

**REVIEW OF THE
PUBLIC SECTOR OMBUDSMEN
IN ENGLAND**

A Report by the Cabinet Office

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REVIEW OF THE PUBLIC SECTOR OMBUDSMEN IN ENGLAND

THE REPORT

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EXECUTIVE SUMMARY

This review was set up by the Government in response to proposals put forward by the Commission for Local Administration (CLA)(which comprises the three local government ombudsmen) and the Parliamentary Commissioner for Administration (PCA) who is also the Health Service Commissioner (HSC).

The purpose of the review was to consider the arrangements for the ombudsmen against the background of more integrated public services. Value for money and the best interests of complainants were key factors to be taken into account.

We have consulted widely among representative and professional bodies, central and local government departments, members of the public and academics. We have also conducted, with the assistance of the Select Committee on Public Administration, a survey of Members of Parliament.

There is general agreement that the public sector ombudsmen must respond to the changing face of public service delivery. To do this they need to operate in a different structure which removes divisions in their jurisdictions, powers and processes. They must work more flexibly and more closely with other organisations. Restrictions on efficient working result from parts of the existing legislation and these restrictions must be removed.

We make recommendations for the creation of a new Commission built on the modernisation and consolidation of the existing legislation. The current PCA, HSC and CLA would be combined in a new collegiate structure which would have a strong customer focus aimed at early and flexible methods of resolution whilst retaining the traditional attributes of an ombudsman. The current requirement for complaints about central government bodies to be put first to a Member of Parliament should, we believe, be removed so that a single gateway could deal with all complaints within the ombudsmen's jurisdiction.

We make no detailed recommendations about the ombudsmen's jurisdiction. We recommend, however, that jurisdiction is considered during the preparation of the primary legislation which the new Commission will require. This may take time to bring forward. We believe that the continuing development of new methods of public service delivery will make evident any resultant need to extend jurisdiction.

Our recommendations should increase value for money in a number of ways. Firstly, the removal of the need for complainants about central government to go first to their MP would probably increase the number of complaints received by the new Commission. But with revised working methods, freed from the restriction of the current PCA legislation more complaints could be dealt with more flexibly without increasing resources. Secondly, the lessons to be learned from dealing holistically with complaints arising from new and innovative partnerships for the delivery of public services could be a valuable management tool. Thirdly, individual members of the public would benefit from faster and more responsive resolution of their complaints. The benefits to the individual could include the satisfactory resolution of complaints which would remove the need to go to court to obtain redress.

SUMMARY OF RECOMMENDATIONS

Our key conclusions are (paragraphs 2.43 and 3.52):

- the current legislative provision for the ombudsmen is restrictive and is distorting the service. It needs a radical overhaul;
- proliferation of methods of public service delivery will continue. This means finding new ways to help complainants and enabling the ombudsman to work with others to provide an integrated service;
- reshaping of the ombudsmen is needed to respond to reshaped government; and
- the MP filter can no longer be sustained in an era of joined up government and we strongly recommend that it is abolished.

Our detailed recommendations are:

We think that a major new emphasis on their initial responses to complainants is needed by the PCA, HSC and CLA and our structural recommendations are intended to address this. (3.16)

We believe that the MP filter can no longer be sustained in an era of joined up government and we strongly recommend that it is abolished. (3.52)

All ombudsmen should be able to cover the complete jurisdiction, any functional divides being purely an administrative arrangement in the same way as areas of the country are at present with the CLA. . We see advantages in retaining specific Local Government and Health Service Ombudsman roles to underpin this focus but neither they nor their colleagues should be confined by law to particular areas of the jurisdiction. We recommend that a collegiate structure (the new Commission) is put in place on the basis described in Chapter 5 (4.4)

We do not consider that the new Commission should include others such as the Prisons Ombudsman who have niche roles, are not established by statute and are properly part of the executive. (4.7)

As long as the external requirements of accountability, service to the public, value for money and transparency are met we recommend that the ombudsmen should be able to manage the internal arrangements of the new Commission, including the location of offices, to adapt it to the changing external environment over time. ... We recommend that the following framework is adopted in planning the legislation for, and organisation of, the new Commission:

- The organisation must be resilient in its ability to respond to developments in the delivery of public services by central and local government. If it is 'government shaped' it may be too inflexible when the shape of government changes.

- The internal organisation must operate as a single entity for the management of work and generally for accountability, policy-making, funding and resource management.
- The individual ombudsmen must be appointed as office-holders with a personal jurisdiction across the entire work of the new Commission. They should not be appointed to have particular functional or geographical responsibilities. However by agreement within the new Commission they would each be identified with a particular group of the bodies under jurisdiction. Thus, for example, local authorities will know which member of the new Commission will deal with them individually or corporately on questions of policy and practice.
- The staff of the new Commission should specialise in aspects of the functions of bodies under jurisdiction and as necessary form teams to deal with partnership working by those bodies. Such partnerships may involve bodies not under jurisdiction, or under the jurisdiction of another complaints investigation scheme, and innovative collaborative arrangements will be needed.
- The new Commission must work closely with central and local government authorities and the National Health Service, as appropriate through the central unit (which we recommend later in this chapter) to address the jurisdictional issues raised by partnerships, franchises, contracted out services or other developing mechanisms for the delivery of public services.
- Each ombudsman will be responsible for his own cases and will not be subject to any other ombudsman. No ombudsman should be superior to another in making decisions and recommendations about matters under jurisdiction nor should any ombudsman act in any appellate capacity if a complainant disagrees with another ombudsman's decision.
- The new Commission will be answerable to Parliament.
- The new Commission should be chaired by one of the ombudsmen for the purposes of representing it externally, for management purposes and when there is a requirement to answer to Parliament. We envisage that this ombudsman would be responsible for matters relating to the UK as a whole and for reserved matters in Scotland, Wales and Northern Ireland.
- The responsibilities of the ombudsmen for bodies under jurisdiction or for the geographical division of work should be agreed within the new Commission.
- The chairman of the new Commission should lay a report annually to Parliament on the work of the Commission which should include an account of the management of the casework of each ombudsman. The chairman should be able to present to Parliament and publish under absolute privilege such other reports as may be necessary on individual or systemic investigation into complaints. Separate arrangements should be made for publishing widely under absolute privilege reports about individual or systemic complaints.

- The new Commission should be funded on the basis which currently applies to the Parliamentary Commissioner and the Health Service Commissioner namely that funds are voted by Parliament subject to the approval of the Treasury. This will entail, for the present Commission for Local Administration, a move away from its current funding arrangements.
- The new Commission should be subject to value for money scrutiny by the National Audit Office and thus, under present arrangements, would be subject to the scrutiny of the Committee of Public Accounts.
- The new Commission should set itself a range of performance targets and publish a comprehensive report of its work, expenditure and performance against targets.
- All the ombudsmen who form the new Commission should be appointed by the Queen by letters patent.
- The board should include a number of non-executive members drawn from external bodies or the general public. All should be in a position to monitor the impact of the new Commission and to offer operational and policy advice.
- We make no recommendations on the name of the new Commission nor the titles of any office-holders. These should be chosen after careful consideration of the role of the new Commission and with public accessibility in mind. We no reason why the name of the new Commission should reflect the titles of any office-holder and note as an example the Comptroller and Auditor-General and NAO. (5.3)

We do not recommend any reduction in existing jurisdiction and powers for the new Commission. (5.4)

We suggest that piecemeal extensions to jurisdiction should not be made before the higher level decisions are taken about the scope of the new Commission's jurisdiction and what the related guiding principles should be. (5.13)

We think that strong and vigorous co-ordination of complaints processes across public services in central and local government and the health service is essential and we recommend that a unit (a strengthened focal point) [in the Cabinet Office] is set up to do this, taking an overview of all public sector complaints processes and the work of the ombudsmen. (5.19)

But it is also essential that focus is maintained during an investigation with an eye to outcomes and transparency. (6.6)

An ombudsman's function must remain grounded in addressing injustice caused to an individual and own-initiative investigation appears inconsistent with impartiality. (6.15)

We see no reason why a complainant should not see a draft report and we so recommend. (6.20)

The ombudsmen could provide readily available material perhaps on the Internet. (6.30)

There is also potential for an integrated approach with (in particular) the Community Legal Service and Community Health Councils aiming at partnership-type collaborations. (6.31)

We recommend that where a complaint is referred back the ombudsmen should be empowered to set conditions which if they are not met will prompt an investigation without a further complaint being submitted. (6.35)

This restriction should be removed and complaint submission provided in whatever form is acceptable to the ombudsmen and convenient to complainants - electronically, by telephone or other format (for example, audio tape). (6.37)

The CLA is more likely than the other ombudsmen to engage directly with complainants on the telephone or in person - this should be the favoured style of working throughout the new Commission. Similar informal methods should be used with the respondent bodies. The ombudsmen also need to improve the language used in letters to complainants - too often this is forbidding and full of legalese. (6.38)

A really first class web site is essential. Access to the ombudsman's services can also be provided through email and on-line form-filling. (6.39)

In designing any new web site and literature the ombudsmen should consider the needs of all their customers - not just complainants but also the intermediaries and staff of respondent bodies. (6.40)

[The new Commission] therefore should have a role (with others) in providing more general guidance. ... but a simple leaflet with a basic explanation of who can help and how, contact details and, importantly, appropriate management of expectations would be useful. Such a leaflet could be available from all major sources of help. (6.41)

The need for a gateway [to the new Commission] with clear guidelines for its work is essential for a highly accessible system. (6.42)

The new Commission should be more active in monitoring return rates and finding out what happens to complaints which do not return. (6.43)

The new Commission would publish a 'scheme' definition which would describe in some detail the arrangements for their operation including how they would interact with complainants and respondent bodies, and the standards they would seek to achieve, in a similar way to a charter. (6.45)

We recommend that a single point of access to the new Commission is created which we term 'the gateway'. (6.47)

The new Commission's process should be continuous until:

- it is clear that the complaint is out of jurisdiction and not investigable; or
- a settlement to the ombudsman's satisfaction has been achieved; or
- investigation has been completed and a report has been produced.

The emphasis should move away from 'acceptance or rejection' to the action or resolution proposed (in some cases, 'no action' by the ombudsman). (6.54)

A telephone conversation might quickly establish for a caller that their complaint is outside the new Commission's jurisdiction. Such a call may be regarded as an enquiry rather than submission of a complaint rejected as out of jurisdiction. The new Commission will need to set a policy on how it handles such complaints to avoid producing misleading statistics or, worse, producing misunderstandings with complainants. (6.55)

Initially, a conciliatory approach should be adopted, working on the basis that most organisations will wish to adhere to good customer-service and complaints-management principles. (6.56)

The new Commission should develop guidance material specifically for the respondent bodies. The new Commission can thus help 'enable' the respondent bodies to resolve complaints - as well as removing barriers to access, barriers to resolution need also to be identified and removed (for example, requiring an ombudsman's report before compensation can be awarded). (6.57)

A simple measure might be to develop an equivalent to the Cabinet Office's 'The Ombudsman in Your Files', available on the Internet and as a web-ready package for organisations with Intranets. (6.58)

The requirement of the 1967 Act that the PCA provides the statement of complaint and the investigation report to the principal officer needs to be reconsidered. (6.59)

A view will have to be taken on how the new ombudsmen legislation is framed in [relation to disciplinary matters and ethical standards]. (6.61)

The new Commission needs to have sufficient flexibility to deal with a very wide range of complaints covering virtually all of government business. (6.62)

Any new legislation should be based around the concept of the ombudsman seeking resolution, by an agreed settlement if possible, with investigation and the ability to make recommendations as an option. (6.63)

Cases should be referred by the gateway to an ombudsman's investigating unit quickly with final jurisdictional checks completed, if necessary, by the investigator. (6.65)

Staff need to engage with people using the telephone, meetings and email rather than paper-intensive methods where appropriate. (6.66)

Modern working also accepts an element of carefully managed risk. (6.67)

The new Commission will need to be fully engaged with Information Age Government. As government moves to greater electronic working and record keeping, the ombudsmen need to keep the implications under review. (6.68)

The new Commission also needs to ensure it is applying resources in the most effective way by using external specialists and other service providers when appropriate. (6.69)

We agree that the current position [the non-binding nature of the ombudsmen's recommendations] is acceptable and should be reflected in the new Commission's arrangements. The ombudsmen should continue to make recommendations and be able to make special reports if necessary to Parliament and councils, and seek publicity as necessary. Because of the sensitivities of Parliamentary oversight of local democracy, arrangements for pursuing compliance for individual local government cases should not involve Parliament. (6.75)

A function of the new gateway should be to provide information and if necessary refer complainants elsewhere for appropriate advice so that as far as possible complainants have reasonable expectations about what can be achieved and are more likely to set out on the path which is right for them. (6.78)

We have seen no evidence that complainants seeking compensation is distorting the ombudsman's function but we believe that the position needs to be monitored as part of the watching brief which we have recommended as one of the functions of the central unit we recommended in Chapter 5. (6.79)

It would be helpful when ombudsmen and complaints examiners are considering which cases to include in reports if the full range of possible outcomes is reflected including failing to obtain redress, apologies, explanations and small levels of compensation. (6.81)

We recommend that the new Commission is given powers to put all publishable case reports into the public domain with absolute privilege. (6.85)

In general, the new Commission will need to ensure that investigations are focused and that there is good liaison with the National Audit Office, Audit Commission and other audit and inspection bodies so that matters of concern can be taken forward. (6.89)

We recommend that arrangements to allow 'associate' status with the new Commission be introduced. (7.3)

We envisage that ombudsmen from the devolved administrations and the Information Commissioner/Data Protection Commissioner would be associates of the new Commission. (7.4)

Where there is no statutory framework, arrangements for streamlining complaints-handling are likely to be unequal. A non-statutory complaints body might be a departmental independent

complaints examiner or a private-sector ombudsman scheme operating entirely on a contract-basis. The new Commission should continue to agree protocols with these other complaints bodies where appropriate but we recommend that details should be put into the public domain (in particular, on an Internet web site) and as far as possible arrangements for streamlined complaints handling put in place. (7.6)

We recommend that arrangements for a new Commission in England should allow for the 'Parliamentary Ombudsman' function working in partnership with ombudsmen in the three countries perhaps in informal college arrangements similar to England. (7.10)

We recommend that 'associate' arrangements for public sector ombudsmen in the other three countries are put in place. (7.11)

We recommend that the new Commission remains able to report to Parliament on a United Kingdom basis. (7.12)

In making recommendations in this report only the HSC and CLA in England have been addressed. We recommend that DETR, DH and the devolved authorities consider the implications for legislation and the [HSCs and CLAs in Scotland and Wales]. (7.13)

We see no immediate reason for making any changes to existing arrangements between public and private sector ombudsmen. (7.18)

CHAPTER 1

INTRODUCTION

1.1 This review was undertaken following submission of a paper to the Government by the public sector ombudsmen in England in October 1998. The public sector ombudsmen in England comprise the Parliamentary Commissioner for Administration, the Health Service Commissioner and the Commission for Local Administration (itself comprising the three Local Government Ombudsmen). All are generally known as ombudsmen. The Parliamentary Commissioner for Administration (PCA) deals with complaints about central government departments including executive agencies and certain non-departmental public bodies; the Health Service Commissioner (HSC) deals with complaints about the National Health Service, the family health service and matters of clinical judgement; and the Commission for Local Administration (CLA) deals with complaints about local authorities.

Setting Up of the Review

1.2 The paper which the ombudsmen submitted in late 1998 to the Minister for the Cabinet Office proposed a review with the aim of creating a commission for public administration. Their main suggestion was to unite the public sector ombudsmen into some form of single body so as to remove the potential conflicts of jurisdictions which exist in their present structures. Whilst this would require legislation it would also create an opportunity to modernise their legislation and procedures. The ombudsmen's paper is at Annex A.

1.3 The ombudsmen's paper was considered by Ministers who agreed to set up this review and we were appointed to conduct it with the following terms of reference:

The review will consider whether the present arrangements for the organisation of the Parliamentary Commissioner for Administration, the Health Service Commissioner for England and the Local Government Ombudsman in England are in the best interest of complainants and others against a background of moves towards the more integrated provision of public services; and whether those arrangements hinder achieving better value for money.

The review will also consider the potential interaction between those Ombudsmen and other independent complaints authorities, such as the Independent Housing Ombudsman and the Data Protection Registrar.

The review will make recommendations about the public sector Ombudsmen, including recommendations on their statutory powers and duties, having regard for constitutional issues.

The review covered England only but has considered boundary issues or interactions with complaints authorities in the devolved administrations of Scotland, Wales and Northern Ireland.

Ombudsmen arrangements in those countries, except for reserved matters, will be for the devolved administrations to consider (in the case of Wales, a change of primary legislation would require action at Westminster). The review was announced in a written Parliamentary answer on 30 March 1999.

Conduct of the Review

1.4 We began with an extensive consultation process in which we invited over 150 organisations including representative and regulatory bodies, government departments and complaints bodies to submit their views to us in writing, and met individuals and organisations in the UK and abroad. Those who contributed to the review are listed in Annex B. We also carried out, with the assistance of the Parliamentary Select Committee on Public Administration, a survey of all Members of Parliament; their opinions about current operations of the PCA, HSC and CLA are set out in Chapter 3.

1.5 During the review we also considered earlier surveys which reflected the quality of the Local Government Ombudsmen's work. Stage II of the Financial Management and Policy Review of the CLA in 1996, which drew on polls by MORI in 1995, concluded that the work of the Local Government Ombudsmen was generally well respected by complainants, their advisers and local authorities; although there was widespread concern about delays. A survey by MORI of complainants to the Local Government Ombudsmen in 1999 reported "a broadly encouraging improvement from the 1995 survey".

1.6 A small number of individual cases were brought to our attention during the review which reflected concerns about the acceptance of cases by the ombudsmen and the outcome of their investigations. The principal concern expressed by organisations which we consulted was that cases take too long to process, especially by the PCA and HSC. Our proposals in Chapters 5 and 6 seek to address this. .

1.7 The result of this process was to give a snapshot of how the ombudsmen fit into modern society (as an institution they are more than thirty years old). Our consultation also allowed a forward look to the likely results of the considerable constitutional and administrative changes in central and local government which are underway.

General Picture

1.8 The review has particularly shown how changes over time have affected the ombudsmen. The efforts of recent governments in developing customer focused public services and improved, though sometimes complex, complaints procedures have considerably changed the environment in which the ombudsmen operate. In some parts of central government the introduction of independent complaints examiners has added an additional and enhanced layer to the complaints resolution methods offered by the executive to the public. But however effective, these changes have not been made with regard to creating a consistent and coherent system of public sector complaints resolution. For the complainant the situation is often far from clear, with multi-layered complaints processes to go through, including perhaps some form of appeal mechanism or independent examiner before the ombudsmen become either available, evident or relevant. Complaining can be

a lengthy process. Our impression is that quite a high proportion of complainants give up during the process of complaining and remain dissatisfied. It has been said that complainants are often exhausted by the complaints process before they have exhausted it.

1.9 The diversity of complaints resolution arrangements together with the changing constitutional and public service environment have made this a complex review. We have felt it important, in developing our conclusions, to concentrate on large structural issues and the overall shape of public sector complaints resolution in the future. Our principal recommendations will need primary legislation but we have also aimed to secure the maximum possible immediate benefit by proposing administrative changes which can be made fairly quickly. Where matters which lie outside our terms of reference have seemed to us significantly to affect complainants and their relationship to the ombudsmen we have commented and made suggestions.

CURRENT ARRANGEMENTS

1.10 It is important to explain the origins of the English public sector ombudsmen in sufficient detail to show what model of ombudsman was intended by the original legislation because our recommendations, if taken forward, would change that model and lead to a new focus towards the complainant.

1.11 Public sector ombudsmen in England were created by statute, are independent from the Government and are impartial in their dealings with complainants and those complained about. They exist to consider complaints by citizens that public organisations (or those acting on their behalf) have caused them injustice by maladministration (a term which is not defined in statute and has been the subject of debate). The ombudsmen do not consider the merits of decisions. The exception to this is that, in addition to considering administrative complaints, the HSC also examines complaints about service failures and the clinical decisions of the medical professions. Although this review is concerned with the public sector ombudsmen the word 'ombudsman' has no legal significance and is used by other complaints handlers in the public and private sector such as the Prisons Ombudsman, the Independent Housing Ombudsman and the Pensions Ombudsman. It is also worth noting that the word 'ombudsman' does not appear in the legislation governing the public sector ombudsmen although proposals have previously been made to replace the word 'commissioner' in the legislation with 'ombudsman'. The internationally recognised model of an ombudsman expects true independence from the executive over which they have jurisdiction and this is not enjoyed by some of the office-holders in England who are called ombudsmen. Although attempts have been made to protect the use of the word we think that it has now passed into common usage and that the protection of the values which the word signifies must be a matter for social consensus.

1.12 Ombudsmen originated in Sweden in the early nineteenth century but the idea was not taken up elsewhere until well into the twentieth century (eg Finland 1919, Denmark 1955, New Zealand 1962 and Norway 1963). The English public sector ombudsmen were created by the Parliamentary Commissioner Act 1967, the National Health Service Reorganisation Act 1973 and the Local Government Act 1974. These Acts followed some years of debate before and particularly after the publication of an influential report by JUSTICE (the Whyatt Report) in 1961 and they have been amended at various times subsequently. It is convenient to discuss the three ombudsman schemes

separately. Because the Parliamentary Commissioner was the first to be created and many of the decisions taken during the passage of the 1967 Act were fundamental the history is instructive.

THE PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION

1.13 The work of the Committee on Administrative Tribunals and Enquiries (the Franks Committee), which reported in 1957, was the focus of some years of earlier discussion by lawyers and academics about ways of dealing with complaints against public administration which were not covered by a tribunal or a form of inquiry. Although this was outside the terms of reference of the Franks Committee some of the evidence to it formed the basis for papers which appeared elsewhere. In these it was recognised that the courts were an expensive and cumbersome way by which citizens might seek redress and the courts were not equipped to conduct complex investigations into the facts. A number of articles appeared which proposed the appointment of an independent and impartial commissioner to examine complaints which stemmed from maladministration by government departments. The cause was taken up by JUSTICE which had been established in 1957 and later that year had become the British section of the International Commission of Jurists. In 1958 and 1959 JUSTICE examined the Scandinavian ombudsmen and by late 1959 had proposed that they should conduct a fuller inquiry into the feasibility of introducing such a system in Britain. JUSTICE sought and received support from the Government for an inquiry and appointed Sir John Whyatt, formerly the Chief Justice of Singapore, to conduct it. The Inquiry was comprehensive and the report, published in October 1961, contained a substantial and detailed analysis of issues which had previously been the subject of rather more general discussion.

1.14 Whyatt came to two principal conclusions. Firstly that there was scope for the introduction of an appeals mechanism in respect of administrative decisions involving discretion, to be supervised by the Council on Tribunals. Secondly, that a Parliamentary Commissioner should be appointed to deal with cases of maladministration by Government departments. The Commissioner would be accountable to Parliament and would at first take complaints only at the suggestion of a Member of Parliament or a peer but later directly from the public.

1.15 In November 1962 the Government issued a statement rejecting the Whyatt proposals. They rejected his proposal for a Parliamentary Commissioner on the basis that it would "seriously interfere with the prompt and efficient despatch of public business" and that "there is already adequate provision under our constitutional and Parliamentary practice for the redress of any genuine complaint of maladministration, in particular by means of the citizen's right of access to Members of Parliament".

1.16 Whilst that was more or less the end of matters so far as the Conservative Government was concerned, the Labour opposition took up the cause, steadily increasing their public statements of support for a Parliamentary Commissioner as the General Election of October 1964 approached and ultimately making it a manifesto commitment. During 1965 the Home Affairs Committee supervised the development of proposals for the Parliamentary Commissioner, drawing on the Whyatt Report, a draft Bill provided by JUSTICE and a memorandum from the Legal and Judicial Group of the Parliamentary Labour Party.

1.17 It was in this period that key features of the current arrangements for the PCA were decided, notably the terms of his appointment, his requirement to work with a Select Committee of the House, his powers of access to papers, the need for all cases to be referred to him by a Member of Parliament and the principle that he examines cases of injustice arising from maladministration. Wyatt's proposal that Ministers should be able to veto his investigation of a case was not adopted.

1.18 Work continued into early 1966 when a draft Bill received its First Reading. Not all observers favoured the introduction of an ombudsman in any form whilst others favoured a different arrangement from that proposed.

1.19 The Second Reading of the Government's Bill was notable in that the opening speech by Richard Crossman contained a discussion of the nature of maladministration which has continued to be taken note of today and has become known as 'the Crossman catalogue'. Had an attempt been made in the Bill, he said, to make a list of the qualities which count as maladministration it might include "bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on". In the event no definition appeared in the 1967 Act and none has been attempted since.

1.20 Maladministration is a concept to be interpreted by all successive public sector ombudsmen in each and every case that comes to them and the 1967 Act set a precedent in this respect for the subsequent legislation which governs the HSC and CLA. The position is made more difficult by the introduction into the 1967 Act of the provision that a complainant must, for the ombudsmen to take their case, have claimed to have sustained "injustice in consequence of maladministration". Again the Act does not define 'injustice'. Thus the ombudsmen have a double test to apply before deciding how to deal with each case. The issues which this raises go wider than simply the setting of the terms of admission to the ombudsmen's embrace. They include questions of the extent of the ombudsmen's discretion, the availability of a remedy to the complainant, the nature of the investigative process and the number of cases which the ombudsman investigates. These issues apply to all the public sector ombudsmen (though it should be noted that the HSC legislation refers to 'injustice or hardship').

1.21 Returning to the events of 1966, the Committee stage produced an important amendment to the Bill to restrict the ability of the PCA to investigate matters in which the complainant had a right of access to a tribunal or access to a remedy in a court of law. In due course, and this was incorporated in the eventual Act, the PCA was given discretion to investigate where he considered it unreasonable in the circumstances for the complainant to have sought recourse to a court or tribunal.

1.22 At the Committee stage in the Lords, discussion of access to the PCA confirmed that the intention was to create a Parliamentary institution, not a public institution. The complainant would complain through a Member of Parliament and the PCA would reply to the Member. The PCA would be restricted to central government matters involving maladministration.

THE PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION TODAY

1.23 The PCA is practically but not technically an officer of the House of Commons and although answerable to Parliament (its interest is largely represented by the Select Committee on Public

Administration) has complete independence. Whilst the 1967 Act gives him discretion to deal with cases as he sees fit, including declining to deal with them at all, the route by which complaints reach him is strictly prescribed. Complaints can only be put to him in writing and must be put forward by a Member of Parliament on behalf of the complainant. By convention only the complainant's own MP puts forward the complaint but this convention can be set aside by MPs who are prepared to take forward a complaint by a non-constituent, perhaps because its subject is of interest or the injustice seems harsh. The views of Parliamentarians vary on this matter.

1.24 The staff of the PCA screen all new complaints to decide if they are within jurisdiction. They must be satisfied that there is *prima facie* evidence of maladministration leading to injustice and (usually) that the complaint is not about matters which gave rise to a complaint more than twelve months before it was referred to the MP and is not a matter for the courts. The PCA's staff then use his discretion, which is delegated to them, to decide how to deal with the case. A proportion go forward to full investigation and the production of a detailed report in which some form of redress can be recommended (but not enforced) if maladministration leading to injustice is found. The Ombudsman's entire process is subject to judicial review.

1.25 The total investigative process is often protracted and has been the subject of criticism. In 1998/99 the average throughput time of a fully investigated case was 91 weeks but this was a year in which an accrued backlog of cases was cleared. The PCA believes that in 1999/2000 the average throughput time will be 10 to 11 months. These times run from the time his office has sufficient information to decide whether the complaint is suitable for investigation. The time taken to decide will vary from case to case.

1.26 In 1998/99, 1,506 new cases were put forward by MPs, 372 cases were investigated and 1,134 were either not investigated or investigation was discontinued.

1.27 The extent to which systemic improvement accrues from the investigation varies but it is the individual complaint which is the central focus except in those cases where a repeated error is evident and a number of individuals are affected. In these instances the PCA has in the past taken a representative case or cases.

THE HEALTH SERVICE COMMISSIONER

1.28 The HSC is also answerable to Parliament and is appointed in a similar way. Whilst the office-holder has so far also been the PCA there is no reason why that should always be so. Although there are internal differences in the methods used to deal with cases, the screening process and its effects are similar to the Parliamentary Commissioner's methods. The law as it relates to matters which cannot be investigated, time limits and alternative remedies is broadly similar to the PCA Act. The staff of both the PCA and HSC share premises and common services.

1.29 The most significant difference between the two schemes is that the complainant does not need to route a complaint to the HSC through an MP. A complaint can be taken to the HSC so long as the internal NHS complaints process has been invoked and (usually) exhausted. A health service body can also refer a complaint it has received about itself to the HSC but this is unusual.

1.30 The HSC investigates complaints about the National Health Service which includes family health services and service delivered by private sector providers of NHS services. His jurisdiction has since 1996 included matters of clinical judgement. In 1998/99, 2,869 new cases were received by the HSC and 119 investigations were completed.

1.31 The number of cases taken forward to full investigation by the Health Service Commissioner is quite small and reflects, among other factors, a high rate of premature or outside jurisdiction complaints which come to him. Where the complaint warrants it, an investigation into clinical decisions is made. The systemic improvements which can accrue from these investigations are considerable. The medical professions generally believe that investigations into clinical decisions benefit those professions. There is, however, widespread concern about a number of aspects of HSC's performance including the small number of cases investigated and the length of time which investigations take.

THE COMMISSION FOR LOCAL ADMINISTRATION

1.32 The Commission for Local Administration administers the Local Government Ombudsmen who deal with complaints about local authorities. The CLA includes on its board the three Local Government Ombudsmen and the Parliamentary Commissioner in an *ex officio* capacity, and it supervises the organisation, finance and accommodation of the Ombudsmen who otherwise operate independently covering different parts of England from offices in York, Coventry and London. Complainants can approach the ombudsmen direct with requests to investigate their complaints. Although the general principles of the PCA and HSC schemes apply in respect of jurisdictional and timeliness issues there are some exceptions to the jurisdiction which were introduced into the Local Government Act 1974, for example there are considerable restrictions on the ombudsman's ability to examine education problems.

1.33 The Local Government Ombudsmen tend to intervene rather earlier in cases and seek rather more frequently the pragmatic solutions or mediation which lead to what are known as 'local settlements'. Out of 15,653 decided cases in 1998/99, local settlement accounted for 2,251. Including cases fully investigated (subject to formal report), redress was obtained or recommended in 2,624 cases. The number of cases received are rising considerably after several years of stability and may reach 18,000 by the end of 1999/2000. The reasons for this are unclear.

1.34 As with the PCA/HSC, only a small proportion (about 5%) of cases are fully investigated. But local settlement provides many complainants with the redress which they were denied by the local authority's own complaints process. As a result of different working methods the CLA tends to have shorter throughput times than the PCA/HSC. In 1999, the LGOs decided 54.9% of cases within 13 weeks, and 81.1% within 26 weeks.

RESOURCES

1.35 Outturn figures for resources used by the public sector ombudsmen for 1998/99 are:

	Expenditure (1998/99)	Staff numbers (April 1999)
PCA	£7.2m	114
HSC	£5.5m	89
CLA	£7.7m	200

(The PCA and HSC share common services which have been divided between the two offices.)

TERMINOLOGY

1.36 Throughout this report we have used a number of terms for brevity. A 'respondent body' is an organisation (and occasionally an individual such as a GP) against whom a complaint has been made to the ombudsman. We often refer throughout to the 'ombudsman' or 'ombudsmen' as an abbreviation for 'the English public sector ombudsmen who are the subject of this review'. Where we have used 'he', 'his' or 'him' this should also be read to cover 'she' or 'her'.

CHAPTER 2

THE CASE FOR CHANGE

2.1 In their paper for Ministers (see Annex A) the ombudsmen put forward a case for change based on the need for their service to keep up with the modernisation process in government. They argue that their legislation is too prescriptive and prevents them from making flexible interventions which might help the complainant quickly and effectively. They also say that it defines their jurisdictions and powers in ways which make it difficult to deal with complaints which span central and local government or relate to services managed by multi-agency providers. In particular health and social services are currently a prime area for innovative developments which span central and local government, strongly encouraged by the Health Act 1999.

2.2 This review has consulted widely. In this chapter we present a case for a comprehensive overhaul of the structure of the present ombudsmen schemes. The important issue of access to the ombudsmen for complainants merits a discussion of its own and this is in Chapter 3.

SUCCESS OF THE OMBUDSMEN

2.3 The broad concept of the public sector ombudsmen is widely regarded as successful. As JUSTICE, in its submission to this review, noted:

- "a) Their independence is unquestioned;
- b) whilst following the rules of natural justice, the procedures of the ombudsmen are informal, inquisitorial and non-adversarial;
- c) legal representation is not necessary;
- d) the service provided is free and (unlike the court system) there is no risk to the complainant of having to pay the others party's costs if the complaint is not upheld."

2.4 These important characteristics have been widely acknowledged by contributors to this review as valuable features of the public sector ombudsmen. Yet many of those consulted during the review and those who have commented over a number of years have also been critical about the current arrangements and have made proposals for change. There is a wide consensus that the time has come to re-appraise the structure of the public sector ombudsmen and in particular its coherence to complainants and its accessibility. The pace of change in modernising government is swift and it is not surprising that institutions founded in the sixties and seventies find it difficult to remain in step with present and future needs.

2.5 What should be the scope of any change? Should a radically different institution incorporating ombudsmen functions be introduced? The scope of this review covered only the English public sector ombudsmen but we have noted the proposals put to us by some that a wider re-

appraisal is needed, dealing with the whole area of public administration or administrative justice. The ombudsmen are simultaneously part of many wider and overlapping systems - complaints-handling, regulatory, ethical, audit and accountability frameworks - which provide checks on the executive, as well as being part of various sectors of public administration and the civil justice system. But proposals for incorporating the ombudsmen into a wider organisation or for a radical alternative to the current approach come from the few - the great majority of contributors to this review see merit in change to the existing arrangements but not their replacement with something new or, indeed, their abolition. It is clear that whilst there is a need for modernisation, the essential role and expertise of the existing ombudsmen and their staff are valued.

THE NEED FOR CHANGE

2.6 In examining the need for change we have considered:

- criticisms of the ombudsmen's operations and working methods, and of legislative and procedural restrictions;
- the position of the ombudsmen in the wider public sector complaints system, among regulatory, audit and inspection bodies, and as part of the constitutional framework for holding the executive to account;
- the impact on the ombudsmen of extensive modernisation of government and constitutional change including the growth of partnership working across government, devolution, regionalism, access to justice, local government and health service reform, human rights and freedom of information initiatives.

CRITICISMS OF THE OMBUDSMEN'S OPERATIONS

2.7 We deal here with some of the major criticisms of the ombudsmen's schemes which have been put to us, whilst criticisms concerning awareness and access are dealt with later. We think that the thrust of the criticisms will be addressed by our recommendations, many of which relate to the unification of the schemes and the legislative revision which that implies. Our discussions with the ombudsmen on these issues have shown that they are very much alive to the need for their methods to keep in step with the needs of the public but feel constrained by the sometimes restrictive requirements of the law.

PCA

2.8 The principal criticism of the PCA concerns the very long throughput times of cases investigated which was the subject of comments in a report in 1999 by the Select Committee on Public Administration. The PCA addressed throughput times in his annual report for 1998/99. He made it clear that his priority had been the elimination of a backlog (which has now been achieved) and he anticipated that throughput times would fall by about a half from an average of 91 weeks. As one reaction to the emerging backlog, the PCA's Office had begun to exercise its discretion not to accept cases for investigation more stringently from 1994, and the present PCA continued this policy for some time after his appointment. However, it was a practice which he did not wish to

continue for longer than was necessary, and he has relaxed the policy as progress with clearing the backlog permitted; in consequence, the proportion of complaints received which are accepted for investigation has increased. The backlog has now been virtually eliminated, and throughput times have fallen substantially. Even so, the expected average throughput time of 10 to 11 months is long.

2.9 The reasons for this are partly to do with the processes set out in the 1967 Act. When a complaint is received from a Member of Parliament it must first be screened to see if it meets the criteria set out in the Act. Almost half the complaints do not and must be returned to the MP. An objective in 1998/99 was to screen 85% of cases in six weeks. If an investigation is to be carried out the principal officer of the department concerned (this would normally be the Permanent Secretary) must be afforded an opportunity to comment. Usually a letter is sent for this purpose and 28 days or other appropriate period is allowed for a response. After the investigation has been carried out a report must be prepared and sent to the MP and to the department. No specific provision is made in the Act for an informal process of resolution but as part of the screening process an informal approach was made to departments in 468 cases in 1998/99 and in 90 of these maladministration was acknowledged and redress given.

2.10 Thus the PCA has two processes in law – screening and investigation. He can screen and using the provisions of the law and his own discretion can decide whether or not to investigate. If he investigates he must produce a report and send it to the MP. He can discontinue an investigation at his discretion. When an investigation is started it will often be unclear how long it is going to take. There is a presumption among the staff of the PCA that the investigation will be thorough.

2.11 Although the process is to a large extent governed by the law, some government departments have expressed concern about the slow work of the PCA once the investigation is under way. A number of Parliamentarians have also expressed a general concern about the length of the process. We think a combination of legislative revision, a focus on early and informal resolution and faster internal procedures could transform the work of the PCA. We do not think that the current situation will be sustainable, leaving aside ‘joined-up’ questions, unless significant changes are made, in particular the provision of direct access for complainants (see Chapter 3).

HSC

2.12 The HSC has been the subject of criticism of a slightly different sort. A number of contributors to this review have commented that the statistics published by the HSC have not allowed an adequate assessment to be made of the reasons why the HSC is investigating a reducing numbers of complaints whilst the number he receives is increasing year by year. The HSC addressed this issue in his 1998/99 report.

2.13 The HSC has considerable discretion and it is important that he has. That discretion, delegated to his staff, was exercised in respect of 2,479 (English) complaints which completed screening in 1998/99. Of these, 1,077 were judged to be investigable and in 135 cases the decision was taken to investigate. In a further 84 the respondent body agreed to look again at the complaint. In respect of the remaining 858 the decision was made that no further action was appropriate. In 113 of those cases the respondent body was given advice on how better to deal with such cases in future. Of the remaining 745 it is clear from the HSC's report that the complainant was probably

satisfied in a number of cases but the number who were dissatisfied with the performance of both the NHS and the HSC is not known.

2.14 We consider that the small and falling number of cases investigated compared to the much larger and rising number of cases received, taken together with the need for the complainant to have first exhausted the NHS complaints processes can only increase the risk that people will eventually be deterred from taking their complaint to the HSC even though they have direct access to him. We know that the HSC is taking steps to address the modernisation of his internal procedures and we have had discussions with him and members of his staff which we hope have contributed to this process. We are convinced that change is needed to these procedures to make the office of the HSC more focused on the complainant's needs and to hasten the progress of investigations.

CLA

2.15 Of the three English public sector ombudsmen the CLA has attracted least criticism during this review and by commentators over recent years. The volume of complaints handled (around 15,000 each year but now rising) and less restrictive legislation has led to less rigid approaches by the CLA. As explained above access is less constrained - there is no equivalent to the MP filter and no general need to exhaust local authority complaints systems. A small number of contributors to this review have criticised the exercise of the local government ombudsmen's discretion in particular cases. It has been difficult for us to assess the extent to which predictable differences of opinion may sometimes stray into some form of persistent mind-set which could adversely affect a particular group of people or organisations. The CLA would like to be answerable to Parliament and the oversight which that would produce could provide a mechanism, as it does for the PCA/HSC, for airing concerns about the use of discretion.

General

2.16 There have also been a number of long-running issues over the years. An inquiry in 1993 by the Select Committee on the Parliamentary Commissioner for Administration made a number of recommendations which the then Government accepted but which were not implemented because of the lack of a suitable legislative opportunity. The most serious criticisms of the HSC's jurisdiction were addressed in 1996 by extension of his remit to allow investigation of clinical complaints and complaints about family health services including GP services. These arrangements have been settling down. A review of the CLA in 1996 made a number of recommendations about jurisdiction, accountability services and internal administration, many of which are still awaiting implementation.

2.17 A further issue of concern is the disparity between the PCA/HSC and the CLA which currently exists in approaches to redress. Both follow the same principle that the loss to the complainant should be restored but follow different criteria.

THE OMBUDSMEN IN THE WIDER ENVIRONMENT

2.18 When the first of the public sector ombudsmen entered the scene in 1967 the stage was uncluttered. That stage now contains many players. As we explained in Chapter 1, regulatory or complaints-handling systems have been introduced with little thought that they should fit any

systemic model or to whether the multiplicity or variety of arrangements would confuse the public. This section of our report shows the environment in which the ombudsmen must operate and why changes to the way they operate are necessary to keep in step with developments.

The Total Complaints Process

2.19 The English public sector ombudsmen are frequently the 'last port of call' for a complainant and may come at the end of a lengthy journey through a complaints system. The ombudsmen cannot be seen in isolation when considering the 'best interests of the complainant'. The complainant is not just a complainant to the ombudsmen but will also have complained along the way, perhaps to many parties, and is quite likely to be exhausted by the process (see Chapter 7).

2.20 Each of three English public sector ombudsmen has different arrangements for access. A complaint to the PCA must be submitted through an MP but there is no formal requirement for a complainant to have approached the department alleged to have been at fault. Many MPs will approach the department - perhaps by writing to a Minister - before referring a complaint to the PCA. The PCA's office also encourage complainants to try to settle their complaints using departments' internal complaints systems but there is no formal requirement that they do so.

2.21 Some departments have set up arrangements for independent review - these might be independent review panels as is the case with the Benefits Agency or independent complaints examiners such as the Adjudicator for Inland Revenue, Customs and Excise and Contributions Agency and the Independent Complaints Examiner for the Child Support Agency. Generally complainants must exhaust an internal complaints system before being referred to its independent review tier.

2.22 Complaints to the HSC must have been through the NHS complaints procedure before the HSC is able to accept them. The first stage of the NHS complaints procedure is an attempt to resolve the complaint by local resolution, using the internal complaints procedure of the body complained against. The second stage involves review by an Independent Review Panel (IRP) but complaints can be referred to the IRP only by a convenor, usually a non-executive director of the NHS Trust or Health Authority involved. If a complaint is turned down for review by the convenor or the complainant is dissatisfied with the outcome of the IRP, he or she may go to the HSC. The HSC may decide to investigate, take other action such as refer the complaint back to the NHS body or take no further action.

2.23 Complaints to the CLA must first have been raised with the relevant local authority but there is no formal requirement to exhaust the local complaints system. How prepared the CLA is to accept an early complaint may depend on their perception of the quality of a council's complaints system. A good complaints system is likely to resolve the vast majority of complaints quickly and to the complainant's satisfaction. Forcing a complainant back to try to navigate through an obstructive or perhaps non-existent complaints system introduces delay and in these cases the CLA may be prepared to accept a complaint earlier. Occasionally, urgency may demand immediate action from the CLA (for example, if a complainant is about to be evicted from his home). Whilst the ombudsmen should not become advocates there is an increasing need to assist the complainant in dealing with the complexity of complaints processes.

The Wider Picture

2.24 The ombudsmen are part of the group of organisations which regulate public bodies and hold them to account. The PCA and HSC have a constitutional position which relates to Parliament, supporting Parliament in holding the executive to account, and are a parallel institution to the Comptroller and Auditor-General and National Audit Office. The HSC works closely with the General Medical Council, other health service regulatory and professional bodies and is beginning to build relationships with the new bodies for clinical oversight, such as the Commission for Health Improvement. There is an increasing role for the ombudsmen in playing a part in systemic developments but they must not lose sight of their prime responsibility for individual complaints.

2.25 The LGOs have responsibility for handling complaints including those currently associated with breaches of the National Code of Conduct for councillors. However, recent proposals for legislation contained in the Local Government Bill envisage a new ethical standards framework which would be the responsibility of a new Standards Board and local standards committees. The impact of this on cases of maladministration is not yet easy to predict but could have wider effect across the public sector.

2.26 There are other ombudsmen or watchdog bodies in the public sector and the private sector. The Data Protection Registrar is concerned with data protection both in the public and private sectors, and handles complaints from the public about such matters as wrong or illegally-held data. The scope for interaction with the ombudsmen will increase when the Data Protection Act 1998 comes into force on 1 March 2000. The proposed Information Commissioner in the Freedom of Information Bill is intended to oversee both data protection and freedom of information and therefore to take over from the PCA the handling of complaints from the public about access to government information. Serious complaints against the police are handled by the Police Complaints Authority which oversees their investigation. There are other commissions with functions which include complaints-handling such as the Mental Health Act Commission, and the Government recently announced that a national Care Standards Commission would be established in its Bill on care standards and would 'have the power to investigate complaints'.

2.27 The numerous private sector ombudsmen include the Independent Housing Ombudsman (who handles complaints against social landlords such as housing associations), the Pensions Ombudsman and the Financial Services Ombudsman (recently set up to group together separate specialist ombudsmen such as the Banking Ombudsman and Insurance Ombudsman). In some cases these ombudsmen, although dealing with the private sector, have been set up in statute. Their operations are very similar to the public sector ombudsmen but they differ in that they are often a precursor to action by the complainant in the courts if a resolution cannot be found by the ombudsman. They also employ techniques such as arbitration. To the extent that public and private sector partnerships will require the relevant ombudsmen to work together it is clear that the differences of approach present considerable challenges.

2.28 All public sector ombudsmen are part of the wider system of administrative law and even more generally part of the civil justice system. Lord Woolf's reports in 1995 and 1996, and recent Access to Justice initiatives have viewed ombudsmen in general as part of alternative dispute

resolution (that is, alternative to the courts). They provide a cheaper, more flexible and less formal alternative to the court system, along with other forms of ADR such as mediation and arbitration. Lord Woolf has made a number of recommendations concerning the ombudsmen which generally remain to be finally considered.

The Impact on Complainants

2.29 The effect of this complex environment can be to lead to a sense of confusion. The public on the whole do not understand how it all fits together. If they have a problem, it is often not clear where to go and frequently only part of their problem can be dealt with by any single body. A complaint which crosses boundaries between agencies (for example, a discharge from a hospital to local authority social services which goes wrong) may need to be pursued through two or more complaints processes, eventually to two or more ombudsmen. Complainants in these circumstances are often vulnerable and may have disadvantages such as language or literacy difficulties which make it difficult to pursue their complaints to a satisfactory conclusion.

2.30 An example of the type of cross-boundary complaint was described in the submission provided to the review by the Association of Social Services Directors:

Mrs A has received intermediate care at a nursing home. Her care was arranged by social services. She has to pay for accommodation and care but would have preferred to stay in hospital but they had no step down beds or 'the patient hotels' she had heard about for convalescence/rehabilitation.

The home is regulated by health. The local agreements between health and social services are in pursuit of 'Modernising Health and Social Services: National Priorities Guidance 1999/00-2001/02'.

Mrs A is not happy she was not told about continuing health care although someone said something about a Long Term Care Charter, the only leaflet her daughter found at the CAB was about a Community Care Charter. She feels the home could be cleaner and the food better. She does not mind paying for accommodation but does not see why she has to pay for care.

She wants to complain about practice and policy in all these areas as well as the fact that her Housing Association did not do the adaptations when they said they would and she stayed in the nursing home an extra three weeks. Problems also arose surrounding her attendance allowance and the CAB became involved.

All of the public sector ombudsmen and perhaps the Independent Housing Ombudsman might find themselves involved in such a complaint, dealing with them as four separate complaints each of which might have been pursued through separate internal complaints processes before arriving on each ombudsman's desk.

2.31 We were surprised when a number of the ombudsmen's staff told us that they rarely handled boundary-crossing complaints. Our impression in looking at a number of cases, which included

direct contact with complainants, was that problems arising because of boundaries between agencies are very common. In one group of 6 cases, 3 involved multiple agencies and the words 'being pushed from pillar to post' were used frequently. Because each agency feels itself responsible for its own transactions but not for an entire activity slip-ups occur and arrangements for resolving the problems are lacking. If a complaint does reach an ombudsman he or she can deal only with the element involving bodies within jurisdiction. When the problem giving rise to the complaint has arisen because of the boundary (for example, a communication failure) it may be difficult to resolve the matter satisfactorily and obtain redress – particularly if the major fault lies with the body out of jurisdiction on the other side of the boundary.

2.32 A further example of the type of cross-boundary problems which are arising was given by the National Association of Citizens Advice Bureaux:

‘... “Falling Short”, our recent Evidence Report on Housing Benefit, used statistics revealed by a monitoring exercise in a representative sample of bureaux over one week. Two-thirds of the clients were in receipt of Income Support or Jobseekers Allowance and thus their HB claims required liaison between the Benefits Agency and the local authority. Yet the monitoring exercise also revealed that, converted to an annual basis, CABx would see around 28,000 cases of poor liaison (although a proportion of that would arise within local authorities).’

This compares with a total number of complaints to the Benefits Agency in 1998/99 of 77,693. We conclude that problems for the citizen arising because of boundaries are very common (this has provided much of the impetus for ‘joining up’ government). If few of these complaints arrive at the ombudsmen’s offices then it raises questions about the system for dealing with such complaints.

2.33 The internal complaints process of bodies engaged in cross-boundary working are needing quickly to adapt to cross-boundary and partnership issues. For example, the joint Department of Health/DETR unit has issued guidance on how this might be done following the 1999 Health Act. As the Royal College of Nursing put it in their submission to us:

" in the first instance, health authorities, trusts and local authorities will have to address how to adapt their complaints mechanisms to these more integrated ways of working. Ultimately, however, the public sector Ombudsmen will be faced with the same challenges and must do the same."

2.34 The public sector ombudsmen should in our view be setting a standard for offering a coherent service to users of public services or those who are subject to the regulatory requirements of government. It is important that when a complainant turns to the ombudsmen for help the service is comprehensive and comprehensible. We do not consider that the present fragmented structure of public sector ombudsmen and complaints systems are able to meet the challenge of handling complaints which cross boundaries.

MODERNISING GOVERNMENT AND CONSTITUTIONAL CHANGE

Developments in public service

2.35 The English public sector ombudsmen have now existed for over 25 years. Since their establishment in the sixties and seventies there has been no major refocusing of their role despite significant changes in public administration, social attitudes and a significant re-appraisal of the rights and reasonable expectations of the individual. During the 1990s in particular these changes have been substantial and the pace of change has quickened. Arrangements for delivering public services have also become more diverse, with more services contracted to the private sector and a substantial reliance on the voluntary sector.

2.36 A key objective in providing responsive public services has been to improve complaints systems. In 1995 the Citizen's Charter Complaints Task Force after a 2 year study looked at the effectiveness of and made comprehensive recommendations on the improvements needed to public sector complaints systems. More recently, in June 1998 the Cabinet Office's Service First Unit published 'How to deal with complaints', a guide setting out a framework for handling complaints and providing examples of good practice from public services. Efforts continue as part of the Modernising Government programme – this review of ombudsmen is itself an initiative to improve public sector complaints handling. As well as putting things right when they go wrong it is essential to set standards and to make these known to the public (for example, through charters), to learn lessons from complaints and to encourage public servants to respond to complaints in a positive manner.

2.37 The emphasis of public service delivery has shifted towards improving service by integrating services around the citizen. The Modernising Government programme is encouraging 'joined-up services', frequently by creating partnerships between agencies to provide services based on people's needs rather than the administrative convenience of service providers. These include, for example, 'one-stop shop' arrangements for delivering central and local government benefits, and partnerships to provide integrated health and social services care for elderly people. This has significant implications for complaints handling in general and for the ombudsmen in particular.

2.38 Modernising Government initiatives are also reforming major sectors of government business. Local government reform has introduced 'Best Value' and proposes radical change of local governance arrangements and the ethical framework. Health service reform is creating new structures and introducing new clinical governance and oversight arrangements. 'Access to Justice' reform will have a wide impact and implications for the ombudsmen (which we set out in more detail later). There can be no doubt that the current arrangements for the public sector ombudsmen lack the flexibility required to respond to the significant change implied by public service delivery structured to meet the needs of the consumers of those services.

Constitutional change

2.39 Constitutional change also has implications for the ombudsmen. In constitutional terms, the ombudsmen exercise functions related to those of the legislature in controlling the actions of executive bodies and providing redress for grievances against them. The ombudsmen are being

affected by devolution and could potentially be affected by regionalism or changes in democratic representation arrangements including in Parliament. The ombudsmen's structure is currently defined by government and constitutional structures and flexibility to respond to change in those structures would be essential. Parliamentary reform may in time also affect their oversight.

2.40 Constitutional change is also affecting the individual citizen's rights. The passing of the Human Rights Act 1998 incorporated the European Convention on Human Rights into United Kingdom legislation. The Act is due to come into effect in October 2000 and has major implications for public bodies, the courts and the citizen. Also, freedom of information legislation is before Parliament and may introduce a legal right for the citizen to access information held by public authorities. The eventual impact of these developments remains to be seen and the ombudsmen's role may need to be reconsidered to ensure it is coherent with these developments.

Conclusion

2.41 The impact of this environmental change is affecting the ombudsman in many ways. The bodies under their jurisdiction are also being radically changed. Respondent bodies in recent years have introduced more elaborate complaints processes which complicate interactions and are being affected by Modernising Government initiatives. Human rights and freedom of information legislation presents new challenges to public bodies and is likely to change relationships with the citizen. As well as being affected by change the ombudsmen themselves are keen to improve their own services and attitudes in line with the new environment, to modernise and join-up their own services to provide a more responsive and better integrated service for the citizen.

2.42 The general picture combines problems with the ombudsmen's own service, wider confusion arising from the proliferation of bodies involved in complaints-handling and system improvement, and a rapidly changing government environment to which the ombudsmen need to respond.

2.43 We conclude that:

- the current legislative provision for the ombudsmen is restrictive and is distorting the service. It needs a radical overhaul;
- proliferation of methods of public service delivery will continue. This means finding new ways to help complainants and enabling the ombudsman to work with others to provide an integrated service; and
- reshaping of the ombudsmen is needed to respond to reshaped government.

CHAPTER 3

ACCESS TO THE OMBUDSMAN

3.1 In Chapter 2 we explained the case for change. In this chapter we address the key issue of access to the ombudsmen by the complainant. The ombudsmen are part of a wider system and cannot operate in isolation. A complainant using their services must first find their way to their door, almost always through an intermediary such as a Member of Parliament or through a complaints system. These intermediaries have a major impact on the ombudsman's relationship with the complainant and new ways must be found to ensure consistent and coherent access for the complainant.

PUBLIC AWARENESS OF THE OMBUDSMEN

3.2 A precondition for access to the ombudsmen is awareness that they exist. Among the concerns raised during this review was a perception of poor awareness and understanding of the ombudsmen's role by the public as well as by others such as MPs and staff of the bodies who may assist the public in making a complaint. The effects of poor awareness are manifested in a number of ways.

3.3 All the public sector ombudsmen are frequently asked to consider a complaint which is not within jurisdiction, has not been through an internal complaints process or cannot be handled for another reason. In 1998/99 nearly half the cases put to the PCA by Members of Parliament were outside jurisdiction, or were not about administrative actions or were cases in which the PCA thought it reasonable that the complainant go to a court or tribunal. All of these render the complaint outside the remit of the PCA. In these cases particularly, the time wasted by the complainant, the MP and the PCA is considerable and, for the complainant, the experience must often have been frustrating or distressing. The number of complaints mistakenly put to the PCA by Members of Parliament is surprising yet as Mark Oaten MP said in the House of Commons on 19 October 1999 during a debate on the ombudsmen (Hansard column 322)

'Given that the ombudsman has that critical role, it is a pity that many of my colleagues who came here in the 1997 intake have little understanding of that role and the way in which Members of Parliament should work alongside that office. ...When I was elected I certainly did not have a clue about what the ombudsman did - from speaking to colleagues, I know that the same was true of them.'

3.4 The picture is no more rosy in respect of those who complain to the HSC. In 1998/99 41% of complaints he received could not be accepted because the complainant had not been through the NHS complaints procedure. Other complaints were outside jurisdiction. In the same year 38% of complaints received by the CLA were premature or outside jurisdiction.

3.5 It is hard to establish whether greater detailed awareness of the factors which control the ability of the ombudsmen to accept a complaint would reduce the problem. For example, a large

number of the complainants to the CLA will have been advised by someone, including the local authority, by the Citizen's Advice Bureau or by some other group. It seems that the information available to all these groups must be failing to register and the information which complainants need is not being disseminated. This is an aspect of awareness which must be addressed. Of course, however much effort is put in to this there will always be people who go to the ombudsmen with a premature or out of jurisdiction complaint. The ombudsmen must have effective mechanisms for dealing with complainants at first instance. This is an important part of the structural changes about which we make recommendations later in our report.

3.6 There is a second issue of awareness relating to the extent to which the public know about the ombudsmen at all. A survey by MORI for the Citizen's Charter Unit in 1997 showed that less than half the population were aware of the PCA or the CLA. A similar figure was found by MORI in a survey for the CLA in 1995. In 1996 a survey by the Consumers' Association found that 41% of all respondents in a sample of 1000 adults had no awareness of the PCA, HSC or CLA. The figure rose to 51% in social group C2DE.

3.7 The British and Irish Ombudsman Association (BIOA), to which the public sector ombudsmen belong, has been working over the past year on awareness of ombudsman schemes generally. The CLA has also devoted resources to outreach work in order to assess its effectiveness. There are signs that in the public sector general awareness of the ombudsmen is growing. An important indicator is the growth in complaints received by the CLA. The nature of the cases they are currently receiving suggests general growth not confined to any subject or geographical area.

3.8 For the future there are clearly two needs. Firstly, public awareness of the ombudsmen must be increased and so far as possible the least advantaged sections of society especially should be aware of what is available to them and awareness levels should be measured by the ombudsmen in the way that the CLA has done in the past. The work BIOA is doing will be important in this respect. Secondly, efforts must be made to reduce the number of cases which come to the ombudsmen prematurely or mistakenly. The public service has an important role to play in explaining the schemes to members of the public at appropriate times.

ACCESS

3.9 Among the great majority of representative bodies which have contributed to this review there is strong agreement that the public sector ombudsmen need a single unified point of access with standardised entry procedures and a customer-facing ethos. Their arguments support the case for a unified public sector ombudsman service put forward in the ombudsmen's paper to the Government in 1998. But in meeting that general desire for simpler, unified access there are very substantial issues about access to the individual schemes as they now stand, particularly in respect of the PCA, which need to be addressed.

3.10 Contributors to this review have expressed almost universal dissatisfaction with the arrangement for access to the PCA via an MP (the so-called MP filter). It has been questioned throughout the life of the PCA. Of all countries which have a public sector ombudsman scheme only here and in France is the complainant denied direct access to the ombudsman who deals with complaints about government departments and their agencies. We have already referred to the high

number of cases which are wrongly put by MPs to the PCA and we cover this in detail later in this chapter. It is sufficient to say here that we believe the MP filter should be abolished.. The survey of MPs which we undertook in co-operation with the Select Committee on Public Administration during this review shows a small majority of the 398 respondents in favour of retaining the filter.

3.11 The effect of the MP filter goes much wider than to affect initial access to the PCA. The concept, described in Chapter 1, of the PCA as a "a tool of Parliament", again to quote Richard Crossman in 1967, had the effect of embedding in the 1967 Act inflexible procedures which add to the time taken to investigate a complaint whilst at the same time formally excluding the complainant from aspects of the investigative and reporting process. Much of this philosophy was carried into the HSC and CLA legislation in the early seventies.

3.12 Complainants to the HSC have direct access but not until they have exhausted the NHS complaints procedure unless the HSC considers that in the circumstances it is not reasonable to expect them to do so. The HSC encourages those who have not invoked and exhausted the NHS scheme to continue to pursue their complaint through that scheme unless there are fairly compelling indications that the complaint will not be resolved by that route. Contributors to this review have told us that many people, especially the vulnerable, are reluctant to pursue their complaint through the NHS procedures or are confused by them. The Association of Community Health Councils in England and Wales (ACHCEW), who estimate that they assist 30,000 people each year with complaints about the NHS, have told us that many people do not feel confident until their complaint is with the HSC who is seen as a truly independent body.

3.13 Complainants have direct access to the CLA. Until May 1988 access was only available by approaching a local councillor to obtain sponsorship of the complaint. When this requirement was removed the number of complaints rose by 44% in the first year and a further 24% in the second

3.14 As the law currently stands any individual or group of individuals (other than defined public bodies) can make a complaint direct to the CLA. The authority concerned must have had a reasonable opportunity to respond to the complaint. A study in 1998/99 called the 'ultimate rung' pilot examined the effects of requiring the authorities complaints systems to be exhausted before the ombudsman took the complaint. The results of this study are only now emerging. We doubt that any process which delays the point at which the complainant can obtain assistance from an ombudsman (not necessarily the investigation of a complaint) can help complainants to feel that they have adequate access to the ombudsman.

3.15 The CLA has developed internal procedures for dealing with complainants at first instance to help them with their complaint or problem which must contribute to the sense of accessibility for many people. Nonetheless we have received complaints from bodies and individuals who feel that access to the investigative process, which is at the discretion of the ombudsman, was unreasonably denied to them by the ombudsman.

3.16 A significant number of organisations were concerned that it is the most vulnerable sections of society who are most affected by difficulties in accessing complaints systems in general. We know that these concerns are shared by the ombudsmen. **We think that a major new emphasis on**

their initial responses to complainants is needed by the PCA, HSC and CLA and our structural recommendations are intended to address this.

MP FILTER

3.17 Under the 1967 Act members of the public must submit complaints to the PCA through a Member of Parliament (the 'MP filter'). This requirement was intended to support the MPs' constitutional role in championing and protecting the citizen. The office of PCA was introduced to supplement existing arrangements for Parliament to hold the executive to account and to provide MPs with an instrument to assist them in seeking redress for citizen's grievances. There was also a practical concern at the office's inception that it would be overwhelmed and that the MP filter provided a means to avoid the PCA being swamped with cases. Only complaints which had merit, could not be dealt with in a better way by the MP and were suitable for the PCA would pass through the filter.

3.18 The Whyatt report which originally proposed a Parliamentary Commissioner envisaged that after sufficient experience had been gained 'perhaps after five years' direct access for members of the public would be introduced. The then Government declined to tie itself to a five-year trial and built the MP filter in as a 'permanent part of the structure' of the legislation. The MP filter is also embedded into the concept and procedural approach of the PCA and could not easily be detached without reconsidering the way in which his office operates.

3.19 The MP filter has long been a matter of debate. During the passage of the Parliamentary Commissioner Bill a number of MPs advocated allowing direct access to the PCA. External commentators and groups have also argued for the removal of the MP filter, notably JUSTICE in their 1977 report 'Our Fettered Ombudsman'. The Select Committee on the PCA looked regularly at the issue, in particular in their 1993 report 'The Powers, Work and Jurisdiction of the Ombudsman' in which it was reported that a majority of MPs surveyed favoured retention of the filter, although a significant minority (38.4%) preferred to allow direct access; the Select Committee recommended retention. Both the current and previous PCAs have expressed the view that the filter should go, as did members of the current Select Committee on Public Administration in a debate in October 1999 on the Parliamentary Ombudsmen (which included the HSC). The overwhelming majority of organisations and individuals other than MPs who have contributed thoughts on the subject to this review have proposed that the MP filter should be abolished.

3.20 Since 1967 other ombudsmen and complaints bodies have been brought into being. No MP filter was created for the HSC - individuals have direct access although they must firstly have used any relevant NHS complaints procedure. For complainants to the Local Government Ombudsmen access was at first through a councillor filter but this was abolished in May 1988 and now members of the public have direct access providing they have first approached the local authority against which they are complaining. No filter has been allowed for in the draft Freedom of Information legislation which makes provision for an Information Commissioner. As is often pointed out, the United Kingdom Parliamentary, Scottish Parliamentary and Northern Ireland Assembly Ombudsmen share with the French Médiateur the distinction of being the only ombudsmen in the world without direct access. Recently, the Welsh Administrative Ombudsman has been established with direct access.

Current operation

3.21 The process of lodging a complaint relies on the Member acting as the gateway to the PCA. A complainant may be aware of the PCA and ask his MP to make a referral, or alternatively an MP might initiate referral perhaps because other methods (for example, a letter to a Minister) had been ineffective in obtaining redress. What happens in practice will depend on several factors - the awareness, understanding and persistence of the complainant, the attitude and knowledge of the MP, the nature and merits of the complaint.

3.22 Surveys have shown that public awareness of the PCA is relatively low and understanding of his role could be expected to be lower. A number of MPs commented in responses to our survey on the low public profile, the lack of understanding and people's unrealistic expectations:

'The current system is confusing and little understood by the public thus reducing their rights of redress.'

'Some of the people who invite me to put cases to the ombudsman have very unreal expectations of what can be achieved.'

'They sometimes think of it as an 'appeal' process which may change a decision they are unhappy with.'

But even where people are aware of the PCA and know that they must approach an MP to have a complaint referred there may be factors which discourage them from making a complaint.

3.23 The willingness of MPs to refer complaints will depend on their awareness and understanding of the PCA's services, perceptions of his usefulness and their past experience. The survey of MPs conducted as part of this review asked about their understanding of the PCA's arrangements: 10% said they were rather confused about arrangements for referral, 20% were not very clear or were unclear about the PCA's jurisdiction, and 15% were rather or very confused about overall arrangements. The high proportion of cases which the PCA rejects at screening (about 70% on jurisdictional grounds or at the PCA's discretion) provides additional evidence of this lack of understanding.

3.24 Attempts have been made to improve MPs' awareness and understanding. A number of MPs commented in our survey on how helpful they and their staff had found briefings and seminars – for example: 'the briefing I had some months ago was excellent' and 'my staff attended a very helpful briefing on the Ombudsman's work'. The various reports (annual, special and selected cases) which the PCA lays before Parliament are also a means of explaining the PCA's role and work. MPs were asked how often they read these reports: 12% of those replying to the survey never read them, 35% hardly ever and 47% occasionally with only 5% frequently reading the reports.

3.25 MPs were also asked their opinions of the PCA. 13% viewed his work and record as very successful, 69% as quite successful, 14% as not very successful and 2% as unsuccessful. 89 (22%) of the MPs commented about the PCA – these ranged from high praise ('I think the Parliamentary

Ombudsman does a first-class job') to highly critical ('The system is a waste of time'). Criticisms included: the lack of public awareness and understanding; the PCA's limited jurisdiction and reluctance to take complaints; the obscure, complicated and cumbersome nature of the system; ineffectiveness in achieving real impact; and the length of time taken to deal with complaints. Many (but not all) of these criticisms came from those MPs who thought the PCA was not very successful or was unsuccessful.

3.26 On their experience of specific aspects of how referred complaints were handled, the majority of MPs said they were quite satisfied – 61% with acceptance of the complaint, 53% with time to complete an investigation and 69% with the result of the investigation. Fewer said they were very satisfied – 21%, 6% and 15% respectively - and 14%, 38% and 11% were not satisfied or were very dissatisfied. As can be seen the biggest area of dissatisfaction was with the time taken to complete an investigation.

3.27 The PCA receives about 1,500 new cases each year. Therefore, typically an MP will refer 2 or 3 cases each year but levels of use varies – from the survey, 6% of MPs sent at least 10 cases, 24% between 5 and 10, 62% between 1 and 5, and 7% sent none. Cases are far more likely to be rejected than investigated - only 24% are investigated - and until recently investigation times were approaching two years. A typical MP's experience of using the PCA might be of an investigation initiated every other year taking two years to complete. Seeing only one investigation through from start to finish within a Parliament is unlikely to be rare. In the context of an individual MP's caseload of thousands of letters each year and hundreds of cases involving grievances against central government, PCA cases are a very small proportion of MPs' involvement in constituents' problems.

3.28 The time available for an MP to handle individual cases is no doubt very limited and this will be a factor for many in the approach they adopt when deciding whether to refer a complaint. A busy MP when asked to refer a case by a constituent may do so without any further consideration. 51% of MPs in the review survey said that they always referred a complaint if asked to do so and the balance of the response on whether the MP or complainant initiated referral was on the complainant's side - 50% of MPs said referral was mostly or always at the complainant's request as opposed to 10% being at the MP's initiative and 37% said it was half and half.

3.29 A number of MPs commented on the approach they adopted to referring complaints. Some greatly valued the gatekeeper role: they viewed referral to the PCA as a last resort which should only be used when all other possible routes to resolution had been exhausted, and that by only referring cases with merit they prevented the PCA from being inundated. Many of those who commented felt discouraged by the jurisdictional limitations and a perceived reluctance on the part of the PCA to investigate.

3.30 A deliberate feature of the MP filter provision was that it allowed an MP to refer a complaint from any member of the public not just a constituent. This can be considered a safety valve against potential difficulties such as reluctance of a complainant on political grounds to approach a constituency MP or where referral has been refused. However, the practicality of this feature relies on the attitude of MPs, given the convention that MPs should only concern themselves with their own constituents' grievances. 8% of MPs said that they had referred complaints from non-

constituents and 29% said they would be willing if approached to refer complaints (though some qualified their response in comments that they would only do so in exceptional circumstances).

3.31 In cases where complainants approach the PCA directly it is possible that an MP might be found to 'sponsor' a complaint (this arrangement has been agreed in the past with the Select Committee) but on the whole the PCA will refer complainants to their MP. The Northern Ireland Assembly Ombudsman, who operates under a provision in legislation similar to the MP filter, takes the MP sponsorship approach one step further and will do initial work on a complaint such as trying to mediate a settlement and approaching an MP only if an investigation is warranted.

3.32 MPs are not always the first port of call for complainants. A complainant may already have approached a government department, perhaps spent some time in the department's complaints system and perhaps have exhausted it. At this stage the department may refer complainants to the PCA advising them to go to their MP first. The MP may refer the complainant immediately or perhaps after a further attempt to achieve resolution – for example, by writing to a Minister. Finally, the complaint will reach the PCA's Screening Unit.

MPs' experiences with the HSC and CLA

3.33 MPs also have some experience of the other ombudsmen (the HSC and CLA) - the survey asked for any comments. 48 MPs provided comments about the HSC the most frequent of which was that they had not used or rarely used the HSC. A few commented favourably: 'I think the system works well', 'Keep him. Give [him] more powers. He's needed'. But most comments were critical or suggested improvement was needed. Criticisms were similar to those made against the PCA – there was a need for greater awareness, understanding and clarity, less restriction, speedier service and greater effectiveness. The following quote represents in one the assortment of views expressed in most comments:

'I have made very few appeals to the Health Service Ombudsman because it is apparent that the terms of reference are extremely restrictive. Where I have made appeals they have been at my initiative because there seems to be little public awareness of this arrangement. I have never had a positive outcome. ...'.

3.34 55 MPs from the 398 who responded to the survey provided a comment on the CLA. As with the HSC a number said that they had never used this ombudsman and comments ranged from 'Excellent and frequently used.' to 'Not very good' (for the same ombudsman office). The familiar criticisms about lack of awareness, slowness and inadequate jurisdiction were made. Their effectiveness notably in being able to enforce recommendations was criticised by a number of MPs, for example:

'Too bureaucratic. Takes too long. Public do not understand that the only sanction is publicity.'

On the other hand a significant proportion of those who did comment gave good marks – there were 5 'very goods' and 2 'excellents' with several more complimentary in other terms for example:

‘Much more positive about LGO because my complaints have been dealt with in an efficient and effective manner’

3.35 The survey was primarily intended to gather MPs’ views on the PCA and with such a small proportion of MPs providing a comment we are cautious about drawing general conclusions about the HSC and CLA. Since MPs will be involved in a very small number of cases it would be easy for individual experiences to strongly influence their views. Both the HSC and CLA are internally structured on a territorial basis and unevenness within this may also contribute to different experiences of these ombudsmen.

Views on the MP filter

3.36 Most submissions to the review that addressed the matter supported removal of the MP filter. Representative organisations were universal in this view, for example:

‘It is hardly necessary to set out the case, supported on many sides, for the removal of the MP filter.’ (*National Association of Citizens Advice Bureaux*)

‘In the case of the Parliamentary Ombudsman, direct access should be permitted and the ‘Parliamentary filter’ should be abolished, as JUSTICE has for long advocated.’ (*JUSTICE*)

‘We appreciate that there [are] other views, and considerations, but, on balance, we support the removal of the MP filter. We find it difficult to understand how an integrated redress system might work efficiently if one element of a complaint was subject to a filtering process.’ (*Consumers’ Association*)

‘Removing the MP filter would greatly improve access to the PCA and would be necessary if the public-sector ombudsmen were to be brought together. ... We cannot see any justification for continuing with a situation in which the ‘customer’ to whom the Parliamentary Commissioner must respond is the referring MP, not the complainant. (*Advice Services Alliance which includes Dial UK, Federation of Independent Advice Centres, Law Centres Federation, Shelter and Youth Access in its membership*)

‘Removal of the Parliamentary Ombudsman’s MP filter would increase consistency between the systems and would be even more desirable if these were a single body.’ (*National Consumer Council*)

‘The rule that MPs must refer, or at least consent to an investigation, is in RNID’s view outdated and reminiscent of traditional doctrines of Parliamentary privilege which no longer fit the current realities of public administration accountability. MPs are not the only advocates for people who have experienced difficulties with public sector agencies – user groups and voluntary sector organisations are increasingly involved in the process. Moreover just as the Courts have expanded the *locus standi* of applicants for judicial review so should the PCA expand its applicant base.’ (*RNID*)

The following, from a member of the public who has used the PCA, is of particular note:

‘Relationship to individual complainant – It seems that the PCA sees himself as answerable only to the referring MP. He will not communicate directly with an individual member of the public. Thus the individual complainant is left ‘in the dark’, not knowing which aspects of his case are being investigated. This practice delays/prevents possible resolution of any items of complaint which the PCA is not investigating. I see this lack of transparency as detrimental to public confidence in the PCA.’

Inevitably, personal experiences are based on past events and we know that the PCA is endeavouring to make improvements. However, the PCA has himself expressed concerns in his 1998/99 annual report:

‘I strongly suspect that some who might otherwise use the services of my Office are deterred from doing so by the complexity of complaints and redress mechanisms in the public sector; also by the fact that recourse to me has to be through a Member of Parliament ...’

3.37 Views from academics and other commentators on public administration have also tended to favour removal of the filter. In a recent Fabian pamphlet *Representing the People: MPs and constituency work*, Greg Power, head of the Parliamentary Unit at Charter88, considered the role of the MP in general in handling constituents’ grievances including how the PCA was used and concluded:

‘To be effective the MP filter must be removed so that citizens can go direct to the ombudsman ...’

MPs’ Views on Abolition of the MP filter

3.38 The survey we conducted asked MPs: ‘Are you in favour of direct referral of complaints to the Parliamentary Ombudsman by members of the public rather than complaints having to be referred by an MP?’ – of those who responded, 177 replied ‘Yes’ and 207 replied ‘No’ (14 gave either no response or a different response to the question). Comparing this with responses from MPs in 1993 to the same question:

	1999	%	1993	%
Allow direct access	177	44	128	38.4
Retain MP filter	207	52	193	58
No response/other	12	4	12	3.6

There has been a slight increase in the proportion favouring direct access but the majority wish to retain the MP filter.

3.39 There has been a general election since the previous survey in 1997 with a change of party in government and a substantial influx of new MPs. A breakdown by party shows:

For Labour MPs				
	1999	%	1993	%
Allow direct access	131	54	68	52.7
Retain MP filter	104	43	53	41.1
No response/other	7	3	8	6.2
For Conservative MPs				
	1999	%	1993	%
Allow direct access	21	21	51	28.7
Retain MP filter	73	74	123	69.1
No response/other	4	4	4	2.2
For MPs of other parties				
	1999	%	1993	%
Allow direct access	22	48	9	35
Retain MP filter	24	52	17	65
No response/other	0	0	0	0

(13 responses were anonymous so we were unable to determine party or other details.)

3.40 The breakdown of responses on the basis of time of election of the MP was:

For MPs elected at least 10 years before survey				
	1999	%	1993	%
Allow direct access	61	40	43	30.3
Retain MP filter	85	56	93	65.5
No response/other	5	3	6	4.2
For MPs elected in the 10 years before survey (including since 1997)				
	1999	%	1993	%
Allow direct access	113	48	85	44.5
Retain MP filter	115	49	100	52.3
No response/other	6	3	6	3.1
For MPs elected in and since 1997				
	1999	%		
Allow direct access	77	49		
Retain MP filter	76	48		
No response/other	5	3		

More recent MPs are more likely to favour direct access than those elected at least 10 years ago but the differences have narrowed since 1993 – from a gap of 35% to 16% for those elected at least 10 years ago and from an 8% gap to negligible difference for those elected in the last 10 years. The difference between very recent entrants and the general picture for those with up to 10 years service is negligible. When looking at party and length of service together Labour MPs consistently split at around 54-55% for direct access/43% for the MP filter irrespective of length of service whereas for

Conservatives MPs prior to the 1997 intake the results are roughly 20% for direct access/78% for the MP filter but from 1997 are 32% for direct access/64% for the MP filter.

3.41 Where MPs have provided comments on the MP filter in their responses to the questionnaire they have generally been in favour of it. MPs views have also been recorded in Select Committee reports and in debates in the House of Commons on the work of the PCA, the most recent of which was in October 1999.

The Case for Change

3.42 During the course of this chapter we have set out a number of the arguments put forward in favour of or against the MP filter and the issue has been looked at in great depth in the past. We note in particular the inquiry by the PCA Select Committee in 1993 which summarised the benefits of the MP filter in words from a report by the Select Committee in 1978: ‘... the Committee concluded that the filter worked to the advantage of:

- a) the complainant, because his problem can often be resolved quickly through the intervention of a Member;
- b) the Member, because he is kept in touch with the problems which his constituents are facing in their daily contact with the machinery of the State; and
- c) the Commissioner, because he is normally asked to investigate only complaints that the Member has been, or knows that he will be, unable to resolve himself.’

We have had difficulty, however, in seeing the consistency of these arguments with the evidence presented to us during the review. In the case of complainants, representative groups have argued that complainants’ interests would be better served without the filter. Our survey and other evidence have shown that a very small proportion of MPs’ contacts with their constituents is associated with use of the ombudsman. Both the current PCA and previous PCA have expressed the opinion that the MP filter should go.

3.43 One of the arguments in favour of the MP filter set out at the inception of the PCA was the constitutional principle of the MP representing his constituent against the executive in seeking redress for his grievances. We believe that the situation has now moved on. Modernisation of government and constitutional change have brought many means by which the citizen with a grievance can seek redress. New attitudes to customer service, organisational complaints systems including independent complaints examiners, increased use of judicial review, the Human Rights Act, Freedom of Information legislation and not least the creation of other ombudsmen, the HSC and CLA where there is no filter – all of these provide or will provide means for an aggrieved citizen to seek redress from public authorities. The MP filter has become inconsistent and anachronistic when set in this wider context.

3.44 The second reason for the MP filter which was put forward at the inception of the PCA was to prevent the PCA from being swamped by complaints. The MP was to be the ‘gatekeeper’ who would decide whether a complaint merited attention and would best be dealt with by asking the PCA to investigate. Many of the criticisms of the MP filter concern the consistency with which the

gatekeeper operates and ultimately are about fairness. There are many MPs who take great trouble to assist their constituents, helping them to find the best way forward with their complaint. But how MPs use the PCA is up to them – they can bar all access, refer complaints mechanically or operate strictly as a filter. They can filter out the frivolous but they do not have to. They can take an active interest in the investigation and any report, or simply act as a post box for the complainant. What happens depends on the MP – each sets his or her own policy for the gatekeeper role.

3.45 Our survey suggests that in the majority of cases the constituent takes the initiative and many MPs (51%) said they always referred complaints to the PCA on request. A significant number of MPs said they were confused about arrangements and this is likely to reduce their ability to help complainants. Whether the complainant has access also depends on their willingness to approach their MP. The 1967 Act was deliberately designed to allow access through any MP but this adds a further step in the process.

3.46 The PCA's enquiries unit currently receives around 1,000 letters and 7,000 telephone enquiries each year from members of the public and others such as MPs, some of which are attempts to lodge a complaint. At present, these complainants will be routed elsewhere – many to their MPs, some of whom will return. Complainants who have exhausted departmental complaints systems are routed via MPs to the PCA. Complainants also come into the system from other sources such as through the Data Protection Registrar's office – again for the PCA to take the complaint it must be referred on by an MP. If the MP filter were removed the 'gatekeeper' role would transfer to the PCA's office and a consistent policy could be applied for the management of complaints which would be transparent to complainants. We would expect the number of complaints to be submitted to the PCA to increase but the impact on the PCA would not amount to 'swamping'. The PCA's office is already involved in handling many more contacts with the public than the 1,500 new complaints submitted through MPs each year suggest. The new approaches that we recommend later will allow a managed approach to dealing with the demand.

3.47 A further point made in favour of retaining the MP filter is that the MP has a wider range of 'tools' available to assist the citizen seeking redress. Research (for example, Gregory and Alexander in 1973) has looked at different Parliamentary techniques for seeking redress of grievances including through the PCA. The evidence we have seen shows that a letter to a Minister is the most likely 'tool' to be used. Annual surveys by the Cabinet Office show that Ministers receive around 200,000 letters each year, mainly from MPs. In contrast, the PCA receives about 1,500 new complaints each year. Gregory and Alexander also looked at perceptions of effectiveness – over 70% of MPs judged a letter to a minister as 'effective or highly effective' against 22% judging the PCA accordingly. Although the research was carried out some time ago the volume of letters to Ministers and replies to our survey suggests that letters to ministers may still be regarded as more effective.

3.48 The PCA was originally introduced to add a further powerful tool for MPs, to be used when other means such as a letter to a minister were found or thought likely to be ineffective. The PCA as an investigator would be able to get behind what was publicly stated, see the papers and interview officials. A comparison cannot be made on an equal basis with other tools available to the MP since resort to the PCA was always seen as being a relatively uncommon event and would probably involve difficult cases with much effort needed to resolve them. The key issue is whether removing

the MP filter would mean that complainants were sent to the PCA when an MP could have got speedier redress more easily by use of another tool.

3.49 Removing the MP filter does not necessarily remove the MP. Constituents could still be referred to the PCA and the PCA's office might advise many enquirers that going to their MP was a good way forward. Removing the filter would simply remove going to the MP as a mandatory step in complaining to the PCA. We believe that many citizens will still prefer to go to their MP – the MP can act as an advocate, has a broader range of options to provide assistance ranging from personal knowledge and contacts to influencing change in the law, has no legislated restrictions on jurisdiction and can provide a personal and direct touch. The constituency workload for many MPs is heavy and some may appreciate some lightening of the load though we think it unlikely that the loss of the MP filter would have a substantial impact – at most a few complaints for each MP each year would be diverted.

3.50 The MP filter acts not only as a restriction on access to the PCA but also continues to affect the process subsequently. The PCA as the 'instrument' of the MP regards the MP not the complainant as the 'customer' for his work. The 1967 Act has been drawn up in such a way that the PCA by law provides his report to the MP. The emphasis is on investigation rather than resolution of the complaint. Again, this is built into the 1967 Act. The result is a distortion of the ombudsman's process. In recent years the PCA has started to move towards the approach used by other ombudsmen of trying to achieve early resolution through informal means – we were given an example by his office of a case which was settled in 6 weeks as opposed to an estimated 10 to 12 months if an investigation had been carried out. The MP filter itself is estimated to add at least a month to the overall process because of the practical arrangements for communication, and impedes contact generally with the complainant (see 3.36). It also can add to the burdens on MPs because of the considerable paperwork added to the flow through their office and adds restrictions to how MPs use the PCA – only one way is built into the legislation. The survey (and various research) has shown that MPs have many different attitudes and preferences about how they work. The relationship between MPs and the PCA should be more flexible so that the level of involvement which an MP wishes to retain in a case can be accommodated.

3.51 The MP filter is also an instrument of accountability. An individual MP is able to hold the executive to account through the PCA's process – a department is required to respond to a statement of complaint and the report at the end of an investigation is provided to an MP who may wish to take action using it. We agree that in a serious case – where there is serious injustice to an individual or widespread injustice, serious maladministration, refusal by a department to remedy a clear injustice and so on – it is right that this it is publicised and steps taken to ensure redress is provided and any systemic problems addressed. The absence of the MP filter does not prevent the MP being involved (as discussed above) in lodging a complaint nor, with the agreement of the complainant, becoming involved after a complaint has been made. For example, if a decision to conduct an investigation is made the PCA could, with the agreement of the complainant, contact the relevant MP. Accountability can also be maintained through general oversight and reporting mechanisms to meet concerns of individual MPs about what is happening in their constituencies. For example, statistical summaries or copies of relevant reports for constituencies might be made available.

3.52 Much of the case which has been presented so far for removal of the MP filter could have been made at any time during the existence of the PCA but change has not been forthcoming. The case for removing the MP filter is strong but recent developments in constitutional change and Modernising Government have substantially strengthened it. Of all the changes taking place we believe the growth of partnerships has the most significant implications. Partnerships are being set up between central and local government providing combined services to the citizen through one-stop shops – for example, combining local authority delivered benefits services with Employment Service and Benefits Agency services. It will become increasingly difficult and in some cases not possible to untangle the jurisdictional issues. Our survey showed that this was an area of difficulty now for MPs and the situation will get worse. **We believe that the MP filter can no longer be sustained in an era of joined up government and we strongly recommend that it is abolished.**

Consequences of removal

3.53 We have already discussed to some extent the consequences of removal. We expect that the numbers of complaints to the PCA (or rather, as discussed later, to the successor Commission we propose) will increase – this is a natural consequence of removing what many argue is a barrier and inhibitor of use of the PCA by the citizen. The level and patterns of increase can only be speculated about. We have referred to the experience of the CLA when the councillor filter was removed – an immediate 44% increase resulted. Past runs of figures for the number of complaints made directly by the public to the PCA (which he is unable to deal with and must therefore refer on) are typically a little higher than the actual number of complaints submitted through MPs. Allowing for some double counting – some complaints made direct to the PCA will be returned by the MP – we would expect on this basis that complaints might double on removal of the filter. Beyond this, much will depend on other circumstances such as the extent to which awareness of the ombudsman increases, services are improved and barriers removed.

3.54 An increased number of cases will not necessarily increase proportionately the effort needed by the ombudsmen to address them. We would expect the increase in complaints to be mostly in the less serious cases. But there are substantial efficiency gains to be made from better management of cases and from removing the restrictiveness of the current 1967 Act. The consequence of the increased number of cases would not be a need for increased resources in proportion.

CHAPTER 4

THE FUTURE OF THE PUBLIC SECTOR OMBUDSMEN

ACHIEVING CHANGE

4.1 We have considered the need for change set out in Chapter 2 and the important issue of access discussed in Chapter 3. We have concluded that four elements of the current arrangements must change and these affect the structural and external relationships. They are highly inter-dependent as determinants of the success of the ombudsmen:

- arrangements for initial approaches to the ombudsmen;
- the processes by which a complaint is settled by early resolution or the need for further action;
- the investigative process; and
- the resolution and reporting process.

Of these principal elements only some form of limited unified advice centre could be introduced without legislation but its operation would be cumbersome. The complainant could be assisted by receiving advice which could lead to the early resolution of the complaint or the effective routing of the complaint. This alone would be a valuable improvement, especially for the vulnerable to whom the act of complaining may be difficult. It is not possible to assess what impact the change would have on the number of complaints received or on the efficiency of the overall work of the ombudsmen including their external relationships.

4.2 To consider any or all of the other three central processes listed above is to bring into play the requirement for legislative change which would involve amendment to primary statute. We have considered whether making changes to one or two of the central processes would provide an easily managed programme of rapid legislative reform but have concluded that each in itself would require an amending Bill of some scale. We therefore believe that the choice of action lies between minor administrative change and major structural, and thus legislative, reform.

4.3 The present Commission for Local Administration provides a possible model for a future organisation. Each of the three Commissioners are Local Government Ombudsmen and have their own caseloads based on where in the England the complaint has arisen. One is Chairman and Chief Executive and is responsible for corporate functions but has no appellate role - he is not 'Chief Ombudsman'. We propose that a collegiate structure, a 'new Commission', could be based on a similar concept with a Chairman, possibly bearing the title Parliamentary Ombudsman, responsible for corporate matters but not with powers to overrule his fellow ombudsmen on individual cases.

4.4 At present, the ombudsmen are defined by function – central government, health service and local government – and each is confined in his or her jurisdiction to that particular function. This will be too rigid in future. **All ombudsmen should be able to cover the complete jurisdiction, any functional divides being purely an administrative arrangement in the same way as areas of the country are at present with the CLA.** Structural arrangements within the new organisation will need to allow for new partnerships cutting across functions but we envisage that a functional focus will predominate. This would provide advantages by maintaining expertise and engagement with the various areas of government. **We see advantages in retaining specific Local Government and Health Service Ombudsman roles to underpin this focus but neither they nor their colleagues should be confined by law to particular areas of the jurisdiction.** By building in this flexibility from the start we believe that the new Commission could be easily reshaped to accommodate changing government structures and it would allow other functional allocations to be made (eg an Education Ombudsman) if appropriate. **We recommend that a collegiate structure (the new Commission) is put in place** on the basis described in Chapter 5.

OTHER FACTORS

4.5 A new Commission satisfying these criteria could not be set up within the current legislation. Each of the English public sector ombudsmen is currently defined in separate legislation and each has a separate jurisdiction. There are a number of differences, some of which would need to be preserved in relation to particular functions (for example, clinical complaints handling in the health service) but as far as possible the aim should be to provide a consistent operation across the various sectors of government.

4.6 We recommended in Chapter 3 that the MP filter be removed for complaints to the PCA. A new Commission could not operate rationally if the filter were retained. Not only would access be inconsistent but a different process for parliamentary complaints would need to be maintained throughout the organisation. The difficulty in handing partnership complaints would not be resolved. The new Commission could not be as responsive to its environment, with the flexibility to organise appropriately.

4.7 **We do not consider that the new Commission should include others such as the Prisons Ombudsman who have niche roles, are not established by statute and are properly part of the executive.** But we do make recommendations later about their relationships with the new Commission. The new Commission needs unifying and standardised legislation in a single Act which modernises and consolidates the existing legislation. It will remain ‘an instrument of Parliament’.

CHAPTER 5

A NEW COMMISSION

5.1 Earlier we discussed the options for change which would address the need to restructure the ombudsmen. Our conclusion was to recommend the establishment of a collegiate structure ('the new Commission') which would incorporate the existing public sector ombudsmen. We believe that the membership of the college should be limited to the offices of PCA, HSC and the CLA because they cover the broad span of central and local government activity. This chapter expands on our proposals for the structure and operation of the college and its external relationships.

5.2 The complainant should be able to approach the new Commission through a single gateway and need not be concerned about its internal operations. The gateway is described in more detail in Chapter 6.

The organisation of the new Commission

5.3 The internal arrangements of the new Commission must meet a number of requirements and have certain features which will allow the necessary improvements to the service of the ombudsmen to be achieved. **As long as the external requirements of accountability, service to the public, value for money and transparency are met we recommend that the ombudsmen should be able to manage the internal arrangements of the new Commission, including the location of offices, to adapt it to the changing external environment over time.** However, a framework for the structure of the new Commission must be established which will ensure that it is robust in its independence, open and accountable in its practices and freely accessible to complainants. **We recommend that the following framework is adopted in planning the legislation for, and organisation of, the new Commission:**

- The organisation must be resilient in its ability to respond to developments in the delivery of public services by central and local government. If it is 'government shaped' it may be too inflexible when the shape of government changes.
- The internal organisation must operate as a single entity for the management of work and generally for accountability, policy-making, funding and resource management.
- The individual ombudsmen must be appointed as office-holders with a personal jurisdiction across the entire work of the new Commission. They should not be appointed to have particular functional or geographical responsibilities. However by agreement within the new Commission they would each be identified with a particular group of the bodies under jurisdiction. Thus, for example, local authorities will know which member of the new Commission will deal with them individually or corporately on questions of policy and practice.

- The staff of the new Commission should specialise in aspects of the functions of bodies under jurisdiction and as necessary form teams to deal with partnership working by those bodies. Such partnerships may involve bodies not under jurisdiction, or under the jurisdiction of another complaints investigation scheme, and innovative collaborative arrangements will be needed.
- The new Commission must work closely with central and local government authorities and the National Health Service, as appropriate through the central unit (which we recommend later in this chapter) to address the jurisdictional issues raised by partnerships, franchises, contracted out services or other developing mechanisms for the delivery of public services.
- Each ombudsman will be responsible for his own cases and will not be subject to any other ombudsman. No ombudsman should be superior to another in making decisions and recommendations about matters under jurisdiction nor should any ombudsman act in any appellate capacity if a complainant disagrees with another ombudsman's decision.
- The new Commission will be answerable to Parliament.
- The new Commission should be chaired by one of the ombudsmen for the purposes of representing it externally, for management purposes and when there is a requirement to answer to Parliament. We envisage that this ombudsman would be responsible for matters relating to the UK as a whole and for reserved matters in Scotland, Wales and Northern Ireland.
- The responsibilities of the ombudsmen for bodies under jurisdiction or for the geographical division of work should be agreed within the new Commission.
- The chairman of the new Commission should lay a report annually to Parliament on the work of the Commission which should include an account of the management of the casework of each ombudsman. The chairman should be able to present to Parliament and publish under absolute privilege such other reports as may be necessary on individual or systemic investigation into complaints. Separate arrangements should be made for publishing widely under absolute privilege reports about individual or systemic complaints.
- The new Commission should be funded on the basis which currently applies to the Parliamentary Commissioner and the Health Service Commissioner namely that funds are voted by Parliament subject to the approval of the Treasury. This will entail, for the present Commission for Local Administration, a move away from its current funding arrangements.
- The new Commission should be subject to value for money scrutiny by the National Audit Office and thus, under present arrangements, would be subject to the scrutiny of the Committee of Public Accounts.

- The new Commission should set itself a range of performance targets and publish a comprehensive report of its work, expenditure and performance against targets.
- All the ombudsmen who form the new Commission should be appointed by the Queen by letters patent.
- The board should include a number of non-executive members drawn from external bodies or the general public. All should be in a position to monitor the impact of the new Commission and to offer operational and policy advice.
- We make no recommendations on the name of the new Commission nor the titles of any office-holders. These should be chosen after careful consideration of the role of the new Commission and with public accessibility in mind. We have no reason why the name of the new Commission should reflect the titles of any office-holder and note as an example the Comptroller and Auditor-General and NAO.

Jurisdiction and Powers

5.4 In suggesting a new Commission we are proposing two major changes: a new Act to replace three separate pieces of legislation, and a new organisation formed from three separate though related organisations. This will be a substantial task though made easier by commonality between the different legislation and existing close working relationships between the three ombudsmen. The jurisdiction and powers of the new Commission will in the first instance be derived from those of the existing ombudsmen:

- The bodies within jurisdiction will include central government including executive agencies, certain non-departmental public bodies, the NHS and local authorities, and any other bodies currently within jurisdiction.
- The matters within jurisdiction and powers will be those which currently exist for each functional area.

We do not recommend any reduction in existing jurisdiction and powers for the new Commission.

5.5 The structure of new legislation might comprise: common sections applying to the new Commission's organisation, office-holders, jurisdiction and powers, and any procedural matters which need to be covered in legislation; and functional sections where particular provisions may apply only to particular groups of bodies within jurisdiction. For example, we envisage that the criteria for accepting a complaint about clinical matters will need to remain specific to health service complaints. The aim will be to minimise specific provisions for functional areas so that the legislation is simple, clear and consistent.

5.6 We therefore envisage that the design of a new Act and new Commission needs to be approached in a holistic way. The new Commission will have jurisdiction over a large part of the public services and in considering whether its jurisdiction needs to be extended beyond the existing

bodies there needs to be a high-level view of where the boundaries of that jurisdiction should be. We do not think it helpful to set out firm recommendations for jurisdictional expansion in this report and that view has been confirmed in discussion with a number of contributors to the review. However, we do think we should reflect the areas of change which will need to be considered if our overall recommendations are taken forward. At present, the ombudsmen are considered to lie in the legislative pillar as part of the apparatus holding the executive to account - this would suggest that the legislature and judiciary should remain outside jurisdiction. Should jurisdiction be extended into areas of the public sector currently outside jurisdiction such as educational establishments and magistrates courts? Where is the line between the public and private sector? How far is it possible to fill the gap between public expectations and current jurisdictional limits?

5.7 Decisions about the jurisdiction of the ombudsmen should not be taken in isolation. They should be coherent with the way the jurisdictions of other public sector watchdogs are set and need to be consistent with emerging arrangements for modernising accountability arrangements. For example, we note the approach in the Freedom of Information Bill to defining ‘public authorities’ and recent statements by the Chairman of the Public Accounts Committee advocating new powers for the NAO to inspect private sector companies carrying out government work.

5.8 A frequently voiced concern about the PCA’s legislation is that it lists the bodies included within jurisdiction in schedules rather than specifies which bodies are excluded from jurisdiction. In new legislation we would expect a mixture of approaches to defining the bodies within jurisdiction. Listing generic types such as local authorities and NHS Trusts will be sufficient to cover many bodies within jurisdiction. But not all parts of the public sector can be described by a generic type and innovative organisational arrangements may mean that other factors come into play. It may be necessary to list at least some of the organisations to banish all doubt. An alternative (though we think this an undesirable approach) would be to rest on a general term like ‘public authority’ and, as with ‘maladministration’ leave it to ‘case law’ to establish what is in and out. We note that the Freedom of Information Bill has adopted a mixed approach.

5.9 An increasing concern is where the line should be drawn between the public and private sector. The ombudsmen have relied on the term ‘on behalf of’ in their legislation to allow them to handle complaints about public services which have been contracted out. For example the PCA Act says

‘... the Commissioner may investigate any action taken by or on behalf of a government department or other authority to which this Act applies, being action taken in the exercise of administrative functions of that department or authority, ...’

Concerns have been raised about how far ‘behalf’ can be stretched as innovative arrangements such as partnerships, franchises and local authority companies have been introduced, involving the private and voluntary sectors. As discussed earlier this issue is not unique to the ombudsmen and we believe should not be considered in isolation from the broader debate about what accountability arrangements need to be put in place. It does seem to us that where a service is largely publicly funded, provides a service to the public and operates within a detailed specification by a public authority to a demanding performance requirement there seems a strong case for it to be within the ombudsmen’s jurisdiction.

5.10 One submission to us raised the concern that where a complaint was made against a GP who subsequently retired there may be no ability for a patient to get redress. It may be that the introduction of Primary Care Groups will provide some scope to address this. But this raises a more general issue about how complaints about a body which has a temporary relationship with the public sector (eg a contract) and how complaints can be progressed when the relationship has terminated. We do not believe such issues can be addressed by the ombudsmen but must be the responsibility of the public organisations which set up these relationships.

5.11 Two further aspects of jurisdiction on matters have been the subject of debate. Since inception, contractual and personnel matters have been excluded by legislation from the ombudsmen's jurisdiction and this has been challenged by a number of commentators. The explanation for not including such matters was that the ombudsmen were there to investigate complaints against government by the governed and not against government in its role as employer or customer. Further, that to allow the ombudsmen to investigate such complaints, staff of and suppliers to the public sector would be put in a more favourable position than private sector equivalents. The question of whether such matters should be in or out of jurisdiction is one that rests on the fundamental conception of the ombudsmen's role and therefore we believe that the process leading to legislation is the right forum to determine whether these matters are brought within jurisdiction.

5.12 The issue has rarely been raised during our consultation except in the situation where an authority has a contract with a supplier and is also regulating that supplier. This appears to us to be similar to the one area of contractual transaction (compulsory acquisition and any subsequent disposal of land) which the ombudsmen is allowed to investigate. This provision was originally included because of the potential for misuse of power by an authority.

5.13 **In conclusion we suggest that piecemeal extensions to jurisdiction should not be made before the higher level decisions are taken about the scope of the new Commission's jurisdiction and what the related guiding principles should be.** We are also concerned that in making major changes in organisation and access, notably with the removal of the MP filter, there is potential for increased demand and it will take time for the new organisation to settle down. The general framework of the legislation and organisation should be drawn up with an eye to the general shape of jurisdiction but it might be wise to avoid major jurisdictional changes initially.

Accountability

5.14 The PCA/HSC is answerable to Parliament. In each capacity he presents to Parliament an annual report and a 6-monthly selection of reports of investigations, as well as occasional special reports on general issues, or individual cases of particular interest or difficulty. The Select Committee on Public Administration takes evidence from the ombudsman and others on the annual reports, and on other reports as it sees fit, and reports accordingly to the House of Commons.. The National Audit Office has responsibility for oversight of the ombudsman's efficiency.

5.15 Organisations whose actions are investigated by the ombudsman may be called before the Select Committee for closer public scrutiny. Witnesses from those organisations may be called to appear before the Committee.

5.16 This form of accountability to Parliament does not extend to the CLA, who account publicly for their work by the production of reports. The efficiency of the CLA in its use of financial resources is more fully reported than by the PCA/HSC and this may reflect the dependence of the CLA on funding the Department of the Environment, Transport and the Regions from resources voted for local authority support. We think that the reporting of performance and the use of resources along the lines currently used by the CLA would provide a desirable degree of openness if adopted for the reports of the new Commission.

5.17 The new Commission will stand as part of the Parliamentary pillar of the constitution and should therefore in its entirety be answerable to Parliament. Our consultation has suggested that such answerability would be widely accepted in respect of the processes and functioning of the new Commission itself as they affected complaints about local authorities. A greater constitutional question would arise if Parliament, in order to learn the lessons from the cases reported to it by the new Commission, could examine (in whatever way) the work of individual local authorities. Nonetheless, we think this would be desirable in allowing full consideration by Parliament of those matters which involve separate actions by local and central government which affected a complainant in a single episode but which required liaison (such the administration of central and local housing benefits payments). It would certainly be of considerable importance in allowing the full examination of cases where important lessons about the working of partnerships involving central and local government were to be learned.

NEW CENTRAL ARRANGEMENTS

5.18 In 1998 a 'focal point' was established in the Cabinet Office to provide a link between the public sector ombudsmen and the Government and to provide BIOA with a similar contact point. This has been effective in providing the opportunity for dialogue.

5.19 One of the strongest drivers for change to the arrangements for the public sector ombudsmen is the increasing complexity of public service delivery. The complaints processes of individual departments, the health service and local authorities will also need to change. **We think that strong and vigorous co-ordination of complaints processes across public services in central and local government and the health service is essential and we recommend that a unit (a strengthened focal point) is set up to do this, taking an overview of all public sector complaints processes and the work of the ombudsmen.** The logical place for the strengthened focal point is in the Cabinet Office where responsibility for best practice on central government complaints processes currently rests. Although there will be inevitable difficulties of working between central government, local authorities and the health services these are the sorts of problem which the Modernising Government agenda exists to resolve. The public can only gain from better complaints handling which must lead to better understanding of how to deliver services. The return in improvements in the value for money achieved across the public service would be huge.

VALUE FOR MONEY AND THE COST OF CHANGE

5.20 In this report we are recommending change which is fundamental. We believe it will open up the possibility of considerably enhanced service to the public by the ombudsmen and a greater awareness for all of the impact of the radical changes to public service delivery which the Modernising Government initiatives imply. The ability to assess risk through the understanding of the impact of change on the users of services should help to make real the benefits which modernisation should bring.

5.21 The principle impact of change will, we believe, be in increasing the level of complaints which currently come to the PCA. It is impossible accurately to predict that increase but we can make best assumptions that it will at least double based on the number of people coming to the PCA advice line and the historical impact of the removal of the councillor filter to the CLA. At present the CLA deal with ten times the number of complaints as the PCA at a similar cost. We have made clear the need for the restrictive process set out in the Parliamentary Commissioner Act to be replaced in the new Commission by a more flexible and rapid process closer to that of the CLA. This will mean changes to the working methods of the staff of the PCA and HSC which, as we have said elsewhere, need to be made more rapid. There may be marginal costs involved in implementing revised working methods.

5.22 We therefore see no reason why a quite considerable increase in complaints about central government departments should not be absorbed by the new Commission following the removal of the MP filter. At the same time it will need to make provision for addressing issues such as the harmonisation, in due course, of the terms and conditions of the combined current staff and the internal administrative arrangements. Modest increases in provision may be necessary for unforeseen costs as change works through. In the longer term there may be general increases in the level of complaints but these will always be very difficult to forecast. We note that the current dramatic increase in the number of complaints coming to the CLA is being met by a combination of a modest increase in provision and a continuing drive for increased efficiency. The new Commission must utilise a range of performance indicators. The cost per case must be kept firmly under control.

5.23 We are aware that the CLA in London has been addressing the need to move to new premises on the expiry of their lease in 2003 for which resources would be required. The creation of the new Commission might transfer that planning process to the question of unified accommodation for the current PCA/HSC staff (who share premises) and the London based CLA staff. The balance of the CLA staff are in Coventry and York. It will be a matter for the new Commission to decide how and where to accommodate itself in due course. We are not proposing increases in staffing so the costs will be those of planning and removal plus any increase in rent levels if the move was for some reason to higher cost premises. These are not matters that can be judged at this stage.

5.24 Overall we do not think that the financial requirement of the new Commission would be greater or lower than the current levels of funding. By dealing better with more complaints the value for money would be higher. One of the largest costs involved in the whole process is the cost to the public in pursuing complaints through complex complaints systems and, sometimes,

protracted investigations by the ombudsmen. Streamlined and flexible procedures should greatly ease the resource which individuals will have to expend in order to obtain redress.

5.25 The new unit in the Cabinet Office will require perhaps four staff equivalents of effort and will represent new work which would need to be resourced. As we have indicated, the pay-back should be very considerable. We firmly believe that the modernisation of public service delivery must be results-driven and the impact of change must constantly be assessed. Only then will better services and increased value for money be assured. Modernising Government will only succeed if it delivers and is seen to deliver.

EXTERNAL RELATIONSHIPS

5.26 The new Commission is designed to address the developing and increasingly complex mechanisms for the delivery of public services. The perspectives of our overseas contacts during this review include some amazement at the complexity of public service delivery (and indeed of government generally) in the UK and what they perceive as the accompanying lack of framework and co-ordination.

5.27 The new Commission, however widely its net was cast in bringing together ombudsmen schemes, could not address all the developments which are and will be in progress to provide innovative service provision. Very active relationships with other bodies will therefore be essential if the complainant is to be supported when things go wrong. These relationships include those with organisations which advise the citizen, MP and local councillors, organisations which deal with complaints outside the jurisdiction of the new Commission and the internal or independent layers which the bodies under jurisdiction provide for the resolution of complaints. We cover relationships with other complaints authorities in more depth in Chapter 7.

5.28 The ombudsmen currently liaise extensively and the British and Irish Ombudsmen Association (BIOA) is active in bringing members of ombudsmen schemes together. Whilst ombudsmen talk to each other some commentators have noted that there has been a tendency for public sector ombudsmen to maintain a distance from external bodies and representative organisations in some circumstances, as though to preserve their independence. If this has been so then it has been a mistake. If the institution of public sector ombudsmen is to thrive in the future the new Commission must be in the forefront in encouraging dialogue and discussion about issues which adversely affect the citizen and which lead to complaint. This is not to say that it should principally be concerned with systemic weaknesses in organisations under jurisdiction (although it must comment when these are found) or that it becomes some form of commission on public administration. Rather, by being closely involved with public sector developments the new Commission can influence and persuade, and by involving Parliament when appropriate can contribute to the process of bringing the executive to account.

5.29 Relationships with those responsible for the Health Service and with the representative bodies of the medical professions are crucial if lessons are to be learned from mistakes and improvements made in the future. The investigation of complaints about the provision of health care will often involve a complex mix of medical and administrative matters and will be time-consuming. These investigations will also demand time in following up the lessons learned with a

range of external bodies. Those representing the medical professions have generally welcomed the work of the HSC in revealing instances of professional shortcoming. The HSC must also continue to work closely with the Commission for Health Improvement.

CHAPTER 6

THE OMBUDSMEN'S PROCESS

THE OMBUDSMEN'S APPROACH TO PROCESS

6.1 The fundamental nature of the approach adopted by the PCA to his work was laid down at the inception of the office. The PCA was to be an investigator of maladministration, an instrument of MPs to assist them in their role in seeking redress for complainants. The result of the PCA's investigation would be a report sent to an MP and, in certain circumstances, a report to Parliament. The emphasis was therefore on process (an investigation) and output (a report) rather than outcome (resolution of the complaint). The 1967 Act was designed around this conception of the PCA's role, and subsequent ombudsmen legislation has to a large extent been modelled on the 1967 Act.

Audit Approach to Investigation

6.2 This approach - audit-like investigation - arose from concepts of the role of the PCA - the PCA's role vis-à-vis Parliament, the concept of maladministration and the analogy drawn between the PCA and the Comptroller and Auditor-General. The parallels between the C&AG handling 'financial maladministration' and an Ombudsman handling other maladministration was considered in the Whyatt Report which proposed 'establishing new machinery ... translating certain features of the Scandinavian Ombudsman system in the English idiom and combining them with the principle underlying the system of the Public Accounts Committee and the Comptroller and Auditor-General'. During the passage of the Bill the Government continually emphasised the role of investigation of maladministration and the first holder of the office of PCA, Sir Edmund Compton was a former C&AG and influential in setting the style of the Office in its early days.

6.3 An audit approach is natural if the focus is to root out maladministration. An investigation will aim to establish what happened, whether a body was at fault and if so what is needed to provide a remedy for the complainant. The investigation may unearth grounds for criticism and concerns about conduct - it therefore needs to be thorough and fair. The investigation may identify systemic problems so that remedies need to be provided to people other than the complainant, serious faults corrected and greater publicity given to the problem found. On the other hand, resolution of a complaint may not depend on establishing what happened or why. Modern complaints management often tries to take a positive stance, avoiding a blame culture, valuing the chance to put things right and learn lessons.

Priorities and Scope

6.4 A distinction can also be made between a problem where an unsatisfactory situation has arisen and a complainant is seeking an intervention (for example, a benefit payment has been delayed), and a complaint about an incident in the past where the complainant wants redress (for example, an apology, an explanation or compensation). There can be a tension between a complainant wanting a quick fix and the need to conduct a lengthy investigation of the complaint on

grounds of the public interest. However, arrangements at present do allow the ombudsmen to conduct an investigation after an individual complaint has been settled.

6.5 Another tension can arise between on the one hand providing high visibility to a complaint, with 'naming and shaming' of 'guilty' bodies and on the other settling matters quietly. At present, the PCA under his legislation is required to provide a statement of the complaint to the principal officer of the department (the Permanent Secretary). This ensures high priority is given but can bring formality into the process. More generally, the ombudsmen produce reports which in almost all circumstances name the guilty body - important for accountability though with potential for introducing defensiveness.

6.6 One issue highlighted to us both by complainants and respondent bodies is the scope of an investigation. An investigation of a complaint may in passing identify faults which go beyond those specific to the complaint made by a citizen. Complainants also sometimes find that the complaint which the ombudsman decides to investigate is not the complaint they thought they submitted. We do not believe the ombudsmen should be over-restricted - for example, parts of complaints are often rejected because they are out of jurisdiction and so the ombudsman needs to define a complaint in terms he can investigate. Also, it is right that faults found are brought to the attention of respondent bodies and others. **But it is also essential that focus is maintained during an investigation with an eye to outcomes and transparency.** For example, early action might allow intervention to avoid an injustice which is preferable to retrospective redress.

Informality and Restriction

6.7 The ombudsmen have moved away from dealing with complaints solely through formal investigation. Informal settlement through which the ombudsman attempts to get a resolution without investigation is most developed in the CLA, where in 1998/99 23.6% of investigable complaints were determined by 'local settlement'. The PCA has also begun to settle some complaints in this way - 90 in 1998/99. Because of the special circumstances of the health service any settlements other than after an investigation are on the basis of providing advice to the NHS body or agreeing with the body that further action will be taken - 197 cases in 1998/99 as opposed to 98 investigations completed in England. Because no investigation is conducted there will be no report and hence the details of the complaint will not be made public unless the ombudsman decides to conduct an investigation subsequent to settlement.

6.8 Although the ombudsmen have been able to take an approach to resolving complaints other than full investigation this is despite their legislation. The PCA in particular has difficulties because he is constrained to carry out his procedure in a defined way by the 1967 Act. Access must be through an MP who is then the 'customer' for all further activities. A 'statement of complaint' must be produced and sent to the 'principal officer' who must respond. Depending on this response the PCA may then decide to conduct an investigation resulting in a report of his findings and recommendations, which is sent to the complainant's MP. In theory his choice in handling a complaint is either to reject it or carry out a full investigation - nothing in between - and the complainant has no role within the process, not even to see the report unless the MP shows it to him. The other ombudsmen were set up less restrictively and some restrictions (eg the councillor filter for the CLA) have been removed since their inception.

6.9 A criticism which has been expressed about non-investigation approaches is that it turns the ombudsmen into a 'small-claims court' (many local settlements are compensation cases) and goes against an important justification for the role of the ombudsman - to identify and publicise systemic problems. Any future arrangements must safeguard this aspect of the ombudsmen's role. Investigations are the 'big-stick' which keeps Parliament engaged and ultimately underpins the ombudsman's ability to ensure redress for complainants. MPs and organisations like Citizens Advice Bureaux can assist complainants with interventions and settlements but the ombudsman has unique powers to investigate complaints.

6.10 Formal investigations are likely to be required in three circumstances: where the investigation is the resolution (this is particularly likely with health cases), where a respondent body has not co-operated in trying to achieve resolution and where the wider public interest means that full details of what happened need to be exposed.

Resources

6.11 Freeing up access to the PCA is likely to increase the numbers of complainants and such an increase can only be accommodated within current funding if the resource applied for each case reduced. Thus the process must become more efficient and investigations fewer and less resource intensive. The resources dedicated on average to each case by the PCA (and HSC) are higher than other ombudsmen including the CLA (Consumers' Association research in 1997 comparing 19 ombudsmen in both the public and private sectors showed the PCA and HSC as having the highest proportion of staff to complaints).

6.12 The PCA carries out investigations which are not only resource-intensive but are also very time-consuming. This partly arises from the structure of the process which can be regarded as a series of three investigations - the first an investigation of the complaint to see if it can be investigated (ie screening), then an investigation by the department based on the statement of complaint and then finally the investigation by the ombudsman to produce his report. This serial staged process, involving baton-passing between parties is in itself lengthy and provides plenty of opportunity for delay to arise - assuming no delays and ideal circumstances we estimated an investigation would take a minimum of 34 weeks from submission of the complaint to issuing a report. This is not satisfactory for complainants, respondent bodies or the ombudsman. The various stages are effectively defined by the 1967 Act and so there is limit to how far the investigation process can be shortened irrespective of resources applied and organisation of work.

Own initiative investigations

6.13 At present the ombudsmen can only investigate if a complaint has been made from someone who says they have suffered an injustice (or hardship in the case of the HSC) as a result of maladministration (or a service failure in the case of the HSC). It has been suggested that the ombudsmen should be given powers to be able to investigate on his own initiative - many overseas ombudsmen are able to do this (though they rarely do) and the argument for it is that it would allow problems to be addressed where no individual has complained. An own-initiative investigation could be a quicker way to tackle a perceived problem.

6.14 The ombudsmen tell us that they do not feel encumbered by any lack of powers and have generally been able to investigate on the basis of a complaint where they had any concerns. They would be concerned that own-initiative investigations would alter significantly their dealings with bodies under jurisdiction. However, the ombudsmen would value an extension of their powers to allow investigation of maladministration at the request of a public authority under their jurisdiction.

6.15 We believe that any power for the ombudsmen to initiate an investigation without a complaint will make them vulnerable to external pressure to examine alleged systemic weaknesses. **An ombudsman's function must remain grounded in addressing injustice caused to an individual and own-initiative investigation appears inconsistent with impartiality.** The landscape is crowded with bodies with regulatory and inspection bodies and keeping a clear focus on what the ombudsmen is there to do is essential if clarity is to prevail.

A new approach

6.16 The elements of the new approach are therefore:

- a focus on outcomes and in particular on complaints resolution;
- clear recognition of when intervention is required;
- a positive attitude to assisting complainants in progressing their complaint whether with the ombudsman or by other means;
- initially an informal approach aiming to achieve co-operation and perhaps using a conciliatory approach;
- investigation in the old sense to be used if informal methods do not work.

It would be wrong to imply that the ombudsmen are not using these methods - often they will but this concept of their role is not sufficiently reflected in their legislation.

Fairness of Process

6.17 The ombudsman's process at present takes an inquisitorial approach, that is the ombudsman investigates in private on an impartial basis, dealing directly with the respondent body and complainant. In general there will be no 'hearing' nor legal representation. A complaint is investigated through inspection of documents and sometimes by interview of those involved. A report is produced describing what happened on a chronological basis, concluding with the ombudsman's findings and recommendations. Each 'side' does not as such have an opportunity to present a case although at various times they may submit material or speak to the investigator. An important principle is to 'level the playing field' by removing the ability for the stronger party, usually the respondent body, to use its strength - greater resources, and access to skills and experience - to overwhelm the weaker party.

6.18 We have received some criticism of this approach as being 'against natural justice' ie that there is no opportunity to present a case, cross-examine or hear the other side's case. One representative group commented on a case of misidentification occurring which was only discovered after the report was issued which they felt would not have occurred had the complainant had an opportunity to see the 'other side's case'.

6.19 Should a complainant see a draft report and be able to comment before it is finalised? It has long been the CLA's practice but is not that of the PCA or HSC to send a copy of the draft report to the complainant (in all cases a copy of the draft is sent to the respondent body). The argument is that the positions are not equivalent - a respondent body is the 'accused' and also responsible for putting matters right. With PCA cases, seeing the draft report gives a department an opportunity to check the facts and highlight any information which under the 1967 Act should not be published in the report on security or other grounds. Also, it is maintained that during an investigation information is constantly cross-checked between respondent body and complainant and so there is no need for a complainant to see a draft.

6.20 **We see no reason why a complainant should not see a draft report and we so recommend.** We understand concerns that complainants might question the judgement of the ombudsman or delay finalisation but given the final nature of a report it is important that both parties are given an opportunity to ensure factual matter is accurate. It should be quite possible to organise satisfactory arrangements and it would be unacceptable if the only reason for withholding a draft was convenience to the ombudsman.

6.21 Some respondent bodies have also expressed concern about whether the ombudsman is always fair. There is a tension between impartiality and levelling the playing field - an investigator will deal first with a complainant who may be distressed and have a very unhappy tale to tell. The ombudsmen's staff have frequently commented on the importance of being impartial in these circumstances. One check is that the investigator working on a complaint will need to 'present his case' to his own management as an additional check on impartiality as well as for reasons such as maintaining quality - investigations will only be initiated or reports issued when the appropriate level of manager is satisfied. Ultimately, respondent bodies will have a chance to comment on a draft report and this should be sufficient.

6.22 Providing complainants are able to see and comment on a draft report we believe that the main concerns about 'natural justice' will have been met. Sometimes complainants' expectations are that the ombudsman will be their representative - guidance given to the complainant at the time of complaint submission needs to make the ombudsman's role and the nature of his process quite clear.

ACCESS - AWARENESS AND ACCESSIBILITY

6.23 The accessibility of the ombudsman depends on awareness and understanding of his role by complainants and those who help and direct complainants such as MPs, advice centres, support groups and respondent bodies.

Public awareness

6.24 A number of surveys have shown various levels of awareness - awareness is at its highest in male, white, white collar, southern, middle-aged people.

6.25 The point at which someone needs to be aware of the ombudsman is when they have a complaint and need to decide how to take it forward. In almost all cases a complainant will already have been to the respondent body and perhaps spent some time moving through a complaints system. As a minimum the complainant needs to be made aware when they have exhausted the complaints system that they can go to the ombudsman and should be made aware earlier in the process so that an inefficient complaints system is not used as a barrier to resolution.

6.26 We foresee two basic mechanisms coming into play. At the inception of a complaint the complainant who has a general awareness of ombudsmen should easily be able to approach a source such as a Citizens Advice Bureau to get more information. Alternatively, a person already in a complaints process should be informed during that process about the ombudsman and where he fits in. Raising public awareness therefore should concentrate on general background awareness rather than high-profile promotion and the main focus needs to be on the intermediaries and respondent bodies.

6.27 Public awareness is also important to the ombudsman in achieving compliance with his or her recommendations. Reports reveal what happened as well as make recommendations but their impact depends on the public and others being aware of them. When authorities refuse to accept or implement recommendations the ombudsman may choose to produce further or special reports, to councils or Parliament, and to seek publicity. The ombudsman needs an audience if he or she is to have an impact.

Respondent bodies

6.28 Respondent bodies should assist complainants by making them aware of the ombudsman. Many bodies include information about the ombudsmen in literature about their complaints process. They should also take the initiative when no further progress can be made to point complainants in the direction of the ombudsman. One weakness at present is that complainants being directed by departments to the tribunal system may not necessarily be told that where there is apparent maladministration in handling their case they may be able to go to the ombudsman with a complaint - information in this area could be improved.

6.29 Professional bodies told us they were very keen to raise awareness and understanding of the ombudsman and in particular to use information such as case digests in professional training as an aid to encouraging good practice. Awareness is not just a matter of understanding the ombudsman's role but also of being able to use the results of his work to improve service to the public.

Complainant representatives and intermediaries

6.30 Complainant representatives and other intermediaries need to gain and maintain an understanding of the ombudsman's role. Our survey of MPs showed that not all had a clear

understanding - 11% were rather confused about or did not understand arrangements for referral of complaints to the PCA and 20% were not clear about his jurisdiction (the results of the survey are discussed in more detail later in the chapter). A number of MPs commented favourably on briefing sessions which they or their staff had attended. **The ombudsmen could provide readily available material perhaps on the Internet.**

6.31 There is also potential for an integrated approach with (in particular) the Community Legal Service and Community Health Councils aiming at partnership-type collaborations.

There are issues about how a national service like the ombudsmen should work with advice and support groups operating on a local basis. In easing access to the ombudsmen there is a danger that their role may 'creep' beyond the core role of the impartial investigator. Where a complainant needs general advice about the best way of taking their complaint forward (in particular, where a legal route might be preferable) or if they need support, representation or advocacy then the Community Legal Service or Community Health Councils may be a better option.

Publicity

6.32 Publicity and outreach can be used to raise public awareness. The ombudsmen occasionally receive publicity in the press, perhaps over a particular case. A handicap is the anonymity of complainants in the ombudsmen's reports of cases - a story is much more likely to be published where there is an identified person perhaps interviewed and pictured. When a case with a successful outcome is reported the ombudsmen can receive a flurry of similar cases but such publicity rarely has long-lasting results. More active promotion has also been tried but again tends to produce short-term flurries, with a large proportion of cases out of jurisdiction.

6.33 The ombudsmen engage in some outreach activities although as a resource-intensive process it is more likely to be focused on intermediaries in complaints systems than the public. There are many examples from abroad of various approaches to raising awareness and encouraging access (for example, in Ireland ombudsmen staff regularly 'set up stall' for a day in provincial towns to receive complaints and promote the service). However, the tension between encouraging the flow of complaints and being able to adequately resource any response remains.

Easing use and removing barriers

6.34 Good accessibility also arises from positive measures to ease access and remove barriers. The ombudsmen are almost always approached through an intermediate point such as an MP or a complaints system - the ombudsman's accessibility is thus affected by that of this intermediate layer, or perhaps several layers. All ombudsmen currently provide an advice line service, an important aid to accessibility. Our proposals for a unified gateway considerably expand this concept.

6.35 Many complainants are reluctant to complain because they have lost trust in the respondent body and in the worst cases fear retribution. Such complainants are often vulnerable and may be subject to the care of the organisation against which they are complaining. They may be unable to have their complaint considered by the ombudsman until it has been submitted to the body and thus those against whom they are complaining will be made aware of the complaint. It is essential that any complaints made to the new Commission in such circumstances can be taken forward

appropriately. The ombudsmen need to preserve their impartiality and are not advocates for the complainant. But they can signpost to those who can support or act (for example, an MP, the proposed national Care Standards Commission or Community Health Councils), and can provide some oversight of the complaint if it needs to be referred back to the respondent body's complaints process. In particular, they can ensure the complaint is referred back at suitably senior level and that satisfactory action is proposed. **We recommend that where a complaint is referred back the ombudsmen should be empowered to set conditions which if they are not met will prompt an investigation without a further complaint being submitted.**

6.36 The ombudsmen also need to ensure they are directly accessible to all members of the community and that those with language, literacy and other difficulties are not excluded from using the ombudsmen.

Modernising access methods

6.37 Present legislation restricts the ombudsmen to accepting complaints only in writing - this has been interpreted to mean on paper. **This restriction should be removed and complaint submission provided in whatever form is acceptable to the ombudsmen and convenient to complainants - electronically, by telephone or other format (for example, audio tape).** The ombudsmen will need to consider issues such as how authentication (confirmation of a person's identity) is to be managed in these circumstances.

6.38 More generally, there is scope for improvement in the ombudsmen's working methods to increase accessibility. **The CLA is more likely than the other ombudsmen to engage directly with complainants on the telephone or in person - this should be the favoured style of working throughout the new Commission. Similar informal methods should be used with the respondent bodies** - these speed up the process and often help resolution by encouraging collaborative approaches. The PCA's processes in particular cause difficulties because of legislative restrictions and the technical position that the MP is the 'customer'. **The ombudsmen also need to improve the language used in letters to complainants - too often this is forbidding and full of legalese.**

6.39 **A really first class web site is essential.** As well as providing a service the process of creating an excellent web site means that an organisation has to think through its business from the point of view of its customers. Looking from the outside-in can show up weak areas and use of information can be monitored so as to make further improvements. **Access to the ombudsman's services can also be provided through email and on-line form-filling.**

6.40 **In designing any new web site and literature the ombudsmen should consider the needs of all their customers - not just complainants but also the intermediaries and staff of respondent bodies.** For example, the ability to search an electronic digest of cases by keyword to find particular types of cases would be invaluable both for local government staff and health professionals. More detailed information on criteria to be applied when deciding whether cases are appropriate for the ombudsmen would also be helpful for those assisting complainants. These might be linked to signposting to others where appropriate - again a web approach provides a natural way

to do this though the needs of the many who do not have access to the Internet should also be considered.

Signposting and Understanding of the System as a whole

6.41 The new Commission as the apex of the public sector complaints system would gain much understanding of the system and how complaints move within it. **It therefore should have a role (with others) in providing more general guidance.** We received many comments about people's general confusion and lack of knowledge about where to go. Ombudsmen literature focuses on its own services and concerns rather than the complainant's broader perspective of finding a way through the maze. A map of the maze would be impractical and quickly out-of-date **but a simple leaflet with a basic explanation of who can help and how, contact details and, importantly, appropriate management of expectations would be useful. Such a leaflet could be available from all major sources of help.**

Reception and rejection regime

6.42 There is an inevitable tension between providing a high level of accessibility to the ombudsman's service and the use of public resources. Since the service is free to the complainant some mechanism needs to be applied to manage the workload so as to provide a reasonable service. For the PCA the MP has in principle a gatekeeper role and decides which cases should be referred (although MPs vary on how actively they filter complaints). All ombudsmen have discretion over which cases they accept and therefore can reject cases which they consider have insufficient merit. But this discretion can also be used to raise and lower the hurdle to control the flow of cases - similar cases at different times may be treated differently. This is inconsistent and can be regarded as unfair. It also has an impact on understanding of the Office - MPs in the recent debate commented on the way in which like cases were handled inconsistently and this led to puzzlement as to what exactly could be referred. **The need for a gateway with clear guidelines for its work is essential for a highly accessible system.**

Monitoring

6.43 Monitoring and feedback mechanisms, identifying barriers and monitoring complainant and intermediary perceptions, are also important to improve accessibility. The ombudsmen need to understand not only their own accessibility but also are in a position to monitor what is happening further down the complaints ladder. The Adjudicator and CSA ICE both monitor the number of premature complaints referred back to the department which subsequently return. The proportion gives a good measure of how successful the internal complaints system is in resolving complaints. **The new Commission should be more active in monitoring return rates and finding out what happens to complaints which do not return.**

THE NEW COMMISSION'S PROCESS

6.44 The new Commission's process will need to strike a number of balances. At present the ombudsmen have considerable discretion but the PCA in particular operates within a highly prescriptive framework. Prescription provides benefits in terms of accountability, consistency and

for management purposes. A defined process helps explain to complainants and others what they can expect and provides a basis for setting targets and measuring performance both for the organisation and for individuals. It provides a framework against which policies and guidance can be developed to promote consistent practice. But prescription can remove flexibility to respond appropriately in a given set of circumstances.

6.45 The balance between discretion and prescription can best be struck by minimising prescription in the legal framework but providing an additional means of holding the ombudsmen to account. **The new Commission would publish a 'scheme' definition which would describe in some detail the arrangements for their operation including how they would interact with complainants and respondent bodies, and the standards they would seek to achieve, in a similar way to a charter.** The scheme would be made widely available and could be used in conjunction with other documents such as business plans and annual reports by the Select Committee and others when scrutinising the new Commission's performance. The scheme could be changed at will by the new Commission but such change would be public and open to scrutiny.

6.46 The scheme would define the basic structure of the process but the structure of the new Commission needs to be considered separately. A structure which delivers good customer service and minimises delay will be essential. We have assumed a division between a gateway (the entry point), and separate ombudsman departments of the Commission. These are described below.

Access to the new Commission - the Gateway

6.47 **We recommend that a single point of access to the new Commission is created which we term 'the gateway'.** All complaints whether about central or local government, health services, other public bodies within jurisdiction or partnerships will be submitted through the gateway. The gateway will also provide information and advice to enquirers, taking over the current ombudsmen's advice line functions.

6.48 The gateway's purpose will be to assist complainants to take forward their complaint. In some cases the complaint will clearly be within the jurisdiction of the new Commission and will be immediately allocated to one of the ombudsmen. In other cases the complaint will clearly be outside jurisdiction: in these cases the gateway will assist the complainant in finding an appropriate way of taking their complaint forward.

6.49 In many cases the complaint may be within jurisdiction but 'premature', that is, it will have been insufficiently considered or not considered within the respondent body's complaints process. The gateway will provide oversight of such complaints particularly where a complainant is vulnerable. Where jurisdiction over the complaint overlaps with that of another ombudsman or commissioner the gateway will liaise to agree who should take forward the complaint and how.

6.50 The gateway will belong to the new Commission as a whole and will act in an informal manner, with customer service principles at the heart of its operation. The aim will be to route a complaint to the right place as quickly as possible. The gateway will operate on the telephone or electronically as well as by written correspondence.

6.51 It will be a matter for the ombudsmen as to how far the gateway examines the complaint but we envisage that it will not perform a complete screening function as the PCA Screening Unit currently does. The CLA and HSC currently allocate complaints to investigators within a week or so; the Adjudicator also aims to turn round an 'assistance' case within 7 days (and achieved an average of 3.8 days in 1998/99). Allocating a complaint to an investigator will thus not indicate that the ombudsman has 'accepted' the complaint as being within jurisdiction.

Acceptance and Rejection

6.52 At present 'acceptance' operates in two stages. A complaint is accepted for initial examination to see if it is within jurisdiction and can be investigated. The complaint may then be accepted for investigation, or rejected as out of jurisdiction or for other reasons including at the ombudsman's discretion not to investigate an investigable complaint.

6.53 A distinction can be made between the PCA which 'screens out' at a definite stage, and the CLA which 'discontinues' as appropriate during the process of investigation. The PCA's process requires under the 1967 Act that a statement of complaint is developed and submitted to the principal officer (normally, the Permanent Secretary). There is much emphasis on establishing whether there is a prima facie case before the ombudsman is prepared to investigate - this puts pressure on complainants to (in effect) prove their case. The PCA's screening process seeks to establish whether a complaint is in jurisdiction, shows evidence of maladministration causing injustice, and is likely if investigated to be capable of being redressed. A statement of complaint is then developed. A complex complaint can involve considerable investigation during screening, and result in rejection if it fails to leap all the hurdles or acceptance for investigation of only part of the complaint.

6.54 The CLA's approach is closer to that which we would recommend for the new Commission. **The new Commission's process should be continuous until:**

- **it is clear that the complaint is out of jurisdiction and not investigable; or**
- **a settlement to the ombudsman's satisfaction has been achieved; or**
- **investigation has been completed and a report has been produced.**

The emphasis should move away from 'acceptance or rejection' to the action or resolution proposed (in some cases, 'no action' by the ombudsman). The term 'rejection' is often considered insensitive by complainants whose complaint is valid but cannot be considered by the ombudsman.

6.55 The status of a written complaint is clearer than telephone complaints. A written complaint will be counted as a received complaint in the ombudsman's caseload statistics even though it might be obviously out of jurisdiction. But a telephone conversation might quickly establish for a caller that their complaint is outside the new Commission's jurisdiction. Such a call may be regarded as an enquiry rather than submission of a complaint rejected as out of jurisdiction. **The new Commission will need to set a policy on how it handles such complaints to avoid producing misleading statistics or, worse, producing misunderstandings with complainants.**

Better Working with Respondent Bodies

6.56 The emphasis of the initial stages of handling a complaint should be on achieving a satisfactory resolution by informal means, if at all possible. The new Commission's jurisdiction will cover many hundreds of bodies with a variety of approaches to complaints-handling varying from nothing laid down to elaborate multi-tiers including an independent review tier. **Initially, a conciliatory approach should be adopted, working on the basis that most organisations will wish to adhere to good customer-service and complaints-management principles.**

6.57 **The new Commission should develop guidance material specifically for the respondent bodies** - many of which may have had little or no previous contact with the ombudsmen. Making respondent bodies aware in advance of some of the issues the bodies may have to consider could help ease the way. Examples of good practice quoted to us in submissions to the review included setting up a liaison point in an organisation who could:

- maintain a knowledge of the ombudsman and his procedures;
- maintain oversight of all ombudsman complaints being processed, and thus ensure staff handling complaints were dealing with them properly;
- ensure units dealing with relevant issues such as compensation policy, complaints management or procedural standards are engaged as appropriate in resolving and learning from complaints.

The new Commission could spread information on good practice in its guidance material. **The new Commission can thus help 'enable' the respondent bodies to resolve complaints - as well as removing barriers to access, barriers to resolution need also to be identified and removed (for example, requiring an ombudsman's report before compensation can be awarded).**

6.58 Earlier sections described how encouraging greater awareness and understanding of the ombudsman's role could improve accessibility for complainants. It would also make working relationships when processing complaints easier. Respondent bodies are less likely to be defensive and will be more focused on resolution. **A simple measure might be to develop an equivalent to the Cabinet Office's 'The Ombudsman in Your Files', available on the Internet and as a web-ready package for organisations with Intranets.**

6.59 **The requirement of the 1967 Act that the PCA provides the statement of complaint and the investigation report to the principal officer needs to be reconsidered.** Informal contacts are best made and may be better progressed at the working level. However, where a formal investigation has commenced and a report is to be produced then the principal officer should be made aware but this could be a matter for the scheme (see paragraph 6.45) rather than the law.

Conduct

6.60 A complaint may raise issues about the conduct of a member of staff. Conduct may be at the heart of the complaint (for example, if a member of staff is said to have behaved in an offensive manner) or be a concern in subsequent handling of the original matter. Complaints management good practice normally recommends that complaints and disciplinary systems are kept distinct. This helps maintain a positive attitude to complaints-handling and ensures procedures are properly focused on the outcome to be achieved. The disadvantage for those with complaints involving poor conduct is that they may remain dissatisfied because the complaints process will not of itself punish the offender. In the most extreme circumstances (notably with health complaints) where conduct might put people at risk there must be a link between complaint and prompt action with disciplinary implications (the Health Act 1999 empowered the HSC to bring such concerns to the attention of the regulatory bodies).

6.61 The ombudsman's process is focussed on the complaint and complainant but allows for 'named officers' whose conduct may have been the subject of complaint to be given adequate information and a chance to comment during the investigation. The respondent body may, on the basis of the ombudsman's findings or on other evidence, decide to take disciplinary action. This is a developing area – for example, in the light of Government proposals for legislation concerning local government ethical standards. **A view will have to be taken on how the new ombudsmen legislation is framed in this respect.**

Flexibility of Process

6.62 **The new Commission needs to have sufficient flexibility to deal with a very wide range of complaints covering virtually all of government business.** There will be a need to prioritise taking account of complainants' circumstances - a greater focus on outcome should mean that cases where rapid intervention may be needed should be taken forward early and quickly. Investigators should not as a matter of course feel that they have to document every twist and turn of lengthy and complex complaints. The cost of such an investigation may amount to thousands of pounds and does not necessarily satisfy the complainant or deliver any wider benefit.

6.63 Informal resolution (or local settlements) are used by the ombudsmen to get a 'quick fix' but their status under current legislation is rather uncertain. **Any new legislation should be based around the concept of the ombudsman seeking resolution, by an agreed settlement if possible, with investigation and the ability to make recommendations as an option.** The process should be sufficiently flexible to allow proportionate effort and any approach which is judged appropriate by the ombudsman.

Screening and Investigation

6.64 If a single point of entry to the new Commission is to be provided to a number of ombudsmen the question then arises as to how far it should go with jurisdictional checks before a complaint is passed across to an ombudsman. With the PCA an extensive process of screening takes place before a complaint is accepted for investigation. An advantage of this split, it is said, is that it helps impartiality by separating responsibilities. Also, the PCA has a very wide range of different

bodies with varying functions and constitutions - government departments, executive agencies and a lengthy list of non-departmental public bodies - which makes jurisdictional issues more difficult to determine (this contrasts with the CLA and the HSC which have only a few types of body within jurisdiction). The skills necessary to screen well are held to be different to those needed to investigate.

6.65 We envisage that the new Commission would structure its ombudsman by function and region. Investigating units could be expected to build considerable expertise in their specialist areas and be responsible for developing good relationships with the bodies they deal with. They may be in a much better position than a general screening unit to understand the nature of a complaint and whether it is within the specific jurisdiction of the specialist area. Also, early liaison with respondent bodies would help generally build relationships and perhaps lead to early resolution. We note that the Independent Case Examiner for the CSA has abandoned a significant 'assistance' phase in handling complaints because it led to delays and rework. **Cases should be referred by the gateway to an ombudsman's investigating unit quickly with final jurisdictional checks completed, if necessary, by the investigator.**

Modernisation of working methods

6.66 The new Commission needs to use modern working methods not only to improve access but also to provide good service and work efficiently. **Staff need to engage with people using the telephone, meetings and email rather than paper-intensive methods where appropriate.** Independence and impartiality do not require such distance that business cannot be conducted speedily.

6.67 **Modern working also accepts an element of carefully managed risk.** If avoiding the risk of a mistake involves over-ponderous working, constant checking and rechecking, drafting and redrafting, the result will be slow delivery of results and a level of resource applied to each case which is excessive. Given that easier access to the ombudsman may increase demand on the new Commission then streamlined administrative methods of investigation will be needed if demand is to be met. A number of submissions to us have commented on the slow and over-thorough approach of the current ombudsmen.

6.68 **The new Commission will need to be fully engaged with Information Age Government. As government moves to greater electronic working and record keeping, the ombudsmen need to keep the implications under review.** Faster, communications-based working and complex computer systems can make establishing what has happened more difficult. Investigators may increasingly need to use computer-based audit techniques and the ombudsmen may wish to align themselves with others promoting conservation of information and promotion of audit trails in public sector organisations.

6.69 **The new Commission also needs to ensure it is applying resources in the most effective way by using external specialists and other service providers when appropriate.** For example, there is no reason why staff from the independent complaints examiners could not be brought in to provide expert support for investigation in the same way as professional assessors are used by the HSC to assist with clinical complaints. Ombudsmen outside the public sector using mediation

frequently bring in external professionals to provide the service, at least partly because this is seen as not putting the ombudsman's impartiality at risk.

OUTCOMES - REDRESS, ENFORCEMENT, SYSTEMIC IMPROVEMENT

6.70 The emphasis of the new Commission should be on outcomes - successful intervention where possible, adequate redress when justified - which will be better for complainants and ensure that resources are applied with best impact. The process will be one of attrition by resolution - most cases will end when little or no substance is found for the complaint or a settlement is made. We envisage successive toughening of the ombudsman's stance, eventually leading to detailed investigation. Reporting by the new Commission of their performance should emphasise their success in achieving resolution.

6.71 One concern with settlements involving little investigation is the loss of the detailed investigation reports which provide information for public accountability and lesson-learning for respondent bodies and professionals. Settlements tend to be concluded by letters rather than reports which are not publicised. The possibility of poor publicity can be an incentive to settle - in fact, a concern of the ombudsman is that systemic faults might be hidden if a respondent body settles with an individual complainant and thus avoids the detailed investigation and publicised report. They retain and the new Commission should retain the option to continue with an investigation after settlement with an individual complainant.

6.72 It is important to the credibility of the ombudsman and ultimately to his ability to achieve compliance with his recommendations that his process and reports are seen to be fair and consistent. Complainants will often judge fairness on the basis of whether or not their complaint was upheld - it is therefore difficult to get a true measure of the ombudsman's performance from measures such as customer satisfaction. Exhaustive investigation and reporting can sometimes be seen as more powerful than the ability to make a binding judgement because the case rests on building a solid case in facts and logic rather than the power to impose. While the ombudsman is not bound by precedent consistency indicates that the approach is measured and fair.

Recommendations and Enforcement

6.73 The ombudsmen make recommendations in their reports which are non-binding, though mechanisms to encourage compliance are provided in legislation (the use of publicity and reports to Parliament in particular). These mechanisms are considered highly effective for the PCA and HSC, with refusal to implement recommendations exceptional, and adequately effective for the CLA (local authorities decline to implement recommendations in a few per cent of reports each year).

6.74 There has been some consideration in the past as to whether ombudsmen should be able to make binding decisions - for example, the issue was examined in some depth for the CLA in the Whetnall Report, and Lord Woolf made recommendations concerning using the courts to enforce compensation recommendations. The recent incorporation of the European Convention on Human Rights into UK legislation by the Human Rights Act 1998 has led to discussion as to how far Article 6 which starts:

‘ In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...’

applies to ombudsman schemes. The non-binding nature of the English public ombudsmen's recommendations has led legal opinion to conclude they are not caught by Article 6 and therefore that there is no requirement for public hearings. The ombudsmen believe that non-compliance is a relatively small problem against the disadvantages in terms of cost, formality and loss of flexibility in introducing hearings.

6.75 We agree that the current position is acceptable and should be reflected in the new Commission's arrangements. The ombudsmen should continue to make recommendations and be able to make special reports if necessary to Parliament and councils, and seek publicity as necessary. Because of the sensitivities of Parliamentary oversight of local democracy, arrangements for pursuing compliance for individual local government cases should not involve Parliament. The new arrangements being introduced for local governance in the Local Government Bill this Session provide potential for a new approach to local accountability. It is too soon to assess how this will affect arrangements for achieving compliance with ombudsmen recommendations.

Redress

6.76 Resolution in favour of the complainant will almost always involve some form of redress. This might be an action following intervention to solve a problem (for example, providing the service which has not been delivered or the benefit which has been delayed) or retrospective redress such as an explanation, apology or compensation. Sometimes both may be involved - both restoration of benefit including arrears and perhaps interest and consolatory payments.

6.77 One difficulty at present is that the ombudsman cannot necessarily provide all the redress which a complainant may feel entitled to. The principle which the ombudsmen adhere to is that as far as possible a complainant should be put back in the position they would have been in if the action complained of had not occurred. This may not be achievable and can raise expectations in complainants. In particular, the ombudsman cannot enforce his recommendations and is therefore unable to provide the certainty of judicial review in the case of justified intervention. Complainants may be dissatisfied with compensation payments because they feel the compensation does not put them back in the position they would have been in (for example, compensation for the loss of highly speculative future profit claimed by a business) or that they are inadequate for the stress and inconvenience suffered. There can also be a gap between what a respondent body can be held responsible for and the impact felt by a complainant.

6.78 It is important therefore that complainants are made aware at the outset of what the ombudsman can and cannot do, and that in seeking redress they should consider with advice what can be provided by the various options available. Complainants may not be able to achieve complete redress from any one source and therefore may need to consider what the priority is. For example, in going to the courts a complainant will almost certainly exclude any possibility of going to the ombudsman. **A function of the new gateway should be to provide information and if**

necessary refer complainants elsewhere for appropriate advice so that as far as possible complainants have reasonable expectations about what can be achieved and are more likely to set out on the path which is right for them.

Compensation

6.79 Compensation is an increasingly used form of redress - the term 'compensation culture' was frequently used by those we spoke to during this review. Public organisations in the nineties have adopted a far more positive attitude to making payments and are now prepared to make consolatory payments to compensate for non-financial detriment such as inconvenience caused by a fault on their part. **We have seen no evidence that complainants seeking compensation is distorting the ombudsman's function but we believe that the position needs to be monitored as part of the watching brief which we have recommended as one of the functions of the central unit we recommended in Chapter 5.**

6.80 In particular, it is possible (and particularly likely to happen with medical cases) that the ombudsman's powers to investigate, require documents and produce a report will be used for discovery purposes in preparing a case for court. The ombudsman in cases where such a purpose is suspected will ask the complainant whether that is their intention and will drop the complaint.

6.81 It is noticeable that the annual reports by the ombudsmen and independent complaints examiners frequently describe the winning of significant compensation. **It would be helpful when ombudsmen and complaints examiners are considering which cases to include in reports if the full range of possible outcomes is reflected including failing to obtain redress, apologies, explanations and small levels of compensation.** Reports not only publicise achievements but will also set customer expectations and could lead to a competitive approach between providers of redress.

6.82 The HSC recommends financial redress less frequently, which is in line with health service policy more generally. In the new Commission it is likely that this policy will be under some pressure in terms of consistency with what happens elsewhere, particularly with partnerships with health aspects. We recognise the importance of maintaining a consistent approach with the NHS complaints procedure - the HSC can be regarded as the ultimate rung of this procedure. There is activity currently in the NHS which may lead to change in this area.

Systemic Maladministration

6.83 There are a number of aspects to the role of the ombudsman in addressing systemic maladministration. Firstly, the maladministration found while investigating an individual complaint may have affected others systematically. The ombudsman will then wish to be assured that the respondent body is tracing those affected and providing appropriate redress. Secondly, the ombudsman may wish to make recommendations about correcting a fault in the system found during investigation as being directly responsible for the maladministration leading to the complaint. Thirdly, the ombudsman might go beyond investigating the specific process which led to the complaint and look more widely at organisation, management, guidance and so on - that is, the environment in which the complaint arose. Lastly, the ombudsman may have a role in identifying

bad practice and setting standards for good practice arising from their experience in investigating complaints in general.

6.84 The emphasis of each of the present ombudsmen in these areas is variable. The CLA has a distinct role in good practice, having published a number of good practice guides on subjects such as complaints systems and housing repairs. Both the HSC and CLA have large numbers of similar bodies in their jurisdiction and therefore their ability to spread the lessons learned from individual cases (a council housing department or a GP practice) is a valuable service and much appreciated. The PCA is dealing with a large number of different organisations and so any lessons to be widely disseminated must inevitably be more general.

6.85 Information on cases - the case digests published by the CLA, case reports, annual and special reports - are greatly valued by professionals and others. The new Commission should as a matter of course make available all publishable case reports (some are not published because of confidentiality), ideally online and in both full and summary versions with index or search facilities. At present there are restrictions on the PCA's (and HSC's) ability to publish reports because he depends on Parliamentary privilege against defamation. He must lay reports before Parliament and this limits the number able to be published. The CLA on the other hand under its legislation has absolute privilege. **We recommend that the new Commission is given powers to put all publishable case reports into the public domain with absolute privilege.** The power (and duty) to lay certain reports before Parliament (in particular the annual report and any special reports the new Commission wishes to make) should remain.

6.86 Some have suggested that the ombudsman role could go further. A 'Commission for Public Administration' would have a wide role in overseeing the standard of public administration, perhaps conducting research and setting general standards for good administration. This would be a major change in the role of the ombudsman and we would be concerned at any reduction in focus on their core role of handling complaints.

6.87 Another suggestion is that the ombudsmen could be active in preventing complaints - for example, by auditing complaints systems or advising on administrative systems early in their life cycle. The ombudsmen have always been reluctant to be seen to be endorsing any system in case they later had to deal with a complaint against it - they saw a risk to actual or perceived impartiality. Independent complaints examiners have said they are sometimes consulted early in the design of an administrative system - they can provide an expert and interested eye in, for example, looking at a proposed new form. In practical terms, the number of bodies within jurisdiction of a new Commission will be too large to provide such bespoke services in general and hard to justify except on a repayment basis (which would itself raise difficult questions about bodies within jurisdiction making payments to the ombudsmen and thus risking their independence and impartiality).

6.88 There is a very wide range of organisations within jurisdiction and some variations in the ombudsmen's role depending on the sector (ie whether central or local government or health service) would be acceptable given the different characteristics of each sector and the different histories of the ombudsmen. Functional specialist ombudsmen might therefore continue to have a slightly different 'fit' within the new Commission to reflect the different sectors. Parliamentary, local government and health service ombudsmen would continue to offer a point of engagement,

expertise, and consultation to policy-makers, regulators, bodies and representative groups in each sector.

6.89 One concern is how far the ombudsman should go from examining the circumstances of a particular complaint towards carrying out a more general systemic audit during investigation. There is a danger that in taking too wide an approach to an investigation the original complaint is lost sight of. **In general, the new Commission will need to ensure that investigations are focused and that there is good liaison with the National Audit Office, Audit Commission and other audit and inspection bodies so that matters of concern can be taken forward.**

CHAPTER 7

THE TOTAL PROCESS AND RELATIONSHIPS WITH OTHER COMPLAINTS AUTHORITIES

7.1 Boundaries between complaints-handlers are not only an issue for the three English public sector ombudsmen which are the subject of this review. There are numerous other boundaries, such as:

- With other public sector statutory complaints authorities such as the Data Protection Registrar and proposed Information Commissioner
- Between ombudsmen in the different countries of the United Kingdom
- With private sector ombudsmen such the Independent Housing Ombudsmen.
- With courts and tribunals
- With other inspection and regulatory bodies
- With respondent bodies' complaints-systems and in particular with any independent review tier which may include ombudsmen-like independent complaints examiners.

At present, complainants may need to deal with more than one ombudsman if their complaint involves more than one organisation. This is inconvenient for the complainant, wasteful for the ombudsmen and may be restrictive. Use of one pathway might disallow use of another. Different complaints-handlers may be able to conduct joint investigations but at various points will need to do things separately (for example, publish separate reports). It may not be possible to get the complete picture from the point of view of providing redress.

7.2 Ideally, any complainant will wish to submit a single complaint, deal with a single investigator and single investigation, receive a single report and have redress considered and provided as a single operation. There will clearly be limits in how far such an ideal can be provided; but we see no reason why arrangements both between the three English public-sector ombudsmen and with other complaints organisations should not be improved.

ASSOCIATES OF THE NEW COMMISSION

7.3 **We recommend that arrangements to allow 'associate' status with the new Commission be introduced.** Perhaps initially, we see this applying only to other statutory ombudsmen in the public sector. An associate will be separate organisationally but formal collaborative arrangements will be written into or allowed by legislation. Such arrangements might include:

- Complaints submission to be handled as a single process - routed, copied or transferred as appropriate, using a common simple form and guidance for the complainant, with arrangements for consent for involving associates built in.
- The ability to transfer to one ombudsman a complaint to be handled as a whole. This may only be possible if powers and expertise are in step. The English and Welsh CLAs are able to transfer cases in this way, and we should expect it might be appropriate for respective HSCs in the various countries to be able to transfer cases.
- A single investigator (probably from the organisation with the bulk of any complaint) to 'front' a single investigation, supervised by the different ombudsmen jointly.
- Other ombudsmen may provide expertise at various points (cf HSC professional advisers) or their powers might be invoked if the lead investigator has insufficient powers or jurisdiction at any point.
- A single report should be produced with recommendations made jointly by the ombudsmen.

The ombudsmen currently operate a number of protocol agreements with other complaints authorities which agree how boundary matters should be handled but these are purely administrative in nature.

7.4 We envisage that ombudsmen from the devolved administrations and the Information Commissioner/Data Protection Commissioner would be associates of the new Commission. Since the concept would be defined in legislation there would need to be a provision to allow further associates to be added. Concerns have been raised with us if such arrangements were set in place about disparity of powers and difficulties in sharing information. In particular the current designate for the office of Information Commissioner is concerned that current provisions in the Freedom of Information Bill would raise barriers to sharing information by making disclosure of information by her staff a criminal matter.

7.5 Whether this can be further extended would need to be considered. It would be best to let a college and an initial associate structure settle down, coexisting with administrative protocols with other complaints authorities. However, the concept might eventually be extended to where there are overlaps with private sector ombudsmen (such as the Independent Housing Ombudsman) or to regulatory bodies (such as the GMC).

Other Complaints Bodies

7.6 Where there is no statutory framework, arrangements for streamlining complaints-handling are likely to be unequal. A non-statutory complaints body might be a departmental independent complaints examiner or a private-sector ombudsman scheme operating entirely on a contract-basis. **The new Commission should continue to agree protocols with these other complaints bodies where appropriate but we recommend that details should be put into the public domain (in particular, on an Internet web site) and as far as possible arrangements for streamlined**

complaints handling put in place. Arrangements with respondent bodies are discussed further below.

DEVOLUTION

7.7 The review was asked to consider arrangements for the organisation of the English public sector ombudsmen. However, it is not possible to do this in isolation from arrangements in the other countries of the United Kingdom and from the consequences of devolution. The Parliamentary Commissioner for Administration has jurisdiction not only in England but also on reserved matters throughout the United Kingdom and is answerable to the British Parliament. The new Commission which we propose will retain this responsibility. The Health Service Commissioner in England is covered by the same legislation which covers the Scottish and Welsh HSCs. The Commission for Local Administration in England is covered by the same legislation as the CLA in Wales. There are various interactions between the various Offices specified in legislation and arising from practical situations. Specific examples are spelt out below.

7.8 The present position in each country is:

- In Wales, as well as the HSC for Wales and CLA for Wales, a Welsh Administration Ombudsman was established by the Government of Wales Act 1998 whose jurisdiction includes the Welsh Assembly and a number of Welsh public bodies. The British PCA has jurisdiction over all central government department functions.
- In Scotland, as well as the HSC for Scotland, there is a Scottish CLA established by Scottish legislation covering local government and a Scottish Parliamentary Ombudsman for matters devolved to the Scottish Parliament. The British PCA has jurisdiction over reserved matters such as defence, foreign affairs and taxation.
- In Northern Ireland, an Assembly Ombudsman has responsibility for devolved matters including agriculture, social services, etc, and a Commissioner for Complaints has jurisdiction on health and local government. Both Offices are held by the same individual. The British PCA is responsible for reserved matters.

Administrative arrangements are in transition. The British PCA, for example, currently holds all three HSC Offices, and, on an interim basis, the Welsh AO and Scottish Parliamentary Ombudsman Offices. There are moves to provide coherent administrative arrangements in each country to take account of the new Assemblies and Parliament, and ease access for the public. In Northern Ireland arrangements on cross-border matters are being discussed with the Republic of Ireland.

7.9 The situation therefore is complex. It is beyond our terms of reference to make recommendations about the specifics of the devolved arrangements but we must take account of them in making recommendations for the English public sector ombudsmen and we also have a number of general observations.

7.10 Specific areas where the continuing 'Parliamentary Ombudsman' function may be involved might include continuing involvement on an *ex officio* basis as a member of the CLA in Wales

(currently specified by the Local Government Act 1974) and combining with other ombudsmen to provide 'one-stop' shop arrangements in each country. The Modernising Government agenda is not confined to England and increased partnership working and the impact of the Assemblies and Parliament will also encourage coherence at the country level. **We recommend that arrangements for a new Commission in England should allow for the 'Parliamentary Ombudsman' function working in partnership with ombudsmen in the three countries perhaps in informal college arrangements similar to England.**

7.11 More generally, cases sometimes cross borders (for example, a complaint by a person living in Wales using medical services in England or concerning a child moving countries involving two sets of social services). It is important that arrangements for assigning cases between jurisdictions or for collaborating on joint investigations are established. A particular arrangement for the Commissions for Local Administration in England and in Wales is the ability for one Commission to investigate cases within the jurisdiction of the other (this is sometimes done for practical or propriety reasons). **We recommend that 'associate' arrangements for public sector ombudsmen in the other three countries are put in place.**

7.12 There may also, occasionally, be instances of serious maladministration, which apply beyond England and where the new Commission may wish to address the matter on a United Kingdom basis, perhaps making a special report to Parliament. **We recommend that the new Commission remains able to report to Parliament on a United Kingdom basis.**

7.13 At present the Health Service Commissioners for England, Scotland and Wales are covered by the Health Service Commissioners Act 1993 and the Commissions for Local Administration in England and in Wales by the Local Government Act 1974. The provisions of these Acts are highly consistent in terms of powers, jurisdictions, investigation and reporting procedures, and arrangements for information and consultation, with differences confined to differences in local circumstances. In making recommendations in this report only the HSC and CLA in England have been addressed. **We recommend that DETR, DH and the devolved authorities consider the implications for legislation and the relevant ombudsmen.** A view will need to be taken on whether the non-English ombudsmen should be subject to separate legislation or continue to be covered by the same legislation as the English ombudsmen and also on how consistent an approach needs to be maintained. Our own view is that it would be beneficial to keep arrangements in step but consistency within countries between ombudsmen may be a factor as well as consistency between similar functions between countries.

7.14 The jurisdiction of each ombudsman is currently determined on the basis of the location of the body rather than the complainant. So the English user of a Welsh medical service would need to complain to the Welsh HSC rather than the English HSC. It has been suggested to us that the location of the complainant should determine which ombudsman has jurisdiction. Although, there may be some convenience benefits for the complainant in so doing we believe that there is a risk that coherent oversight of bodies will be lost. A facility to transfer responsibility for a case, similar to that used by the CLAs in England and Wales, would be sufficient to allow for the occasional case.

RELATIONSHIPS WITH PRIVATE SECTOR OMBUDSMEN

7.15 As discussed in Chapter 5 the ombudsmen liaise extensively with fellow ombudsmen including private sector colleagues. We have considered whether any changes are necessary to arrangements.

7.16 There have been a number of proposals to set up ombudsmen on a subject basis instead of dividing between the public and private sector - for example, that the HSC should have the private health care sector added to his jurisdiction or that a Housing Ombudsman should cover both public sector housing and the functions of the Independent Housing Ombudsman. We have considered the issue but have not found a case to set up 'subject ombudsmen' covering both public and private sectors. There are severe difficulties in establishing institutional arrangements which are sufficiently acceptable and can be applied to both public and private sector bodies - issues of funding, accountability, compliance, establishing jurisdiction, wider regulatory issues and so on. Potentially, such a move introduces a new set of boundaries for people to have difficulties with and in the absence of a demand or identified problems with existing arrangements, we see no case for joining up on subject lines rather than sector lines.

7.17 However, there are potentially boundaries which could cause problems - we discussed with the Independent Housing Ombudsman where such boundaries might arise, for example, where there were transfers of housing stock (and thus tenants) from local authorities to housing associations. He found that there were very few complaints involving boundaries and any that occurred were satisfactorily handled by existing arrangements. Tenants were almost always clear who their landlord was at the time of a housing stock transfer and contracts arrangements set down what should be expected.

7.18 **We see no immediate reason for making any changes to existing arrangements between public and private sector ombudsmen.** Our proposals for a gateway should be sufficient to ensure smooth handling of complaints where boundary issues might be involved.

RELATIONSHIPS WITH COURTS AND TRIBUNALS

7.19 The ombudsmen were intended to deal with grievances which were not appropriate to be taken to court and are often categorised as a means of alternative dispute resolution (ADR). Ombudsmen in the public sector differ from ombudsmen in the private sector because the relationship between government and citizen is different from that between a private sector company and a customer. The English public sector ombudsmen have explicit exclusions to their legislation to prevent their involvement in most complaints concerning contracts between government and a complainant.

7.20 The ombudsmen are also concerned with administration which is faulty rather than the merits of decision-making. They are not an alternative to tribunals or to ministerial appeal or other authorities able to make a new decision. It is not always clear to complainants when the use of tribunals is appropriate or when the ombudsman is more appropriate. A complainant may complain that a decision was made maladministratively - although the ombudsman cannot substitute his

decision he may recommend that it be taken again by the respondent body using the correct procedure.

7.21 The ombudsmen are also subject to the courts' jurisdiction. In particular, the ombudsmen are public authorities and make decisions which are capable of being taken to judicial review (the ombudsmen regard themselves as accountable to the courts for their decisions on individual cases). The CLA is taken to judicial review more frequently than the PCA (local authorities but not government departments can ask for judicial review as well as complainants) and the HSC has never been taken to judicial review.

Litigation and Complaining to the Ombudsman

7.22 The law provides that the public sector ombudsmen may not investigate a complaint if the complainant could take the matter into court to seek a remedy. The ombudsmen have discretion to take such a case if it would be unreasonable to expect the complainant to take the matter to court. The law therefore establishes the presumption that a complainant will seek a remedy in the courts. From time to time the ombudsmen have been challenged over the use of their discretionary power to accept or not a complaint which it would be unreasonable to have expected the complainant to take to court.

7.23 There is at present a separation between the role of the ombudsmen and the role of the courts as means of providing remedy to a complaint. In some circumstances a choice faces the complainant as to whether to ask an ombudsman to look into the matter or to bring an action. For example, some complainants must decide between complaining to the HSC about a matter of clinical judgement or taking advice as to whether the complaint could found an action for clinical negligence. In such cases the investigatory power of the HSC and his ability often finally and fully to explain what happened to the patient may provide an incentive for complainants to take a complaint to him rather to bring an action. In theory, many of the complaints brought to the public sector ombudsmen could also be the subject of judicial review.

7.24 Medical negligence is a matter of particular note. The HSC is prevented by legislation from accepting complaints where a complainant clearly intends to take the matter to the courts. But such clarity of intention will not necessarily be apparent. An ombudsman investigation carried out at no cost to a complainant, with powers of discovery and access to clinical advice, can provide valuable evidence for anyone considering litigation. Use of the ombudsman does not at present prevent a complainant later going to court on the same matter. The HSC considers it impractical to introduce arrangements to prevent such actions. Leaving aside whether a mechanism could be introduced (for example, barring access to the courts where an ombudsman has accepted a case), the ombudsmen are concerned that vulnerable people should not be put to distress on the matter and in many cases the basis for any negligence action might only become apparent during an investigation. It would be unfair to prevent a complainant from taking further action.

Lord Woolf's proposals

7.25 Recommendations in Lord Woolf's Final Report on Access to Justice have suggested a shift to a position in which there would not be a presumption that the ombudsman could not investigate a

case in which remedy was available through the courts. Among bodies who represent or assist complainants we have found a firm view that the courts and the ombudsmen should remain quite separate. In particular, the ombudsmen should retain discretion to decide whether or not take a case which otherwise could go before the courts. The courts should not, in appropriate cases insist on referral of a case to the ombudsman. We agree with this perspective whilst noting that no substantive discussion of Lord Woolf's proposals has taken place.

7.26 A further recommendation by Lord Woolf was to allow the ombudsmen to put points of law to the courts. We have received the views of the ombudsman on this recommendation and, as they previously told the Government, rapid settlement by a court of a point of law in which the ombudsman is in need of guidance would sometimes be helpful.

7.27 Opinion is divided about whether or not the ombudsmen should be able to call on the courts to enforce his recommendation, as Lord Woolf recommended. As we have recommended elsewhere in this report, we do think that the ombudsmen's recommendations should be binding and it follows that they should not be enforceable in court.

RELATIONSHIPS WITH OTHER INSPECTION AND REGULATORY BODIES

7.28 We have referred a number of times in this report to the need for the ombudsmen to work closely with other bodies which carry out functions concerned with checking the bureaucracy (both in its audit and accountability sense).

7.29 We received a number of expressions of concern about the plethora of such bodies from the perspective of respondent bodies. For example, the Local Government Association said:

'In the local government context, however, we are concerned about the implications for the citizen, the local authority and the councillor of the proliferation of other investigative bodies.'

In addition to the Ombudsmen in cases of maladministration, local authorities and local councillors come under the investigative jurisdictions of the District Audit Service (in cases of financial mismanagement or ultra vires actions); and the police and CPS (in cases of fraud). The Government is proposing that these bodies will be joined by a National Standards Board, whose remit will be to investigate accusation of breaches by councillors of the National Code of Conduct. The Information Commissioner will also be introduced in the near future.'

Specific points were raised by respondents such as concerns about the impact of serial investigation and double jeopardy for staff which could lead to lengthy periods of uncertainty for all concerned, a continual overhead and distraction for management, and potential duplication (and possibly conflicting recommendations) from investigations covering the same ground. There were calls for arrangements to be rationalised and greater ability to carry out joint investigations to be provided. Inspection and regulatory bodies are themselves keen to be able to collaborate better with others.

7.30 We believe that to cater for this complex environment the ombudsmen need to be well-focused on their core role of handling complaints. This does not mean they should not do other things but they will need to respect the 'fit' to be achieved in the different parts of the public sector so that overlaps and gaps can be minimised (we recommended in Chapter 5 that a functional focus would need to be maintained). The new Commission's gateway and associate concept will be able to provide co-ordination from the complainant's perspective where multiple investigatory bodies are involved. The associate concept may also help respondent bodies since the aim is to improve joined-up investigating. We have also made a number of recommendations about how the new Commission could improve working relationships with respondent bodies, principally in Chapter 6.

RELATIONSHIPS WITH RESPONDENT BODIES' COMPLAINTS SYSTEMS

7.31 Virtually all complainants coming to an ombudsman will have had some contact with the body against which they are making a complaint. When a complaint is submitted to the new Commission to what extent should complainants be required to have exhausted the body's complaints process? At one extreme the new Commission could have complete discretion on whether to accept a complaint and there might be no legal requirement for the body to have been approached. At the other extreme a complainant may be required to exhaust the complaints system.

7.32 We do not believe it will be reasonable to require every complainant to have exhausted the complaints system. Complaints systems vary depending on the body concerned, and conceivably could be unfair, possibly deliberately designed to impede a complaint. But complete discretion for the ombudsman could be arbitrary. A possible approach is to put a requirement into legislation but with discretion for the ombudsman to put the requirement aside if it would be unreasonable to require a complainant to satisfy the requirement. We do not believe this requirement should be to exhaust the complaints system but complainants should be required to attempt first to achieve resolution with the respondent body. Specific arrangements between the new Commission and particular respondent bodies or sectors such as the NHS on what is considered reasonable should be left at the administrative level.

7.33 In dealing with central government, the new Commission must in particular develop its relationships with the independent complaints examiners such as the Adjudicator and the Independent Case Examiner for the Child Support Agency as well as future independent layers which may emerge and which are properly part of the machinery put in place by the executive to assist complainants. Our terms of reference have required us to consider the boundary issues between the PCA and the independent complaints examiners (ICEs). The PCA regards the present position as unsatisfactory for a number of reasons. In particular he thinks there is little attempt to distinguish between complaints that can be quickly resolved by conciliation or mediation, or require only fairly brief investigation, and which he regards as well suited to the internal complaints examiners, and those which require investigation in depth or raise policy issues, and which he believes are better suited to his office. He says that both the Adjudicator and the Independent Case Examiner have begun to experience backlogs and lengthening throughput times, and is concerned that in a significant number of cases the reference of a complaint to him has been delayed by months or even years by an investigation by the complaints examiner which has proved unsatisfactory to the complainant. In such cases, he says, the complainant has been subjected to considerable extra inconvenience; and the lapse of time may well make it impossible for the PCA and his staff to

conduct the independent investigation which the 1967 Act envisages. However, we understand that there have been steps taken by the independent complaints examiners to try to eliminate backlogs.

7.34 We have a rather different perception of the issue and think that the position of the ICEs must be more clearly publicised and understood especially if they are to proliferate as a means of providing a better complaints resolution service. But it is essential to understand that they belong to the executive which appoints and funds them. They do not have the internationally recognised characteristics of an ombudsman in terms of their appointment, funding or independence from the executive. It cannot be doubted that the office holders are individuals of considerable independence of thought who act with scrupulous impartiality. They have, in our view, an important place in the complaints resolution process as a thorough top layer.

7.35 We believe that the relationship between the new Commission and the ICEs should be collaborative with exchanges of expertise and experience flowing both ways. If the ICEs deal satisfactorily with the majority of complaints which are not settled earlier within the department in question, using their detailed knowledge, then the outcome for the complainant may often be the same as though the complaint had been settled earlier. The ICEs should remain under the new Commission's jurisdiction so that their process can be examined if it is maladministrative. But that apart, the ICEs should make clear to complainants that the new Commission is available to them just as we would hope that all public bodies under jurisdiction will also do at the earliest possible stage in the life of a complaint. If the complainant chooses to go at an early stage to the new Commission that is his choice and if the internal complaints process has not been invoked or given a chance to be effective it will be the job of the new Commission's gateway to refer the complainant back, if necessary under some form of supportive observation. But where the ICE is asked to take the case by a complainant but needs the advice or support of the new Commission then that should be available.

7.36 The PCA has suggested that a time limit should apply to ICEs' consideration of complaints after which the complaint should go direct to him so that he sees a greater number of complaints. We think that the solution might better lie in a clearer presentation to complainants of the relative roles and status of internal complaints processes, the ICEs and the new Commission by all concerned. We do not think that the lack of volume of complaints will reduce the expertise of staff in the new Commission because there are currently many areas of government which produce few complaints where all the ombudsmen and their staff have little opportunity to get to know the work of the body under jurisdiction before they take a complaint. In any case a positive advantage of the ICEs is the availability to everyone of a specialist group of investigators who understand the detail of the work of the bodies to which they relate. Collaborative working on the most intractable complaints by ICEs and the new Commission will bring to bear for the complainant the most comprehensive effort in resolving the problem.

CHAPTER 8

CONCLUSION

8.1 This review has shown that the pace of change in the modernisation of Government is leaving behind the public sector ombudsman. It has also highlighted the need for the ombudsmen and other organisations involved in the resolution of complaints or in giving assistance to the public to work more closely together. Our recommendations suggest a new collegiate structure with streamlined working methods and an enhanced role in assisting members of the public earlier, more informally and more constructively.

8.2 Little can be done to achieve this without taking on the task of modernising and consolidating the existing legislation. But we believe that the benefits to the public in the better resolution of complaints; the benefits to those responsible for serving the public in understanding what needs to change, and how, and the benefits to Parliament in learning from the work of the ombudsmen, would be considerable.

8.3 Our recommendations comprise a package of measures and a blueprint for change. It would be possible to achieve a degree of their benefits if, for example, it was decided to retain the MP filter. But we know that Parliamentarians are divided in their views on the subject and there is very considerable support from other organisations for removal of the filter. It would not be possible, however, to improve the work of the PCA/HSC without major change to the relevant legislation. Nor could a quasi-new commission be created by retaining the existing legislation and administratively combining and co-housing the ombudsmen and their respective staff.

8.4 We do not consider that the additional costs of the new Commission would be significant taking into account the improvements to be gained. Although very difficult to quantify on a comparative cost per case basis, the benefits to the public would be so huge compared to the current service that the value for money arguments in favour of change are overwhelming.

8.5 The constraining factor may be the legislative timetable which would require the relative importance of this legislative reform to be assessed before it take its place alongside other Government initiatives to be brought before Parliament.

8.6 Our report contains the consistent theme that innovative public service delivery must be a managed process with constant assessment of impact and measurement of outcomes. The public sector ombudsmen independently provide the public, interest groups, their elected representatives and the Government with a tool for that purpose.

THE OMBUDSMEN'S PAPER – PRESENTED TO MINISTERS IN OCTOBER 1998**A COMMISSION FOR PUBLIC ADMINISTRATION IN ENGLAND****Note by the Local Government Ombudsmen for England and the Parliamentary and Health Service Ombudsman**

1. We suggest that the time has come for a comprehensive review of the organisation of the public sector Ombudsmen in England. The present arrangements do not adequately reflect recent changes in public administration. We see opportunities to achieve benefits for complainants, efficiency gains and cost savings, without adding to the burdens of the bodies subject to the Ombudsmen's jurisdiction. Some review of the arrangements for Scotland, Wales and perhaps Northern Ireland is necessary because of the plans for devolution. It would be anomalous not to consider the arrangements for England, too.

Which Ombudsmen?

2. The English public sector Ombudsmen to whom this note most clearly applies are:
- the Parliamentary Commissioner for Administration (PCA);
 - the Health Service Commissioner (HSC);
 - the three Commissioners for Local Administration (LGOS).

They are referred to as "The English Ombudsmen" in the rest of this note.

3. The review might also cover:
- the Police Complaints Authority;
 - the Independent Housing Ombudsman;
 - the proposed Freedom of Information Commissioner;
 - the Data Protection Registrar.

4. The Police Complaints Authority is concerned with complaints against police officers (the LGOs already have jurisdiction to investigate complaints about the administrative actions of police authorities). The Independent Housing Ombudsman deals with complaints about housing associations and social landlords (other than local authorities) and about private landlords who volunteer to join his scheme. The nature of those complaints is broadly the same as that of complaints to the LGOs about local housing authorities. The proposed Information Commissioner would consider complaints about matters which the Ombudsmen listed in paragraph 2 can and do already investigate when they concern bodies within their jurisdiction. The Data Protection Registrar has jurisdiction over the private as well as the public sector; again, the Ombudsmen listed in paragraph 2 can and do investigate complaints about breaches of the data protection legislation where such complaints are a component of wider grievances about a body within their jurisdiction.

The Present Arrangements for the PCA, HSC and LGOs

5. The legislation establishing the HSC and LGOs was modelled on the Parliamentary Commissioner Act 1967. So, for example, all of them have the powers of the High Court to require the production of information; must conduct their investigations in private; are wholly independent of Parliament, Ministers and bodies within jurisdiction in the conduct of investigations; may make recommendations but have no powers to enforce them; and have similar matters excluded from their jurisdictions (eg commencement and conduct of court proceedings, personnel matters, some contractual matters).

6. The biggest legislative differences between the English Ombudsmen are:

- a. Members of the public have direct access to the HSC and LGO but not to the PCA (to whom access is only through an MP).
- b. The PCA and HSC are within the terms of reference of the House of Commons Select Committee on Public Administration.

- c. All the reports of the LGOs must be made publicly available (unless exceptionally a direction is given disapplying publicity requirements).
 - d. If the PCA or HSC considers that there has been injustice caused by maladministration and he is not satisfied that the injustice has been remedied, he may lay a report before both Houses of Parliament. He may also draw the matter to the attention of the Public Administration Select Committee of the House of Commons. The Select Committee would usually take this up with the body concerned and include appropriate recommendations to the Government in one of their own regular reports.
 - e. If the LGOs are not satisfied with the action taken or proposed following the issue of a report finding injustice in consequence of maladministration, they are required to publish a further report and, thereafter, if still unsatisfied may require the respondent body to publish (at its expense) in newspapers such statement as the LGO considers necessary.
 - f. While the LGOs and PCA may investigate complaints that injustice has been caused by maladministration, the HSC may investigate not only such complaints but also complaints of “hardship” or that there has been a failure of service or a failure to provide a service that should have been provided and may also investigate complaints about clinical judgement.
7. All the English Ombudsmen are statutorily independent of each other. But there are powers for the PCA, HSC and an LGO to consult each other on a complaint which relates to matters within the other’s jurisdiction.
8. The PCA and HSC share accommodation equipment and staff. They share none of these things with the LGOs. All three Ombudsmen schemes produce their own, separate Annual Reports and Accounts, information and publicity.

9. The Commission for Local Administration (CLA)¹ provides accommodation, staff and supporting services for the LGOs. These arrangements were found to be working well in the report on Stage 2 of the Financial Management and Policy Review of the CLA in 1996.

10. Since the office of the HSC was created in 1973, it has been held by the PCA of the day. But there is no requirement for this.

Disadvantages of the Present Arrangements

11. The present arrangements are unhelpful to complainants. Complaints do not necessarily relate only to the actions of a body within one ombudsman's jurisdiction.

For example:

a. an elderly or mentally ill person may have a complaint about the way a hospital and a social services authority dealt with his or her discharge from hospital; or

b. parents may be aggrieved by the delay in issuing a Statement of their child's Special Educational Needs partly because of tardiness by the education authority and partly because of dilatoriness by the health authority in providing reports for the child's assessment or may be aggrieved by the subsequent failure of both types of authority to secure the provision of the speech therapy specified in the Statement;

c. a claimant of Housing Benefit may have been caused injustice because of faults not only by the council but also by the DSS or the Rent Officer Service.

12. Increasingly, partnerships are being forged between, for example, NHS bodies and local authorities so as to achieve better assessment of the client's needs and the delivery of services to meet them. It is clear from, for example, the White Paper on modernising local government that the Government wishes to see partnerships going further and wider. This is welcome but the present jurisdictions of the English Ombudsmen do not sit easily with this trend.

¹ The Commission comprises by law the three LGOs and the PCA

13. Complainants find it difficult to know to which Ombudsman to complain and rarely complain to more than one at the same time even though they would have good grounds to do so. This was recognised by the Select Committee on Public Administration in its report on the Government's proposals for Freedom of Information legislation. In paragraph 89 of its report, the Select Committee said:

“...there are strong arguments for bringing together the various authorities within some form of collegiate structure. We do not intend to make firm recommendations on this subject in this Report, for it is one to which we intend to return; but we are keen that bringing greater coherence to the structure of the UK complaints system should be energetically pursued. We note that a similar interest has informed part of the Government's proposed reforms to the financial regulatory system. It has called the current Ombudsmen schemes in the financial services part of the private sector a ‘patchwork quilt’ of differing schemes which is confusing for the consumer. It has decided that it would ‘like to see the various [financial services] Ombudsmen consolidated into a single Ombudsman scheme’. **We recommend that the Government likewise review the system of public sector complaints authorities in the UK with a view to bringing them together – or at the very least making it easier for people to complain without having the difficulty of working out precisely which complaints authority they need to deal with.**”

14. At present, far from having only “one door” to knock on, the complainant (often vulnerable, inarticulate and poor) is faced with at least three. Indeed, complainants cannot even knock on the PCA's door themselves but have to find an MP who will refer them to the PCA.

15. Information and publicity about getting redress is fragmented because the PCA, HSC and LGOs produce separate brochures, complaint forms and press notices. It seems likely, therefore, that awareness and understanding about what the English Ombudsmen can do is impaired.

16. The words “maladministration” and “injustice” are not well understood by the public. The PCA and LGOs regard “hardship” as a possible injustice consequent on maladministration and so it

is confusing that the HSC legislation expressly mentions “hardship” in addition to injustice. Similarly, the PCA and LGOs may find that a failure of service or failure to provide a service amounts to maladministration; and so it is confusing that the HSC legislation expressly refers to these failures in addition to maladministration.

17. Recruitment and training of the PCA/HSC’s and LGOs’ investigative staff are fragmented. The PCA’s and HSC’s staff have different pay and superannuation arrangements and other conditions of service from those of the LGO’s staff. Yet the type of people required and much of the training they need is the same.

18. The IT requirements of the English Ombudsmen are very similar. But the CLA’s computerised registry system was developed and is maintained separately from the PCA/HSC’s. Similarly, there are separate finance, accounting, auditing and procurement systems.

19. The PCA and HSC have a clear and open line of answerability to one body - Parliament. By contrast, the LGOs accountability is less open and less clear.

20. Responsibility is fragmented for considering how the lessons of investigations could be applied across the public sector. So it is more difficult to identify good and bad practice and make proposals for improvements to public administration across the board.

21. One of the findings of the Citizen’s Charter Unit is that complaints systems should be easy for complainants to understand and use. The present organisation of the English Ombudsmen flies in the face of that finding. The proliferation of other bodies – such as those listed in paragraph 3 – adds to the confusion and complexity.

A Review

22. We suggest, therefore, that there should be a comprehensive review of the present arrangements with the aims of producing a system which:

- a. is easier for complainants to understand and use;
- b. has consistent and satisfactory means for accountability;
- c. achieves resource savings and improved efficiency;
- d. recognises that a single complaint can often involve several public sector providers, crossing traditional boundaries between services;
- e. enables the lessons of investigations to be used for the improvement of public administration across the board;
- f. does not add to the costs of the bodies which are the subject of complaints; and
- g. takes account of other and newer complaints institutions such as the Independent Housing Ombudsman and the proposed Freedom of Information Commission.

Such a review would be in accordance with the recommendations by the Select Committee on Public Administration quoted in paragraph 13 above.

23. One option might be to develop the concept which currently lies behind the CLA. There might be a single Commission for Public Administration in England to whom all complainants would have direct access. The Commission would be responsible for finance, accommodation, staffing, publicity, planning and common services. The members of the Commission would all be Ombudsmen, each specialising in particular areas of public administration but authorised, where necessary, to investigate and report on a complaint about the actions of several types of public body (eg health and social services authorities; benefits authorities whether in central or local government; etc). The Commission would be answerable to a Select Committee of the House of Commons for the general conduct of its activities but not for the investigation of individual complaints.

24. In paragraph 90 of its report on the proposed Freedom of Information legislation, the Select Committee on Public Administration commented on the relationship between Parliament and Ombudsmen:

“Although the White Paper has rejected the model of the Parliamentary Ombudsman, and particularly the Ombudsman’s relationship with Parliament, we believe that the relationship is a proper and useful part of the Ombudsman’s armoury. The Committee performs a useful role in encouraging compliance by the bodies subject to his jurisdiction. They may be less necessary where a Commissioner has powers to enforce compliance. But even the Data Protection Registrar told us that she felt that a similar relationship with a Select Committee to that enjoyed by the Ombudsman would be useful in her own job. Maurice Frankel said to us that the Campaign for Freedom of Information did not have any objection to a Select Committee having a monitoring oversight role: ‘I think it would be extremely valuable. If your Committee wanted to do that we would be absolutely delighted, we think it would be a very important function which would do a great deal to assist the legislation meeting its objectives’. The Ombudsman described his meeting with the Committee as like ‘an energetic workout, very tiring at the time, but it is good for one in the long run’. He added that ‘it seems to be entirely right that, like any other aspect of public administration, freedom of information should be subject to Parliamentary scrutiny and examination’. We believe that the publicity and profile and awareness of public opinion which could be given to the Information Commissioner through regular contact with a Select Committee would be useful; and **we recommend that a Select Committee be established to examine the reports of the Information Commissioner; or that the function be added to those of this Committee**”.

25. Some commentators have suggested that it would be objectionable in principle for the LGOs to be accountable to Parliament because local government is directly elected and councils should not, therefore, be summoned to account by Parliament. This constitutional argument may not be persuasive because the LGOs (and other English Ombudsmen) would not be subject to direction of the House of Commons, or any of its Committees, in the conduct of an investigation or in reaching a view on what would be a satisfactory remedy in any particular case. Moreover, the LGO service,

like that of the PCA and HSC, is financed from general taxation and so its use of public funds should be and is already subject to scrutiny by the Public Accounts Committee. Parliament is quite capable of binding itself, in seeking information from councils, not to question their administrative conduct but rather to focus on the operation and effectiveness of the Ombudsmen dealing with local government and on general lessons for public administration. Finally, the HSC has within his jurisdiction general medical and dental practitioners, who are independent contractors, not public servants, and private bodies providing health care under arrangements with NHS purchasers. It is perfectly open to the Select Committee to take evidence from them, even though they are not directly accountable to Parliament.

26. Finally, we suggest that our proposal for a comprehensive review fits well with the Government's Better Government initiative and might usefully be considered in that context.

28 October 1998

CONTRIBUTORS TO THE REVIEW

Many organisations and individuals contributed to the review - below are listed organisations who provided submissions or contributed through discussion. To anyone who has inadvertently been omitted we offer our apologies.

The Adjudicator for the Inland Revenue, Customs and Excise, Contributions Agency and
Contribution Unit (NI)

The Adjudicator for National Savings

Advice Services Alliance

Age Concern

Amsterdam Municipal Ombudsman

The Arts Council of England

Association for Improvements in the Maternity Services

Association of Community Health Councils for England and Wales

Association of Council Secretaries and Solicitors

Association of Directors of Social Services

Audit Commission

Benefits Agency

British Association of Medical Managers

British Dental Association

British Federation of Care Home Proprietors

British Medical Association

Bristol Royal Infirmary Inquiry

Cabinet Office

Child Support Agency

Children's Legal Centre

The Children's Society

Citizens Advice Bureau (Uckfield)

Commission for Local Administration in England

Commission for Local Administration in Scotland
Commission for Local Administration in Wales
Companies House
Complaints Adjudicator for Companies House
Consumer Congress
Consumers' Association
Customer Management Consultancy
Danish Ombudsman, Dr Gameltoft-Hanson
Darbari Trust
Data Protection Registrar
Department for Culture, Media and Sport
Department for Education and Employment
Department of the Environment, Transport and the Regions
Department of Health
Department of Social Security
Department of Trade and Industry
Dutch Interior Ministry
Dutch Ombudsman, dr Marten Oosting
Energy Industry Ombudsman, Victoria, Australia, Fiona McLeod
English Heritage
North Essex and South Essex Local Medical Committees
Foreign and Commonwealth Office
Funeral Ombudsman Scheme
General Medical Council
George House Trust
Health Service Commissioner
HM Customs and Excise
HM Magistrates' Courts Service Inspectorate
HM Procurator General and Treasury Solicitor
HM Treasury
Home Office

Independent Complaints Examiner, Child Support Agency
The Independent Complaints Mediator
Independent Complaints Reviewer to HM Land Registry
Independent Housing Ombudsman
Inland Revenue
Irish Ombudsman, Kevin Murphy
The Insolvency Service
The Institute of Health Services Management
JUSTICE
London Borough of Lewisham
Local Government Association
Lord Chancellor's Department
Medical Protection Society
Mental Health Act Commission
MIND
Ministry of Defence
National Association of Citizens Advice Bureau
National Audit Office
National Care Homes Association
National Consumer Council
National Federation of the Blind of the United Kingdom
National Housing Federation
National Lottery Charities Board
NHS Executive
Northern Ireland Ombudsman, Gerry Burns
The Nuffield Trust
Occupational Pensions Regulatory Authority
Office for National Statistics
Office for Standards in Education
Office of the Solicitor, Department of Social Security and Department of Health
Office of Water Services

The Ofsted Complaints Adjudicator
Parliamentary Commissioner for Administration
Parliamentary Commissioner for Standards
The Patients Association
Pensions Ombudsman
Prisons Ombudsman
Royal College of General Practitioners
Royal College of Nursing
Royal College of Physicians
The Royal College of Surgeons of England
Royal National Institute for the Blind
The Royal National Institute for Deaf People
Scottish Executive
Parliamentary Select Committee on Public Administration
SoLACE
Sport England
United Kingdom Central Council for Nursing, Midwifery and Health Visiting
University of Reading, Centre for Ombudsman Studies
University of Sheffield
War Pensions Agency
Warwick District Council
Waterways Ombudsman