

# The Future

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The latter part of the twentieth century has been a time of fairly rapid change and reform of the English legal system. Courts have been abolished and replaced; new courts or types of judge have been created; and legal process has in many respects been overhauled and in some instances streamlined. Many aspects of the system remain either clearly defective or at least questionable in quality, and none of us can ever realistically expect to find that perfection will have been attained. Yet the movement for reform is strong, and commands general adherence from all party political quarters, so we can expect the momentum to continue. In this article it is proposed to consider the prospects for reform and strengthening of the position and work of the English Local Ombudsmen.

The movement for the creation of ombudsmen first came to prominence in the United Kingdom as a result of the Crichel Down affair culminating in Sir Andrew Clarke's report published in 1954.<sup>1</sup> It gathered in strength steadily during the succeeding decade, assisted in particular by the efforts of JUSTICE, the British section of the International Commission of Jurists, who set up committees which recommended the setting up of ombudsmen to deal with complaints against both central government<sup>2</sup> and local government<sup>3</sup> authorities. The point had been grasped that there was a gap in our administrative law. The courts provided remedies of various kinds to redress illegality, and they had developed a classification of such illegality by administrative authorities under the headings of *ultra vires*, breach of natural justice and error of law. There had for years been a volume of criticism based upon the antiquated character of the procedures surrounding the provision for judicial review, a criticism which was not met until the introduction of the modern Application for Judicial Review with effect from 1978,<sup>4</sup> though even now there are doubts whether case-law since 1977 had adequately reflected the high hopes raised by the new procedure.<sup>5</sup> But what

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1. *Report of the Public Inquiry ordered by the Minister of Agriculture into the disposal of land at Crichel Down*, Cmnd. 9176.
2. *The Citizen and the Administration: The Redress of Grievances* (1961).
3. *The Citizen and his Council* (1971).
4. S.I. 1977 No. 1955; re-enacted with amendments by the Supreme Court Act 1981, s. 31.
5. See Yardley, *Principles of Administrative Law* 2nd ed. (1986), Ch. 5.

Crichel Down had opened up for all to see was the prospect of administrative authorities acting quite legally and yet unfairly or wrongly by ordinary standards of public morality. For such behaviour the law offered no prospect of a right to any redress, and it was for this lacuna that the model presented by the Scandinavian office of Ombudsman offered the prospect of a substantial improvement in our system.

It is well known that the first British Ombudsman, the Parliamentary Commissioner for Administration, was set up for Great Britain by the Parliamentary Commissioner Act 1967.<sup>6</sup> The Parliamentary Commissioner for Administration's jurisdiction covered complaints of injustice caused by the maladministration of most of the various central government departments or agencies, and his jurisdiction has been increased on a number of occasions in later years by comparatively minor measures of either primary or secondary legislation. The most important addition to his functions occurred at the time of the reorganisation of the National Health Service when the original exemption from the Parliamentary Commissioner for Administration's authority of the whole hospital service was reversed by the creation of three separate Health Service Commissioners, for England, Wales and Scotland,<sup>7</sup> with the duty to investigate any alleged failure in a service provided by a health authority, or any action taken by or on behalf of such an authority, where there is a complaint of injustice in consequence of maladministration. Although these Commissioners seem at first sight to be different ombudsmen, all three offices have in practice always been held by whoever is the current British Parliamentary Commissioner for Administration, and so in reality (and with only minor procedural differences between the work of the apparently separate Commissioners) the creation of these offices can be considered as a method of extending the jurisdiction of the Parliamentary Commissioner for Administration.

The extension of the ombudsman system from Great Britain to Northern Ireland was achieved by the Parliamentary Commissioner Act (Northern Ireland) 1969 and the Commissioner for Complaints Act (Northern Ireland) 1969, both passed by the old Stormont Parliament. The latter measure was the first Act within the United Kingdom to extend an ombudsman jurisdiction to the workings of local government, and it preceded related legislation for England, Wales and Scotland. Nevertheless the Northern Ireland Commissioner for Complaints has a jurisdiction extending beyond local government, because in that province there are several important administrative functions entrusted to province-wide bodies which in Great Britain are the concern of local government authorities. Thus his remit covers such bodies as the Northern Ireland Housing Trust, the Northern Ireland Fire Authority and the Northern Ireland Hospitals Authority, as well as

6. This was the second non-Scandinavian ombudsman office to be created. The first was in New Zealand: Parliamentary Commissioner (Ombudsman) Act 1962.

7. By the National Health Service Reorganisation Act 1973 (for England and Wales), and the National Health Service (Scotland) Act 1972.

local authorities. In Great Britain, on the other hand, the division of labour between the ombudsman dealing with central government functions and those dealing with local government is much more clear-cut. The Local Ombudsmen for England and Wales were set up by the same Act in 1974,<sup>8</sup> and the Local Ombudsman for Scotland in 1975.<sup>9</sup> There are minor differences between them as to jurisdiction, funding *etc.*, but in most respects they have identical powers and functions. Each of them has been concerned to improve the service provided, and with varying results, but the remainder of this article will be concerned only with the prospects for development as they relate to the English Local Ombudsmen.

It is not intended to list here the details of the jurisdiction and procedures of the Local Ombudsmen, but Part III of the Local Government Act 1974 provides for the setting up of the Commission for Local Administration in England, consisting of an unspecified number of Local Commissioners, popularly known as Local Ombudsmen, together with the Parliamentary Commissioner for Administration for Great Britain, and that one of the Local Ombudsmen shall be appointed as Chairman of the Commission. The Local Ombudsmen have the duty to investigate complaints of injustice suffered in consequence of maladministration in connection with the execution of administrative functions performed by a local authority, police authority, water authority or any joint board of local authorities. There are a number of exclusions from their jurisdiction, such as the investigation of crime, discipline in schools, matters affecting all or most of the inhabitants of an authority's area, matters relating to the pay and conditions of service of local government officers, and matters in respect of which the complainant has a right of recourse to a tribunal, a Minister or a court, unless the Ombudsman considers that it is unreasonable that he should pursue such a remedy. A complaint must be in writing, must usually be made within twelve months of the matter complained about, and must normally be referred to the Ombudsman by a member of the authority concerned with the consent of the complainant, though this latter requirement may be dispensed with if the Ombudsman is satisfied that such a member has been asked to refer the complaint and has failed to do so.

It has been consistently argued by the Commission since its early days that a complainant ought to have the alternative of direct access to a Local Ombudsman, but the Secretary of State has never agreed to amending legislation designed to effect this, mainly because of the view of the Representative Body (mentioned below) that such a change might weaken the relationship of the ward councillor with his constituents. In 1984, however, a compromise was achieved with the agreement of the Secretary of State and of the Representative Body which did not require legislation. Under this any complaint received direct is no longer returned to the complainant, as it was before, but instead is sent to the Civic Head of the authority complained about (Chairman, Mayor or Lord Mayor), asking him to

8. Local Government Act 1974.

9. Local Government (Scotland) Act 1975.

effect a local settlement if possible, and if he cannot do so to refer the complaint formally to the Local Ombudsman; and the complainant is informed that this is being done. Thereafter any local settlement or reference by the Civic Head brings the case into line with the normal practice where a complaint has initially been properly referred, while any failure to settle it or to refer it enables the Local Ombudsman to exercise his discretion to take it on anyway on the basis that a member has failed to refer it.

The result of any investigation must be reported to the complainant, to the authority concerned and to the member of the authority who may have referred the complaint. The authority must then make the report available for public inspection. Where the Local Ombudsman has concluded that injustice has been caused as a result of maladministration, the report must be considered by the authority, which must then tell the Ombudsman what action it proposes to take in consequence of it. If the Local Ombudsman is not satisfied with such action he may make a further report, but he has no other formal means of insisting upon compliance with his findings.

The 1974 Act provides that the Commission for Local Administration should periodically review its legislative framework as laid down by the Act, and report its findings or recommendations to the Secretary of State for the Environment, and this would seem to be the mechanism which Parliament intended to enable reforms or adjustments to be set in motion. Unhappily experience has shown it to have worked out less effectively than might have been expected. In the dozen or so years since it was set up the Commission has submitted three such reviews to the Secretary of State, in 1978, 1980 and 1984, making in all a substantial number of recommendations designed to strengthen the effectiveness of its work. It has been unfortunate in the first place that the Commission has usually had to wait a considerable period of time before the Secretary of State's response has been forthcoming. The longest period was the three and a half years it took to receive the response to the 1980 review, and the response to the 1984 review took some 13 months to appear. But secondly, and more crucially, the responses have tended for the most part either to be negative or else to accept the main thrust of certain recommendations without thereafter making any provision for ensuring their implementation.<sup>10</sup>

A number of the matters dealt with in the periodical reviews by the Commission have been concerned with details, and there may be little point in further ventilating them here. But it has been the belief of the Commission that a credible Local Ombudsman system should have a jurisdiction covering all aspects of local government unless there is some very good reason why an exception should be made. Accordingly it has been disappointing to find that successive Secretaries of

10. See also recommendations made in a later report by JUSTICE, *The Local Ombudsmen: A Review of the First Five Years* (1980); and Yardley, "Local Ombudsmen in England: Recent Trends and Developments", [1983] *Public Law* 522.

State have rejected recommendations to extend the jurisdiction of the Commission for Local Administration to cover parish and town councils (the only local authorities exempted under the Act), disciplinary matters within schools, personnel matters, and commercial and contractual matters (most of which, other than transactions relating to the acquisition or disposal of land, are currently exempted). The Secretary of State has also not agreed to the suggestion that Local Ombudsmen should be able to initiate investigations themselves, and he has steadfastly set himself against the repeated recommendation that a complainant should be permitted to register his complaint direct, if he so wishes, rather than through a member of the authority complained about. It should not be thought, however, that he has been stubborn or quixotic in these decisions, for on each of these matters he has reflected the views of the Representative Body, set up by section 24 of the Act, which has a limited role for purposes of consultation, but which is clearly labelled in the Act as representing the English authorities under the jurisdiction of the Local Ombudsmen. Granted the statutory position of the Representative Body, it is not surprising that the Secretary of State must pay special heed to its views put forward as "representation".

Yet there have over the years been a number of recommendations by the Commission for reform which *have* been accepted by the Secretary of State, and which still await implementation. In response to the 1978 review, for example, it was agreed that authorities should be required to consider a Local Ombudsman's further report on an investigation in the same way as a first report. Again, in response to the 1980 review, it was agreed to repeal the provision excluding from jurisdiction the investigation of action taken by an authority in connection with the investigation or prevention of crime, and also to extend jurisdiction to cover the housing functions of New Town bodies and the development control functions of Urban Development Corporations.<sup>11</sup> A very few changes have been implemented,<sup>12</sup> but the only one of substance was in the end achieved by means of a private member's bill introduced into the House of Lords by Baroness Faithfull. This became the Local Government Act 1978, and it gives authorities the power to incur expenditure lawfully to remedy injustices found by Local Ombudsmen to have been caused by maladministration. Ironically the reform was quite unconnected with any review of the Act made by the Commission. It remains the case that successive Secretaries of State have stated their intentions to introduce legislation amending the provisions relating to the Commission for Local Administration, but in the main have failed to carry out these intentions.

It is not all that surprising that the Department of the Environment, with its multifarious and often politically highlighted responsibilities, should consider

11. Subsequently reiterated in Cmnd. 9563 (1985). Under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, tenants of the Scottish Special Housing Association now have the right to complain to the Scottish Local Ombudsman, and they may do so direct.

12. See, *e.g.*, the Local Government, Planning and Land Act 1980, s. 184.

matters concerning the Commission of less urgency than some others. But in the mid-1980s there has been interest in the work of the Local Ombudsmen from two other significant quarters. In 1984 the House of Commons Select Committee on the Parliamentary Commissioner for Administration became concerned about the fact that in a small number of instances authorities have not accepted or fully implemented the reports of Local Ombudsmen. Strictly speaking the Select Committee has no direct jurisdiction over the work of Local Ombudsmen, but its terms of reference include not only the work of the Parliamentary Commissioner for Administration and Health Service Commissioners but also a general oversight of matters which are concerned with furthering the ombudsman principle, and it was on this score that the Committee decided to make some inquiries on the issue. Secondly in 1985 the Committee of Inquiry into the Conduct of Local Authority Business, chaired by Mr David Widdicombe, QC, and set up by the Secretary of State for the Environment, expressed a more general interest in the work of Local Ombudsmen and its possible expansion. Much of the evidence given by the Commission to these bodies was in similar vein to that provided by other United Kingdom ombudsmen, and in the event the written evidence submitted was followed by oral evidence to the Select Committee by the writer on 15 May 1984,<sup>13</sup> and to the Widdicombe Committee by all the Local Ombudsmen from England, Scotland and Wales on 25 November 1985, the latter evidence being in private.

Apart from the evidence directed towards the desirability of making the Local Ombudsman system more comprehensive, special attention was given to what has in general parlance been called "enforcement". The Commission made it clear that it has never favoured any reform which would enable it directly to enforce Local Ombudsmen's recommendations, which are extra-judicial and ought not to be considered as binding enforceable judgments. Nevertheless the credibility of the system is harmed if it is seen that authorities may ignore Local Ombudsmen's reports with impunity if they so choose. It was the clear intention of Parliament in 1974 that the Act should provide for a means of impartial arbitration, and that it should be effective. The Parliamentary Commissioner for Administration and Health Service Commissioner has no problem on this score because he has the Select Committee to support him, and may, if necessary, make a report direct to Parliament, where MPs would be likely to make a sufficient fuss to ensure that recalcitrant departments or civil servants comply. Many ombudsmen in other countries report direct to their Parliaments, and some even address their Parliaments orally. Only the British Local Ombudsmen are without such support and must rely upon their own powers of persuasion with authorities where difficulties arise. Accordingly the view put by the English, Welsh and Scottish Local Ombudsmen to the Select Committee and to the Widdicombe Committee has been that the best solution would be for all authorities always to agree to accept

13. Select Committee on the Parliamentary Commissioner for Administration, Session 1983-84, Minutes of Evidence.

and implement Local Ombudsmen's reports, however much they may sometimes dislike them: this is a course which has been urged upon the local authorities by their own associations. But, failing such an achievement, they have urged the importation into Great Britain of a provision in the Commissioner for Complaints Act (Northern Ireland) 1969, section 7. Uniquely among the provisions for ombudsmen in the United Kingdom or elsewhere, a report of the Northern Ireland Commissioner for Complaints may be used, at the instance of the complainant, as the basis for a claim in the county court for damages or any other suitable remedy. There is thus little point for an authority in the province to refuse to comply with the terms of a report by the Ombudsman because to do so would be likely to result in a court order which, in practice, has normally been identical to the recommendation in the report.

The Reports of both the Select Committee<sup>14</sup> and the Widdicombe Committee<sup>15</sup> were published in the summer of 1986. That of the Select Committee is of course concerned with the single issue of "enforcement". The Report is unanimous in its condemnation of those authorities which may from time to time refuse to accept or to implement the recommendations made in the report issued after an investigation by a Local Ombudsman, and reflects the belief of both Local Ombudsmen and the Representative Body that it is really incumbent on the authorities, in the interests of the good name of local government, that they put their own house in order in this respect. But the Select Committee feels that the time has not yet come for the importation into Great Britain of the provision for possible court enforcement existing in Northern Ireland, especially since ombudsmen commonly recommend a higher standard of behaviour than would satisfy mere legal requirements, and thus are in effect requiring moral, rather than legal, duties to be carried out. The Select Committee leaves it open for this development in the future if what they prefer now proves to be ineffective, but for the present they recommend that the House of Commons extend their own remit to enable them to call upon members and officers of recalcitrant local authorities to appear before the Select Committee to be questioned. It remains to be seen whether the House of Commons accepts and implements this recommendation, and if so whether it does prove effective. One can envisage possible confrontation on a central/local government basis, and all Local Ombudsmen still prefer their own chosen solution. But we shall be only too pleased if the Select Committee Report in the end *is* shown to have done the trick.

The Report of the Widdicombe Committee, however, not only covers a much wider field, but is far more radical in approach, and may well have stolen the Select Committee's thunder. The Widdicombe Report makes many recommendations about the whole conduct of local authority business which are outside the scope of

14. *Local Government Cases: Enforcement of Remedies*, 15 July 1986 (Third Report from the Select Committee on the Parliamentary Commissioner for Administration, Session 1985-86), H.C. 448.

15. *The Conduct of Local Authority Business*, 19 June 1986.

this article. But by way of provisions for safeguards against abuse it also recommends some new powers for the Audit Commission,<sup>16</sup> greater accessibility of judicial review,<sup>17</sup> and a considerable increase in the jurisdiction, and strengthening of the powers, of the Local Ombudsmen.<sup>18</sup> For the first time we have an independent report by a body set up specially by the Secretary of State himself which has not only endorsed virtually all the suggestions for reform of the arrangements for Local Ombudsmen which the ombudsmen have themselves urged, but has even gone a step further in recommending a substantial increase in jurisdiction which the ombudsmen have not themselves voluntarily suggested.

In brief the Widdicombe Committee has recommended six main reforms concerning the Local Ombudsmen. These are:

1. The removal of all the restrictions upon their jurisdiction which the Local Ombudsmen have already urged; and the speedy implementation of any earlier recommendations which have been accepted by the Secretary of State.
2. That Local Ombudsmen should have the power to investigate individual cases on their own initiative.
3. That Local Ombudsmen should be able to receive complaints direct from members of the public, even though the Committee recognises that the procedural device adopted in 1984 has at least effected an improvement.
4. The abolition of the Representative Body, and provision for funding the Local Ombudsmen from central government funds, rather than from local government as at present.
5. That there should be a new statutory right for complainants to apply to the county court for a remedy in cases where the Local Ombudsman has found maladministration leading to injustice and the complainant is dissatisfied with the remedy offered by the local authority, as in Northern Ireland.
6. That there should be a new statutory power of assistance for individuals wishing to challenge a decision by their local authority in the courts in cases where there are implications for an authority's services at large or for the conduct of its business generally, or where there are important issues of principle on which clarification of the law is desirable, or where there is evidence of persistent breaches of the law; and this new power to provide assistance should be vested in the Local Ombudsmen.

The English Local Ombudsmen have consistently pressed for 1, 2, 3 and 5 above, and it will be seen that recommendation 5 is not only in line with our own views, but also more bold than the solution proposed by the Select Committee.

16. Paragraphs 9.46 – 9.59.

17. Paragraphs 9.85, 9.95 and 9.99.

18. Paragraphs 9.64 – 9.82.



Recommendations 4 and 6 are not the ideas of the Local Ombudsmen, but they welcome them as being in keeping with the general furtherance of their work. The idea behind recommendation 6 is that the Local Ombudsman should become in a sense a citizen's defender, yet if implemented it would not compromise the essentially impartial character of the ombudsman office because the Local Ombudsman would not be expected to do any more than decide that any individual case is suitable for a hearing by way of judicial review: he would not in any sense prejudge the case. It is not without interest that a fairly similar suggested reform has been made by Lord Justice Woolf in the second Harry Street Lecture,<sup>19</sup> though he does not suggest that the function be given to Local Ombudsmen.

The Secretary of State has now embarked upon a comprehensive round of consultations about all the proposals in the Widdicombe Report, and early legislation on those concerning Local Ombudsmen cannot be expected. But all Local Ombudsmen do now have some real hope that their office will be strengthened in the foreseeable future, and that an era of progress towards more adequate provision for extra-judicial justice is around the corner. If the Secretary of State needs any further incentive to act to implement the proposals he may perhaps be influenced by a Resolution adopted by the Committee of Ministers of the Council of Europe on 23 September 1985<sup>20</sup> that member states should consider extending and strengthening the powers of the Ombudsman so as to encourage the effective observance of human rights and fundamental freedoms in the functioning of the administration. Just as the Franks Committee Report of 1957<sup>21</sup> proved to be the watershed between the earlier rather haphazard and mistrusted system of administrative tribunals and their present systematic and generally respected arrangements, so in a few years' time the trigger for a more satisfactory system of Local Ombudsmen may be seen to have been the work of the Widdicombe Committee.

19. "Public Law – Private Law: Why the Divide? A Personal View", [1986] *Public Law* 220.

20. Recommendation No. 8 (85) 13.

21. *Report of the Committee on Administrative Tribunals and Enquiries*, Cmnd. 218.