

Delivering More with Less : The Discretion of the Ombudsman

Austerity, public policy and politics – implications for fettering the discretion of the Ombudsman to investigate complaints.

**Dr Jane Martin
Chair, Commission for Local Administration in England
and Local Government Ombudsman**

**2 The Oaks, Westwood Way
Westwood Business Park
Coventry
United Kingdom
CV4 8JB**

Email: L.mccaig@lgo.org.uk

IOI Paper

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ABSTRACT

Should austerity measures fetter the discretion of the Ombudsman to investigate complaints?

UK coalition government austerity measures have included asking all public sector organisations to reduce budgets by up to one-third during the comprehensive spending review period to 2015. LGO has negotiated a 27% reduction in funding with its sponsor department, Communities & Local Government based on a transformation plan which implements a new business model. Building on a strategic review of the organisation, the LGO have looked hard at how more flexible use of resources can give better value for money, based on proportionate dispute resolution, without threatening the discretion of the Ombudsmen.

One key consideration for LGO is how to manage demand for the service. We are operating in a challenging external environment. The Government recognises the value of the Ombudsman institution and acknowledges the importance of independent redress for citizens. At a time of reducing the costs of central regulation, the Government has signalled its commitment to 'armchair auditors' holding local authorities and service providers to account for service quality. This means that we have to adapt to a changing landscape of local service provision by the private, independent, voluntary and charitable sectors commissioned increasingly by local groups, closer to the community, on behalf of the principal local authority. This will present an increasing need to ensure fairness for citizens and communities in terms of good public administration and service provision.

This session will provide a learn more about how the LGO is transforming the organisation to deliver more for less in a public policy context which challenges the traditional boundaries of the Ombudsman institution.

Introduction

The Commission for Local Administration in England (CLAE) is the governing body for the Local Government Ombudsman Scheme (LGO). It was established by statute in 1974, one of the longest standing Ombudsman schemes, to make provision for the Ombudsman to investigate and decision complaints about local authorities. Since that time, now nearly 40 years, local public administration has changed dramatically. Not only have the statutory powers and duties of local authorities, as the local administrators of state services, changed, but the norms and expectations of public management have also changed in response to a dynamic public policy environment. Since 1974 the quest for improvement and value for money in the local provision of services by successive governments has shaped and

reshaped local public administration. Compulsory competitive tendering, market-making, arrangements for public health, increased autonomy of schools, out-sourcing and commissioning, consumer-led service improvement only begin to scratch the surface. As the powers and duties of local authorities have waxed and waned, so has the scope and scale of the work of the LGO adapted to fulfill its statutory obligations, including adapting to UK devolution and the creation of new roles of Public Services Ombudsman in Wales, Scotland and Northern Ireland.

As a publically funded body under the coalition Government, CLAE faces increased pressure to do more with less. We learned in March last year that our funding would be cut by 27% by 2015 with an expectation of more beyond that. To prepare for this we commissioned an independent Strategic Business Review which paved the way for a radical transformation plan. This plan restructures our staffing and all tiers of management, rationalizes our accommodation outside London onto one site and introduces a new business model for more efficient complaints handling and proportionate dispute resolution. It probably represents the most significant change programme the organization has ever gone through.

This brief introduction provides an indication of the pressures and challenges on the LGO from the external environment. Pressures and challenges which we are responding to through internal operational transformation. Incremental change is not an option given the scale and nature of the pressures we face.

The discretion of the Ombudsman as a fundamental basis for the role

The discretion of the Ombudsman to initiate, discontinue and decide a complaint is widely drawn and supported by the Courts. Within a constitutional framework where the Ombudsman has a role to determine administrative justice independent of the public authorities of the state, the freedom and confidence of the Ombudsman to exercise discretion within parameters set down by the legislature, supported by defensible reasoning, is a fundamental tenet giving public assurance of independence and impartiality.¹

So far, so sensible. It follows from this that the resourcing and the operations of the scheme, within acceptable political and social norms, is adequate and sufficient to support and protect the exercise of such discretion. The fundamentals of the LGO scheme need to be protected and properly resourced such that there should be adequate public awareness of the role; access for citizens continues to be free; sufficient resources to manage demand at acceptable levels through an initial assessment process; professional and specialist expertise to investigate and decide complaints as required and robust quality control and assurance for complainants and bodies in jurisdiction.

Responding to public policy and political change

It also follows that the Ombudsman should be free from any undue (political) pressure or interference which put this at risk. As an independent institution, the LGO must stand apart from political change and its effect on public policy. But we should advise, warn and inform government on the implications of change for how we exercise our discretion.

¹ See Buck et al (2011) 'The Ombudsman Enterprise and Administrative Justice' Farnham: Ashgate Publishing Limited p.176

In recent years, the LGO has been cited in various legislation prompted by changes in public policy. These are detailed below.

Self funders of adult social care: Changes in the funding and provision of adult social care services resulted in citizens with funds over a certain level paying for and exercising choice over their own social care in residential or domiciliary care settings. The Health and Social Care Act 2009 extended the jurisdiction of the LGO to all registered social care providers in England in 2010. This enabled a route to redress with LGO for all citizens receiving care services, whether funded and provided by private providers, or commissioned and funded by the local authority.

Schools: To complement our jurisdiction for all complaints concerning children's services, special educational needs, school transport and school admissions, the LGO was given statutory authority to take complaints about the internal management of schools. This provided parents and pupils with the opportunity of an impartial and independent investigation of their complaint against the school for the first time. A new Government intent on greater autonomy for schools repealed this legislation in 2012.

Health and Safety : A review for the Prime Minister in 2010 sought to address the 'inconsistent and unreasonable' decisions of local authority officials on health and safety matters, to ensure that decisions are transparent and applicants given clear reasons for decisions, and to provide applicants with a right of redress which can be effected rapidly where circumstances demand, for example in the case of banning an imminent event. In responding to the review, LGO agreed to exercise discretion in exceptional circumstances to override the premature complaint filter and fast track for an early resolution within two weeks.

Housing : In order to create a single Ombudsman for social housing tenants, legislation will transfer LGO jurisdiction for housing complaints in relation to the social housing function of the local authority to the Independent Housing Ombudsman in 2013. This may fragment the route to redress for local authority complainants.

Consumer choice: Government policy designed to open up the provision of public services to greater choice and competition, within a context of reduced central regulation relies on what has been referred to as 'an army of armchair auditors' ie. citizens who use their consumer power by exercising choice to leverage improvement in service delivery. The role of the Ombudsman is highlighted in documents as 'consumer champions' particularly in relation to the right to exercise choice.

Public expectations of the role

Public confidence that the Ombudsman can exercise her discretion unfettered from political interference is fundamental. It is conventionally acknowledged that administrative justice is concerned with disputes between the citizen and the state. More particularly it is a system of justice concerned with ensuring fairness for citizens in the administrative and executive decision-making of the state, the procedures for making decisions, the law under which decisions are made and the systems for resolving disputes – and providing redress for

citizens wronged as a result of poor decision-making. The Ombudsman is part of the system for resolving disputes and provides independent redress when the state is unable to resolve the complaint and has often been described as sitting at the apex of the complaints handling system. Her discretion and judgement can only be challenged in the Courts by Judicial Review and only then on grounds of having acted unlawfully or otherwise ultra vires.

Buck et al (2011)² helpfully provide a useful analysis of the fundamental contribution of the Ombudsman to the constitution. Recognising that the Ombudsman must operate autonomously from executive government, Parliament and the Courts, this can be summarized as holding to account public authorities for meeting public expectations (in terms of the rule of law) and pursuing proper conduct (as well as lawfulness) and providing a choice of remedy and inquisitorial investigative process more suited to the disputes in question. (pp. 24-25) In short, the Ombudsman can provide a proper check on the abuse of executive power and poor administration which is different from but complementary to the role of the Courts in upholding and interpreting the law – and which serves Parliament and locally elected assemblies in holding the executive to account.

Founding legislation for the LGO provides for this traditional role of the Ombudsman to investigate allegations of maladministration. In this role, the Ombudsman and investigators acting under delegated authority, focus on the propriety of decision-making procedures and the application of policies in so doing. In seeking to ‘put the complainant back in the position they would have been were it not for the maladministration’ is making a judgement on the extent of the alleged injustice, the investigator will also take into account the possible outcome if it were based on the proper application of policy, regulation and the law. To this extent the Ombudsman puts herself in the role of the decision-maker but cannot retake the decision of the public authority.

The LGO jurisdiction to investigate allegations of service failure by registered providers of adult social care has taken us into new territory where we are making findings against private, independent and commercial organizations. In such cases we are not bound by the decisions of a democratic authority and providers (and complainants) expect us to provide restorative justice rather than administrative justice in resolving their complaint.

The legitimacy of Ombudsman to exercise our discretion to initiate, discontinue and close an investigation depends on the expectations and confidence of the public. Managing their expectations is a constant challenge which requires greater clarity. Our most vociferous critics challenge our inability (as they see it) to overturn a decision of the Council or to require a Council to change its decision. I understand their frustration. The concern is that this public trust will be further eroded when reduced resources require the Ombudsman to use our discretion to take fewer complaints (in the first instance) and even when we do investigate, increasingly consider the cost of investigation over the merits of achieving a remedy. In short the LGO needs to agree with its stakeholders what they expect from the service and how we can deliver to those expectations with reduced funding.

² Buck et al (2011) op.cit.

The LGO scheme has, with a few exceptions, handled around 10,000 complaints each year. Over the years, the scope and scale of these complaints has changed. We can only speculate that these numbers reflect wider changes to public policy and socio-political concerns. Forecasting and planning for such changes to ensure operational efficiency is as much an art as a science, but responsive management and an appropriate funding formula are essential. Demand for the service will have to be tempered by expectations of the service: ranging from speedy arbitration, mediation and compensation for service failure to investigation and regulation and public bodies. The LGO Scheme will need to provide a service which clarifies, defines and responds to public expectations.

Preserving the right for all citizens to have independent and impartial investigation of complaint

My concern is that without public agreement for the revised role for the LGO and therefore trust and confidence in our ability to exercise discretion fairly, we are at risk of losing legitimacy for the role we perform. If the LGO does exist to mediate the relationship between the citizen and state, and if that traditional role is being eroded to ensure fair treatment by diverse providers, then how important is it that all citizens have the right to an independent and impartial investigation of their complaint which is not a reflection of an abuse of state power, nor unfairness at the hands of an over-bearing bureaucracy? Presumably there is no different between that imperative and the right to have an independent Ombudsman support regulation of the market in which services are delivered? In times of austerity who decides what is important, significant and critical to systemic change and wider public benefit? And how does the Ombudsman provide public assurance that the service is open to all and treats all complainants equally and fairly? At LGO we are designing a new assessment unit which will operate with clear criteria based on four tests:

- **The Injustice Test** – This assesses the level of personal injustice the service user claims to have been caused as a direct result of the actions or inactions of the service provider.
- **The Fault Test** – This assesses the scale and nature of the fault, the service failure, or the maladministration that is alleged to have occurred and whether it is directly linked to the injustice claimed.
- **The Remedy Test** – This assesses how likely it is the LGO will be able to achieve a meaningful outcome to the complaint.
- **The Public Interest Test** – This assesses the level of wider public interest arising from the individual case.

It is imperative that these tests are applied consistently, fairly and with good reason, based on the evidence available.

More proportionate dispute resolution – wider system failure and public concerns

Proportionate dispute resolution is most often referred to as the appropriate matching of resolution processes to achieve a desired remedy. To that extent it is helpful in distinguishing between different procedures; facilitated arbitration or mediation, an informal and confidential inquisitorial process, private hearings such as in a tribunal and the public cross-examination of the courts. In the redesigned LGO scheme we will focus

resource on quickly assessing cases for investigation. Jurisdictional bars aside, this is the first key point in the process when the discretion of the Ombudsman is exercised – to initiate an investigation. Taking into account the complexity of the case, as well as the validity and reliability of the evidence already available from the local complaints process, in times of resource constraint we are more likely to set the discretionary bar high and decide more cases are not significant enough to warrant an investigation. We will effectively ‘assess out’ complaints which it is felt are not significant for the individual case, for a wider local group or for the system as a whole. Where it is likely from the evidence that the intervention of the Ombudsman might resolve matters this will be considered as an early option. But we recognize that most of the complaints that come to us arrive precisely because a local agreement was not possible. So it is increasingly likely that complaints which are amenable to local resolution but where one of the parties failed to agree, will not gain any benefit from recourse to the Ombudsman. We are less likely to play the role of referee or adjudicator and more likely to put our resource into matters where wider public benefit or serious unfairness has occurred. In this way we aim to get ‘more bang for our buck’ – more impact for less resource through proportionate dispute resolution which is more likely to maximize the value of the LGO.

As the provision of local services is increasingly diversified through commissioning and contracting out by the local authority to independent charitable and commercial providers, it is questionable whether the LGO will become a regulator of a local market as much as the guarantor of fair local administration. The discretion of the Ombudsman to uphold standards and hold providers to account (or at least ask their regulator to hold them to account) takes on a wider significance.

The discretion of the Ombudsman - from administrative justice to restorative justice

Maladministration is one of those ‘elastic’ terms which has never been defined in the English system. A good thing too. It has served the Ombudsman well over the years because it allows us to use our discretion (provided we put up a well reasoned case) to assess what is fair and reasonable in all the circumstances of the case – effectively to put ourselves in the shoes of both the body under investigation and the complainant and consider what should have happened (bearing in mind policy, regulation and legislation) and what actually did happen. This is the prime test to be applied to public bodies to ensure that they exercise their authority properly in administering the functions of the state. From housing repairs to education provision, the consideration of benefit payments to emptying the bins, exposing and remedying maladministration provides a proper check on executive power which affects the day to day life of citizens. In the traditional role, the LGO has used the open-ended list of the ‘Crossman catalogue’ as a benchmark for maladministration : arbitrariness, delay, incompetence, neglect, turpitude, misinformation, bias, inattention, inaptitude, perversity or illegality.³ This is open to interpretation and underscores the malleability of the concept. It provides a focus for good decision-making: did the public authority properly consider all the circumstances of the case; was the complainant given adequate opportunity to make representations; was there undue delay in taking a decision; did the decision appear to be wrong in the face of the facts? An Ombudsman finding of

³ This list was set out by Richard Cross man, the Leader of the House of Commons, during the debate over the Parliamentary Commissioner Bill which led to the Parliamentary Commissioner Act 1967.

maladministration and recommendations for remedy will not include retaking a decision of a public authority because that would override their legal discretionary authority to act. Administrative justice as achieved by the LGO by holding the body to account for its actions (or inactions) – holding a mirror up to the body through an inquisitorial process – and asking the body to put things right.

At LGO we are asking ourselves how this traditional role – at the heart of which lies a judgement on the rights and responsibilities of citizenship based on a social contract between the citizen and the state – translates into a role more concerned with the rights and responsibilities of the consumer within a regulated market. It seems to me that this new horizon for the LGO is much better described as restorative justice than administrative justice.

My evidence for this is the nature of complaints brought to us by service users who choose and pay for their own social care from registered providers and the remedies we can obtain. They focus on issues such as differential charging, contract compliance, the need for public information, quality monitoring and service standards rather than the administration of statutory duties and obligations by a state body.

If I am right, the LGO needs to ask what is the proper exercise (and boundaries) of our role, what are the skills needed for investigation and deciding complaints, and how can we secure the long-term credibility and legitimacy of the institution. Should we be considering a funding model where the body in jurisdiction pays for the service rather than the public purse? Should we be considering more punitive compensation payments as remedy to deter bad practice and encourage best practice? How far should we recognize commercial considerations in achieving remedy?

In 2012 in times of austerity the public will expect more for less. But we need to be clear about what precisely it is they want more of. Complainants are increasingly litigious and hanker for more Court-like behaviour and process. For others the key is a quick 'real time' resolution of the problem. The Ombudsman must exercise discretion freely and without fear or favour – and be increasingly clear about the benefits of the role for achieving restorative justice.

Dr Jane Martin is Chair of the Commission for Local Administration in England and Local Government Ombudsman

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**International Ombudsman Institute -
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The UK context

- > 27% budget cut
- > Strategic business review
- > Transformation plan

2. Ombudsman's discretion

- > Independence and impartiality
- > Established by legislature
- > Supported by the judiciary
- > To initiate, discontinue and decide complaints

3. Public policy

- > Self funders of adult social care
- > Schools
- > Health and safety
- > Housing
- > Consumer choice

4. Public expectations

- > Legitimacy and authority
- > Trust and confidence
- > Public authorities and private providers

5. Discretionary tests and proportionate dispute resolution

- > Injustice
- > Fault (maladministration)
- > Remedy
- > Public interest

6. From administrative justice to restorative justice

- > Fairness for individual citizens
- > Wider systemic public benefit
- > Upholding standards
- > Holding providers to account
- > Regulating the market