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It's public law, but not as we know it: understanding and making effective use of ombudsman schemes

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> "Maladministration comes in many guises, and while there is a substantial element of overlap between maladministration and unlawful conduct... they are not synonymous"
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> *R (Liverpool City Council) v Local Commissioner for Local Government for North and North East England* [2000] EWCA Civ 54 per Henry LJ at [17].

1. This article overviews the principles deployed by the main public sector ombudsmen – those primarily concerned with central government, NHS and local government bodies – when they investigate, adjudicate upon and recommend redress for wrongs that might otherwise be challenged by judicial review. The ombudsmen only began publishing information about these principles comparatively recently and the development is welcome: lawyers can find themselves in an invidious position when advising on whether an ombudsman complaint should be made. If one is, the time to bring a prompt judicial review claim will almost certainly pass; there will be far less control over the pace and scope of an ombudsman investigation than there would be with a legal claim; and worst of all, the client must be told that even if their complaint is upheld, the body investigated may reject any remedy recommended. Similarly, once a specific issue has been the subject of a judicial review claim the ombudsmen can legitimately refuse to investigate it.[1]

2. Notwithstanding these difficulties, far more complaints are made to the ombudsmen each year than claims are put to the Administrative Court and in many ways the ombudsmen have a freer hand to devise remedies that address the ongoing effects of past injustice experienced by individuals and groups. Ombudsmen will rarely limit

[1] *R (PH) v Commissioner for Local Administration* 8th March 1999, unreported.

themselves to asking a public body to reconsider its position. In recent years the Local Government Ombudsman ('LGO') has recommended a financial redress package exceeding £100,000 to address a council's failure to provide adequate services to a child with learning disabilities[2] and compensation of £75,000 for three siblings who experienced institutional racism and abuse while in foster care many years ago (ref). Ann Abraham, the Health Service Commissioner ('HSC'), has recommended a framework for the return of money unlawfully charged for community care services[3] and that £25,000 should be paid to a GP who had suffered psychiatric illness as a result of the mishandling of a complaint against her[4]. Last, but certainly not least, the Parliamentary Commissioner for Administration ('PCA'), an office also currently held by Ann Abraham, has recommended financial redress for over 130,000 members of final salary occupational pension schemes who were maladministratively misled into thinking their pensions were secure, whatever the fortunes of the sponsoring company[5]. She has also recommended that the government should establish a compensation scheme to address the effects of Equitable Life being inadequately regulated[6].

3. It is unlikely any of these outcomes could have been achieved through any form of litigation, much less judicial review (though, as discussed below, the pension scheme members had to resort to the Administrative Court to ensure the PCA's key findings in their favour were accepted).

Jurisdiction

4. There are many basic similarities between the jurisdiction of the Administrative Court and that of the public sector ombudsmen. At base, both are concerned with administrative acts and failures[7] but intervene as a matter of discretion: there is no 'right' to an ombudsman investigation any more than there is a right to judicial review. Issues which have become academic are of little interest to the ombudsmen or the Court. Like a judicial review claim, an ombudsman investigation can be brought to an end at an early stage[8] and PCA complaints must also be made via an MP intended

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[2] *Complaint 05/C/11921 against Trafford Metropolitan Borough Council.*

[3] Retrospective continuing care funding and redress 3rd Report Session 2006-2007, HSC / PCA 2007.

[4] *Complaint against Medway Primary Care Trust (Medway) and West Kent Primary Care Trust (West Kent)* p 15, Remedy in the NHS, HSC 2008.

[5] *Trusting in the Pensions Promise*, HC 984 (Session 2005-2006), PCA 2007.

[6] *Equitable Life: a decade of regulatory failure*, HC 815i (Session 2007-2008), PCA 2008.

[7] s 5 of the Parliamentary Commissioner Act 1967, s 3 of the Health Services Commissioner Act 1993, and s 26 of the Local Government Act 1974.

[8] The Court of Appeal concluded in *R (Maxhuni) v Commissioner for Local Administration for England* [2002] EWCA Civ 973 12 July 2002, unreported that the LGO may legitimately conclude an investigation by means of a reasoned 'local settlement' without needing to produce a full report.

to function as a 'filter'.[9] The ombudsmen expect concerns to be raised with them reasonably expeditiously, that is within a year of the events to which they relate, though they have discretion to entertain those brought to their attention later for good reason.[10] As with the judicial review pre-action protocol, the normal expectation is that public bodies will have had the opportunity to respond to a complainant's concerns before resorting to the ombudsmen. However, this will normally entail a reasonable attempt to exhaust an authority's internal complaints procedure, something that would not be expected in an urgent judicial review or where a complaint could not realistically resolve the issues in dispute. The ombudsmen are expressly prohibited from investigating where a complainant has a legal remedy,[11] subject to the important caveat that it must be reasonable to expect it to be used bearing in mind, amongst other things, the complainant's resources.[12] Last, the granting and nature of remedies (by way of recommendations) is discretionary.

5. The extent of these similarities should not be exaggerated. There have, however, been some recent changes in the jurisdiction to allow joint investigations involving more than one ombudsman[13] and for the LGOs to investigate 'apparent' maladministration and service failure that impacts on third parties (i.e. non-complainants) of their own initiative[14]. The ombudsmen are limited by their parent statutes in what they can investigate. [15] They can do nothing when it emerges there is no maladministration or, in the case of the HSC and LGO, a service failure. The courts, not the ombudsmen, are the guardians of the rule of law and have repeatedly stressed that only they can rule upon the legality of actions and failures[16] including whether there has been a breach of the Human Rights Act 1998.

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[9] s 6(5) of the Parliamentary Commissioner Act 1967.

[10] s 6(3) of the Parliamentary Commissioner Act 1967, s 9(4) of the Health Services Commissioner Act 1993, and s 26B(2) of the Local Government Act 1974.

[11] s 5(2) of the Parliamentary Commissioner Act 1967, s 4(1) of the Health Services Commissioner Act 1993, and s 26(6) of the Local Government Act 1974.

[12] *R (Liverpool City Council) v Local Commissioner for Local Government for North and North East England* [2000] EWCA Civ 54per Chadwick LJ at [40]:

> "the Commissioner reaches the conclusion that there is a remedy by way of proceedings in a court of law, then he must go on to consider whether, in the particular circumstances, it is not reasonable to expect the person aggrieved to resort (or to have resorted) to such proceedings. That does involve an exercise of discretion. It is for the Commissioner to decide whether or not he is satisfied that it is not reasonable to expect the person aggrieved to pursue the alternative remedy."

[13] Regulatory Reform (Collaboration etc. between Ombudsmen) Order 2007 (SI 2007/1889)

[14] s 26D of the Local Government Act 1974 as amended.

[15] eg schedule 5 of the Local Government Act 1974.

[16] See *R v Commissioner for Local Administration ex parte Croydon* LBC [1989] 1 All ER 1033 per Woolf LJ

> "[i]ssues whether an administrative tribunal has properly understood the relevant law and the legal obligations which it is under when conducting an inquiry are more appropriate for resolution by the High Court than by a commissioner, however eminent"

and *R (Liverpool City Council) v Local Commissioner for Local Government for North and North East England* [2000] EWCA Civ 54 per Chadwick LJ at [47]:

6. Procedurally too there are considerable differences. Ombudsman investigations, and sometimes their reports, are not public. 'Hearings' though technically possible, are almost unknown. In LGO cases there may be no clear determination of the dispute, given the discretion to end an investigation with a local settlement exercised the vast majority of cases, even where the complainant is reluctant. Ombudsman investigations generally progress far slower than judicial review claims and there is no power to grant interim remedies (a special effort to investigate expeditiously may be made by the LGO where there is a risk of irreversible prejudice, for instance in education admission cases). When their investigations are concluded, the ombudsmen have no power to compel public authorities to do anything, save to co-operate with their investigation and, in the case of the LGO, to publish reports. Though most recommendations are accepted, there are occasional and significant aberrations.

7. Yet to some extent these limitations are mitigated by the extensive information gathering and fact finding powers of the ombudsmen. Ombudsmen have been specially equipped by Parliament to enable them to root out facts which may show maladministration leading to injustice in a way which a Court could not.[17] Thus in *R v Local Commissioner, ex parte Liverpool CC* [2001] 1 All ER 462, the Court of Appeal acknowledged at [28] that the Ombudsmen are uniquely:

> "in a position to get to the bottom of a prima facie case of maladministration… and can reach facts which might not emerge under the judicial review process."

8. As discussed below, most investigations will involve a through examination of the public authorities files, including material that c would normally not be disclosed under the duty of candour to which judicial review defendants are subject and some material – such as legal advice – that would never be disclosable. This may be particularly helpful in cases where the natural inclination of the Administrative Court would be to accept the Defendant's view of events where there is a conflict.[18]

Bases of challenge: maladministration and public law wrongs compared

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"The Commissioner's power is to investigate and report on maladministration; not to determine whether conduct has been unlawful. So there is no reason why, when exercising the power to investigate and report, (which has been conferred on him by the 1974 Act) he should, necessarily, be constrained by the legal principles which would be applicable if he were carrying out the different task (for which he has no mandate) of determining whether conduct has been unlawful."

[17] *In the matter of a Subpoena issued at the request of the Commissioner for Local Administration* 2 April 1996.

[18] See e.g. *R v Camden LBC ex p Cran* [1995] 94 LGR 8, 12

9. The Courts have made three main statements of principle about what is meant by 'maladministration'. The other main limb of the HSC and LGO's jurisdiction, 'service failure', has yet to be the subject of judicial comment.

10. First, the concept of maladministration is an evolving, rather than a fixed one and it is for the Ombudsmen themselves, rather than the Courts to decide whether a given set of facts amount to it. As Denning MR observed in *R v Local Commissioner, ex p. Bradford MCC* [1979] 1 QB 287, 311:

> "Parliament did not define "maladministration." It deliberately left it to the ombudsman himself to interpret the word as best he could: and do it by building up a body of case law on the subject."

11. The ombudsmen themselves have recognised that this is not without its advantages. The PCA has stated, for example:

> "To define maladministration is to limit it. Such a limitation would work to the disadvantage of individual complainants with justified grievances which did not fit within a given definition."[19]

12. Interestingly, the Courts have been willing to allow the ombudsmen themselves to develop and interpret the concept. As Sedley J noted in *R v Parliamentary Commissioner for Administration ex parte Balchin No.1* [1997] JPL 917:

> "…so far as a court of judicial review is concerned the question is not how maladministration should be defined but only whether the Commissioner's decision is within the range of meaning which the English language and the statutory purpose together make possible. For the rest, the question of whether any given set of facts amounts to maladministration – or by parity or reasoning, to injustice – is for the Commissioner alone."

and *R (Doy) v Commissioner for Local Administration* [2001] EWHC Admin 361 per Morison J: "the Ombudsman and not the court is the arbiter of what constitutes maladministration."

13. Second, as with public law wrongs, 'maladministration' is primarily concerned with process, rather than merits. In *R v Local Commissioner for Administration for the North and North East Area of England ex parte Bradford Metropolitan City Council* [1979] 1 QB 287 at 311H Lord Denning MR adopted a passage from the 4th Edition of Wade on Administrative Law:

[19] WK Reid, Annual Report, 1993, 16 March 1994.

> "It 'would be a long and interesting list', clearly open-ended, covering the *manner* in which a decision is reached or discretion is exercised; but excluding the *merits* of the decision itself or of the discretion itself. It follows that 'discretionary decision, properly exercised which the complainant dislikes but cannot fault the manner in which it was taken, is excluded': see Hansard, 734 HC Deb, col. 51.
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> In other words, if there is no maladministration, the ombudsman may not question any decision taken by the authorities. He must not go into the merits of it or intimate any view as to whether it was right or wrong. This is explicitly declared in section 34(3) of the Act of 1974. He can inquire whether there was maladministration or not. If he finds none, he must go no further. If he finds it, he can go on and inquire whether any person has suffered injustice thereby."

14. Third, while there is an overlap with public law principles, maladministration is undoubtedly broader than any failure to discharge a legal duty or obligation or to act unfairly in a sense that would give rise to grounds based on procedural unfairness or abuse of power (see further below).

15. All of this could well make it difficult, at least on the face of things, to make any reliable prediction on whether an ombudsman will investigate any individual complaint and ultimately find that maladministration has occurred. Besides the ombudsman reports on past cases, there are now three sources of helpful guidance.

16. The first is the expanded 'Crossman Catalogue'. The Catalogue is the list of examples given to Parliament by the sponsoring minister of the 1967 Bill, Sir Richard Crossman, specifically: "bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on". This, open ended definition was judicially endorsed by Denning LJ in the *Bradford* case. In his 1993 *Annual Report* the then PCA, Sir William Reid, took the opportunity to add:

> "rudeness (though that is a matter of degree); unwillingness to treat the complainant as a person with rights; refusal to answer reasonable questions; neglecting to inform a complainant on request of his or her rights or entitlement; knowingly giving advice which is misleading or inadequate; ignoring valid advice or overruling considerations which would produce an uncomfortable result for the overruler; offering no redress or manifestly disproportionate redress; showing bias whether because of colour, sex , or any other grounds; omission to notify those who thereby lose a right of appeal; refusal to inform adequately of the right of appeal; faulty procedures; failure by management to monitor compliance with adequate procedures; cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use a service; partiality; and failure to

mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment."

17. This Crossman Catalogue has been fleshed out further by two important publications: the PCA and HSC 's *Principles of Good Administration*[20] and the LGO's updated guidance to local authorities on *Good Administrative Practice*.[21] Ten common principles emerge when all three are read together.

18. First, it is maladministrative to fail to follow a code, policy or procedure to the detriment of an individual or class of people[22]. Plainly, this is analogous to procedural impropriety, though the origins of the procedure – statutory or by way of guidance – will be far less significant to an ombudsman and limitations placed by the Courts on the concept of legitimate expectation are not generally applied.

19. Second, delay in discharging a legal duty or honouring a commitment that causes a detriment (including a lost opportunity or mere uncertainty) will generally be maladministrative. Again, there are analogous public law principles, in that the Courts have held that the exercise of statutory powers must not be delayed to the extent that the purpose for which they are conferred is unlawfully or irrationally frustrated.[23] A public body will also act irrationally where it has no demonstrably rational means of prioritising competing demands on its resources and taking into account relevant considerations in any prioritization exercise.[24] However, there is much in the ombudsmen reports to suggest that delay falling short of irrationality will nevertheless amount to maladministration, especially where a public authority fails to adhere to its own published standards.

20. Third, failing to provide adequate information, or actively providing misleading information, will amount to maladministration. This has no obvious public law corollary outside the specific contexts of consultation and fair hearings. It may be negligent for public bodies to give misleading information, but for a cause of action to arise the hurdles of a duty of care and proximity will need to be overcome. If an ombudsman concludes that they are required to demonstrate that maladministration

[20] http://www.ombudsman.org.uk/pdfs/pga.pdf
[21] http://www.lgo.org.uk/pdf/good_practice_2.pdf

[22] e.g. *R v Commissioner for Local Administration, ex parte Blakey* (1994) COD 345, *R (Liverpool City Council) v Local Commissioner for Local Government for North and North East England* [2000] EWCA Civ 54

[23] e.g. *R v Tower Hamlets London Borough Council ex Parte Khalique* (1994) 26 HLR 517 at 522.

[24] *R v North West Lancashire Health Authority ex p A* [2000] 1 WLR 977 at p 991D and *R v Secretary of State for the Home Department, ex parte Mersin* [2000] INLR 511.

has caused or contributed to an injustice they must show a link,[25] but not necessarily to the same standards that would apply in tort.

21. Fourth, an unreasoned decision or one which is made for reasons that are unclear to those affected or to an objective reviewer will often be maladministrative. There is an obvious similarity here to public law principles of fairness, though the ombudsmen appear to take the approach that almost all administrative decisions call for reasons, not merely those where a procedure, or fairness, imposes a duty to give them.

22. Fifth, a decision that is made without adequate information having been gathered will often be maladministrative. This is closely analogous to the public law principles of due inquiry and taking account of relevant considerations.

23. Sixth, unlawfully discriminatory decisions will also be maladministrative. This has some resonance in the common law as well as the statutory torts. It is not entirely clear how an emphatic finding could be made by an ombudsman, given they have no jurisdiction to determine whether torts have been committed. In practice, the ombudsmen seem to take a reviewing role when discrimination is alleged and check whether authorities have been proactive in minimising the risk that it might occur and responding to concerns in line with their own procedures.

24. Seventh, when a decision is infected by conflicts of interest or personal bias it will almost certainly be maladministrative. The test is closely analogous, but not identical to the common law one.[26]

25. Eighth, a decision made without regard to the consequences of an inflexible application of discretion, or which is otherwise arbitrary or disproportionate, may well be maladministrative. This has some resonance with the prohibition on fettering, but once again is a broader concept. The expanded Crossman Catalogue refers to "failure to mitigate the effects of rigid adherence to the letter of the law" and so following a procedure insensitively (but wholly lawfully) when the consequences for the affected individual will be unduly harsh is caught.[27] There will also be some exercises of discretion, such as the establishment of an inflexible ex gratia compensation scheme

[25] *Secretary of State for Work and Pensions v Bradley* [2008] EWCA Civ 36 per Chadwick LJ at [108] to [110]. See also *R v Commissioner for Local Administration ex parte S* (1999) 1 LGLR 633.

[26] *R (Liverpool City Council) v Local Commissioner for Local Government for North and North East England* [2000] EWCA Civ 54

[27] e.g. Complaint against Medway Primary Care Trust (Medway) and West Kent Primary Care Trust (West Kent) p 15, Remedy in the NHS, HSC 2008.

using common law or prerogative powers, that are not subject to the prohibition on fettering.[28] The PCA has shown no hesitation to examine these critically.

26. Ninth, it is maladministrative to fail to be self-critical, especially where processes which exist to facilitate this (such as statutory complaints procedures) are not followed. This will encompass failure to provide adequate redress, or an apology. Again, there is no obvious public law corollary with this principle although the failure to giver proper weight to the outcome of a statutory complaints procedure[29] or factual findings of independent tribunal may be unlawful.[30]

27. Tenth and last, it is important to note that there are degrees of maladministration. In service failure cases for instance, maladministration will be examined very critically when it manifests itself in a failure to deliver a service (or delivers a manifestly inadequate service) which either:

    (1) is required as a result of a statutory duty owed to the individual service user; or

    (2) may be driven by a desire to avoid expenditure, notwithstanding such a duty; or

    (3) is needed because a service user is particularly vulnerable (whether by reasons of age, disability or illness) and thus particularly reliant on the help of the State; or

    (4) is repeated, persistent or systemic, rather than simply an aberration.

28. Maladministration that combines two or more of these features will be treated very seriously by the ombudsmen as in *Complaint 05/C/11921 against Trafford Metropolitan Borough Council* (see further below). Similarly, in PCA investigation reports, special criticism is reserved for conduct which flies in the face of basic notions of 'fair dealing' as between the individual and the state, for example where the government has taken it upon itself to regulate a particular area of public life but, in doing so, acted maladministratively.

The investigation process

[28] *Secretary of State for Defence v Elias* [2006] 1 WLR 3213, [2006] EWCA Civ 1293
[29] *R v Islington LBC ex parte Rixo*n (1998) 1 CCLR 119.
[30] See *R v Warwickshire CC, ex parte Powergen plc* [1997] EWCA Civ 2280, at page 6 *(*Simon Brown LJ); *R v Secretary of State for the Home Department, ex parte Danaei* [1997] EWCA Civ 2704, pp. 7 – 8 per Simon Brown LJ, and p. 9 per Judge LJ.

29. There are ten normal stages to an ombudsman investigation, with an eleventh applying uniquely in the NHS context. These are service failure complaints with a clinical element "where the action or decision complained of relates directly to the patient's treatment or care and can properly be taken only by a professional trained in the appropriate discipline and possessing recognised qualifications and experience."[31]

30. The stages are:[32]

(1) Initial screening. At this stage the relevant ombudsman considers jurisdictional questions and, critically, if the maladministration is proven and whether this has led to an injustice.[33]

(2) Preparation of internal statement or summary of the complaint. This statement will be prepared by the ombudsman's staff on the basis of the information received and effectively functions as the terms of reference of the investigation. A supplementary statement may be issued if necessary. The facts set out are not considered undisputed: they are merely the complainant's version of events.

(3) Providing an initial opportunity for the body complained of to respond in writing. The statement will be sent to the practice or body that is the subject of the complaint along with an invitation to respond. If a complainant's letter or note is sufficiently comprehensive, the Ombudsman may simply forward this. Some LGO investigators will follow matters up with a telephone call in cases which are urgent and there is prima facie maladministration.

(4) Consideration of whether the investigation should proceed or be determined at a preliminary stage.

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[31] *A Guide to the Work of the Health Service Commissioner*, Office of the Health Service Commissioner, April 1996, para 53.

[32] This draws on the HSC Guide (above), the PCA's explanation of her internal procedures in the skeleton argument filed in *Secretary of State for Work and Pensions v Bradley* [2008] EWCA Civ 36 and the LGO's investigation Handbook which can be obtained under the Freedom of Information Act 2000.

[33] See, for example, the first Ombudsman, Sir Edmund Compton in his talk "The Parliamentary Commissioner for Administration", published in the Journal of the Society of Public Teachers of Law (1968-9, 101-113). At p. 104, it was said that

> "I begin with the statement of complaint by the aggrieved person. Note that he does not have to prove maladministration. The Act says he has to claim to have sustained injustice in consequence of maladministration in order to start me on my investigation. Now in my experience a complainant is usually specific about the injustice he has sustained but less so about maladministration which caused injustice. So the complaint, as I get it, usually starts with the injustice of which the complainant is naturally most aware and says little about the maladministration. My investigation on the other hand, follows the sequence laid down by the Act which puts the injustice not at the beginning but at the end of the causal chain".

(5) Request for internal records. In most cases, the relevant ombudsman will proceed by requesting access to all the documents necessary for the investigation, ranging from medical and complaints records to internal guidance and protocols. In this respect the ombudsmen's powers are identical to those of a court and they can certify an obstruction as a contempt of court. The fact Parliament conferred such powers on the ombudsman is a clear indication of the importance it attaches to them having the fullest possible access to the relevant records even in sensitive areas.[34] A dim view is taken of inadvertent loss or destruction of records once an investigation is underway and even if there is no evidence of bad faith, this will often lead to a finding of maladministration.

(6) An interview of the complainant, by telephone or, more commonly in person, will normally follow consideration of the documents requested.

(7) There will then, normally be an interview of key officers whose decisions are the subject of the complaint. Occasionally this will be done by means of a written questionnaire, or over the telephone, though face to face interviews are more common. Those interviewed are permitted to have a 'friend' in attendance. It is not normally envisaged that this will be a solicitor or barrister. The investigating officer will normally read back his or her notes to check their accuracy. Again, those who the ombudsman wishes to interview can be required to co-operate. The ombudsmen could, in theory at least, use their powers to convene a hearing.

(8) In HSC cases advice is then sought from clinical assessors. The ombudsman has appointed a number of health care professionals to advise him on issues of clinical judgement. Normally at least two will be involved in an investigation of this kind. They may, themselves, become involved in interviewing the person who is the subject of the complaint. Their advice will address whether "the actions complained of were based on a reasonable and responsible exercise of clinical judgement of a standard which the patient could be reasonably entitled to expect in the circumstances in question."[35]

(9) The evidence gathered will then be considered.

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[34] See *In the matter of a Subpoena issued at the request of the Commissioner for Local Administration* 2 April 1996, unreported and *R (Liverpool City Council) v Local Commissioner for Local Government for North and North East England* [2000] EWCA Civ 54

[35] *A Guide to the Work of the Health Service Commissioner*, HSC 1996, para 54.

(10) A provisional view may then be reached that the investigation should not proceed further (in which case this will be notified to the complainant so that they can comment). In the case of the LGO, a local settlement may be brokered if the local authority is amenable to this.[36] Failing that, a draft report (normally confined to factual findings) will be produced and sent to both the complainant and body complained of for comment.

(11) A final report will then be produced and issued. No particular form is prescribed.

1. The ombudsmen are normally willing to reconsider provisional decisions and draft reports in an open minded way when representations are made to them. If a final decision is made not to continue with an investigation, it is also possible to ask for this to be reconsidered at a senior level. As Simon Brown LJ observed in *R v Parliamentary Commissioner ex parte Dyer* [1994] 1 WLR 621 at 626, challenging the exercise of an ombudsman's discretion and conclusions by means of judicial review will always be inherently difficult.

The ombudsmen and the Administrative Court

2. As noted throughout this article, the Courts have been very respectful of the way the ombudsmen themselves have defined maladministration and injustice. They have been equally wary of interfering with the application of those concepts in individual cases whether the ombudsman's decision is to begin or abandon an investigation or to reach conclusions that maladministration has or has not occurred. Such decisions have always been acknowledged to be highly discretionary in nature and made by an expert body.[37] As Simon Brown LJ observed in *R v Parliamentary Commissioner ex parte Dyer* [1994] 1 WLR 621 at 626, it follows that judicial review challenges will always be inherently difficult.

3. Given this, the ombudsmen have generally emerged from the Administrative Court unscathed, though there are a few notable exceptions. In *R v Parliamentary Commissioner for Administration ex p. Balchin No. 2* (2000) 79 P&CR 157 [1999] EWHC Admin 484 at [47] Dyson J stressed that the PCA had to engage with the principal controversial issues in the complaint by giving reasons "sufficient to enable the parties

[36] As the LGO's *Remedies* guidance explains:

> "Local settlements occur where, during the course of our consideration of a complaint, the authority concerned takes action which provides what we regard as a satisfactory outcome to the complaint. Commonly local settlements account for some 95 per cent of the complaints where a remedy is involved."

[37] See e.g. Re: Fletcher's Application [1970] 2 All ER 527 and R (Maxhuni) v Commissioner for Local Administration for England [2002] EWCA Civ 973 12 July 2002, unreported.

to know what he decided, and why". A high standard of fairness is also expected in the course of an investigation, so in *R (Turpin) v Commissioner for Local Administration* [2001] EWHC Admin 503 the failure to disclose notes of a critical interview to the complainants to enable them to comment proved fatal to the report ultimately produced.[38]

4. Public authorities that are dissatisfied with the LGO's findings will, like complainants, either have to accept them or bring a challenge that is unlikely to prevail. In *R v Local Commissioner, ex parte Eastleigh BC* [1988] 1 QB 855, CA Lord Donaldson concluded at 869G – H:

> "Whilst I am very far from encouraging councils to seek judicial review of an ombudsman's report … in the absence of a successful application for judicial review and the giving of relief by the court, local authorities should not dispute an ombudsman's report, and should carry out their statutory duties in relation to it."

5. Were local authorities free to take a different view of a LGO's findings:

> "Such an action would wholly undermine the system of ombudsman's reports and would, in effect, provide for an appeal to the media against his findings. The Parliamentary intention was that reports by ombudsmen should be loyally accepted by the local authority concerned." (at 867).

6. The position with PCA reports is different. In *Secretary of State for Work and Pensions v Bradley* [2008] EWCA Civ 36 the Court of Appeal considered the legality of a Ministerial decision to reject *Trusting in the Pensions Promise*. It held that Parliamentary accountability was the primary means of enforcement. PCA findings are not 'binding' as the Claimants had argued, save in the LGO. If a government department does not accept a finding of maladministration, it is not obliged to bring a judicial review challenging it, but rather provide a full and reasoned explanation to Parliament through a Minister. Specific Parliamentary machinery, such as the Public Administration Select Committee, existed to facilitate this.

7. However, the Court went on to say that PCA findings can only be rejected when it is rational *to reject* them (which is not the same thing as where it is possible to reach a different, rational view about whether a given set of facts give rise to maladministration – there must be some respect for the office of the PCA and the nature of her expert investigation). Here as Bean J concluded at first instance that it

[38] This issue is shortly to be considered by the Court of Appeal in an appeal arising out o*f R (Kay) v Heath Services Commissioner* [2008] EWHC 2063 (Admin).

was not rational for the Secretary of State to reject the PCA's findings that the government material was misleading. Nor was it correct for Bean J to find that there was no causal link between the identified maladministration and many of the forms of injustice identified by the PCA. Specifically outrage, lost opportunities to make informed choices or take remedial action, distress anxiety, uncertainty and distortion of reality (though there might well not be a causal link between maladministration and all the financial losses of all the affected scheme members).

8. Recommendations – irrespective of the ombudsman involved - are by their very nature not binding. There is an implicit expectation that they will be followed and this is almost always so. The relevant ombudsman will normally write to the individual or body concerned around three months after the issue of the report to enquire about compliance. Where there is none in the local government context, provision exists to require publicity of the local authority's stance and occasionally the LGO will publish a supplementary report. The PCA/HSC may decide to lay a special report before both Houses of Parliament where inadequate steps are taken in response to findings or recommendations in her view.

9. Of course, a decision potentially amenable to judicial review is made whenever an ombudsman recommendation is rejected. To the writer's knowledge, so far, only two such cases have ever been issued and neither has reached a full hearing. It therefore remains to be seen what standard of justification and reasoning the Court will require of public authorities challenged in respect of such decisions, especially if the findings of maladministration and fact are themselves unchallenged. Interesting questions also arise about the fairness of the procedure most authorities adopt when deciding whether to implement recommendations: generally this is done behind closed doors with officers' reports not disclosed to complainants for comment. When a complaint involves race, disability or gender issues it is also strongly arguable that the statutory positive equality duties will be engaged.

Suggested structure of a letter / note of complaint to an ombudsman

(1) 'The complaint in a nutshell' / introduction

As with judicial review grounds, it is always helpful to set the scene with a pithy paragraph or two from which the essence of the complaint will be clear.

(2) Supporting documents

Despite their evidence gathering powers, ombudsman investigators invariably find it helpful to be presented with the key materials needed for a decision on whether to commence an investigation. It also helpful to organise these by category and/or chronologically:

(3) Legal and policy framework

A short summary (perhaps a page or two) of the relevant legislative provisions and policy guidance.

(4) Background

This should take the investigator through the documents, highlighting the actions and failures complained of (particularly where a pattern emerges) and their impact on the complainant.

(5) The maladministration leading to unremedied injustice

Set out what specific form or forms of maladministration arise in more detail and the ongoing, unremedied injustice that has resulted.

(6) Remedy (or remedies) sought

Identify these clearly, drawing on precedents from the relevant Ombudsman's own guidance and reported investigations.

(7) Whether, and if so on what basis, reimbursement of legal costs is sought