

The Function of the Ombudsman in Local Government

by

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The Parliamentary Commissioner Act 1962 established the office of the Ombudsman as an independent means of review of administrative action by public officials in central government departments.

The Act was a recognition of the inadequacy of existing methods of controlling the exercise of statutory authority by administrators who frequently enjoy discretionary powers.¹ The Ombudsman's jurisdiction was extended to almost all local authorities by the Ombudsman Act 1975,² and followed the reforms of the Local Government Act 1974, as "part of a great effort to revitalise local government."³ Successive amendments have eroded much of the reforms, but the Ombudsman's jurisdiction and function remain unchanged, due to the success of his role as an impartial officer of Parliament,⁴ which did not arouse great political debate.⁵

Considerable interest was aroused throughout the common law countries.⁶ In 1962 there were three Ombudsmen in the world. By 1972 there were 40 in the English speaking world alone. Much has been written, justifying the Ombudsman's role in administration, but surprisingly little attention was paid to the fact that it was a constitutional innovation.⁷

¹ G.S. Orr, *Report on Administrative Justice in New Zealand* (1964) 7.

² See Hon. J.R. Hanan, 330 N.Z. Parliamentary Debates, (Hansard) 1962, 1012. It was intended to extend the Ombudsman's jurisdiction to other public authorities in the course of time.

³ Hon. Henry May, "The Ombudsman Bill" [1975] *New Zealand Local Government* (N.Z.L.G.) 27.

⁴ Sir Richard Wilde C.J., Conference of Ombudsmen, 1974 Report of Proceedings, Office of the Ombudsman.

⁵ For a discussion on the adoption of the concept by political parties see Larry B. Hill, *The Model Ombudsman*, Princeton University Press 1976, 68-70, 73.

⁶ For example, *The Citizen and Administration* 1961. A report by Justice, British Section of the International Commission of Jurists, 1961. Chairman, Sir John Whyatt.

⁷ Described by Sir Guy Powles as "a foray into new constitutional territory", address to Canadian Bar Assn, in L.J. Smith, "The N.Z. Ombudsman, Today and Tomorrow" [1971] *N.Z.L.J.* 299.

The Ombudsman for Local Government⁸ considers his powers are wider than the courts, and is prepared to take his jurisdiction to the limits. Unlike other countries, there has been no protest about his powers, and his jurisdiction has not been tested in the courts. Nor has his procedure or method of investigation been challenged. Yet local authorities have been alarmed at the procedures of the English Local Commissioner, and a major legal review was suggested.⁹

Since the functions of the Ombudsman will be prescribed by the extent of his jurisdiction and by the nature of local authority administration and procedure, the paper examines: the legislation,
 — the impact of the Ombudsman on local government administration, with reference to the cases referred.
 — the Local Commissioner in England.

The Legislation

Although investigation of complaints on behalf of constituents is part of a politician's role, the Ombudsman may not, (section 4), be a member of Parliament, nor of a local authority. Consequently the office is not regarded as a political appointment, and the Ombudsman has not been replaced in the aftermath of an election.

While the Ombudsman can be removed, (section 6), for disability, bankruptcy, neglect of duty or misconduct, he may not, (section 4), engage in any occupation for reward outside the duties of his office, nor hold any office of trust or profit (without approval of the Prime Minister).

Thus the Ombudsman is independent from departments and organisations whose actions he may investigate and he is removed from potential conflicts of interests or outside influences. Except for bad faith, (section 26), no proceedings shall lie against him, and information supplied to him is privileged. The dissatisfied citizen therefore, can expect the investigation to be impartial, and fair.

The Ombudsman's function, (section 13), is to investigate decisions or recommendations, or acts done or omitted, relating to a matter of administration, and affecting any person or body of persons in his or her personal capacity. The subject matter of the investigation may involve acts, decisions or recommendations of a Committee (other than a committee of the whole) or subcommittee of the named organisations (Part III, First Schedule), or made by any officer, employee or member of such organisation in his official capacity.

There are two limits to the jurisdiction.

⁸ Mr L.J. Castle, Ombudsman in an interview with the writer, 17 July, 1981.

⁹ R.G. Brooke and R. Greenwood, "The Procedures of the Local Commissioners" [1978] October, *Local Government Studies* (L.G.S.) 13.

- (a) The investigation must concern a “matter of administration”. In one view,¹⁰ “everything done by a local authority is presumed to be administration, or at least to ‘relate’ to it”, and so the limitation would be slight. This view may be challenged, since a distinction can be drawn between matters of policy, and matters of administration.
- (b) Actions of the full council are excluded from investigation. This is not a limitation in cases where the council acts on recommendations of officers, committees or subcommittees since these may be investigated. It is paralleled in central government, where the actions of the executive, subject to political controls, are excluded. Furthermore, executive decisions concern policy matters. To provide remedies for ‘wrong’ policy decisions could involve value judgments and particular political views. To impose penalties or to make recommendations as a result of political views would deny the democratic process and invite accusations of political bias on the part of the Ombudsman.

However the Ombudsman is concerned¹¹ at lack of jurisdiction over the full council decision.¹²

At least two councils meet twice per month and receive verbal reports.

This absence of an administrative infrastructure virtually precludes my jurisdiction over both bodies. Granted that I am entitled to call for a transcript of the officer’s verbal reports to council, but all memories are fallible and an investigation on that basis poses problems.¹³

Since each local authority is a self governing body, which decides its own procedure, citizens may effectively be denied access to the Ombudsman and his position rendered inoperable. It seems “unreasonable that a person’s right to have his complaint investigated . . . should depend upon the way a local body organisation orders its business.”¹⁴

Three specific exceptions to the general jurisdiction are provided:¹⁵

- (a) Where a complaint is out of time. The subject of the complaint must have arisen or continued after 1 October, 1975.
- (b) Where an alternative right of appeal or objection exists, or a right to apply for a review on the merits of the case to any court or tribunal, whether or not the time prescribed for the exercise of the review has expired, unless special circumstances render it

¹⁰ Dr D.E. Paterson, “The Ombudsman in Local Government” [1976] *Local Authority Administration (L.A.A.)* No. 1 Vol 2, 35. Dr Paterson was then Legal Counsel to the Ombudsman.

¹¹ Mr L.J. Castle, interview *supra*.

¹² All Australian states, except Victoria, give jurisdiction over the full Council, on matters of administration.

¹³ L.J. Castle, App. J.H.R. (1980) A.3, 21.

¹⁴ Mr A. Eaton Hurley, App. J.H.R., *ibid.*, 17.

¹⁵ Section 13(7) Ombudsman Act 1975.

unreasonable to expect the complainant to exercise that right. The Ombudsman considers:

The section has limited relevance in local authority complaints for the very good reason that there is no jurisdiction over council decisions . . . and . . . no statutory rights of appeal to a court of statutory tribunal¹⁶ from decisions or recommendations of such officers, committees or subcommittees. . . .¹⁷

Furthermore, section 13(7)(a) specifies a right to review "on the merits" of a case, and in this regard the High Court itself is limited in its jurisdiction¹⁸ to situations where the prerogative writs and specified equitable remedies of declaration and injunction would have been available, and there is no record¹⁹ of an administrative decision set aside by the court on the ground that it is based on an error of fact, is unjust, oppressive, improperly discriminatory or wrong; i.e. the grounds for intervention by the Ombudsman.²⁰

(c) The Ombudsman may refuse to investigate a complaint:

(i) if, under section 17(1)(a) there is an adequate remedy or right of appeal (other than the right to petition Parliament) to which it would have been reasonable for the complainant to resort; (for example complaint to Mayor, or Town Clerk).

(ii) if further investigation becomes unnecessary, section 17(1)(b).

(iii) where a complaint relates to a decision made more than 12 months earlier; the subject matter is trivial, frivolous, vexatious, not made in good faith, or the complainant has insufficient personal interest in the matter, section 17(2).²¹

Procedure of an investigation

Section 13(3) provides that the Ombudsman may investigate a complaint made by any person (in writing, section 16); or of his own motion. Several investigations have been conducted of the Ombudsman's own motion²² when the outcome of a complaint may have been satisfactory to a complainant, but it related to unsatisfactory practices and procedures. Since these were not reported it led one writer to conclude incorrectly²³ that the provision has not been used, which would imply a voluntary limitation to the jurisdiction.

A petition, or the matter of a petition can be referred by the House,

¹⁶ Apart of course, from provisions in the Town and Country Planning Act 1977.

¹⁷ L.J. Castle "The Role of the Ombudsman in Local Government", [1978] April N.Z.L.G. 3, 8.

¹⁸ Section 4, Judicature Amendment Act 1972.

¹⁹ L.J. Castle *supra*.

²⁰ In four years, only 5% of the complaints to the Auckland office were declined under s.13(7). App. J.H.R. (1980) A.3, 14.

²¹ During Mr Eaton Hurley's term of office, 386 complaints were declined, or the investigation discontinued under s.17(2). App. J.H.R. (1980) *supra*. See also App. J.H.R. (1978) A.3, 23.

²² Interview *supra*, 14.7.81.

²³ W.G.F. Napier, "Ombudsmania Revived: The Local Government Complaints" (1980) 10 V.U.W.L.R. 415.

section 13(4) and the Prime Minister can refer any matter other than concerning a judicial proceeding. The latter caused concern²⁴ since it indicated the Ombudsman's link with the government, not Parliament, and could detract from his impartial image. It has seldom been used.

The principal administrative officer of the organisation affected must be informed of the intended investigation, section 18(1), and the Ombudsman consults with the Mayor or Chairman if requested, or if the complaint concerns a recommendation made to them. Otherwise the Ombudsman regulates his procedure as he thinks fit, section 18(7). The investigation is conducted in private, but the Ombudsman may hear such persons, obtain information and make enquiries as he thinks fit, section 18(3). No hearing need be held, and no person is entitled as of right to be heard unless it appears there may be sufficient grounds for making a report or recommendation that may adversely affect any Department, organisation or person. If there is substantial evidence of any significant breach of duty, or misconduct, the Ombudsman must refer the matter to the appropriate authority, section 18(6). The Ombudsman can require any information, documents, papers or things relating to the investigation to be produced, and may examine on oath, section 19(2). Privilege, as in a court hearing applies, section 19(5).

There are limits to the type of information that may be obtained:

- (a) Statutory protection, other than the State Services Act 1962, and Official Secrets Act 1951, unless the information relates only to the complainant who consents;
- (b) information that would be privileged from disclosure in a court of law;
- (c) information (certified by the Attorney General) which might prejudice security, defence, or international relations; the investigation of or detection of offences; or might involve disclosure of Cabinet deliberations or Cabinet proceedings of a confidential nature.

Secrecy must be maintained unless disclosure is needed for investigatory purposes or to establish grounds for recommendations and conclusions, section 21(4).

Neither the complainant nor the local organisation is obliged to maintain secrecy and the Ombudsman regards as unhelpful, occasions when information about an investigation has been given to the Press. But the desire for secrecy conflicts with the need for publicity so that knowledge of the Ombudsman's function will spread, and local authorities be aware of possible scrutiny of their actions.

²⁴ Sir Guy Powles, App. J.H.R. (1973) A.3, 14.

The Ombudsman's anxiety may stem from a desire to maintain impartiality and not to appear as the complainant's advocate. Yet many complaints have been the subject of Press comment before referral, and at times threat of adverse publicity can result in changes in administrative procedures. To avoid the appearance of manipulation, open debate in local government should be maintained.

The annual reports, except in exceptional circumstances, preserve secrecy, yet local government is expected, at least in theory, to act in the interests of the governed. The local authority which has pursued unjust, oppressive or discriminatory procedures has offended twice—against the individual, and against the public interest.

Since the Ombudsman depends on the co-operation of local authorities to carry out his recommendations, his desire for diplomatic relations is understandable. Publicity from the English Local Commissioners' reports has caused complaints and their jurisdiction has been challenged.²⁶

After the investigation is completed, the Ombudsman must form an opinion as to whether the action investigated appears to be contrary to law; was unreasonable, unjust, oppressive or improperly discriminatory or was in accordance with any rule of law, provision of any Act, regulation, bylaw or practice that might be so considered; was based wholly or partly on a mistake of law or fact; or was wrong, section 22(1). This provision is wide enough to enable the Ombudsman to make a subjective evaluation of the provision, regulation, bylaw or practice in question. Where these relate to the administration of policy, by recommending a change in the administration, it is possible that the policy itself may be altered. Under section 22(2) the Ombudsman may consider whether a discretionary power has been exercised for an improper purpose, or on irrelevant grounds, whether irrelevant considerations have been taken into account, or whether reasons should have been given for the decision. Review of the exercise of discretion impliedly includes policy and is a crucial factor in the effectiveness of the Ombudsman where there is discretion there is choice and choice may be made according to policy. Political considerations may force repeal or amendment of oppressive or unjust laws or bylaws, but administrative discretion is not controlled by the ballot box, and elections are not normally a means of redressing grievances.

The Ombudsman must report his opinion and reasons for it to the Mayor or Chairman of the authority concerned, and may make recommendations, section 22(3)(g) and request the organisation to notify him of steps taken to give effect to his recommendations. He

²⁶ R.G. Brooke and R. Greenwood, "The Procedures of the Local Commissioners", *supra*.

can require a summary of his report to be published, section 23, and this is available for public inspection for four weeks. The complainant is notified of the result of the investigation, section 24, and the proceedings are not subject to review or challenge in any court, and cannot be held bad on any ground except lack of jurisdiction, section 25.

However, would there be any reason to challenge recommendations which rely on the power of persuasion for their enforcement and are consequent on an investigation conducted in private by an investigator bound to secrecy? The only effective weapon the Ombudsman can deploy is the persuasive power of logic and reason.²⁷

Almost without exception, (my) recommendations have been acted upon,²⁸ and anything approaching the nature of a judicial hearing . . . avoided.

Commentators,²⁹ and the Ombudsman himself, insist that he is not an alternative to the courts and tribunals, but where they are not appropriate he is a forum for seeking redress. Nevertheless the Ombudsman has wider powers than the courts:

(a) He looks at all the evidence—not just that presented in court.³⁰

He may compel disclosure, although he has not had to do so, nor has he needed to compel documents to be submitted, and his enquiries may be very extensive. He is not restricted by a code of procedure, nor are his recommendations bound by precedent. His decision not to investigate is unappealable, and there is no appeal from nor review of his recommendations.

He can make recommendations to persons of decision making power³¹ and so may initiate change beyond rectification of a particular grievance. He has no power of injunction, i.e. cannot enforce the status quo pending the outcome of an investigation, but “local authorities have responded affirmatively” to his suggestion that action is suspended pending investigation and “power of injunction would breed ill will, and be appealable”.³²

(b) The Ombudsman can look at any act, bylaw or practice that may be unfair, and at the merits of a decision, but he has no enforceable decision power. This is the reason for the lack of an appeal procedure from his recommendations and it is the lack of appeal which caused resentment in England, yet it establishes the unique position of the Ombudsman. He is independent of both executive

²⁷ L.J. Castle, 1978, *supra*.

²⁸ App. J.H.R. (1980), A.3, 14.

²⁹ L.J. Smith, 1971, *supra.*, 299.

³⁰ Interview, *supra.*, 14.7.81.

³¹ See G.R. Laking, “Ombudsman Favours Limits on Differential Rating Powers”, [1977] March N.Z.L.G. 15, and App. J.H.R. (1979) A.3, 24, re comments referred to Secretary for Justice.

³² Interview, *supra.*, 14.7.81.

and judiciary, with wide discretion as to investigation and procedure.

In theory, at least, local government acts in the interests of the community as a whole and private aims must at times be frustrated. But, as the Franks Committee reported,³³

. . . administration must not only be efficient in the sense that the objectives of policy are securely attained without delay. It must also satisfy the general body of citizens that it is proceeding with reasonable regard to the balance between the public interest which it promotes and the private interests which it disturbs.

The Ombudsman can help to maintain this balance. Increased reliance on professional advice from officers can be seen as inconsistent with the principle of control by the elected representatives. The complexity of work means an increase in the number of decisions, and in delegation of administrative discretion. To protect the citizen from arbitrary or capricious administration, there is need for a method of controlling discretionary authority without stifling initiative or innovation. Existing complaints procedures were considered inadequate. "The Ombudsman Act should . . . make it easier for a Council to delegate. The Act gives the community greater protection than it has had. . . ." wrote a Deputy Town Clerk.³⁴

Where the Ombudsman does decide to investigate, his resources, knowledge and expertise can question an officer's expertise. Compromise is more likely outside the courts, and not only the merits but the discretionary element in the case may be explored and the Ombudsman can comment on principles which should guide similar cases in the future, or where legislation should be amended.

Other factors, besides the statute provisions, limit the Ombudsman's powers:

- (a) the nature of the issue, and whether all citizens will be affected by the outcome;
- (b) whether the issue will result in attempted policy change, increased expenditure or reallocation of resources;
- (c) whether a discretion has been exercised in accordance with set principles;
- (d) whether the issue has been considered fully by the authority;
- (e) the Ombudsman's own procedure and practice, and the criteria he uses for the exercise of his own discretion.

Despite these limits an examination of the local authority complaints indicate that the Ombudsman functions as a safeguard for the citizen, achieves redress of grievances, improved administrative procedures, and at times, substantive change.

³³ Reported by G.S. Orr, *Report on Administrative Justice in New Zealand*, (1964) 7.

³⁴ K.N. Sampson, "Delegation by a Council of its Powers and Duties", [1977] L.A.A. No. 1 Vol. 3, 27, 42.

The Local Authority Complaints

The Act provides no guidelines as to the type of allegations which complainants may make, and no formal framework within which a complaint must be stated. The grounds on which the Ombudsman may form an opinion are provided in section 22(1) and (2), and these are utilised in the form of the allegations.³⁵ Thus a complaint may concern an action alleged to be unreasonable, or any other section 22 grounds. The main factors giving cause to complaints were expected³⁶ to differ little from in central government; that is failure: to determine relevant legal or factual issues; to obtain accurate, complete information; to consult affected parties; to apply relevant information to the issues; to give proper advice and to take proper action; to inform affected parties adequately and accurately; to act in appropriate time; to revise or reverse decisions or practices where circumstances warranted it; to act with appropriate courtesy.³⁷

The annual reports of the Ombudsman contain summaries of complaints investigated during the previous 12 months. In four years, the Auckland office inquired into 1121 local authority complaints. Of these 127 were fully investigated and sustained. Fifty-four recommendations were made, and effect was given to all but two.³⁸ Miscellaneous inquiries and interviews totalled 572. Complaints can be broadly classed as relating to rates, services and charges, town planning, building permits, land subdivision, bylaws. The factors giving rise to complaints apply to all classes. The Ombudsmen Reports emphasise two aspects:

(a) Cases where adequate reasons for a decision were not given.³⁹

Reasons enable a person who has a right of appeal and review to determine whether he has good grounds for an appeal; act as a check on the exercise of discretion; ensure that relevant factors have been considered, and should prevent arbitrary action.

Public confidence in the administrative practice is encouraged by reasons, since these disclose the criteria on which a discretion has been exercised.

(b) Failure to act with appropriate courtesy.⁴⁰ Mr Castle commented in his 1979 Report:

One of the essential elements in the administrative decision making process by officialdom must be the recognition of and respect for human dignity. . . (which)

³⁵ W.F.G. Napier, *supra.*, 413.

³⁶ Lester Dally, "The Ombudsman and Local Government", [1977] N.Z.L.J. 270. See also L.G. Castle 1978, *supra.*, 32.

³⁷ Cases from the Ombudsman Reports illustrate these factors. See A172; A39; W12006; A434; A168; A336; A447; cases illustrating grounds for complaint and A8; W12379; A447; C94; A467; C150.

³⁸ App. J.H.R. (1980) A.3, 14, 15.

³⁹ App. J.H.R. (1979) A.3, 2.

⁴⁰ *Ibid.*, 21.

demand(s) from the public official a serious and profound consideration of the actual situation of his or her fellow citizen. . . . In at least two complaints that I investigated, although I was unable to sustain them in the given circumstances, I had the unhappy feeling that the dignity of the individual may have been trampled upon perhaps unwittingly—that there had not been in the administrative process a clear and unarguable demonstration of respect for that dignity.

Mr Castle considered⁴¹ that the principal factors giving rise to justifiable complaints were failures of consultation, communication and courtesy. Investigations have led to minor changes in legislation⁴² and acceptance that changes are appropriate on future reviews. For example, in case W12141 the Ombudsman formed the opinion that clauses of a district scheme ordinance permitting dispensations were unreasonable and recommended redrafting the ordinance. Case W11748 resulted in "the remedying of a serious defect" in the district scheme and in the Ombudsman's opinion the decision taken had been based on an error of law and was wrong.

Nevertheless, investigations provide a very limited base from which to espouse legislative change, since the complaint must be within jurisdiction and be sustained before a recommendation can be made. Remedies usually fall into two categories:

- (a) Action taken by the organisation to ensure that similar maladministration does not recur—e.g. review of procedures, disciplinary action or improvement of methods of communication with the public.
- (b) Action taken by the organisation directly to remove the grievance giving rise to the complaint, e.g. remedy of a planning error, reassessment of rates or service charges, or action to compensate a claimant such as *ex gratia* payment to make good a financial loss.⁴³

Where a remedy cannot be easily provided the Ombudsman sees his role as persuader, "the formulator of administrative equity by the power of persuasion."⁴⁴

In four years, the Auckland Ombudsman did not find it necessary to require an organisation to publish a summary of his report under section 23, because his recommendations were acted upon. In the public interest, however, he published three reports.⁴⁵ One concerned a special investigation, undertaken at the request of the Waitemata City Council, into the procedural handling and administration of the attempt to build a city centre at Lincoln Road. The Ombudsman found failure to comply with town planning procedures, meeting pro-

⁴¹ L.J. Castle, 1978, *supra.*, 8.

⁴² App. J.H.R. (1980) A.3, 20, 21.

⁴³ Mr Castle is concerned at the lack of legislative authority enabling an *ex gratia* payment to be made, and thinks that this should be provided by Statute. *Idem.*

⁴⁴ App. J.H.R. (1978) A.3, 17.

⁴⁵ App. J.H.R. (1980) A.3, 14.

cedures and standing orders regarding expenditure of monies, as well as an attempt to concoct minutes of a meeting that did not take place. No recommendations were made as follow up action was left as an internal matter for the council.

The Ombudsman Reports, formerly annual but now six monthly, are widely circulated to local authorities and government departments and recent publication of case notes in the press must be welcomed since it increases citizens' awareness of the office.

The Auckland Ombudsman concluded⁴⁶ that his office was identified and valued as a safeguard for the citizen with a grievance. In the many cases when the action of the local authority is sustained, the complainant at least has had the satisfaction of an impartial investigation and an explanation of the merits of the situation, without incurring legal costs. But in small matters, such as communication failure the Ombudsman may come in too late. Lack of courtesy has an immediate effect, which a belated apology may not alleviate. (Consequently the local authority should ensure good public relations as a priority.)

The Ombudsman's functions include supervision of administration as well as securing redress of complaints. The recommendations consequent on an investigation sustain or criticise the administration and may lead to new procedures within that local authority. But since each authority establishes its own procedure, one is not necessarily influenced by improvements in another.

In his watchdog role, the Ombudsman's function is to invite complaints, and examine decisions. He can undertake special investigations, and can investigate of his own motion, thus extending the scope of the original complaint. The complainant must have sufficient personal interest in the complaint, but when the outcome of an issue has implications for all citizens, a public inquiry or Royal Commission may better serve the public interest.

The New Zealand Parliamentary Commissioner was the first in the English speaking world, and as such was regarded as "the model ombudsman". Extension of his jurisdiction to local authorities did not involve establishment of a new structure, but an expansion of the office, which therefore exists outside the local government system.

The success of the role is appreciated when it is compared with the experience of other ombudsmen, and in particular with that of the Commissioners of Local Administration in England.

⁴⁶ *Ibid.*, 13.

*The System of Ombudsmen in the United Kingdom:
The Local Commissioner*

There is a multiplicity of ombudsmen in the United Kingdom, dealing with different authorities in different parts of the country. A disadvantage of the system is that the aggrieved citizen does not always know which ombudsman has jurisdiction to investigate his complaint, and many complaints are wrongly referred.

The distinction between central and local government has been emphasised, and the close links between the Local Commissioners and the local government system, raise the question of the independence of the office. While the Parliamentary Commissioner reports to a Select Committee,⁴⁷ the Commission for Local Administration reports to a body of representatives of local authorities, and thus comes within the local government system. The Representative Body considers the Commission reports, the annual estimates, since commission expenses are paid by local authorities, and discusses policy matters with the Commission. For example, a Code of Practice for guidelines on complaints procedures was drawn up after consultation and was sent to all local authorities.

The Representative Body may make recommendations to the Select Committee on matters which arise from the Commission Reports, or which concern the Commission's powers. The Body has opposed the establishment of any formal relationship between the Select Committee and Local Commissioners on constitutional grounds: that this would undermine the responsibility of independent local authorities to their own electorates.

Local authorities are not accountable . . . through Ministers to Parliament for their actions in the same way as central government departments . . . the statutory and constitutional relationships in the context of the local government system are quite different.⁴⁸

Thus it was considered inappropriate for a Select Committee to call democratically elected bodies to account for their actions whereas no such objection arose in the case of government departments for which Ministers were directly accountable to Parliament. The Local Commissioners were established under the Local Government Act 1974 and are appointed after consultation with the Representative Body, which further distinguishes them from the central government system (section 23(4)).

The Parliamentary Commissioner for Administration⁴⁹ investigates complaints against central government departments which must be

⁴⁷ The Select Committee on the Parliamentary Commissioner for Administration.

⁴⁸ H.C. Select Committee. Second Report 1978-1980, on the Parliamentary Commission for Administration "The System of Ombudsman in the United Kingdom", 48. See also *ibid.*, 14.

⁴⁹ Appointed under the Parliamentary Commissioner Act 1967.

referred by a member of Parliament. He also acts as Health Service Commission for England, for Wales and for Scotland,⁵⁰ investigating complaints against health authorities. Provided the health authority has been given an opportunity to investigate the complaint, complainants have direct access to the Commissioner.⁵¹ The Commission for Local Administration in England, (section 23) consists of the Parliamentary commissioner ex officio, and three local Commissioners, each of whom investigates complaints against local authorities, police and water authorities in his area.

There are separate Commissions for Local Administration in Wales and Scotland.

An examination of the functions of the Local Commissioners for England shows that their role is restricted in significant aspects, compared with the Parliamentary Commissioner, the Commissioner for complaints in Northern Ireland or the New Zealand Ombudsman. Civil disturbances are given as the reason for the direct access and enforcement procedures in Northern Ireland, but direct access and enforcement procedures may be vital to the success of any ombudsman.

The Local Commissioner may investigate written complaints from members of the public who claim to have sustained injustice in consequence of maladministration . . . through actions taken in the exercise of administrative functions of local authorities, section 26(1).

Complaints must be referred by a member of the authority concerned, but where a member has been asked to refer a complaint and has refused, the complaint may be made directly section 26(3). Before an investigation can proceed, the authority concerned must have been afforded an opportunity to investigate and reply, section 25(5).

Except in special circumstances, the Local Commissioner may not investigate where a person has a right of appeal, reference to or review by a tribunal, Minister of the Crown, or by action in a court of law, section 26(6), nor shall he investigate where a matter concerns all or most of the inhabitants of the area concerned, section 26(7). Otherwise the Local Commissioner has discretion whether to initiate, continue, or discontinue an investigation, section 26(10). This discretion is complete. In *Re Fletcher's Application*⁵² leave to appeal to the House of Lords was refused, as there was no jurisdiction to order the Commissioner to investigate.

⁵⁰ The posts were established by the National Health Service Reorganisation Act 1973, and the National Health Service (Scotland) Act 1972.

⁵¹ The Commissioner for Complaints (Northern Ireland) Act 1969 established a commissioner to investigate complaints against local authorities and public bodies (access is direct) and a Parliamentary Commissioner for Administration for Northern Ireland to whom complaints are referred by members of Parliament.

⁵² *Re Fletcher's Application* [1970] 2 All E.R. 257.

The Commissioner determines whether a complaint is 'duly' made section 26(1) but cannot investigate if civil or criminal proceedings have commenced, section 26(8).

The extent of the Ombudsman's jurisdiction depends largely on the definition of maladministration—which must have caused the injustice suffered by the complainant. Maladministration was defined by the minister in charge of the Bill as "bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness." Now known as the Crossman catalogue, the Parliamentary Commissioner claims it gives very great powers.⁵³ Lord Denning, MR. reiterated the catalogue, in the case of *R v. Local Commissioner for Administration for North and East of England*⁵⁴ but said that the complaint must relate to the way in which an administrative decision is reached, and not the quality of the decision itself. Bradford City Council had sought to prohibit the Commissioner from investigating allegations of maladministration. The Court held that the Local Commissioner had exercised properly his discretion to investigate a complaint out of time. The "special circumstances" in which this may occur were not defined by the Court, so that each case may be considered on its merits. The contention that a complainant must expressly indicate that he has been treated unfairly due to bad administration was not upheld and so a liberal interpretation was placed on the Commissioner's jurisdiction.

The extent of the Ombudsman's jurisdiction, in that it must relate to a "matter of administration", has been examined by Australian courts. In *Booth v. Dillon* (No. 1)⁵⁵ Lusk J. held that a matter of administration had no precise demarcation. The enforcement of prison discipline was administration and it seems that the Ombudsman's entitlement to investigate existed independently of the fact that a remedy could have been sought in a court of law. The Supreme Court of Victoria held in *Booth v. Dillon* (No. 2)⁵⁶ that a matter to be investigated must not relate to policy, and is limited to specific decisions or omissions. Statements not made in the course of employment could not come under the definition of administration, nor could sleeping arrangements for prisoners. These were a policy matter. Judicial matters were outside the Ombudsman's jurisdiction,⁵⁷ and a Crown Solicitor's inactivity was not an administrative act or omission.

⁵³ Sir Idwal Pugh, Parliamentary Commissioner, "The Ombudsman, Jurisdiction, Powers and Practice", (1978) 59 Public Administration London (P.A.L.) 127.

⁵⁴ *R. v. Local Commissioner for North and East Area of England, ex parte Bradford Metropolitan City Council*, [1979] 2 W.L.R. 1.

⁵⁵ *Booth v. Dillon* (No. 1), [1976] V.R. 291.

⁵⁶ *Booth v. Dillon* (No. 2), [1976] V.R. 434.

⁵⁷ *Glennister v. Dillon*, [1976] V.R. 550.

A commentator claims⁵⁸ that these three cases show "the Ombudsman cannot be a possible answer to the public cry for the effective guarantee of the civil liberties of the individual." It is submitted that this is to expect the Ombudsman's role to extend beyond administrative matters and to operate despite the existence of alternate remedies.

During the investigation, the Local Commissioner may obtain such information as he thinks fit, section 28(2). He may require disclosure of documents, section 29(1) and has the same powers as the High Court concerning attendance of witnesses and production of documents. The local authority is asked to comment on the allegations, then receives a copy of the complete report and must state what action (if any is required) will be taken. If not satisfied, the Local Commissioner may issue a further report, section 31. The reports identify the local authority, but no person, unless this is required in the public interest, section 30.

A possible bar to investigation is provided by section 32(3) which provides that the Minister or local authority may give notice that disclosure of information or documents is not in the public interest. In the case of *Re a Complaint against Liverpool City*⁵⁹ it was claimed that this provision emasculates the powers of the commission but the court held the section could not be re-written, and the decision is considered to have greatly curtailed the investigatory powers.⁶⁰

A lack of natural justice in the Ombudsman's procedures was averred in *R v. Dixon ex parte Prince and Oliver*.⁶¹ Prohibition was sought, to prevent the investigation proceeding further, and to prevent publication of a report. The court⁶² upheld the Commissioner's actions. Burt, C.J. said "he is master of his own procedure. Nothing that he does affects the rights of applicants."⁶³

The decision is of interest in view of a claim⁶⁴ that the Commissioner's procedures are "seriously unfair . . . in need of alteration," and that principles of natural justice should be observed. Another critic stated,⁶⁵ that the Ombudsman had an enormous amount of discretion. . . . "no-where subject to effective control, least of all when it is concerned with securing redress." It is submitted that these

⁵⁸ J. Kwodo Benti, "Concept of Administrative Action and the Ombudsman" [1976] A.C.L.D. 297.

⁵⁹ *Re a Complaint Against Liverpool City Council*, [1977] I.W.L.R. 995.

⁶⁰ C.M. Chinkin, "Powers of the Ombudsman Re-examined" [1980] Journal of Planning and Environmental Law (J.P.L.) 87.

⁶¹ *R. v. Dixon ex parte Prince and Oliver* (1979), W.A.R. 116.

⁶² The Full Court of the Supreme Court of Western Australia.

⁶³ *Ibid.*, 120, 121.

⁶⁴ R.G. Brooke and R. Greenwood, *supra.*, 21. Note the authors are from the Institute of Local Government Studies, Birmingham.

⁶⁵ "Current Topics", [1979] J.P.L. 569.

claims are based on a misinterpretation of the role of an ombudsman, who adopts an investigatory procedure, not a judicial and adversarial model.

Further, the concern arises over what is a small number of investigations, considering the size of population and extensive functions of English local authorities. Of 2116 complaints accepted for investigation in 1979, the majority were outside the jurisdiction; maladministration and injustice was found in 312 completed investigations, but not found in another 9 cases. The remedies included compensation,⁶⁶ changes made in local authority procedures and council action such as repair of housing.

In most cases adequate redress was made but a commentator wrote in 1976⁶⁷ "Quite clearly a tussle is taking place between the Local Commissioner and some local authorities."

In the 1978 Review the Commission recommended changes in jurisdiction, on the basis that exclusion from the Ombudsman's jurisdiction can only be justified if there exists a realistic alternative avenue of redress.⁶⁸ This echoed the report from the Royal Institute of Public Administration which sought a more vigorous Commission and direct access.⁶⁹ Reports by JUSTICE⁷⁰ were consistently in favour of extending the Ombudsman's powers.

In one view⁷¹ it seemed that the Local Commission was machinery for processing small claims against local authorities and was a substitute for the courts, but JUSTICE disagreed. The court could consider maladministration but cannot award compensation for unlawful administrative Acts, as can the Ombudsman. The court can only quash the decision.⁷²

Basic norms can be extracted from the Ombudsman's casebook:⁷³

- a duty to give correct advice,
- the need to handle a citizen's affairs with reasonable speed,
- the duty to refrain from giving incorrect advice,
- that like cases are required in justice and fairness to be treated alike,

and Bradley considers that from these norms, principles of good administration may emerge.

Questions arise:

(a) Should the Ombudsman refer to the court to resolve a point of

⁶⁶ Under the Local Government Act 1978, local authorities have discretion to pay compensation, which ranges from £62,000 by the County of Cleveland, [1979] J.P.L. 61, to small amounts.

⁶⁷ Victor Moore, "The Ombudsman Cometh" [1976] J.P.L. 607, 611.

⁶⁸ H.C. Select Committee Second Report 1979-1980, *supra.*, 5.

⁶⁹ Norman Lewis and Bernard Gateskill, *The Commissioner of Local Administration; A Preliminary Appraisal* (1978) Royal Institute of Public Administration.

⁷⁰ JUSTICE, British Section of the International Commission of Jurists, Reports 1961, 1969, 1977, 1980.

⁷¹ "Current Survey" [1978] Winter Public Law 413, 415.

⁷² Report by JUSTICE (1980) 44.

⁷³ A.W. Bradley, "The Role of the Ombudsman in Relation to the Protection of Citizen's Rights" [1980] C.L.J. 304.

law that may arise? Maladministration was found in one case, but was only settled on referral to the court.⁷⁴

- (b) Should the Ombudsman have power to maintain the status quo pending resolution of an investigation?
- (c) Should the courts enforce the Ombudsman's decision? This would mean the decision would be appealable.
- (d) Should the Ombudsman observe the rules of natural justice? It appears from court decisions he may have instead a duty to act fairly.⁷⁵

Conclusion

Throughout the world there are many forms of Ombudsman, but there are three essential features:⁷⁶

1. he is an independent, non-partisan officer of the legislature who supervises administration. His no-cost private investigation contrasts with the adversary procedure of the court;
2. he deals with specific complaints from the public against administrative injustice and maladministration;
3. he has power to investigate, criticise and publicise, but not to reverse administrative action.

Since the Ombudsman may act where previously no form of review or appeal existed, he reconciles, reinforces and legitimates community control of government decision making, whereas the adversary system "polarises issues, fosters individualism and passive decision making."⁷⁷ However, in cases where the local authority denies the maladministration, the complainant is left to appeal to the political process or pressure of public opinion. Not only does this undermine the position of the Ombudsman by stressing the ineffectual aspect of his function, but it destroys public confidence in local government as an accountable and representative system.

In reply to criticism of the Ombudsman's informal and flexible procedures it can be said that the local authority should be concerned to improve its administration in the public interest. Should a local authority expect a higher standard of investigation from the Ombudsman than it was prepared to extend to the complainant?

The anxiety to protect the elected members' constituency role may account for preservation of access through a member, but refusal to allow investigations of his own motion, limit the English Ombudsman's role.

⁷⁴ *Congreve v. Home Office* [1976] 1 All E.R. 697.

⁷⁵ *Re Dixon*, supra., 116.

⁷⁶ Paul R. Verkuil, "The Ombudsman and the Limits of the Adversary" (1975) 75 *Column L. Rev.* 845, 846.

⁷⁷ Verkuil, *ibid.*, 846.

Restriction of the findings to "injustice as a result of mal-administration" is a further limitation compared with the New Zealand Ombudsman, who has the potential for making considerable impact in administrative procedures and in recommending legislative change.

The English Ombudsman does not receive complaints on a scale commensurate with those in other countries. For this, the legislation, the attitude of local authorities and lack of adequate publicity are to blame. The 1981 riots demonstrate a need for confidence in the administration and in the local authority's concern for its citizens.

An Ombudsman system which is easily accessible and well publicised can lessen the gap between citizen and administration. Even with its limited scope, the Local Commission is a constitutional innovation, capable of effecting substantive change—that is, what should be done in a given situation—and procedural change.

To retain the confidence of the citizen and the administration, the Ombudsman must be demonstrably impartial, and the public interest may require that Ombudsman reports be well publicised. The local authority may deplore the publicity and at times the cost of redress of grievances is high, but the cost to society of disaffected citizens is higher, and it is in the citizens' interests that the Local Government system should operate.