harlow, 'Ombudsmen in search of a role' (1978) 41 *MLR* 446, 450–3.

[37] *Review of Access and Jurisdiction,* HC 615 (1977/8) [31]. See also First Report of the SC, HC 129 (1990/1) [19–22].

[38] *Observations by the Government on Review of Access and Jurisdiction*, Cmnd 7449 (1997/78), pp. 5–6.

[39] See HC 33 (1993/4), and for the Government Response, HC 619 (1993/4).

Equally, the SC may adopt a fire-watching stance, taking up cases that suggest endemic failures. After Mr Buckley reported two cases of lengthy delay by the Immigration and Nationality Directorate, for example, resulting in leave to remain being granted 'largely because of the delays rather than because it was judged there had been any original merit in [the] case', the SC sent for and questioned the Director. When he and his staff admitted to 'poor performance, poor working processes and heavy backlogs', the Committee reviewed the department's IT provision, concluding:

> The resultant crisis, with attendant publicity, has led to action being taken. Budgetary constraints have recently been relaxed, and the IND has recruited substantial numbers of additional staff. However, it is important to recognise both that it will inevitably take some months for the benefits of these welcome additional resources to filter through, and, perhaps more fundamentally, that the recent crisis only revealed the extent of the difficulties in which IND has been struggling for some considerable time previously; it did not cause them. An end to the short-term crisis in asylum seekers will not mean an end to the day-to-day problems attendant on the rest of the IND's workload. **A proper assessment must be made of long-term requirements and adequate resources provided to ensure that such backlogs are not permitted to build up again.**[40]

Expressing the hope that it would not 'be necessary to recall the IND for our next inquiry', the SC accepted that 'a corner had now been turned'. This belief, as we know from previous chapters, has not been the case!

In her Special Report on the child and working tax credits system, aimed at tackling child poverty and encouraging more people into work, Ann Abraham also took a broad-brush approach. The system affected around 6 million families, using a wholly IT-based processing system. Given the scale of this undertaking, the PCA concluded, introduction of the scheme had been broadly successful yet the complaints in one single year had amounted to 22 per cent of her total workload. Her Special Report:

> charts the experience for that particular group of tax credit customers. It seeks to understand what has gone wrong in those cases, the impact on customers, the effectiveness of the Revenue's response and the lessons to be learned. However it also raises wider and more fundamental issues, which are not for me, but for Government and Parliament to address, such as whether a financial support system which includes a degree of inbuilt financial uncertainty can meet the needs of this particular group of families. It also suggests that, if such a system is to meet those needs, then a much improved level of customer service is required in the form of better and clearer communications, easier and quicker customer access to Revenue staff who can address problems and queries, and prompt and efficient complaint handling. Without these a sizeable group of families will continue to suffer not just considerable inconvenience, but also significant worry, distress and hardship . . .

[40] 4th Report for 1998-9, HC 106 (1999–2000) [17–20].

> In addition, I believe that this review suggests that there are important lessons to be learned, not just for HM Revenue and Customs, but for all public bodies when implementing new policies and systems. In particular, it highlights the importance, when designing new systems, of starting from the customer perspective and maintaining customer focus throughout the development of the programme. It also highlights the dangers of introducing a 'one size fits all' system. Such systems, whilst superficially providing a fair and consistent and efficient service for all customers can, by failing to pay sufficient regard to the different circumstances and needs of specific client groups, have entirely unintended harsh and unfair consequences for more vulnerable groups.[41]

Twelve very specific recommendations followed. Implementation was monitored and the report followed up two years later, when the office realised that complaints were not, as they had assumed, falling. This report contained six new recommendations, and the PCA said:

> The distress and hardship unnecessarily caused to some low income families faced with the recovery of tax credits overpayments require prompt action. The revisions that HMRC are proposing to make to COP 26 should go some way towards ensuring that decisions on recovery will be far less harsh and more appropriate to this particular customer group. However, those revisions will not be sufficient in themselves to deal with all of the problems identified in this report, nor prevent potential future misunderstandings arising about the proper application of the revised Code.[42]

Seneviratne sees the future of the PCA primarily in firefighting, suggesting that successive PCAs have seen their role 'to be more one of providing an internal administrative audit than of acting as a ready channel for uncovering and investigating citizens' grievances'.[43] The title of the Annual Report for 2007–8 certainly lends support to this view and in her Introduction, Ann Abraham says:

> The work of my Office during the course of 2007-08 reflects its place in the constitution and its twin functions of delivering individual benefit to complainants and serving the wider public benefit. It achieves this larger ambition by drawing on its experience, expertise and independence to right individual wrongs and drive improvements in public services. It is this fruitful mix of individual benefit and public benefit that gives the Office its distinctive character.[44]

[41] PCA, *Tax Credits: Putting things right*, HC 577 (2005/6), pp. 3–4. There had been 404 complaints with 204 in hand; in April 2006, 120 more came in with 314 in hand; by April 2007, 25 were in hand; an average of 74% of complaints were upheld: *Annual Review for 2006/7*, *Putting principles into practice*, HC 838 (2006/7).

[42] PCA, *Tax Credits: Getting it wrong?* HC 1010 (2007/8) [3]. For comparison with the Revenue Adjudicator, see p. 460. above.

[43] M. Seneviratne, *Ombudsmen in the Public Sector* (Open University Press, 1994), pp. 52, 57–8.

[44] PCA, *Bringing wider public benefit from individual complaints*, HC 1040 (2007/8).

5. Inquisitorial procedure

Ombudsman procedure is investigatory and inquisitorial and hence provides an alternative to the adversarial paradigm. Perhaps the sharpest contrast is that the procedure is free for the complainant! Legal representation is unnecessary and still exceptional (though increasing reference in reports to solicitors suggests a higher visibility for the office amongst lawyers). Once the complaint is laid before the PCA, the investigation is wholly out of the complainant's hands and, although he may be interviewed, this is not a statutory requirement, a point picked up below.

At an early stage, the office evolved a three-stage, investigatory procedure, described by Sir Idwal Pugh as follows.

(a) Screening

The complaint is screened to determine whether it has been properly referred and whether it is within jurisdiction.

Complaints outside jurisdiction still run at about 4 per cent, although this procedure, which drew attention to the disproportionately high number of complaints screened out for lack of jurisdiction, has now, as we shall see, been modified. These figures are, in light of the MP filter, hard to explain away. They are usually attributed to the complexity of the jurisdictional criteria, including the question of overlap with courts and tribunals (s. 5) and the fact that only bodies listed in Sch. 2 to the Act can be investigated. Reversal has been recommended: only bodies *not* subject to investigation should be listed, obviating the need to amend the legislation to reflect the creation of new government bodies.[45] Because it would require amending legislation, however, this sensible change has not been made. The office has always tried to be helpful to disappointed complainants, advising them where else to take their complaints.

(b) Investigation

A statement of complaint setting out the material facts of the case is prepared and sent to the principal officer of the department concerned with a letter requesting his comments. If a complaint names a particular member or members of the department, they receive copies. There are no pleadings and seldom any hearings, though the PCA has power to conduct oral hearings and lawyer-ombudsman Sir Cecil Clothier occasionally did so; oral statements to officers are, however, frequently made. There are no rules of proof or evidence and all information, including comments, may be quoted and relied on in the report. The burden of proof is also unspecified.

[45] Select Committee on the PCA, *Powers, Work and Jurisdiction of the Ombudsman*, HC 33 (1993/4).

Sir Michael Buckley spoke in his 2000–1 Report of lightening the 'evidential burden' placed on the complainant, a change that allowed the office to 'take positive action in a significantly higher proportion of cases'.[46] Section 8 of the Act requires anyone who can furnish information to do so and provides that no claim of public interest immunity, legal privilege or official secrecy shall prevail against the PCA except in the case of the proceedings of Cabinet and its committees. Although it is very rare for such a claim to be made, there have (as we saw in Chapter 10) been several instances.[47]

(c) Report

Sir Idwal Pugh tell us that, when the investigation is complete:

> a draft 'results report' on the case is prepared and is submitted to me and is often the subject of a case conference. This sets out all the facts of the case, the course of the investigation and the conclusion and findings on the complaint. If the complaint is upheld, it will also specify the remedy which is called for. I then send the draft report to the permanent secretary of the department concerned. I do this for the following reasons. First, so that he can check, as far as the department's records are concerned, that I have correctly reported facts. Secondly, so that he can confirm that the department will or will not agree to a remedy where one is included in the report. Thirdly, so that he may also decide whether or not in the very rare case to ask the minister in charge of the department to use the right which he has under the statute to prevent disclosure of information [when it] 'would be prejudicial to If you want a note here it would be in 48 above the safety of the State or otherwise contrary to the public interest'[48]

There is no mention in this passage of the complainant. Yet inquisitorial procedure should also be 'contradictory', a continental term meaning that parties must be given an opportunity to comment on statements and refute any allegations made against them. Current practice is to outline the steps to be taken in a letter to the complainant, who may also be contacted, according to the PCA's website:

> to discuss the details of your complaint and what you would like us to do to make things right . . . We will let you and the MP know what is planned and provide regular updates on our progress with your complaint. At the end of our investigation we will send you and the MP a letter or report explaining our final decision.

This procedure underlines that, technically, the complainant is the MP. Whether the draft report should, in accordance with the rules of natural justice, be sent to the complainant was once considered by the SC, which rejected the

[46] *Annual Report for 2000/1*, HC 5 (2000/1).

[47] An early example is the *Court Line* investigation, where a certificate was issued under s. 11(3) of the Act and the government subsequently refused to accept the PCA's recommendations: see HC 498 (1974/5) and HC Deb vol. 896 cc1812–23. And see p. 472.

[48] I. Pugh, 'The Ombudsman: Jurisdiction, powers and practice' (1978) 56 *Pub. Admin*. 127, 134–6. The statutory requirement referred to is in s. 7(1) of the 1967 Act.

idea on the ground that it would add to delays.[49] There is a contrast to be drawn with the procedure used by the EO's office, where procedure is fully contradictory and involves exchange of documents.

The draft report as sent to the principal officer (PO) normally contains a recommendation as to remedy. The PO should correct any errors, draw attention to omissions and discuss with the PCA proposed action in respect of the recommended remedy. Where compensation is involved, the department may also have to contact the Treasury. Both the SC and the office have expressed concern at the delays occurring at this stage of the investigation. In 2001, Sir Michael Buckley, then engaged in trying to lower the average length of investigations to meet his business plan target of ten to eleven months, expressed concern both at 'the length of time that it takes departments to respond to enquiries and to the statement of complaint which is the preliminary to an investigation, and also to resolve issues, especially issues of redress, after we have sent them a draft report on our investigation'. A special culprit was the Child Support Agency, which frequently overshot the limit of thirty days for a department to respond to the PCA's office, sent 'no more than a holding reply', or sent a reply that did not fully and properly address the issues.[50] Once the reply is received, the report is ready to be sent to the referring MP, to the SC and the complainant.

The thoroughness of this 'Rolls Royce procedure' undoubtedly contributed to the respect in which the office was held, as Sir Idwal Pugh emphasised.[51] The procedure is, however, slow and lengthy – a serious source of public discontent. During the 1990s, delays in the PCA's office grew to the point that they were thought to discourage MPs from submitting complaints. The Select Committee demanded improvements. NPM had hit the Ombudsman's office:

> One of the greatest sources of dissatisfaction with the work of the Ombudsman has been the time it sometimes takes to complete a case. Often this has been for very good reasons. There is a tradition of thorough and complete investigation of complaints which is admirable. As the Ombudsman has said, the Office has 'tended to emphasise thoroughness rather than speed'. But as our predecessors have regularly commented, it is also important to resolve complaints speedily, and they have from time to time voiced their concern about the length of time investigations have taken . . . For cases completed in 1997–98, the average time taken to complete was almost two years (although this figure is somewhat distorted by the clearance of some old cases).
>
> In recent years, both the present Ombudsman and his predecessor have made considerable efforts to reduce the time taken to deal with cases. The main initiatives have been a greater use of more informal techniques to resolve cases; greater delegation; more sophisticated efforts to manage the caseload; and an expansion in staff numbers. The Office began in 1994 to implement a 'fast-track' system, or 'pre-investigation resolution'. Screening is the first

[49] Minutes of Evidence, HC 62-i (2000/1), Q 5 to Sir Michael Buckley.
[50] See *Annual Report for 2000/1*, HC 5 (2000/1).
[51] I. Pugh, 'The Ombudsman: Jurisdiction, powers and practice'.

> stage of the examination of a complaint by the Ombudsman's Office, in which a decision is taken either to reject the complaint or to refer it on for investigation. If it appears at this stage from a complaint that something has gone wrong, the Office may contact the body concerned to ask them informally whether they agree that they have made a mistake. If they do, it asks them to provide a suitable remedy to the complainant . . . In 1997–98 the Office obtained 'due redress' through these means in 110 cases, ranging from an apology to 'the payment of quite large sums of money'. The Ombudsman began to delegate authority to issue reports in 1995. Managers have also been given greater delegated power and freedom to use their staff more effectively depending on the type of cases that they have to deal with. Finally, there is greater stress on concentrating on those aspects of a case which will lead to obtaining redress for the individual complainant 'and less on identifying ancillary systemic weaknesses which it is departments' own responsibility to address'. Such matters 'will be taken up separately with departments, so as not to hold up the processing of individual cases' . . .
>
> We welcome the efforts that have been made to reduce the amount of time taken to deal with cases . . . Like our predecessors, we appreciate the need for thorough investigations in some cases; but we doubt the effectiveness of any system of redress which takes so long to achieve a resolution. **We recommend that the Ombudsman should set as his ultimate aim that all cases should be resolved within six months of their arrival in the Office; and that the Government and he should work together to eliminate the obstacles to achieving this aim. These may include the resources available to him, staff especially, and the powers at his disposal. In particular, it should be made clear to departments that they need to respond fully and urgently to the Ombudsman's requests for information.**[52]

Sir Michael Buckley also decided to change procedure by amalgamating the two stages of screening and investigation:

> After an initial scrutiny to check that a complaint is within my jurisdiction, it is passed to a caseworker who sees it through to a conclusion [which] may range from resolution by making enquiries of the department or agency to a detailed investigation culminating in a statutory report. Investigations are being taken as far, but only as far, as is necessary to reach a fair and soundly based conclusion.[53]

Complaints that fall outside jurisdiction are now classified as 'enquiries' and wherever possible dealt with informally.

The Annual Report for 2003–4 shows the office working more as a modern complaints-handling system:

[52] PASC, *Report of the Parliamentary Ombudsman for 1997-8*, HC 136 (1998/9) [7–9] (fnn. omitted). The SC noted that the number of uncompleted investigations more than one year old had already fallen from 346 in 1997 to 58 a year later. By 2005/6, 38% of PCA complaints were completed in 3 months (target, 80%) 65% in 6 months (target, 85%) 99% within 12 months of being received (target 90%): *Annual Review for 2005/6*, HC 1363 (2005/6). The comparable figures for 2007/8 were: 29% completed within 6 months (target 55%), 75% within 12 months (target 85%) (*Annual Report for 2007/8*, HC 1040 (2007/8)).

[53] *Annual Report for 2000/1*, HC 5 (2001/2) (Sir Michael Buckley). The constant changes in methods of recording not only make comparisons of performance problematic but suggest they may be designed to enhance performance.

The way we work

Once we have received a complaint that has been properly referred by a Member, a named investigator – working under the guidance of an investigation manager and a director of investigations – generally takes responsibility for progressing a complaint from receipt to resolution. Investigation managers and senior investigation officers report the results of all but the most complex or sensitive statutory investigations. Investigators normally issue letters reporting the outcomes of all other consideration of complaints referred by Members, and keep complainants informed of the progress of investigations.

When we receive a complaint from the referring Member we ask four questions:

- Is the complaint about a body and a matter within the Ombudsman's jurisdiction?

If either the subject matter of a complaint or the body complained against is outside the Ombudsman's jurisdiction the matter cannot be considered further. Subject to that:

- Is there evidence of administrative failure?
- Did that failure cause personal injustice which has not been put right?
- Is it likely that the Ombudsman's intervention will secure a worthwhile remedy?

The range of possible outcomes of a complaint to the Ombudsman is as follows:

Outcome 1: If the body complained against or the subject matter of a complaint is clearly outside the Ombudsman's jurisdiction the matter cannot be considered further.

The Ombudsman continues to receive complaints (around 4% of the total received) about areas which are clearly outside her jurisdiction, such as personnel or contractual matters, or decisions which carry a right of appeal. She also receives a number of complaints about planning matters, where the complainants are unhappy with a planning decision, and essentially want her to criticise a planning inspector's professional judgment. In such cases, the most the Ombudsman can do is satisfy herself that the correct procedures have been followed.

Outcome 2: After further consideration of the papers submitted the complaint is not taken further, for example because there is no evidence of maladministration resulting in an unremedied personal injustice, or no added value is likely to be achieved for the complainant.

Outcome 3A: As an alternative to starting an investigation, enquiries are made of the body complained against, and result in an appropriate outcome seen as positive for the complainant. Many complaints can be settled quickly and efficiently in this way without a statutory investigation. It is evident that both complainants and the bodies complained against appreciate the benefits of this approach.

Outcome 3B: Enquiries of the body complained against result in the complaint being seen as one that cannot usefully be taken further, for example because no injustice has been suffered or no added value is likely for the complainant.

> When a statutory investigation is initiated, we issue a statement of the complaint to the body concerned; this is copied to the referring Member. One of two possible outcomes will then result:
>
> *Outcome 4:* The investigation process is taken no further when an appropriate outcome has been achieved or no worthwhile remedy can be achieved.
>
> *Outcome 5:* A statutory investigation report is sent to the referring Member. It is also copied to the body complained against (which has previously had the opportunity to comment on the facts to be reported and their presentation).[54]

The Annual Report for 2006–7 records further changes in the interests of efficiency:

> First, we have introduced a more robust process for deciding whether we could and, if so, whether we should accept a case for investigation. Our aim has been to ensure that our decisions to accept cases for investigation are correct in law, consistent, speedy and strategic in line with the Ombudsman's role as a complaint handler of last resort. Secondly, promoting better local complaints handling and resolution is one of our key objectives. Our assessment process therefore ensures that the body complained about has had an opportunity to resolve the complaint. Also, where appropriate, we ensure that the complainant has made use of any appropriate second tier complaint handler, such as the Adjudicator or the Healthcare Commission. Before we accept a case for investigation we want to be satisfied that:
>
> - the complaint is properly within the Ombudsman's remit and the body complained about has not been able to resolve it;
> - there is evidence of maladministration leading to un-remedied injustice;
> - there is a reasonable prospect of a worthwhile outcome to our investigation.
>
> We have also established a much clearer distinction between cases where we intervene to secure a positive outcome for a complainant without the need to launch an investigation, and cases where we investigate and report. Therefore, in future we will be able to report more accurately and comprehensively on those cases where our intervention short of an investigation has secured the resolution of a complaint, which is an important aspect of our work. Such cases are now recorded as concluded enquiries. The figures in this Report show a substantial number of cases that were initially accepted for investigation but subsequently closed as an enquiry. This is because we reassessed all cases in hand when we adopted the assessment process described above. Subsequently, 373 cases were closed as enquiries rather than as investigations. Overall, while the number of investigations has reduced, our overall workload remains substantially unchanged as more work is being done at the enquiry stage. The changes are more of presentation than of substance.[55]

Statistics for the years 2006–7 and 2007–8 give a fair indication of how complaints are going.

[54] *Annual Review for 2003/3*, HC 847 (2002/3), pp. 9, 10.
[55] *Annual Review 2006/7*, *Putting Principles into Practice*, HC 838 (2007/8).

Table 12.1 Complaints to PCA and HSC in 2006–7 and 2007–8

	In hand		Received		Closed		Carried over	
telephone	0	3	5790	5077	5787	4751	3	329
email	7	20	2145	2996	2132	2287	20	129
written	333	644	6575	5048	6264	4651	644	1047
TOTAL	**340**	**667**	**14510**	**13121**	**14183**	**11689**	**667**	**1505**

Source: adapted from HC 838

Table 12.2 Outcomes: The way inquiries ended in 2006–7

	Information requested	Not properly made	Out of remit	Premature – parliamentary	Discretion not to investigate	With-drawn	Accepted	Total
Telephone	4112	620	634	1	1	10	5	5787
e-mail	148	993	579	1	5	15	15	2132
Written	113	1131	593	479	1035	240	1662	6264
TOTAL	**4373**	**2744**	**1806**	**481**	**1041**	**262**	**1682**	**14183**

Source: adapted from HC 838. (N.B. The Table includes complaints to HSC, except in respect of premature complaints. Comparable figures for 2007–8 were not available.)

6. The 'Big Inquiry'

(a) Grouping complaints: The Child Support Agency

Group complaints have been mentioned as a way of surmounting the embargo on 'own-initiative' investigations. In this type of case, the practice is to select around four sample cases from the group, 'parking' the rest and absorbing them into a Special Report under s. 10(3).[56] Before making a Special Report on the CSA, the PCA had received ninety-five complaints of administrative failings in carrying out the agency's statutory functions of tracing 'absent parents' and collecting maintenance payments from them.[57] Complaints were largely associated with failures of the computer system or with delay. Seventy complaints were accepted for investigation and a representative selection compiled, using the wide discretion to filter others off to alternative complaints systems. In a passage that prioritises the inspectorial function, Mr. Reid explained why this was done:

> It was not the best use of my resources to investigate additional individual complaints unless they involved aspects of CSA work which had not previously been brought to my

[56] Sir Michael Buckley, *Oral Evidence*, HC 62-i (2001/2), questions 23, 24.

[57] For fuller accounts of the CSA affair, see C. Harlow, 'Accountability, new public management, and the problem of the Child Support Agency' (1999) 26 *JLS* 150; G. Davis, N. Wikeley and R. Young, *Child Support in Action* (Hart Publishing, 1998). In 2008, the CSA was wound up and replaced by the Child Maintenance and Enforcement Agency: see Child Maintenance and Other Payments Act 2008.

> attention, or unless the complainant had been caused actual financial loss. I took the view that investigation of a number of representative cases should identify any administrative shortcomings needing to be remedied and that any resulting improvements to the system should bring general benefits in which others should share. Many complaints sent to me were about the policy underlying the legislation. That is outside my jurisdiction. Many complaints were about the financial assessment of support for children and single parents. The assessments are open to appeal to Child Support Appeal Tribunals. I have confirmed with the President of the Independent Tribunal Service that it stands ready to handle such appeals.[58]

In common with the various parliamentary committees that have over time investigated this major administrative failure, the PCA identified systemic failures, notably in the IT systems:

> The computer failings have meant that the CSA have had to deal with an increasing number of cases manually. We recognise the need to do so in order to ensure that individual claims are processed as quickly as possible. However, operating both electronic and manual systems alongside one another have given rise to concerns about the impact on standards of data recording. We are concerned that processing claims manually may generate problems of its own. Another area of significant concern centres on the slow progress made by the CSA in processing new claims and the delays in making assessments. The method of calculating child support was changed in 2003. Although the new calculation rules are simpler and more straightforward than before, management of the transition has presented significant challenges. We have received a large number of complaints about delays and mishandling of cases under the old rules. It is disturbing that there have been systemic failures to keep people informed about what is happening in their individual cases – a basic tenet of good customer service.[59]

But the PCA also criticised the hurried way in which the scheme had been implemented:

> Maladministration leading to injustice is likely to arise when a new administrative task is not tested first by a pilot project; when new staff, perhaps inadequately trained, form a substantial fraction of the workforce; where procedures and technology supporting them are untried; and where quality of service is subordinated to sheer throughput. [60]

The SC's response was to register unease at the absence of any in-house complaints machinery. An Independent Case Examiner (ICE) was put in place in 1997 to handle procedural cases. The first ICE (Anne Parker) hit harder than the PCA, accusing the CSA of grossly inconveniencing many of its clients,

[58] PCA, *Investigation of Complaints against the Child Support Agency*, HC 135 (1995/6), p. i.
[59] PCA, *Annual Review for 2004/5*.
[60] HC 135, p. iii.

slating its 'grudging' reports and failure to learn from past mistakes.[61] Despite the new complaints-handling machinery, however, complaints to the PCA continued to multiply, to the point that the office had to enter into a memorandum of understanding with the CSA as to how they were to be handled. Complaints about the CSA rose steadily but by 2007–8, when the ICE was handling complaints for the DWP generally, John Hanlon, now ICE, felt that his widened remit had been broadly speaking successful:

> DWP customers who previously would either have complained through their Member of Parliament to the Parliamentary and Health Service Ombudsman (PHSO) or who would have given up even though they remained dissatisfied, have had their concerns addressed and had the reassurance that the impartial ICE service can bring. DWP businesses have produced good results by their willingness to attempt to promote resolution of complaints at the earliest opportunity, and to take on board feedback and proposals from this office, with a view to improving their approach to resolving complaints.[62]

In respect of the CSA, however, the story was rather different. The intake of CSA cases had been 'higher than expected'. Complaints went randomly to the CSA, to the ICE, to the PCA – and to MPs, who had experienced a big rise. Complaints might or might not be redirected to another part of the system and might also be re-referred or duplicated. This put pressure on those handling complaints and confused complainants. The volume of complaints was so great that the CSA had had to redeploy staff to work on ICE cases. Moreover, it had become necessary:

> to introduce an 'Exit' arrangement, which allowed ICE to disengage from an unacceptably high number of cases where the CSA had not implemented post-investigation ICE resolutions or recommendations within agreed timescales. Between October 2007 and February 2008, it was necessary to 'Exit' 51 cases. In 47 of these, recommendations have subsequently been satisfactorily implemented, but disappointingly 4 remain outstanding. After discussions with senior CSA management, immediate action was taken to ensure that no further 'Exits' would be required from March 2008.

Perhaps complaints are not so much a 'gift' as a distraction.

(b) Political cases

Group investigations may also be used for publicity purposes, to draw attention to 'hard cases' and pressurise government into a change of political position. This overtly political use of the PCA started very early with the *Sachsenhausen*

[61] First Report of the ICE (1998). There were 28,000 complaints of which 1,078 were investigated. The statistics in the ICE's *Annual Report for 2006/7* do not permit comparison.

[62] ICE, *Annual Report for 2007/8*, available online. CSA complaints are not separately recorded.

case in 1967, where the intervention of Sir Edmund Compton persuaded the government to reconsider the case for compensating those who were not strictly prisoners of war but had been incarcerated in this notorious institution.[63] Shortly after, in the notorious *Court Line* affair,[64] the PCA strayed into high politics by criticising ministerial statements that implied that a troubled holiday firm would not collapse. The Labour Government promptly rejected the finding – it was called by one MP 'a political judgement' – but in the end compensation was paid.

Ten years separated *Sachsenhausen* from *Barlow Clowes*, which established the use of the 'Big Inquiry' for campaigning purposes. Barlow Clowes (BC) dealt in 'bond washing' (which enables highly taxed income to be converted into tax-free or low tax capital gains). It had to be wound up in 1988 after its funds were found to have been fraudulently diverted to high-risk ventures and the directors' private use. The issue was the extent to which the DTI had known or ought to have known of this malpractice and taken steps to warn off potential investors; as in *Court Line*, the objective was government compensation. The affair shows a variety of complaint-handling techniques in action. The first step was to complain to MPs, producing a ministerial inquiry, which reported that 'the department's general handling of the licensing of Barlow Clowes . . . was careful and considered and its actions reasonable'; consequently, the findings provided 'no justification for using taxpayers' money to fund compensation'.[65] Immediately, a large number of dissatisfied MPs turned to the PCA, who responded positively but reminded them of s. 12(3) of the 1967 Act, which put *discretionary* decisions to grant, refuse or revoke licences outside his jurisdiction; only if he found maladministration could he examine the minister's decision. The Government agreed nonetheless to co-operate.

With the PCA treading the same ground as the inquiry, duplication was a danger. However, his largely discretionary documentary procedures permitted him to use witness statements from the inquiry. Unusually, we find intervention from lawyers on behalf of investors and detailed submissions from Barlow Clowes's solicitors; unusually too, Sir Anthony Barrowclough – perhaps influenced by his legal background – and his officials took oral evidence from a large number of witnesses, departmental and otherwise. Unlike Mr Le Quesne, who had conducted the inquiry and had confined his remit narrowly to 'fact-finding', leaving evaluation to the minister, the PCA found maladministration on five counts. His 120,000 word report represented a *de luxe* investigation: 'Rarely, if ever, can any record of administration have been so closely scrutinised, and reconstructed in such detail, as in the Commissioner's report on the Barlow Clowes affair; some of the officials subjected to interrogation certainly

[63] *Special Report of the PCA*, HC 54 (1967/8); HC Deb., vol. 758, cols. 112–16. And see A. Bradley, 'Sachsenhausen, Barlow Clowes – and then?' [1992] *PL* 353.

[64] HC 498 (1974/5). And see R. Gregory, 'Court Line, Mr Benn and the Ombudsman' (1977) 30 *Parl. Affairs* 3.

[65] HL Deb., vol. 500, cols. 1255–69.

felt not a little bruised by the experience.'[66] Construing causation in a way familiar to lawyers, the PCA concluded that 'injustice' had been caused and that compensation was due.

What followed raises questions over the effectiveness of any grievance-handling machinery when it comes up against the highest echelons of government. The minister (Mr Ridley) rejected the PCA's findings, criticising him for a trait that also characterises public inquiries and judicial proceedings: measuring departmental action with the benefit of hindsight against 'a way of proceeding which, after the event, can be shown to be more satisfactory than what was actually done'.[67] Taking legal liability as his benchmark, Mr Ridley asserted that the investigation should never have been undertaken: the complainants were not 'directly affected' (the legal test of standing to sue); the findings trespassed on both the discretionary and policy areas of decision-making, proscribed territory for the PCA by s. 12(3); the decision to recommend compensation departed from established principles of civil liability on the part of regulators; and causation had not been shown. Despite the sound and fury, the Government agreed (as governments almost always do) to substantial *ex gratia* compensation 'in the exceptional circumstances of this case and out of respect for the Office of Parliamentary Commissioner'.

Barlow Clowes proved to be the first in a line of high-profile cases in which victim-support groups utilise the PCA as one of several complaints-handling mechanisms to obtain a political outcome in their favour, notable examples being the *Occupational Pensions* case (see p. 554 below), the *Debt of Honour* affair described in Chapter 17, and the *Equitable Life* investigation into the conduct of the Financial Services Authority (FSA) as regulator of an assurance company. After the first PCA investigation into Equitable Life, EMAG, the action group, threatened judicial review, leading to a negotiated compromise after the PCA agreed to a further and fuller investigation. [68] In the meantime, EMAG had taken the matter to the Petitions Committee of the European Parliament, which recommended that the UK government set up a compensation scheme for victims and criticised the light-touch approach of the UK regulatory system.[69] In an unusually complex investigation leading to a five-volume report,[70] the PCA concluded that maladministration in the shape of 'serial regulatory failure' by the FSA had caused injustice, repeating the

[66] R. Gregory and G. Drewry, 'Barlow Clowes and the Ombudsman' [1991] *PL* 192 and 408, 439.

[67] See HC Deb., vol. 164, cols. 201–12; *Observations on the Report of the PCA,* HC 99 (1989/90). Gregory and Drewy, 'Barlow Clowes and the Ombudsman', p. 429, thought the PCA exceeded his jurisdiction in relation to discretionary decisions and interpreted maladministration very generously.

[68] *The Prudential Regulation of Equitable Life*, HC 809 (2002/3); EMAG press release 'EMAG drops judicial review against the PO' (6 Dec. 2004). And see PCA, *Equitable Life: A decade of regulatory failure*, HC 815 (2007/8).

[69] European Parliament, *Report on the crisis of Equitable Life Assurance Society* (the Wallis Report) 2006/2199 (INI)) P6-A(2007)0203 Final (4 June 2007). Individual petitions were also presented to the Petitions Committee.

[70] PCA, *Equitable Life: A decade of regulatory failure*, HC 815 (2007/8).

recommendation 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, with the aim of putting those people who have suffered a relative loss back into the position that they would have been in had maladministration not occurred'. The initial response of the Government was sympathetic but it was not until January 2009 that the Government, stating that it accepted only some of the PCA's findings, apologised 'on behalf of public bodies and successive Governments stretching back to 1990 for the maladministration that it believes took place'. An adviser was appointed to advise on an *ex gratia* payment scheme to help victims.[71] With a reminder that it had anticipated this scenario, the PCA referred the matter back to PASC:

> Once again, the government has thought fit to reject findings made by the Ombudsman after a lengthy, detailed, complex, and rigorous investigation. This scenario was one considered by the Committee in its report *Justice Delayed: The Ombudsman's report on Equitable Life*, published in December 2008: We urge the government to act without further delay and to accept the Ombudsman's findings of maladministration. She is Parliament's Ombudsman and it is imperative that the government respects her conclusions. There are valid arguments to be had about the scale of compensation and the way that such cases should be handled in the future, but we would be deeply concerned if the government chose to act as judge on its own behalf by refusing to accept that maladministration took place. This would undermine the ability to learn lessons from the Equitable Life affair.[72]

7. Occupational pensions: Challenging the ombudsman

The prolonged debate over occupational pensions provided – or in practice not provided – by private-sector commercial firms had its roots in the fraudulent activities of Robert Maxwell, whose inroads into the pension funds of his enterprises prompted the establishment of a committee to review pension law. Its report led to the Pensions Act 1995, which established the Occupational Pensions Regulatory Agency (OPRA) and introduced a Pensions Compensation Board. To protect those in occupational pension schemes, it laid down a minimum funding requirement (MFR) to ensure that those in charge of occupational pension schemes could meet their liabilities to existing pensioners and obligations to those not yet on pension. It would seem that the limitations of the MFR were not widely realised or understood even by professional advisers. The Pensions Act 2004 replaced MFR with scheme-specific requirements and a Pensions Protection Fund (PPF) funded by a levy on the pensions industry

[71] See *The Prudential Regulation of the Equitable Life Assurance Society: the Government's response to the Report of the Parliamentary Ombudsman's Investigation*, Cm. 7538 (2009). The claim was for £4.5 million.

[72] PCA, Memorandum to PASC (26 Jan 2009), available on the EMAG website. The reference is to HC 815 (2007/8).

to help those whose schemes had already been wound up. It was widely felt, however, that these measures were still insufficient, as they left around 100,000 people either entirely uncovered or insufficiently funded. At this point, the Government balked at acting as guarantor to private industry, claiming that £15 billion would be necessary to make reparation. This sum was hotly disputed by the Pensions Action Group (PAG), set up to fight for compensation and its adviser, Ros Altmann, who estimated the true figure at £3.7 billion, spread over sixty years. This disagreement lay at the heart of the compensation struggle.

In time, 500 direct complaints from aggrieved pensioners, augmented by over 200 referrals from MPs of all parties, reached the desk of the PCA. The office selected four appropriate test cases for investigation and launched a 'Big Inquiry'.[73] The main allegations were that:

(i) The legislative framework from commencement of the Pensions Act 1995 to commencement of the Pensions Act 2004 had afforded inadequate protection of the pension rights of members of final salary occupational pension schemes.

(ii) On a number of occasions, ministers and officials had ignored relevant evidence when taking policy and other decisions related to the protection of pension rights accrued in such schemes.

(iii) The information and advice provided by a number of government departments and other public bodies about the degree of protection that the law provided to accrued pension rights had been inaccurate, to the extent that it had amounted to the misdirection of the members and trustees of such schemes. Particularly criticised were a 1996 DSS leaflet entitled 'The 1995 Pensions Act' and a 2002 leaflet, 'Occupational Pensions: Your Guide'.

(iv) Public bodies were responsible for unreasonable delays in the process of winding-up schemes.

These complaints posed several jurisdictional problems. First, category (i) was entirely ruled out on the ground that the PCA had no jurisdiction to question the *content* of statute law (see the earlier discussion of the 'bad rule' problem). Secondly, although both the Treasury and Department of Work and Pensions fall squarely within the PCA's remit, the FSA had not been added to the Schedule to the 1967 Act, while other bodies involved, such as the Institute of Actuaries, were private bodies not amenable to the jurisdiction of any public ombudsman. Thirdly, category (ii) complaints involved ministerial discretion and were hence subject to the restrictions of s. 12(3) (see *Barlow Clowes*, p. 552 above). Finally, some allegations, notably those in category (iii) could – and in the event did – give rise to a judicial remedy, requiring the PCA to exercise her discretion under s. 5(2). Undeterred by these obstacles, the PCA told MPs:

[73] PCA, letter to all MPs, 6 Nov. 2004. Full details of the selected cases are given in Ch. 2 of the final Report.

> I had been shown indications that maladministration might have caused injustice to those who had complained to me – and to those in a similar position as those complainants. I also believed that my ability to access evidence which was not available to complainants meant that an investigation by me would achieve a worthwhile outcome, whatever its result. I therefore decided to conduct an investigation.[74]

An unkind critic might call this a 'fishing expedition'.

On 15 March 2006, the PCA laid her mammoth review – in the course of which the office had crawled through departmental files and considered a range of reviews and reports on pension policy – before PASC as a Special Report under s. 10(3),[75] a step necessitated by the Government's unfavourable response to the draft report. There were three findings of maladministration:[76]

- Official information – about the security that members of final salary occupational pension schemes could expect from the MFR provided by the bodies under investigation – was sometimes inaccurate, often incomplete, largely inconsistent and therefore potentially misleading. This constituted maladministration.
- The response by DWP to the actuarial profession's recommendation that disclosure should be made to pension scheme members of the risks of wind-up – in the light of the fact that scheme members and member-nominated trustees did not know the risks to their accrued pension rights – constituted maladministration.
- The decision in 2002 by DWP to approve a change to the MFR basis was taken with maladministration.

The PCA also found injustice in the shape of financial loss, a sense of outrage, and considerable distress, anxiety and uncertainty, coupled with inability to make informed choices or to take remedial action. None of this had been remedied.

In the most controversial section of a controversial Report, Ms Abraham, choosing her words very carefully, made five recommendations as to redress:

> - I recommend that the Government *should consider whether* it should make arrangements for the restoration of the core pension and non-core benefits promised to all those whom I have identified above are fully covered by my recommendations – by whichever means is most appropriate, including if necessary by payment from public funds, to replace the full amount lost by those individuals.
> - I recommend that the Government *should consider whether* it should provide for the payment of consolatory payments to those scheme members fully covered by my

[74] PCA, letter to all MPs, 6 Nov. 2004.

[75] PCA, *Trusting in the Pensions Promise: Government bodies and the security of final salary occupational pensions*, HC 984 (2005/6). Unusually, the Government Response is annexed to the Report.

[76] HC 984 [5.164].

> recommendations – as a tangible recognition of the outrage, distress, inconvenience and uncertainty that they have endured.
> - I also recommend that the Government *should consider whether* it should apologise to scheme trustees for the effects on them of the maladministration I have identified, particularly for the distress that they have suffered due to the events relevant to this investigation.
> - I recommend that the Government *should consider whether* those who have lost a significant proportion of their expected pensions – but whose scheme began wind-up in the year prior to the new regime becoming operational – should be treated in the same manner as those fully covered by my recommendations.
> - I recommend that the Government *should conduct a review* – with the pensions industry and other key stakeholders – to establish what can be done to improve the time taken to windup final salary schemes.[77]

The curt response was that, with the exception of the final suggestion for a review, the Government was 'not minded to accept the Ombudsman's findings of maladministration nor to implement her recommendations'.[78] A statement on the departmental website justified the apparently negative decision:

> Although the Government does not accept liability for these losses, it agrees that there should be a significant package of support, which is why we have committed an additional £2bn to the FAS [Financial Assistance Scheme], which will help about 40,000 people . . . We have real sympathy for those who have lost their occupational pensions and this is why we have put the FAS in place. However, we do not believe that the taxpayer should be expected to underwrite what were private company pension schemes.[79]

Neither the PCA nor PASC was minded to leave matters there. Ms Abraham retorted that nothing in the Response had persuaded her that her findings and recommendations were unreasonable, while Dr Wright, chair of PASC, told the House:

> It is the first time – the only time; the unique time – that a case has arisen in which not only has the finding of maladministration been rejected by the government of the day, but the injustice has remained unremedied. Both components of the ombudsman's work have been set aside: the finding of maladministration and the description of how it might be put right. It is an important moment for the House when Parliament's ombudsman is in such a position over an issue of this kind . . .
>
> I was surprised and disappointed, as no doubt was the ombudsman, by the way in which her report was immediately set aside. I think she was particularly troubled by the fact that,

[77] Selected recommendations from HC 984 [6.15] [6.24] [6.25] [6.28] [6.34], italics and bullet points ours.

[78] HC 984, Annex D.

[79] Mr Purnell (Minister for Pensions Reform), 'Government responds to Public Administration Select Committee' DWP website (2 Nov. 2006).

> in her view, the report had been misrepresented. She had not said to the Government, 'You must sign a blank cheque straight away: that will take care of it.' However, I think she was even more upset by the rejection of her finding of maladministration.[80]

The minister was not minded to back down. The Government respected the role played by the Ombudsman, and would continue to do so but:

> the case we have been discussing is exceptional. The Committee asked us to explain whether it was a new policy or a new approach. The case is exceptional. We shall continue our approach, which is to respect the ombudsman. In fact, in 39 years, this is the first time that my Department has not responded positively to an ombudsman's findings . . .
>
> [The information given] was the right level of information to give, given the context. We are talking about introductory, very general leaflets. . . If we had given the amount of detail that is suggested, with hindsight, we should have done, they would have been not leaflets but handbooks, and they would not have served the purpose for which they were intended.[81]

The next shots in a rapidly escalating war came from PASC, which issued a new report[82] brushing aside as 'simply untenable' the contention that the Government's leaflets were designed 'as part of a wider set of communications to encourage those who had not made provision for their retirement to consider doing so and gave people a starting point for this, as is made clear'. PASC strongly supported the PCA's conclusions and recommendations; the Government was being unreasonable and ungenerous; it should reconsider its parsimonious attitude to redress. Insisting that the disagreement between it and PASC was 'not about *whether* there should be some support, but about *how much* support there should be', the Government held its line. It made a minor concession to look again in the light of the PASC report at what extra support could be made available within the existing framework.[83]

A new attack was about to open on a new battlefield. A test case was brought by four pensioners, arguing that ombudsman findings are binding on the public authority against which they are made, either (a) absolutely, or (b) unless they can be shown objectively to be flawed or unreasonable. Pointing to s. 10(3) of the 1967 Act, the Government replied that the proper recourse was a special report to Parliament; the PCA was 'not there to make binding findings of fact. The function for a s. 10(3) special report is no more and no less than to provide a stimulus to political debate'. Bean J disagreed:

[80] HC Deb., col. 512 (7 Dec. 2006). Dr Wright was speaking in a debate on an adjournment motion asking that funds be allocated to the DWP and set aside for full payment of losses.

[81] *Ibid*., cols. 542–5.

[82] PASC, *The Ombudsman in Question: The Ombudsman's report on pensions and its constitutional implications*, HC 1081 (2006/7).

[83] *Government Response to The Ombudsman in Question: The Ombudsman's report on pensions and its constitutional implications*, Cm. 6961 (2006).

> As it happens, the present case is about a decision of a Secretary of State announced in an oral statement to the House of Commons, affecting many thousands of people, and concerning a significant issue of public policy. But much of the Ombudsman's work concerns decisions of non-departmental public bodies or 'quangos' affecting a single individual or family. If [this] submission is correct, the non-binding nature of the findings of fact would apply equally in such a case.[84]

The judge made three findings: (i) in agreement with the PCA, he found the departmental advice to be 'inaccurate and misleading'; but ruled (ii) that her reasoning on causation was 'logically flawed and in that sense unreasonable'; and (iii) that the department was entitled to accept the 'clear recommendation' from the leading professional body and its own specialist adviser. 'The Ombudsman was in effect expecting the Secretary of State, who is not an actuary, to keep a watchdog . . . and then bark himself.' This reasoning was criticised by the Court of Appeal, which thought the true question was:

> not whether the defendant himself considers that there was maladministration, but whether in the circumstances his rejection of the ombudsman's findings to this effect is based on cogent reasons.[85]

Applying a test of rationality to each of the DWP decisions, the Court of Appeal ruled that it had been irrational to reject one of the PCA's findings of maladministration causing injustice. The DWP had failed properly to consider those findings that dealt with outrage and loss of opportunity to take remedial action. The DWP should therefore reconsider its response.

While PASC maintained its support for the PCA, requiring the Government to respect her recommendations, it also expressed concern over the propensity of dissatisfied complainants to turn for relief to the courts:

> The Parliamentary Commissioner Act was established to deal with maladministration; i.e., actions or failures which cannot be remedied in the courts for either legal or practical reasons, but which nevertheless cause injustice. To ask a court to review the Ombudsman's findings would effectively make matters which are currently not justiciable subject to judicial decision. In these circumstances Parliament's role would be diminished to that of an interested bystander. We believe that when there are disputes between Government and the Ombudsman, Parliament is the proper place for them to be debated.
>
> However, this system will only work if the Parliamentary Ombudsman, the Government and Parliament share a broad common understanding of what maladministration might be and who should properly identify it. If it became clear that the Government routinely considered rejection of a finding of maladministration, then that common understanding would no longer exist. The first step towards resolving such difficulties would be for the House

[84] *R (Bradley) v Work and Pensions Secretary* [2007] EWHC 242.
[85] *R (Bradley) v Work and Pensions Secretary* [2008] EWCA 36 [72].

> to debate these matters. However, if that failed, new legislation might be needed, or the Government could attempt to use judicial review to establish where current boundaries lie. We hope it will not come to that . . .
>
> It would be extremely damaging if Government became accustomed simply to reject findings of maladministration, especially if an investigation by this Committee proved there was indeed a case to answer. It would raise fundamental constitutional issues about the position of the Ombudsman and the relationship between Parliament and the Executive.[86]

Next in time came a double-edged reply from the ECJ to a preliminary reference made[87] under TEC Art. 234 by the High Court in an action for damages. Asked to construe an EU directive on the protection of employees in the event of insolvency of their employer, the ECJ issued a cautious ruling: the provision made by the UK government was insufficient to comply with the directive, because it was limited to 20 per cent or 49 per cent of the benefits to which an employee was entitled. On the other hand, the ECJ thought that pension rights 'need not necessarily be funded by the Member States themselves or be funded in full' and, even if the directive had not been properly transposed, state liability was 'contingent on a finding of manifest and grave disregard by that State for the limits set on its discretion'. This would have to be proved to the satisfaction of the High Court. Again the Pensions Action Group claimed victory.

In parallel, changes were taking place as part of a wider review of pension provision.[88] A bill introduced into the House of Commons made improvements to the FAS scheme, guaranteeing 80 per cent of pension for affected employees up to a cap of £26,000 and extending relief to members of some solvent schemes, enough to satisfy the ECJ ruling. Welcoming the improvements, PASC claimed the credit:

> Although the Government continues to deny that any maladministration occurred, the Parliamentary Ombudsman's intervention has already resulted in significant improvements to the position of those whose pension funds wound up underfunded.
>
> - Even though the Government rejected the Ombudsman's report, it brought forward its review of the FAS in consequence, and substantially improved the scheme. This initial improvement was itself significant; it meant that some help was available for those within 15 years of scheme pension age, rather than being restricted only to those within three years of retirement.

[86] HC 1081 [75–8].

[87] Case C-278/05 R*obins and Others v Work and Pensions Secretary* [2007] ELR I-1053. See also Art. 8 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. The state liability principle of EC law, on which the action was based, is explained below at p. 763.

[88] DWP, *Simplicity, Security and Choice: Working and saving for retirement: Action on occupational pensions*, Cm. 5835 (2003); *Security in Retirement: Towards a new pensions system*, Cm. 6481 (2005/6).

- After our report and the subsequent judgment of the High Court, the Government announced that the FAS would be extended still further, so that all members of affected pension schemes would receive 80% of their core pension entitlements. That promise has resulted in the amendments to the Pensions Bill already described.
- The Government's review of the FAS will explore whether there are resources, other than the public purse, which can be used to increase the funds available to scheme members.

We recognize that the Parliamentary Ombudsman's report has already resulted in significant concessions from the Government, and significant improvements in the assistance available to those who have lost their pensions. The Ombudsman system has proved to be effective even in the face of Government resistance.[89]

But the concessions were not enough to satisfy PASC. It fought on to see the PCA's recommendations fully implemented:

> It might be argued that redress should be offered to those covered by the Ombudsman's finding of maladministration, rather than all those affected by the loss of their pensions during the period in question. We consider on this that the Government approach has been correct. The most effective response to the Ombudsman's report is to amend the Financial Assistance Scheme, particularly since some of the losses were due to policy deficiencies, which fall outside the Parliamentary Ombudsman's remit, but which Parliament can and should remedy. Our remarks apply to all those in schemes which began to wind up before the regime established by the Pensions Act 2004 came into force.[90]

By now the bill was in the House of Lords, where an amendment was inserted, requiring an increase to FAS payments to bring them up to the level of the PPF. Again PASC reported, accusing the Government of 'using the position of scheme members to exert pressure on employers . . . the Government should not use the indigence and distress of those who have suffered considerable losses to try to blackmail them to do so'.[91] The Government did not concede. The Commons rejected the Lords amendment on the ground that it involved the expenditure of public funds. The Lords did not insist and the legislation duly passed into law as the Pensions Act 2007.

What should we make of these two epic inquiries? Like *Barlow Clowes*, both concern the vexed question of compensation for the *supervisory* and *regulatory* functions of government and public bodies. In this way, each is similar, and needs to be related, to the rules of legal liability in cases such as *Three Rivers* case discussed in Chapter 17 (see p. 767 below). In none of these cases is

[89] PASC, *The Pensions Bill: Government Undertakings relating to the Financial Assistance Scheme*, HC 523 (2006/7).

[90] *Ibid*. [12].

[91] PASC, *The Pensions Bill and the FAS: An update including the Government Response to the 5th Report of Session 2005-6*, HC 992 (2006/7).

government the primary wrongdoer; as the most solvent party, it is being asked to stand in as guarantor for risks created by and losses caused by other actors;[92] to put this differently, the end of the security line has been reached. In this respect, the position is broadly comparable to the line taken later in the larger financial disasters caused by the failure of Northern Rock and other banks, the difference being that government was there left free to choose on what terms to intervene. This is what it was arguing for in the *Occupational Pensions* and *Equitable Life* affairs.

Note too how the use of the PCA as a weapon in these political struggles is escalating. Complaints and appeals multiply: to MPs, ombudsmen, Parliament and every court that might have competence, as all available machinery is tested. Note too how the nature of investigations has changed. These are much more like the 'big public inquiry' discussed in the next chapter than standard ombudsman investigations; indeed, as in *Barlow Clowes*, they sometimes run alongside an inquiry. Unlike inquiry panels, however, the PCA is not specially selected for her expertise and this must, over time, bring into question the competence of the office to handle such matters. Finally, the ruling that findings of fact – surely never intended to be binding – now bind the Government invites recourse to the courts. In short, with the 'Big Inquiry', the PCA is moving in a new direction that is not without its dangers and which may end by imperilling the success of the ombudsman scheme.

8. Control by courts?

It is highly improbable that anyone in 1967 foresaw that ombudsman decisions might one day be judicially reviewed. Statute dealt specifically with boundary disputes between courts and tribunals (s. 5(2)) and left the PCA such wide discretion whether or not to investigate that it would have seemed unlikely to be challenged. In fact the first (unsuccessful) application for review of the PCA was not long in coming[93] but it was not until the *Balchin* affair (see p. 481 above) that a PCA decision was quashed and twice sent back for reconsideration on the ground that the PCA had irrationally failed to take account of the supervisory powers of central government departments over *ex gratia* payments by local authorities.[94] In the meantime, as we saw in Chapter 10, courts were happy to review the decisions of other public and statutory ombudsmen. From the standpoint of the judiciary this step is entirely logical: either the ombudsmen, as investigators, are carrying out an administrative function, in which case their decisions are reviewable; or

[92] See for further explanation, J. Stapleton, 'Duty of care: Peripheral parties and alternative opportunities for deterrence' (1995) 111 *LQR* 301.

[93] *Re Fletcher's Application* [1970] 2 All ER 527 was a challenge to the PCA's refusal to investigate.

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

if the ombudsmen are adjudicators, they can be classified with subordinate jurisdictions.

Not surprisingly, given what has been said about the preference in our legal culture for the adversarial model of justice, challenges were largely on due-process grounds. In the case of the PCA, the natural preference was probably intensified by the reality: the administrative stage of complaints-handling takes place within departments, the process is not transparent and the nominal complainant is the MP. There have been moves towards continental 'contradictory' procedure if not to a full-blown adversarial model; as we have seen, draft recommendations must be presented to the department, giving it an opportunity to respond. Named individuals are also provided with a copy of complaints against them and current guidance warns public servants that any named individual must (i) be notified of the nature of a complaint about them and (ii) be given an opportunity to explain their position with the help of a trade union representative. Where the complainant is legally represented (which remains unusual), anyone complained about has a right to be legally represented.[95] This means that an opportunity must be afforded to contradict and correct findings of fact or inferences drawn by the investigator. Nonetheless, to lawyers trained in adversarial procedure, the procedure of the PCA is criticisable. There is no statutory right for a complainant to see the draft report, while the final report is made to the referring MP, although in practice the complainant receives a copy. This procedure has been condemned by complainants, who feel that they are being pushed to the sidelines. In *Dyer*,[96] however, the Divisional Court rejected an application for judicial review based on breach of the rules of natural justice. The court upheld the standard procedure on three different grounds: (i) the department but not the anonymous complainant is subject to public criticism; (ii) it is essential that the department suggests and discusses redress with the PCA; and (iii) it is necessary, in order for notice under s. 11(3) to be given if documents or information are to be withheld from further disclosure.

In *Cavanagh*,[97] the HSC was approached by a parent who complained that an NHS Healthcare Trust had improperly intervened in the treatment of his epileptic child by setting aside the existing arrangements without providing a satisfactory alternative. The HSC rejected the complaint and, acting on the evidence of two expert reports she had personally commissioned, blamed the consultants in charge of the case. Distressed at the unexpected turn taken by the investigation, the father joined with the impugned doctors to seek judicial review. The Court of Appeal ruled that the investigative and inquisitorial nature of the proceedings

[95] Cabinet Office, 'Handling of Parliamentary Ombudsman Cases', DEO(PM)(96)4 (1996), available online. See also Cabinet Office, 'The Ombudsman in your files' (1995).

[96] *R v Parliamentary Commissioner for Administration, ex p. Dyer* [1994] 1 All ER 375.

[97] *Cavanagh and Others v Health Services Commissioner* [2005] EWCA Civ 1578. In extending the inquiry to the doctors' conduct, the HSC relied on the provisions of the Health Service Commissioners (Amendment) Act 1996, extending the HSC's jurisdiction in matters of clinical judgement, which had just come into force.

did not entitle the HSC simply to investigate and make findings on matters not the subject of the complaint. There were legal limits to her powers:

> *Sedley LJ:* Certain clear propositions emerge from the legislation. First, the Commissioner's functions are limited to the investigation of complaints: she has no power of investigation at large. Secondly, the statutory discretions which she possesses, while generous, go to (a) whether she should embark upon or continue an investigation into a complaint (s. 3(2)) and (b) how an investigation is to be conducted (s. 11(3)). They do not enable her to expand the ambit of a complaint beyond what it contains, nor to expand her investigation of it beyond what the complaint warrants. This legislative policy is emphasised by the distinction contained in s. 11 between persons 'by reference to whose action the complaint is made' and who are automatically entitled to respond, and others who may become implicated but who enjoy no such automatic right. In the present case, one consequence of this scheme was that, although they were interviewed in the course of the investigation, the first the two doctors knew of the full criticism they were facing was when they were sent the draft Report for the purpose only of proposing factual adjustments to it.
>
> This does not mean that the ambit of every complaint or the scope of every inquiry is a question of law: it is for the Commissioner not only to decide what constitutes a discrete complaint but to decide what questions it raises and to investigate them to the extent she judges right. But there are legal limits. One may well be . . . that if she does not elect to discontinue an investigation she cannot truncate it. Another is that how she investigates a complaint is subject not only to the express requirement of notice to those directly implicated (s. 11(1)) but to the common law's requirements of fairness in so far as the statute itself does not restrict them. A third, central to these appeals, is that a point may come at which the pursuit of an investigation goes beyond any admissible view either of the complaint or of what the statutory purpose of investigation will accommodate.

The *Bradley* decision, however, changed the ballgame. In previous cases, complainants were questioning the PCA's discretionary choices. Here they were effectively asking for her findings to be enforced. Yet, as we saw earlier, ombudsman recommendations are not enforceable; this is indeed a characteristic of most ombudsman schemes and one generally regarded by ombudsmen as desirable. Although this is largely a convention, it is highly unusual for the PCA's recommendations to be rejected and, as we have seen, parliamentary pressure usually prevails at the end of the day. There is much force too in the argument advanced by PASC in the *Occupational Pensions* case (see p. 554 above) that enforcement is a matter for Parliament rather than for the courts. Local ombudsmen, who over the years have had more trouble in enforcing their decisions, tend to agree that 'providing a power of compulsion would frankly be overkill and might jeopardise what is a . . . generally very cooperative relationship'.[98] Thus the most curious feature of the *Bradley* ruling is, to quote

[98] Local Government and Health Service Commissioner to Wales, cited by R. Kirkham, B. Thompson and T. Buck, 'Enforcing the Recommendations of the Ombudsman' [2009] *PL* 510, 522.

a recent commentary, 'that it appears to have confirmed in law a position that no one asked for and few people were aware of';[99] and, it might have added, that almost no one seems to have wanted. Let us hope that the more activist line the courts are clearly taking will not do damage to ombudsman schemes.

9. Conclusion: An ombudsman unfettered?

Over its 40 years of existence, the office of PCA has evolved a distinctive role, atypical of most ombudsmen. Successive PCAs have utilised their special position to adopt a firefighting stance, though much has depended on the predilections of the current incumbent. At one end of a spectrum, Cecil Clothier envisaged the office as a substitute for a 'small claims court', handling group complaints only where each complainant could show 'injustice' and often turning away representative actions as political. William Reid, like Idwal Pugh before him, treated multiple complaints as indicative of poor performance, using his discretion to make a selection of symptomatic cases. Ten years on, at the other end of the spectrum, Ann Abraham takes her fire-watching role for granted and 'Big Inquiries' in her stride.

Parliamentary support has been important. When the journey started, the PCA was responsible to the Select Committee on the Parliamentary Commissioner for Administration. PASC, to which the PCA now reports, takes its work seriously under the steady chairmanship of Tony Wright and is, as we have seen in other chapters, ambitious. PASC's interest in good governance has enhanced the fire-watching function and provided support for its officer in hard times. PASC has added legitimacy and authority, enabling the PCA to direct officials and give guidance on good administrative practice, complaints-handling and appropriate redress and remedies. Kirkham, in his fortieth-anniversary review, also focuses on fire-watching, noting a growing tendency to target 'major systemic concerns about the operation of an investigated department'. He warns, however, against settling complaints at an early stage 'before establishing whether there are broader lessons to be learned'.[100]

The PCA now possesses and has used to good effect many of the qualities listed by the EO as characteristic of the office:

- a personal dimension to the office, with an office-holder who is more widely recognised
- independence
- free and easy access for the citizen
- primary focus on the handling of complaints, whilst having the power to recommend not only redress for individuals but also broader changes to laws and administrative practices

[99] *Ibid*., p. 512.

[100] R. Kirkham, *The Parliamentary Ombudsman: Withstanding the test of time*, HC 421 (2006/7), p. 11. See also R. Kirkham, 'Auditing by Stealth? Special reports and the Ombudsman' [2005] *PL* 740.

- use of proactive means – successive PCAs have shown creative skill in providing themselves with weapons the legislature deliberately chose not to provide: the power to challenge bad rules, for example, or the 'class investigation' into endemic maladministration.
- effectiveness, based on well-reasoned reports and reliance on persuasion plus the power of the Select Committee rather than on the power to issue binding decisions, as discussed in the previous section – there has been regular publication of guidance on complaints-handling, notably the *Principles of Good Administration* and *Redress*.[101]

These are the qualities that matter from the top-down perspective we have adopted. High visibility and free and easy access for the citizen, qualities rated highly by Gregory and Giddings, are not especially important from this perspective. The PCA gains from the MP filter. It is a cheap and easy way of filtering out 'small claims' with the inestimable advantage of a widely accessible and well-known outreach service: the MP and his or her surgery.[102] We should not necessarily be worried if it has the effect of prioritising the concerns of MPs; MPs are concerned to get re-elected and their complaints reflect the contents of their mailbags, as we can tell from the way they pushed *Barlow Clowes*, the *Child Support Agency*, *Tax Credits* and *Occupational Pensions* investigations. The MP filter might also be credited for acting as a partial substitute for the power to open 'own initiative inquiries' and playing a part in the development of the 'Big Inquiry'.

It might at first seem that the PCA excels in 'big inquiries', where the exhaustive investigative procedure, too costly, cumbersome and slow for trivial complaints, comes into its own. Over the years, the office has honed its techniques until, with *Barlow Clowes*, *Debt of Honour* and *Occupational Pensions*, its 'Rolls Royce' investigatory procedures have evolved into a formidable investigative weapon of inquiry and the relationship with the Select Committee is highly effective, as we saw in the *Occupational Pensions* affair. It is fair to see it as a sort of standing public inquiry, able to handle complex investigations as fast and effectively as a public inquiry but at less expense. Kirkham applauds the tendency for investigations to become 'more high profile', calling the development 'one of the most important contributions that the Office can bring to the constitution'.[103] It could, however, denote politicisation and an element of capture by pressure groups and political institutions. It might too, as we have suggested, have the unintended effect of bringing the ombudsmen into too close a relationship with the courts.

But the PCA has a 'small claims' function and stands at the apex of a complaints-handling pyramid. Evaluating the office from the PDR angle means

[101] PCA, *Principles of Good Administration* (2007) *Principles for Remedy* (2007) and *Principles of Good Complaint Handling* (2008) all available on the website..

[102] R. Gregory and J. Pearson, 'The Parliamentary Ombudsman after twenty-five years' (1992) 70 *Pub. Admin.* 469, 496.

[103] Kirkham, *The Parliamentary Ombudsman.*

prioritising different ombudsman qualities, such as those listed by the BOIA: clarity of purpose, accessibility, flexibility, openness and transparency, proportionality, efficiency and quality outcomes. Lady Wilcox, late of the Citizen's Charter Unit, once argued that all ombudsmen should actively promote their services, seeking the help of the media to advertise their wares; they should appear on 'phone-in' programmes and participate in other high profile events. So far as possible their procedures should be informal; they should accept telephone complaints, travel through the country, and establish local offices. In this way their outreach could be extended to 'people who are not well informed about their rights and entitlements' and 'reach the more vulnerable groups in society, the socially disadvantaged and the underprivileged, whose need for help may be greater'.[104]

Here the PCA scores less highly. There is too much truth in Michael Buckley's first impression of his office as like 'an excellent research department in the Arts faculty of one of our older universities':

> Its staff were careful and conscientious. It had a high regard for truth, intellectual honesty in its investigations, and scholarly accuracy. It had a good deal less regard for urgency, for any practical use to which a particular investigation might be put, or for user-friendliness . . . The Office's Annual Reports were an illustration of these attitudes: around 100 pages of densely packed letterpress accompanied by erudite quotations and scholarly footnotes, and largely unrelieved by such concessions to weakness as side-headings, let alone the expensive frivolity of pictures.[105]

The style of the inquisitorial PCA investigations, anonymous, with restricted rights of participation for the complainant and ending in a report to an MP and Select Committee, all act as barriers to accessibility. Again, no complaints system can honestly be described as accessible if access depends on the unstructured discretion of MP intermediaries. And a good understanding of an ombudsman's powers is only possible if the jurisdictional criteria are simple, which is, unfortunately, not the case. A major obstacle to clarity lies in the fact that only bodies *specifically listed* in Sch. 2 of the 1967 Act can be investigated; legislative action is badly needed to reverse this position. The fuzzy boundaries of the term 'maladministration' are, on the other hand, probably advantageous; they allow the PCA considerable discretion, which has usually been used to good effect.

The appointment of the present incumbent, with her background in citizens' advice bureaux, was a signal for change. Ann Abraham takes visibility and accessibility very seriously. Applauding 'the way in which this now venerable institution has begun to embrace the modernising agenda that has swept through public life in the last decade and more', she has promised a regime 'fit

[104] J. Wilcox, 'A consumer organisation view' in R. Gregory *et al*., *Practice and Prospects*, pp. 61–6.

[105] M. Buckley, 'Through the retroscope', *The Ombudsman* (December 2003), p. 17.

for purpose well into the twenty-first century'.[106] In line with this promise, the PCA is usually now styled the 'Parliamentary Ombudsman' and the office is less elite and more visible. An up-to-date website enhances visibility, reports are no longer desiccated and impermeable but garnished with pictures and case studies, and some at least of the informal methods recommended by Lady Wilcox are being tried. This is beginning to look like the sort of complaints system that typical NHS patients, pensioners, asylum seekers and those in receipt of income support, might feel comfortable in using. And reforms introduced by Sir Michael Buckley (such as the screening and fast track procedures described above) have had the effect of tilting the balance 'in favour of speed rather than thoroughness'.[107] Turn-around times are now fairly respectable and, even if the office is still below its targets, they compare relatively favourably with other complaints-handling systems.[108]

At the end of the day, however, the public judges effectiveness by final outcome, something that is hard to evaluate. Ombudsman recommendations, we have said, are almost invariably carried out. And if initially apology from a senior officer was seen as sufficient redress, those days are long gone; the CSA was, for example, strongly criticised in a Special Report for failing to provide appropriate remedies other than apologies.[109] Monetary compensation and how it should be calculated was effectively the point of disagreement in the *Channel Tunnel* case, where delays in building the high-speed rail link through Kent had put the project in limbo, causing hard cases of planning blight. There were sharp exchanges between the PCA and Permanent Secretary when the PCA ruled that this was maladministration causing injustice meriting a measure of compensation. The outcome was a new compromise, when the Government conceded new 'Indicative Guidelines' for cases of exceptional hardship, agreed by the SC.[110]

The PCA also requires a general rectification of error, often involving large numbers of cases, and recent Guidance places much emphasis on 'putting things right' and seeking continuous improvement.[111] An earlier statement from William Reid captures the modern priorities:

> Apologies, and acknowledgements of fault and the provision of financial recompense are undoubtedly important – but there is more to redress than that. Complainants need

[106] A. Abraham, 'Introduction' in Kirkham, *The Parliamentary Ombudsman: Withstanding the test of time*.

[107] P. Leyland and G. Anthony, *Textbook on Administrative* Law (Oxford University Press, 2008), p. 136.

[108] The *Annual Report for 2006/7*, HC 838 (2006/7), pp. 58–60, gives clear-up rates of 15% within 3 months; 43% within 6 months; and 79% within one year.

[109] *Investigation of Complaints against the Child Support Agency,* HC 135 (1995/6); *The Child Support Agency,* HC 199 (1994/5), pp. xii–xiv.

[110] PCA, *The Channel Tunnel Rail Link and Blight: Investigation of complaints against the Department of Transport*, HC 193 (1994/5). The Government agreed to look again at a limited scheme 'for those affected to an extreme and exceptional degree'.

[111] PCA, *Principles for Remedy* (2007), available online.

> an assurance that, so far as is humanly possible, identified failings will not be repeated. Appropriate corrective action helps others to avoid sustaining comparable injustices and it improves the quality of service generally available. That is why I attach particular importance to getting rid of systemic defects, those which are liable to affect adversely hundreds or perhaps thousands of individual[s] . . . That is why in their inquiries into a case my staff make a point of ensuring that any wider implications to an individual complaint have been identified and dealt with. That takes time, which I regret. There is still much truth in the old saying that 'Prevention is better than cure'.[112]

This is a firefighting function that courts cannot undertake. Even JUSTICE has admitted that, in respect of redress and enforcement, there is really 'no problem to be tackled'.[113]

[112] HC 20 (1995/6), p. vii.
[113] From JUSTICE–All Souls Review, *Administrative Justice* [5.36–9].