

Submission of Evidence on the Northern Ireland Public Services Ombudsperson Bill
to the Ad Hoc Committee considering the Bill

By Brian Thompson

Summary

Support for the broad principles of the NIPSO Bill but not in favour of staff at universities being able to complain to NIPSO. Suggesting that there should be a new discretionary power to publish report. Argument against legal enforcement of NIPSO recommendations for remedy preferring political enforcement. Finally recommending conferring expressly a new role similar to that held by the Scottish counterpart to NIPSO, that of a Complaints Standards Authority.

1. I am very pleased to accept the invitation to make a submission about the Northern Ireland Public Services Ombudsperson (NIPSO) Bill. Reform is needed and I congratulate the Northern Ireland Assembly and the OFMDFM Committee on bringing forward the first Bill produced by a statutory committee. It is very appropriate that the subject matter of this Bill about resolving disputes with governmental and public bodies and holding them to account.
2. My submission is made on my behalf. I teach and research in the Liverpool Law School at the University of Liverpool and one of my specialist areas is Administrative Justice which includes the ombudsman institution. My research has led to reports and publications not only on the Northern Ireland Ombudsman but also ombudsmen in the UK and Ireland, Australia and New Zealand. I was a Member of the Administrative Justice and Tribunals Council (a non-departmental public body which advised the Lord Chancellor, and Scottish and Welsh ministers) whose work included oversight of the work of ombudsmen in the administrative justice system. I have advised the Northern Ireland Ombudsman on new legislation, given oral evidence to two House of Commons select committees and submitted at its invitation written evidence to the Welsh Assembly's Finance Committee for its recent inquiry into proposals for reform of the Public Services Ombudsman for Wales.
3. I welcome the NIPSO Bill, the merger of Assembly Ombudsman and Commissioner for Complaints Offices, the inclusion of educational institutions amongst listed authorities, the removal of personnel/employment matters from jurisdiction and the inclusion of the power of own initiative investigations. On this last point, this is catching up with the Ombudsman for Ireland and the great majority of European Ombudsmen as well as those in Australia and New Zealand. If enacted it would be ahead of the UK Parliamentary Ombudsman, and the proposed merged ombudsman institution for England which are included in a current consultation by the Cabinet Office. It was supported by the Welsh Assembly's Finance Committee in its recent report on the Public Services Ombudsman for Wales.

4. I also welcome the importance given to the independence of the NIPSO reflected in clause 2 of the Bill. Not every institution which has the title of Ombudsman or Ombudsperson is independent and the recent report of the Finance Committee of the Welsh Assembly took evidence on the idea of protecting the title. The committee thought that it was important that people should be able to trust that an office or individual with this title would act fairly and impartially. (Link to the report <http://www.cynulliad.cymru/laid%20documents/cr-ld10200/cr-ld10200-e.pdf>)
5. I wish to comment on the proposed jurisdiction in universities, the publication of reports, and enforcement of NIPSO recommendations for remedy and on conferring expressly a role similar to that held by the Scottish counterpart to NIPSO of a Complaints Standards Authority.
6. Clause 18 deals with students at Queen's University, Belfast (QUB) and the Ulster University (UU). They would be able complain to the NIPSO if dissatisfied with result of the universities' internal handling of their complaints. This follows the position in Scotland. In England and Wales students may complain to the Office of the Independent Adjudicator for Higher Education. This office currently handles complaints against the Open University from students in Northern Ireland which the Bill does seek to change and I support that position.
7. It has been suggested that in addition to students, staff at QUB and UU should also be able to complain about their institutions. I would not support such a change. It seems to me staff complaints would be about employment matters. One of the key aspects of the NIPSO Bill is not to retain this jurisdiction and this proposal was supported in the public consultation in 2010.
8. Clauses 34 and 35 of the NIPSO Bill provide for publication of certain investigation reports, and follow the position in Wales, otherwise the default position is that individual investigation reports are not published. Generally this has been the position in the UK but the Local Government Ombudsman for England has been publishing its reports of investigations of complaints received after 1 April 2013. Not all reports have been published as discretion has been retained to deal with reports where, for example, anonymisation or other redaction is inadequate to protect identities due to the particular facts of the case. Such factors could arise in cases involving child protection.
9. The 2011 report *Public Services Ombudsmen* by the Law Commission for England and Wales, (link http://lawcommission.justice.gov.uk/docs/lc329_ombudsmen.pdf) dealt with different ombudsman schemes and their different legislation. It was not proposed to make changes to the English LGO or the PSOW. The Commission recommended changes to the legislation for the UK Parliamentary Ombudsmen and the Health Service Ombudsman for England which had the most limited provisions on publication. The recommendation were to confer a power, not duty, to publish individual investigation reports to publish sought to improve transparency and to provide statements of reasons where it has been decided not to open investigations into complaints and that that complainants should only be identified investigation reports or statements of reasons with their consent.

10. I would recommend an amendment to clause 34 so that it begins with the conferring of a discretionary power to publish individual investigation reports in full or in part and reports of reasons for decisions discontinuing investigation and decisions not to investigate complaints. The power should state that it comes into effect on a specified date in respect of complaints received after a specified date. This time will be needed to prepare for the new power to publish.
11. There will be a need for the provisions in clause 34 on the sending of reports to those specified parties both before and after the date when the power to publish comes into effect.
12. The new power to publish would remove the need for clause 35 but it might be thought useful to retain specifically the category of a report on investigations in the public interest so that attention could be drawn to them.
13. The duty to publish an own initiative report in clause 36(1) should be retained but there is no need for clause 36(2).
14. The next topic I wish to comment on is enforcement of the NIPSO's recommendations for remedy having upheld a complaint. I strongly support the principle that the remedy is a recommendation not a binding determination. This is the position in all of the other public services ombudsman offices which I have conducted detailed research and most of those which I have not researched. It may seem odd that the ombudsman has upheld the complaint but as the proposed remedy is a recommendation, it may not be carried out. Yet the position is that the remedy is carried out in the vast majority of cases. The listed authorities accept (sometimes grudgingly) that it is the proper thing to do. This is linked to an important point that maladministration covers a wide range of deficiencies ranging from breach of the law to minor shortcomings. The office of the ombudsman was originally established to provide a remedy where no other existed, hence the provision in clause 21 which first precludes taking a case which has an alternative remedy but then provides that if the NIPSO thinks it is not reasonable for the person aggrieved to resort to that alternative, the case may be accepted.
15. The usual manner in which compliance with the recommended remedy may be sought is by the ombudsman making a special report to the Parliament or Assembly, or council in England. With colleagues I wrote an article on this (R. Kirkham, B. Thompson & T. Buck "When Putting Things Right Goes Wrong: Enforcing the Recommendations of the Ombudsman" [2008] *Public Law* 510-530) which focused on the UK Parliamentary Ombudsmen. At the time of publication the laying of a special report before Parliament had happened on four occasions and in each case after an investigation by a House of Commons committee, a remedy was provided which satisfied the Parliamentary Ombudsman. Since then three more such reports have been laid, two also resulted in a satisfactory outcome. The outcome of the last such report published last year is awaited.
16. The new Scottish and Welsh Ombudsmen established in 2002 and 2005 have yet to exercise their power to lay a special report.

17. The position had been different in the 1970s and 1980s in local government in England, Scotland and Wales and a report on The Conduct of Local Government Business, had recommended that the provision in the Northern Ireland Commissioner for Complaints legislation which provided that the person aggrieved who was dissatisfied with the remedy could bring an action in the county court, should be extended to English local government. This was not done in part because of research in which I was co-investigator commissioned by the Department of Environment. I studied the reports of such cases in the Commissioners Annual reports supplemented by information which the then Commissioner Mr Hugh Kernohan and his staff supplied which demonstrated that the county court action was overwhelmingly used in cases involving employment issues. My colleague and I pointed out only the Northern Ireland Ombudsmen could deal with employment matters, and that with the Fair Employment legislation complaints about employment matters decreased. Indeed it is almost 30 years since the last county court action was brought under this power
18. We also suggested that while the availability of the power might act as a deterrent to non-compliance, it might upset the balance in which recommendations were usually accepted and acted upon.
19. The government response was to pass legislation which would result in a notice being placed in local newspapers if a council after the further report it was not prepared to follow the recommendation for remedy. The position now is that such a notice is required to be published every now and again in relation to an English local council because the Local Government Ombudsman is dissatisfied with their partial or non-compliance with the recommended remedy after a further report.
20. The Law Commission in its 2011 report endorsed the current position preferring political enforcement to legal enforcement and that is what I urge.
21. Clause 43 extends this possibility of a county court action to all listed authorities. Currently it is available in relation to councils, the Northern Ireland Housing Executive, registered housing associations, education and library boards. The extension would bring in all departments and agencies of the Northern Ireland Executive, general or independent health service providers and those bodies not previously within remit but now brought in the educational institutions.
22. I would suggest that there is no need for the power as it has not been used in long time and it puts the aggrieved person to the choice of pursuing a court action which they may understandably be unhappy to do. If their dispute was one for which there was a court remedy then that is where they would have gone unless the NIPSO exercised the discretion to accept it, the legislation seeks to direct people and their dispute to the appropriate method of resolving it.
23. If there should be non-compliance with the NIPSO's recommendation for remedying injustice, it is I suggest far better that the NISPO lay a special report before the Assembly which a Committee can then take-up. This does not cost the disappointed and dissatisfied aggrieved person. Maladministration is not usually about breaches of the law, and it is appropriate that elected representatives can hold to account listed

- authorities delivering public services for not meeting the standard of good administration and thereby causing injustice.
24. Related to this is the driving up of standards of public administration and the role of Complaints Standards Authority pioneered in Scotland in which the ombudsman works with the different sectors of the public service to improve their standards of complaint handling. Common complaints handling procedures are agreed for the different sectors and they then can lead to improvements in their performance so that fewer people complain to the NIPSO as the bodies are resolving complaints that are made about their work and it is hoped, through learning the lesson (which can be shared in the sector) they take action to prevent recurrence of poor administration.
 25. The experience in Scotland seems to be that the number of premature complaints to the Ombudsman have reduced and the different sectors of those delivering public services do seem to be improving their complaint handling performance.
 26. The recent Welsh Finance Committee report supported this role going to their Ombudsman and the report by the House of Commons Public Administration Select Committee in 2014 supported it for the Ombudsman service in England (link <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpublicadm/655/655.pdf>)
 27. It would be a pity not to grab the opportunity in the NIPSO Bill of taking action to establish this role which other parliamentarians think is a good idea.

Dear Sir /Madam

Thank-you for your acknowledgment of my submission on the NIPSO Bill.

In it I did give hyperlinks to facilitate access to some reports which I cited.

Here are two other links in relation to the proposal in paragraphs 24-16 to play a greater role in promoting improvements in complaints handling.

The first is to the current Cabinet Office consultation

A Public Service Ombudsman

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417111/Ombudsman_Service_Consultation.pdf

see pp14-15

and the second is to the report by Robert Gordon in which chapter 4, 5 deal with this issue of using complaints to drive up standards

Better to Serve the Public: Proposals to restructure, reform, renew and reinvigorate public services ombudsmen

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416656/Robert_Gordon_Review.pdf

I also attach a couple of materials to assist the understanding of the points about enforcement of the NIPSO recommendations for remedy

The first is the article cited in para 15. of the submission

R. Kirkham, B. Thompson & T. Buck "When Putting Things Right Goes Wrong: Enforcing the Recommendations of the Ombudsman" [2008] *Public Law* 510-530

This account was updated in our book

T. Buck, R. Kirkham and B. Thompson. *The Ombudsman Enterprise and Administrative Justice*. (Ashgate, 2011)

At pp210-15. I understand that Alyn Hicks, who assisted the Committee on OFMDFM as they prepared the Bill, has a copy of this book.

I also enclose a Table from the book which shows what happened in relation to the completed 6 cases in which the Parliamentary Ombudsman laid report under a s.10(3) of the Parliamentary Commissioner Act 1967 before Parliament, not being satisfied that the injustice had been or would be remedied.

I hope this is of assistance to the committee in its scrutiny of the NIPSO Bill.

Yours,

Brian Thompson
Liverpool University
School of Law

Public Law

2008

When putting things right goes wrong: enforcing the recommendations of the ombudsman

Richard Kirkham

Brian Thompson

Trevor Buck

Subject: Administrative law. **Other related subjects:** Constitutional law. Dispute resolution

Keywords: Enforcement; Ombudsmen; Recommendations

Legislation: [Parliamentary Commissioner Act 1967 s.10](#) (3)

Case: [R. \(on the application of Bradley\) v Secretary of State for Work and Pensions \[2007\] EWHC 242 \(Admin\); \[2007\] Pens. L.R. 87 \(QBD \(Admin\)\)](#)

***P.L. 510** A dominant feature of most public sector ombudsmen schemes in the United Kingdom is the principle that the recommendations that an ombudsman makes following the completion of an investigation cannot be enforced in law. There are exceptions to this rule,¹ but ordinarily the public body complained against retains the choice as to whether or not to implement the recommendations of an ombudsman. This means that for the public sector ombudsmen (hereinafter the Ombudsmen)² to function successfully they are dependent upon public bodies respecting the authority of their findings. The effectiveness of this arrangement was recently put to its most serious test yet when the Department for Work and Pensions (DWP) decided to dispute the findings and recommendations made by the Parliamentary Ombudsman (PO) in the *Occupational Pensions* report.³ This led to four people affected by the report bringing a judicial review case against the DWP's decision in the case of *Bradley v Secretary of State for Work and Pensions*.⁴ Shortly before this case was decided in the Court of Appeal, the ***P.L. 511** DWP responded with a new set of measures⁵ which the PO then accepted had implemented her main recommendations.⁶

Notwithstanding the eventual positive response of the DWP, the decision in *Bradley* goes to the heart of the design of the ombudsman institution. This article evaluates the issue and asks whether the *Occupational Pensions* affair represents a significant evolutionary development in the work of the Ombudsmen.

Resolving ombudsman disputes the traditional way

Despite their long-standing existence within the United Kingdom, there are a number of unresolved questions regarding the powers of the Ombudsmen,⁷ one of which is the legal status of ombudsman reports. Much of the explanation for the uncertainty can be traced to the Parliamentary Commissioner Act 1967 (the 1967 Act) which introduced the first ombudsman in the United Kingdom. The 1967 Act created an ombudsman's office designed to investigate citizen complaints forwarded by MPs. To carry out this task the PO was granted powers modelled on those of the Comptroller and Auditor-General, but on the important question of enforcement the 1967 Act was short on detail and ambiguous. The same basic legislative design was later adopted for most of the other Ombudsmen.⁸ The result is that current ombudsman legislation allows for wide ranging powers of investigation and empowers Ombudsmen to produce reports on their findings, but what should be contained within those reports and what happens to them is left open.

Notwithstanding this lack of clarity, the practice of Ombudsmen using their reports to recommend appropriate forms of redress has become commonplace and is not disputed. It has always been understood, however, that the investigated public body retains responsibility for acting upon the ombudsman report as it sees fit. Given that ombudsman recommendations often have financial and practical implications for the public body concerned, it is accepted that in the absence of specific legislative authority it would be wrong for an ombudsman to be able to impose upon a public body's discretion to act.⁹ This common understanding makes the Ombudsmen curious jurisprudential phenomena. Ombudsmen investigate disputes between a public body and an individual complainant.

In producing a report on the matter Ombudsmen make findings on the substance of disputes and make recommendations for **P.L. 512* their resolution, but they possess no specific legal powers with which to enforce their conclusions on either issue.

In practice, the only tools available to most of the Ombudsmen to enforce their reports are their powers of persuasion, their ability to make the public aware of the public body's actions, and whatever access they have to the political process. In order to maximise their impact, therefore, all the Ombudsmen are required to put in a considerable amount of work raising their profile within the public sector. Ordinarily, such a strategy is successful, as with the vast majority of ombudsman reports respect for the authority of the office, coupled with the logical strength of the report, secures the compliance of the public body to ombudsman recommendations. But by themselves strong working relations and well written reports are insufficient to resolve all differences of opinion.

The political lever

Given the nature of the complaints that Ombudsmen deal with, it is inevitable that public bodies will not always agree with their findings and, on occasion, will refuse to comply with their recommendations. When this occurs, to resolve the dispute, all the Ombudsmen rely upon the political pressure that they can bring to bear on the body concerned. The capacity to exert such pressure is facilitated by legislation. For instance, with the Local Government Ombudsmen in England (LGO), when a local authority does not respond satisfactorily to an ombudsman report, the ombudsman can issue a further report.¹⁰ If the local authority still fails to respond satisfactorily, the ombudsman can then require it to publish a statement in a local newspaper detailing the action required of the local authority and any further information that the ombudsman requests, such as the reasons for its decision not to accept the report.¹¹ The effectiveness of this arrangement can be underestimated, nevertheless, should publicity fail, the LGO in England lack the ability to refer the dispute onwards to any higher authority and some reports are never implemented.¹²

Other schemes go further by granting the ombudsman the power to submit reports to the relevant democratic assembly, the idea being that this triggers a process that puts extra pressure on the public body to comply. By way of example, the benefits of this arrangement became apparent very early in the PO's history following its report on *Sachenhausen*,¹³ which described how the government had refused to pay compensation to a group of former prisoners of war at a German concentration camp. The PO found maladministration in the process by which this decision had been made and the Foreign Office responded by disputing the report but agreeing "to review the complainants' cases".¹⁴ What this meant was initially uncertain, but the combination of the PO's **P.L. 513* investigation and parliamentary pressure proved telling. Despite continuing to refuse to accept in full the PO's finding of maladministration, the Foreign Secretary conceded to the House of Commons that his Department would make financial awards to the complainants concerned.¹⁵

For the PO at least, *Sachenhausen* has since provided a template for how the more difficult ombudsman disputes should be resolved. Such disputes occur when an ombudsman report is initially resisted on various grounds by the government. In response, the PO is able to increase the pressure on the government by submitting a formal report to Parliament and making her findings publicly available. Parliament can then provide its opinion on the affair. If at this stage it becomes clear that there is little political support for its position, the government ordinarily finds some way to change its position and comply with at least the key features of the PO's report. Thus the effectiveness of the ombudsman scheme is maintained, albeit on occasion a significant period of time elapses before a solution is arrived at and sometimes the government continues to dispute certain aspects of the original ombudsman report.

With the PO, this part-legal, part-political form of dispute resolution has operated for just over 40 years with some considerable success. Today the normal parliamentary practice is for the PO's relationship with Parliament to be dealt with through the select committee procedure. Although not specifically referred to in the 1967 Act, from the beginning a select committee was appointed to receive and consider such reports of the PO that she deems appropriate to lay before Parliament,¹⁶ an arrangement which was later replicated for the Health Services Ombudsman for England (HSO).¹⁷ This means that where PO/HSO reports raise any issues of concern, such as systemic administrative problems or the possibility of unidentified maladministration, they are invariably followed up by the Public Administration Select Committee (PASC).¹⁸

But the most telling contribution of the select committee system is when it is called upon to help

resolve the most intransigent of government versus ombudsman disputes. The importance of the *Occupational Pensions* affair was that it tested this system to its limits.

The limitations of ombudsman dispute resolution

According to s.10(3) of the 1967 Act, the PO is empowered to submit a special report to Parliament where "it appears ... that the injustice" investigated "has not been, or will not be, remedied". An identical power is granted to the HSO¹⁹ and similar powers are possessed by the Scottish Public **P.L. 514* Services Ombudsman in reporting to the Scottish Parliament,²⁰ the Assembly Ombudsman for Northern Ireland to the Northern Ireland Assembly,²¹ and the Public Services Ombudsman for Wales to the National Assembly for Wales where the report relates to the work of the National Assembly.²² What this power entails in Scotland, Northern Ireland and Wales is as yet unclear, as there have been no instances of such special reports being issued, but the procedure opens up the possibility of a democratic assembly reviewing the ombudsman's report and arriving at an independent opinion as to its validity. This scenario has occurred on more than one occasion with the PO and the experience amply demonstrates the added weight that this process can provide in pressing the government to remedy the injustice.²³

The key strength of the select committee process is its ability to open up the ombudsman's report to public scrutiny alongside the objections raised by the government. More often than not, this results in a classic exercise in Parliament calling the government to account for its actions. PASC's consideration of the *Occupational Pensions* report is an excellent example of this process. Three separate evidence sessions of PASC were held and a number of witnesses invited to attend, including complainants, the PO herself and the Secretary of State for Work and Pensions. In addition, a large quantity of written evidence was received and reviewed by PASC and the subject was discussed with witnesses from other inquiries where relevant. The output from this process was a deliberated report which analysed the issues involved in some depth. Significantly, this was not a report that simply rubber stamped the conclusions of the PO, but instead PASC appeared to go out of its way to explain the rationale for its recommendations. In doing so, PASC stated its adherence to a working rule laid down by one of its predecessors²⁴ :

"We cannot (and would not expect to) replicate the Ombudsman's investigations, and we are confident in the evidence she assembles, which is also revealed to the Government. This does not mean that we automatically accept her findings without making our own assessment of the Ombudsman's report, the Government's response and the other evidence available. Our approach is to test the Ombudsman's findings thoroughly."²⁵

The assertiveness of PASC in reviewing PO reports would suggest that it considers itself to be a suitable arbiter in ombudsman disputes. It is also a solution **P.L. 515* that the PO would appear willing to adopt, as she has previously accepted that PASC has the authority to criticise her reports.²⁶ If accepted as a mode of resolution, this would imply that if PASC reports in favour of the ombudsman then it is no longer appropriate for the government to resist the PO's report.

But in terms of conclusively resolving ombudsman disputes, there are a number of difficulties with the select committee solution. First, PASC does not possess the authority to make binding rulings. According to the Standing Orders of the House of Commons, PASC is only granted the power to examine the reports of the PO and report to the House.²⁷ Ultimately, therefore, it would be for the House itself to determine the matter by way of resolution. But given the political domination of the House of Commons by the government of the day, if used, this resolution route would considerably raise the stakes of a dispute and could backfire. It could even see the dispute become a party political matter, as with the *Court Line* affair in 1975,²⁸ when a parliamentary vote was held on the government's response to the PO's report. This vote split along party lines in favour of the government.²⁹

Secondly, in the absence of a binding resolution of the House, there are problems with using parliamentary material in the courts. As was made clear in *Bradley*, it is for the courts, not parliamentary committees, to decide questions of law.³⁰ Thus, as the courts cannot be bound by a PASC report, when an ombudsman dispute occurs it remains possible for proceedings to take place first in Parliament and thereafter the courts, and for both to come to separate conclusions. An additional problem is that Parliament is bound by the *sub judice* rule, meaning that if legal proceedings are commenced first into an ombudsman report, PASC's ability to review the report in full is restricted and delayed.³¹

Thirdly, commendable as PASC's work has been, it is made up of a majority of representatives from the governing party. In the event of PASC siding with the government in an ombudsman dispute this would expose its conclusions to criticisms of party bias.

Finally, the biggest drawback of all with the select committee process is that its value is reduced considerably if the government does not respect the outcome. Yet in its response to more than one previous report of the PO, the government has failed to accept in full a convention that it is bound by either the PO's report or the conclusions of PASC.³² With the *Occupational Pensions* affair, the DWP used these previous cases as precedent for its decision not to accept some aspects of the PO's report and it did not back down following the publication of PASC's report.³³

***P.L. 516** For all these reasons PASC cannot be relied upon as an authoritative arbiter in ombudsman disputes and instead is best seen as a part of the political process of resolution.³⁴ In the performance of this service, with many previous PO reports the select committee's role has been extremely effective and it is probable that the mere presence of PASC and the thought of appearing before it have been sufficient to deter government departments from disputing most ombudsman reports.³⁵ Indeed, it is extremely rare for the PO to have to resort to a s.10(3) special report, with only four such reports being issued in over 40 years.³⁶ But impressive as the select committee's input into the process is, it cannot guarantee compliance with ombudsman reports where a government department chooses to be particularly obdurate.

Nowhere was this better demonstrated than with the *Occupational Pensions* affair. Despite supporting the PO entirely and even though an Estimates Day adjournment debate on the matter was held on the floor of the House of Commons,³⁷ the government did not respond positively until well over a year after PASC reported.³⁸

Using the law to resolve ombudsman disputes

To be vindicated through a process of dispute resolution and then to find that the public body complained against has dismissed the outcome of that process, undoubtedly creates a level of frustration and disillusionment with the ombudsman system amongst complainants. It also increases the possibility of redress being pursued in the courts, an option which was explored in a novel form in the *Occupational Pensions* affair.

It has long been recognised that ombudsman reports can be subject to judicial review by either the complainant or the public body involved, but before *Bradley* no one had ever sought judicial review of a public body's decision to reject an ombudsman report. Following the DWP's continued refusal to accept the full implications of the PO's report, four people affected by the winding-up of their occupational pension schemes did just this.

The *Occupational Pensions* report covered pension provision obtained through membership of certain private sector final salary occupational pension schemes. As a result of a variety of factors, a considerable number of people suffered financial loss when many of these pension schemes were wound up.³⁹ Behind the complaints to the PO, the overriding allegation was that the government, and the DWP in particular, had failed to perform effectively ***P.L. 517** its function as regulator of the pensions sector. On investigation the PO found that the government's handling of the matter included three findings of maladministration. It was the DWP's responses to the first and third of these findings that were at the centre of the legal action in *Bradley*.

The first finding of the PO was that the official literature provided by the government about the occupational pension schemes "was sometimes inaccurate, often incomplete, largely inconsistent and therefore potentially misleading".⁴⁰ In the PO's view this failure properly to inform went against basic principles of good administration and the DWP's own written standards on information provision. The third finding referred to the DWP's decision in 2002 to amend the basis upon which a key feature of the occupational pension schemes, the Minimum Funding Requirement (MFR), was calculated. The PO found that the DWP had made this decision in a manner that failed to ensure that all relevant considerations were taken into account and irrelevant ones ignored.⁴¹ Again, this failure in decision-making amounted to maladministration. In the opinion of the PO, with both these examples of maladministration, the government action directly led to injustice in that it caused a sense of outrage and stress amongst those affected and effectively denied the complainants the information necessary to make informed decisions about their pension schemes.

In its response, the DWP did not accept that the information it had produced on occupational

pensions carried the same weight as had been given to it by the PO in the first finding.⁴² For the DWP, the information provided was merely introductory and clearly stated and implied that professional advice should be sought before any occupational pensions were taken out. On the third finding, the DWP pointed out that it had relied upon the advice of its own specialist adviser, the Government Actuary's Department, and argued that it would have been more open to criticism if it had followed alternative advice. Further, even if the PO's findings of maladministration were correct, it could not be said that the decisions of the DWP had caused the losses suffered by members of the affected pension schemes. The 1967 Act states that the maladministration must cause the injustice suffered, and in this instance the injustice suffered (the loss of expected benefits) was the responsibility of the trustees of the pension schemes not the government. If these arguments were not sufficient, the DWP went on to point out the unrealistic costs of implementing the PO's recommendations.

The DWP, therefore, pursued a multi-track policy in its rejection of the PO report, a key aspect of which was to disagree with the PO's finding of maladministration. "A striking feature"⁴³ of this response was that even in the Court of Appeal the DWP did not directly address the substance of the PO's first finding. Instead the DWP pursued its own interpretation of the facts in order to demonstrate that its preferred view was rational.

***P.L. 518 The legal status of the ombudsman's findings**

As a matter of tactics, it is unsurprising that the government in the *Occupational Pensions* affair chose to dispute the PO's factual findings and the conclusions that she drew from those findings. Ombudsman legislation lacks any detailed statutory definition of the grounds on which an ombudsman is statutorily empowered to report. Although this flexibility generally works in favour of the Ombudsmen in the courts, the uncertainty surrounding the term maladministration leaves considerable room within which a public body can dispute ombudsman findings. Furthermore, if a public body has decided not to implement a recommendation of an ombudsman, this is going to be more politically acceptable if it can argue that the findings contained in an ombudsman's report are incorrect. Such an approach though raises a constitutional concern, for in challenging the judgment of the ombudsman the public body calls into question the authority of the office.⁴⁴

To address this concern, following the *Occupational Pensions* report, the current PO expressed the view that a clear legal distinction should be made between the standing of an ombudsman's recommendations and that of its findings. This argument was picked up by the claimants in the case of *Bradley*. They submitted that the correct place to subject to scrutiny the findings of an ombudsman was in court. According to the claimants, the statutory powers of the ombudsman imply that if a public body does not succeed in quashing a report by way of judicial review, then it should be considered legally determinative on the issue of findings. The benefit of such a rule would be that it would provide the Ombudsmen with the legal support required to ensure that public bodies take their reports seriously, while retaining ultimate decision-making authority on the implementation of any recommendations with the public body. This interpretation of the ombudsman's powers contrasted starkly with the government's position, which was that its decision on an ombudsman report is final and there is no legal distinction to be made between the findings and recommendations of an ombudsman. Thus in defence of its position on the *Occupational Pensions* report, the DWP argued that it was lawfully entitled to express a bona fide difference of view on the PO's findings and *on that basis* reject the PO's recommendations.⁴⁵ This implied that it was not required to challenge the report by way of judicial review.

The rulings of the Administrative Court and the Court of Appeal

In contrast to the recommendations of an ombudsman, hitherto, the legal status of an ombudsman's findings has received relatively little attention in the courts, but in *Bradley* this was the focus in both the Administrative Court and the Court of Appeal. Until *Bradley*, it was largely understood that respect for ombudsman reports operated as a matter of convention, with this idea backed up by the occasional quasi-authoritative government guidance.⁴⁶ The ***P.L. 519** difficulty is that on several occasions the government has gone out of its way to dispute the PO's findings, contrary to such a convention. In its response to two of the most high profile ombudsman reports, *Channel Tunnel Rail Link* and *Barlow Clowes*, the government went as far as to issue a parliamentary paper outlining perceived flaws in the PO's reasoning.⁴⁷ Likewise, there have also been many LGO cases in the past where local authorities have been forthright in their criticism of ombudsman reports and refused to

implement the report's recommendations as a result.⁴⁸

Despite these past examples, when called upon to decide the legal issue in *Bradley*, the Administrative Court accepted the claimant's arguments. Giving judgment, Bean J. drew authority from a previously overlooked statement made by Lord Donaldson of Lynton M.R. in a case on the LGO, *R. v Local Commissioner for Administration Ex p. Eastleigh BC*⁴⁹ :

"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."⁵⁰

Bean J. also found a parallel between the effect of decisions of the ombudsman compared to those of other quasi-judicial bodies in the public sector. In doing so, he attached much weight to the words of Judge L.J. in *R. v Secretary of State for the Home Department Ex p. Danaei*⁵¹ :

"The desirable objective of an independent scrutiny of decisions in this field would be negated if the Secretary of State were entitled to act merely on his own assertions and reassertions about relevant facts contrary to express findings made ... by a special adjudicator That would approach uncomfortably close to decision making by executive or administrative diktat."⁵²

This line of logic led Bean J. to conclude that the findings of an ombudsman should be treated as legally authoritative unless they can be "objectively shown to be flawed or irrational, or peripheral, or there is genuine fresh evidence to be considered".⁵³ He went on to uphold the decision of the DWP to reject the third finding of maladministration and the PO's finding of injustice, but quashed the DWP's decision on the PO's first finding.

The Court of Appeal rejected Bean J.'s two main arguments. First, it concluded that he had read too much into the case law on quasi-judicial ***P.L. 520** bodies. Secondly, the Court of Appeal held that there were significant differences between the legislative regimes covering the LGO and the PO, which meant that *Eastleigh* could not be considered good authority in a case on the Parliamentary Ombudsman scheme. In particular, whereas the 1967 Act allowed for a process under s.10(3) by which the PO could request that Parliament scrutinise the government's response to the office's report, no equivalent procedure existed for the LGO scheme.⁵⁴

Even so, the Court of Appeal did go some way towards establishing added authority to the status of PO reports. The court did this first through a simple application of existing administrative law, by confirming that the government has to respond rationally to the reports of the PO. More than that, though, despite noting that there existed a special parliamentary procedure to deal with differences of opinion between the PO and the government, the court accepted that the government was under an obligation to give due recognition to the statutory status of the PO. This led Sir John Chadwick to cite with approval the skeleton argument of the claimant:

"... [T]he relevant test is not whether a reasonable Secretary of State could himself conclude that failure to disclose risks in official leaflets was [not] maladministrative. Such a test would fail to take into account the fact that Parliament has conferred on the Ombudsman the function of making findings of maladministration and that the decision under review is a decision to reject that conclusion. The question is not whether the defendant himself considers that there was maladministration, but whether in the circumstances his rejection of the Ombudsman's findings to this effect is based on cogent reasons."⁵⁵

It was on the basis of this test that the Court of Appeal found that it was rational for the DWP to reject the PO's third finding of maladministration,⁵⁶ but irrational to reject the PO's first finding and the PO's finding of injustice.⁵⁷ This led the Court of Appeal to uphold the ruling of the Administrative Court which required the DWP to reconsider its response.⁵⁸

In explaining the court's approach, Sir John Chadwick made it clear that the decision was not focused on the quality or otherwise of the PO's report but instead on the rationality of the DWP's response. Thus in finding the DWP's response to the third finding lawful, it had not been "necessary to hold that the Ombudsman was not entitled to make the findings that she did".⁵⁹ On review, the key difference between the DWP's response to the first and third findings was that with the latter the DWP had provided sound arguments that directly addressed the crux of the PO's finding.⁶⁰ By contrast, with the first finding the tactic of the DWP had been to present an alternative analysis of the quality ***P.L. 521** of its decision-making to that of the PO, and thereby avoid confronting the points made by the PO.

Likewise with the DWP's approach to the question of whether injustice had occurred. The Court of Appeal accepted that it was rational for the DWP to conclude that their actions had not directly caused financial loss on the part of the complainants in the *Occupational Pensions* report. However, the DWP's argument had failed to pay proper heed to those aspects of the PO's findings that dealt with the outrage suffered by the complainants and the loss of opportunities for them to take remedial action.⁶¹ Hence its decision to reject the entirety of the PO's finding of injustice was irrational.

Before moving on to analyse this decision, it is important to note a significant corollary point that emerged from the judgment in the Court of Appeal. Although the Court of Appeal and the Administrative Court differed in the standard of scrutiny that should be applied to a government decision to reject the findings of the PO, they agreed on the full impact for the LGO of the ruling of Lord Donaldson of Lynton M.R. in *Eastleigh*. Wall L.J. even went as far as to state that the ombudsman system devised under the Local Government Act depended "upon the convention that local authorities will be bound by the findings of the LGO".⁶²

Should the ombudsman's findings be legally enforceable?

The Court of Appeal's ruling in *Bradley* has for the first time confirmed that, as a matter of law, public bodies are not entitled to dismiss without good reason the findings of an ombudsman. For local authorities this obligation is possibly even more onerous, as they may now be obliged to obtain judicial permission before they reject the findings of the LGO. This decision was premised on an interpretation of Parliament's intention, backed up by an application of existing administrative law. In order to evaluate the decision, it is necessary to go further and explore the theoretical and pragmatic considerations that underpin this area of the law.

Most ombudsman statutes are silent on the legal status of an ombudsman's report, with only the Commissioner for Complaints in Northern Ireland presently supported by a specific legislative reference on the matter. The reason this provision exists, however, is almost entirely due to the unusual sectarian divisions in Northern Ireland and the inclusion of public sector personnel issues within the jurisdiction of the Commissioner of Complaints. Such was the sensitivity of this issue that provision exists for the report of the Commissioner to be enforced in court, with Art.18 of the Commissioner for Complaints (Northern Ireland) Order 1996 implying that the findings of the Commissioner are binding on the court "unless the contrary is proved". On the basis of the Commissioner's report, the Order also grants the court the power to award damages as [it] thinks "just in all the circumstances".⁶³

***P.L. 522** Within the wider public sector ombudsman community the Commissioner for Complaints model is not currently seen as an appropriate one to be used elsewhere. A standard objection to legalising the enforcement process has always been a residuary concern that it would significantly change the nature of the ombudsman's work and go against the ethos of the ombudsman scheme, as traditionally practised in the public sector. The success of the Ombudsmen has been seen to be due to their ability to establish positive and mutually supportive relationships with the public bodies they investigate. For instance, in giving evidence to the Welsh Affairs Committee, the PO made the point that:

"... [I]t is very good for Ombudsmen ... to have a relationship where they are seeking to persuade, when it comes to improving public services, I think that is a much better relationship than simply saying, 'I have made a binding decision and that is it'."⁶⁴

This process of persuasion can also serve to ensure that the Ombudsmen themselves have tested their findings thoroughly. In the same hearing, the then Local Government and Health Service Ombudsman for Wales expressed the view that "[p]roviding a power of compulsion would frankly be overkill and might jeopardise what is a ... generally very cooperative relationship".⁶⁵ The suggestion is, therefore, that Ombudsmen working in constructive partnerships with public bodies are in a stronger position to secure workable solutions than if the Ombudsmen were seen as a hostile force imposing solutions. Moreover, any short-term gains in securing redress would have to be offset against the long-term costs involved in discouraging public bodies from being amenable partners in the process of resolution and in working towards future improvements in the quality and fairness of administration.

Even though the *Bradley* ruling is not directed at the recommendations of an ombudsman report these arguments remain relevant, for there is a risk that granting legal authority to ombudsman findings may upset the delicate balance in the working practice of the Ombudsmen. In particular, such

a move could legalise the whole process, both in terms of the ombudsman's relations with the public bodies under investigation and by encouraging public bodies and complainants to expose ombudsman findings to more frequent judicial scrutiny. The extent of these concerns, however, is debatable. Very few ombudsman reports lead to conflict between the ombudsman and the public body investigated, and the general trend in the ombudsman community **P.L. 523* has been to issue fewer formal reports and concentrate efforts on arriving at agreed settlements.⁶⁶ Nor should the prospect of judicial review intimidate the Ombudsmen. While the experience is no doubt an uncomfortable one, the Ombudsmen have already adapted their investigations and report writing to take account of judicial scrutiny, and the case law on the Ombudsmen is generally very respectful of their discretionary authority.⁶⁷ Finally, as well as the Commissioner for Complaints, in the private sector a number of ombudsmen operate with powers that, to a greater or lesser extent, mean that their decisions are binding on the bodies ruled against.⁶⁸ Significantly, with none of these schemes have any major drawbacks to the ombudsman's work been noted as a result of clarifying the legal status of ombudsman reports.

The central justifying argument behind granting some form of legal authority to the findings of an ombudsman is relatively simple. While there are several roles that an ombudsman can perform, all the Ombudsmen in the United Kingdom were introduced to act as a form of dispute resolution mechanism and were thus established to investigate and report upon complaints. According to standard liberal conceptions of justice, in order to maintain the fairness and legitimacy of this process, a minimum requirement is that the final proclamation as to the validity of the complaint is given by an independent body or person. To maximise the effect of the ombudsman scheme, therefore, this is the role that should be the sole prerogative of the ombudsman. By contrast, were the body complained against to have the final say on the findings of an ombudsman report then this would devalue the process; objectivity would not be secured and public confidence in the strength of the ombudsman system would be much reduced. In the words of the former Select Committee on the Parliamentary Commissioner for Administration:

“There would be no point in having an Ombudsman if the Government were to show disregard for his Office, his standing as an impartial referee, and for the thoroughness of his investigation.”⁶⁹

Objections to making the ombudsman's findings binding

Contrary to this reasoning there are two standard lawyer's objections against making ombudsman findings legally enforceable. First, the ombudsman establishes her findings on the basis of informal procedures which do not allow for a fair hearing of the issues involved, or cross-examination on either side. Secondly, ombudsman schemes do not provide for an independent appeal mechanism. Assuming that the ombudsman is as capable of making mistakes as anyone else, this arrangement denies public bodies an appropriate opportunity to defend or clear their name. Therefore, because of the lack of adequate **P.L. 524* safeguards, the recognised investigative role of the ombudsman should mean that reports are kept at an investigative status only.

These objections, however, both undervalue the fairness of the procedures open to the ombudsman and overplay the importance of the adversarial approach to justice. In the words of Bean J., “[a] public hearing is not the only fair way of finding facts”.⁷⁰ One of the strengths of the ombudsman model is that the office is not restricted by the strait-jacket of judicial procedures and has the flexibility to choose the method of investigation most appropriate to the investigation concerned. This can mean that, if the ombudsman deems it appropriate, a hearing is held at which both parties to a dispute are present and represented by lawyers.⁷¹ Ordinarily though, the inquisitorial approach is adopted; an approach which is backed up by wide-ranging powers of investigation with regard to documents and people.⁷² The scale of this discretion is detailed in statute,⁷³ but at the same time ombudsman legislation also “provides for a substantial degree of due process”, particularly with regard to the public body.⁷⁴ By law, the public body complained against is afforded “an opportunity to comment on any allegations contained in the complaint”⁷⁵ and, by practice, the Ombudsmen submit their draft reports to the public body for comment on the factual accuracy of the investigation.

There are also very good reasons why an appeal mechanism should not be included in ombudsman schemes. To begin with, most ombudsman schemes already have in place an internal appeal mechanism.⁷⁶ In addition, to ensure that the interests of public bodies and complainants are properly taken into account, both parties can challenge the legality of an ombudsman report by way of judicial review. Both in terms of money and time, to add on an independent appeal process to these pre-existing safeguards would add to the cost of ombudsman schemes and impact on their ability to

provide a relatively accessible and efficient form of justice.

In any event, appeal mechanisms are unnecessary as most of the Ombudsmen do not possess legal powers of enforcement and their reports are not determinative of any civil rights that could be justiciable under Art.6 ECHR. Thus, even if the *Bradley* ruling means that a public body may be burdened by an ombudsman finding that it fundamentally disagrees with, it can choose not to implement the ombudsman's recommendations if it concludes that they are politically or economically unrealistic. Admittedly, this position may be harder for a public body to defend to its electorate, but such an inconvenience is **P.L. 525* hardly a sound argument for reducing the status of ombudsman reports to that of advisory only.

An alternative objection to the ruling in *Bradley* is to ask whether it is really necessary. Certainly, the Ombudsmen schemes in the United Kingdom have survived pretty well for 40 years now without the *Bradley* test. Evidence for this can be seen in the results of all the Ombudsmen. A few individual cases aside in its early years,⁷⁷ there is little evidence of the office of the PO ever failing to see its recommendations implemented.⁷⁸ Whatever the residuary differences of opinion about the merits of the PO's findings have been, following time, negotiation and parliamentary pressure, the outcomes proposed by the government have satisfied the PO that the recommendations have been implemented. Even in those headline cases referred to earlier, *Channel Tunnel Rail Link* and *Barlow Clowes*, despite disputing the PO's findings, on both occasions the government implemented the recommendations of the PO "out of respect" for the office.⁷⁹ Likewise, in *Court Line* a remedy was provided to the complainants, albeit the form of remedy did not exactly match the PO's recommendations.⁸⁰ Above all, it is necessary to emphasise the end result in the *Occupational Pensions* affair itself. Even though the government never fully accepted either the PO's report or PASC's July 2006 report, in December 2007 the DWP announced significant extensions to its pre-existing Financial Assistance Scheme following an extensive review of the matter.⁸¹ In the PO's words, this constituted "full compliance with [her] key recommendation and ... also remedie[d] the deficiencies in the Financial Assistance Scheme identified in [her] report".⁸²

Similar success rates have been recorded by the other Ombudsmen. The Scottish Public Services Ombudsman is a relatively young institution, but has yet to record a single instance of a recommendation of the office remaining unimplemented,⁸³ nor has the more recently established Public Services Ombudsman for Wales in 2006.⁸⁴ The Assembly Ombudsman for Northern **P.L. 526* Ireland and its predecessor, the Northern Ireland Parliamentary Commissioner for Administration, in a period of almost 40 years, have also recorded very few occasions when recommendations have not been implemented. Likewise with the Health Service Ombudsmen for England, Scotland and Wales the number of recommendations that remain unimplemented is minimal and almost invariably minor in impact.⁸⁵ Only with the LGO have there been significant numbers of unimplemented reports, but even here the success rate today is commonly cited as over 99 per cent.⁸⁶

Protecting the ombudsman institution in the long term

Given the shortage of enforcement powers granted to the Ombudsmen these are extremely impressive returns but one should not get too complacent about the effectiveness of the Ombudsmen. With the LGO scheme there is precedent in the United Kingdom for an ombudsman system coming close to breaking point due to significant public sector resistance to its recommendations. In the years after the LGO were introduced there was a relatively high number of instances when local authorities chose not to support the findings of the LGO, with at one stage up to 6 per cent of the office's recommendations remaining unimplemented.⁸⁷ One reason for this situation was the lack of support given to the LGO by the political body originally allocated to back up the scheme, the Representative Body, which was made up of representatives from the local government sector. The problems experienced by the LGO resulted in calls for a method to be developed by which the reports of the LGO could be legally enforced,⁸⁸ but the eventual solution chosen was to dissolve the Representative Body⁸⁹ and amend the LGO's legislative reporting framework.

Although the implementation of the LGO's recommendations did not immediately improve following the reforms, today the results are positive and there is a sense that a positive culture of working with the ombudsman has become engrained in local government thinking. Nevertheless, the former experiences of the office demonstrate the vulnerability of the post of ombudsman and it should be recalled that the LGO's abolition was mooted at high levels.⁹⁰ Building on this point, while the current recommendation conversion rate of all the Ombudsmen is extremely high, future pressures may yet upset the arrangement. Were a diminution in confidence in the **P.L. 527* Ombudsmen to result, then

the danger is that potential complainants could be tempted to pursue remedies through judicial review instead.⁹¹

It is in this context that the *Occupational Pensions* affair is significant, for the DWP's response to the PO's report was not an isolated incident.⁹² In 2005, the government did not accept that it had operated with systemic maladministration in its management of the tax credits system, a claim that it maintained in the face of extensive criticism from two separate parliamentary select committees.⁹³ Then in 2005, the government confronted the PO on the *Debt of Honour* report and again with the *Occupational Pensions* report in 2006. This trend led the PO to express her concern to PASC, and it is significant that both Parliament and the Court of Appeal in *Bradley* felt it necessary to reaffirm her constitutional position.⁹⁴

It may be that any ombudsman system has to accept a certain level of resistance from the public sector and that these incidents are sufficiently rare not to threaten the authority of the office. After all, the experience of the LGO demonstrates that it is not necessarily the case that an ombudsman needs complete acceptance of her recommendations to remain a respected institution. Nevertheless, significant moral and financial energy has been invested in establishing ombudsman schemes. They have become a vital part of the administrative justice system serving the dual function of upholding the rights of citizens in their dealings with the public sector, while encouraging the promotion of good administration. Both of these roles map on to wider constitutional agendas.⁹⁵ The government has made much in recent years of its move towards establishing a system of more proportionate redress,⁹⁶ and a regular refrain of constitutional lawyers is the need to put in place stronger accountability mechanisms. In its contribution towards these tasks the Ombudsmen have been granted extensive powers of investigation. Given all of this it would be strange were the reports of Ombudsmen to be granted only advisory legal status, so that it is at the whim of public bodies whether or not to accept them. In *Bradley*, the Court of Appeal provided legal support for these arguments, and in so doing confirmed that the role of the public body is to respect the statutory status of the ombudsman, to focus on the outcome of an ombudsman report and accept the spirit within which this dispute resolution mechanism was established.

***P.L. 528 Does *Bradley* go far enough?**

The key feature of the ruling in *Bradley* is that if a public body decides to dispute a finding of an ombudsman outside the courts, the issue is not the rationality of the ombudsman's finding but the rationality of the public body's response. Moreover, in establishing what "rational" means in the PO context, account has to be taken of the statutory and, one could argue, constitutional position of the PO. It would seem that a minimum requirement, therefore, is that if the government wishes to reject an ombudsman's finding, it is required to provide rationally defensible reasons that directly address the PO's report. A broader interpretation of this ruling would require the government to pay full respect to the PO's findings. Either way, what *Bradley* implies is that it is perfectly possible for the PO to make a finding within the law and for the government to reject that finding, as occurred with the PO's third finding in the *Occupational Pensions* report.

Arguably, therefore, the legal test established in *Bradley* confirms a duty no greater than that which already exists under public law, albeit that the case appears to be another example of the courts developing a more sophisticated version of the irrationality test. The ruling, however, does have important merits. First, it maps well on to the previous practice with PO reports. Although it is true that on occasion the government has attempted to save face with a legalistic rejection of the PO's key findings, at least those submissions tackled the PO's report head-on.⁹⁷ This was the key difference with the DWP's initial response to the *Occupational Pensions* report when compared to previous ombudsman disputes. By initially refusing to provide redress to the complainants identified in the PO report the DWP demonstrated that it disagreed with the PO, but in failing to address directly some aspects of the PO's report, and at one stage even offering misleading interpretations of the PO's report, the government paid insufficient respect to the office and indeed to PASC.⁹⁸ Thus the ruling in *Bradley* that the DWP's response was irrational should serve to lay down a clear marker for the future. It also confirms that complainants can pursue the procedural remedy of challenging the rationality of the government's response to a PO report.

A further important service provided by *Bradley* was that it returned the focus of the debate on to the political question of whether or not the government should provide a remedy. It may be unfortunate that the courts have to be called upon in this way, but it is probably inevitable. There is precedent for this multi-action approach to resolving ombudsman disputes, as with both the *Television Licence*⁹⁹

and *Debt of Honour* reports there were associated legal proceedings,¹⁰⁰ as well as parliamentary discussions. In such cases it is not always *P.L. 529 easy to establish the final trigger for the provision of redress, but with the *Occupational Pensions* affair it is highly probable that the ruling in *Bradley* played an important part in forcing the government to reconsider its position.¹⁰¹

But should the Court of Appeal have gone further and upheld the Administrative Court's ruling that the PO's findings are binding, provided they are made within the law? This is a rule that the Court of Appeal appears to accept, applies to the findings of the LGO. In *Bradley* the distinction between the PO and the LGO was justified on the basis that, unlike the amended Local Government Act 1974, the 1967 Act put in place a strong parliamentary support mechanism for the PO. By itself, the existence of this process does not preclude the introduction of a rule that makes ombudsman findings binding. Were PO reports to be legally binding it would still be possible for PASC to perform an important role in calling the government to account when it refuses to implement the PO's recommendations. Nevertheless, were the findings of the PO no longer to be debatable in Parliament, this would represent a significant change in practice for PASC, which has on several occasions allowed itself to become a forum for exploring the full range of issues contained in a PO report and the government's response to it. In this respect the decision in *Bradley* has loyally followed the past practice of the parliamentary ombudsman scheme and is consistent with legislation. For these reasons, the *Bradley* decision is probably expedient and serves to maximise the parliamentary input into the process of resolving ombudsman disputes, a process which has proved highly effective in the past.

The wider implications of Bradley

The decision in *Bradley* represents a judicial vote of confidence in the existing practice of both the PO and PASC. The current arrangements are sometimes long-winded, but given the sensitivity of some of the issues which the PO is called upon to investigate, arguably necessarily so. In an attempt to refine this process further, the government and the PO have recently appointed a senior civil servant to the role of Permanent Secretary "Champion" for PO issues.¹⁰² How effective this post will be is uncertain, but in future ombudsman disputes it should at least guarantee the PO a sympathetic ear within government from which a constructive dialogue can commence.

For the other Ombudsmen the impact of *Bradley* is less clear cut. Given that the reporting procedures are almost identical, it is almost certain that the same legal test will be applied to the HSO in England as with the PO. The same will probably apply to the Public Services Ombudsman for Wales, the Northern Ireland Assembly Ombudsman and the Scottish Public Services Ombudsman. This will place the onus on their linked democratic chambers to put in place adequate procedures for dealing with ombudsman issues. At present the trend *P.L. 530 in Wales, Northern Ireland and Scotland is towards the ombudsman reporting to more than one committee depending on the subject-matter involved. The question here is whether the arrangements chosen will facilitate the long-term understanding and appreciation of the work of an ombudsman necessary to enable the respective chambers to provide a supportive role on a par with PASC.

The most curious feature of the ruling in *Bradley*, however, is that it appears to have confirmed in law a position that no one asked for and few people were aware of--that the findings of the LGO are binding, provided they are made within the law. Furthermore, as Wall L.J. confirmed, "if a local authority wishes to avoid findings of maladministration made by the LGO, it must apply for judicial review to quash the decision".¹⁰³ This is a radical step forward that does not follow from the practice of the LGO, but appears to have been justified on the grounds that, unlike the other Ombudsmen, the LGO scheme is not backed up by a political assembly. The LGO scheme is certainly weakened by the absence of a political body, akin to PASC, to which it can report individual cases.¹⁰⁴ Even so, at present there is no real call for the LGO's findings to be made legally binding, and the evidence suggests that the reformed reporting arrangements of the LGO have been successful. Significantly, these reporting arrangements allow for reasons to be provided by the local authority for not implementing the LGO's recommendations, but the legislation does not place any express limits on the reasons that the local authority can supply.¹⁰⁵ It should also be noted that not only were the various references to the LGO in *Bradley* obiter dicta statements, so arguably was the ruling of Lord Donaldson of Lynton M.R. in *Eastleigh*. In this context, it must be open for a future court to consider whether the better analysis of the law is that the status of the LGO's findings is identical to that of the PO's findings.

This uncertainty surrounding the LGO aside, the *Occupational Pensions* affair has served to emphasise the role that the Ombudsmen perform within the constitution. No one argues that public

bodies should not be able to dispute ombudsman reports. The issue is that when they do so they should be required to operate according to a convention that pays due respect to the ombudsman's office and the political process set up to support it.

P.L. 2008, Aut, 510-530

1. e.g. The Northern Ireland Commissioner for Complaints.
2. The reference is to the Parliamentary Ombudsman, the Health Service Ombudsman for England, the Local Government Ombudsmen for England, the Scottish Public Services Ombudsman, the Public Services Ombudsman for Wales, the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints.
3. Sixth Report of the PCA, *Trusting in the pensions promise: government bodies and the security of final salary occupational pensions*. HC Paper No.984 (Session 2005/06).
4. [2007] EWHC 242; [2007] Pens. L.R. 87, partially upheld in the Court of Appeal [2008] EWCA Civ 36.
5. *Hansard*, HC Vol.469, col.100WS (December 17, 2007) (Peter Hain, Secretary of State for Work and Pensions).
6. Parliamentary and Health Service Ombudsman, Press Release 07/07, December 17, 2007.
7. e.g. Fourth Report of the PCA, *The Parliamentary Ombudsman: Withstanding the test of time*. HC Paper No.421 (Session 2006/07) and M. Seneviratne, *Ombudsmen: Public Services and Administrative Justice* (London: Butterworths, 2002).
8. B. Thompson, "The Scottish Public Services Ombudsman: Revolution or Evolution?" in A. McHarg and T. Mullen (eds), *Public Law in Scotland* (Edinburgh: Avizandum Publishing Ltd, 2006), p.281.
9. Confirmed in *Bradley* [2007] EWHC 242; [2007] Pens. L.R. 87 at [43] (Bean J.) and [2008] EWCA Civ 36 at [10] (Sir John Chadwick).
10. Local Government Act 1974 s.31(2A).
11. Local Government Act 1974 s.31(2D).
12. The Commission for Local Administration in England, *Local Government Ombudsmen Annual Report 2007-08*, at 9.
13. Third Report of the PCA, *Sachsenhausen*. HC Paper No.54 (Session 1967/68).
14. *Sachsenhausen*, para.71.
15. *Hansard*, HC Vol.758, col.116 (February 5, 1968) (George Brown, Foreign Secretary). Strictly speaking this move did not meet the recommendations of the PO as payments were made without a repeat review of their applications.
16. Ordinarily submitted under the Parliamentary Commissioner Act 1967 s.10(4).
17. Standing Orders 133 and 146(1).
18. Formerly the Select Committee on the Parliamentary Commissioner for Administration until 1997.
19. Health Service Commissioners Act 1993 s.14(3).
20. Scottish Public Services Ombudsman Act 2002 s.16.
21. Ombudsman (Northern Ireland) Order 1996 (SI 1996/1298, NI 8) art.17(2).
22. Public Services Ombudsman (Wales) Act 2005 ss.22-24.
23. e.g. *Rochester Way, Bexley--Refusal to meet late claims for compensation*. HC Paper No. 598 (Session 1977/78); *The Channel Tunnel Rail Link and Blight: Complaints against the Department of Transport*. HC Paper No.193 (Session 1994/95); *'A Debt of Honour': the Ex Gratia Scheme for British Groups Interned by the Japanese During the Second World War*. HC Paper No.324 (Session 2005/06).
24. See Select Committee on the PCA, Sixth Report, *The Channel Tunnel Rail Link and Exceptional Hardship*. HC Paper No. 270 (Session 1994/95), para.5.
25. Public Administration Select Committee, *The Ombudsman in Question: the Ombudsman's report on pensions and its constitutional implications*. HC Paper No.1081 (Session 2005/06), para.61.
26. Public Administration Select Committee, *Oral Evidence*. HC Paper No.1081-i (Session 2005/06), Ev.1, q.70 (Ann

- Abraham).
- [27.](#) Standing Orders 133 and 146(1).
 - [28.](#) Fifth Report of the PCA. HC Paper No.498 (Session 1974/75).
 - [29.](#) *Hansard*, HC Vol.897, col.586 (August 6, 1975).
 - [30.](#) [2007] EWHC 242; [2007] Pens. L.R. 87 at [35] (Bean J.).
 - [31.](#) Resolution of November 15, 2001, *Hansard*, HC Vol.374, col.1020 (November 15, 2001).
 - [32.](#) *Sachenhausen, Court Line and Barlow Clowes*. HC Paper No.76 (Session 1989/90).
 - [33.](#) *The Government Response to the Public Administration Select Committee's Sixth Report of 2005-06*. 2006. Cm. 6061, p.7.
 - [34.](#) R. Gregory and G. Drewry, "Barlow Clowes and the Ombudsman Part II" [1991] P.L. 408, 442.
 - [35.](#) C. Clothier, "Fact-finding in inquiries--the PCA's perspective" [1996] P.L. 384, 388-389.
 - [36.](#) *Rochester Way, Channel Tunnel Rail Link, A Debt of Honour and Occupational Pensions*.
 - [37.](#) *Hansard*, HC Vol.454, cols 512-547 (December 7, 2006).
 - [38.](#) *Hansard*, HC Vol.469, col.100WS (December 17, 2007) (Peter Hain, Secretary of State for Work and Pensions).
 - [39.](#) It is estimated that as many as 125,000 people lost significant parts of their occupational pensions between April 1997 and March 2004: Department for Work and Pensions, *Response to the Report by the Parliamentary Ombudsman, "Trusting in the pensions promise"* (June 2006), p.37.
 - [40.](#) *Trusting in the pensions promise*, para.5.164.
 - [41.](#) *Trusting in the pensions promise*, para.5.164.
 - [42.](#) *Response to the Report by the Parliamentary Ombudsman, "Trusting in the pensions promise"*.
 - [43.](#) [2008] EWCA Civ 36 at [91] (Sir John Chadwick).
 - [44.](#) *Oral Evidence*, Ev.1, q.70; Further memorandum by the Parliamentary and Health Service Ombudsman, *Written Evidence*, Ev.54, para.15.
 - [45.](#) *Response to the Report by the Parliamentary Ombudsman, "Trusting in the pensions promise"*; *Oral Evidence*, Ev.26, q.132 (John Hutton, Secretary of State for Work and Pensions).
 - [46.](#) e.g. *Handling of Parliamentary Ombudsman Cases*, Cabinet Office.
 - [47.](#) See *The Channel Tunnel Rail Link and Exceptional Hardship--The Government Response*. HC Paper No.819 (Session 1994/95) and *Observations by the Government on the Report of the Parliamentary Commissioner for Administration*. HC Paper No.99 (Session 1989/90).
 - [48.](#) See, e.g. Commission for Local Administration in England, *Annual Report 1995-96*, p.4.
 - [49.](#) [1988] 1 Q.B. 855.
 - [50.](#) [1988] 1 Q.B. 855 at 867b per Lord Donaldson.
 - [51.](#) [1998] Imm. A.R. 84.
 - [52.](#) [1998] Imm. A.R. 84.
 - [53.](#) [2007] EWHC 242; [2007] Pens. L.R. 87 at [58].
 - [54.](#) [2008] EWCA Civ 36 at [45]-[62], (Sir John Chadwick).
 - [55.](#) [2008] EWCA Civ 36 at [72].
 - [56.](#) [2008] EWCA Civ 36 at [126].
 - [57.](#) [2008] EWCA Civ 36 at [95] and [111].
 - [58.](#) [2008] EWCA Civ 36 at [95].

59. [2008] EWCA Civ 36 at [129].
60. [2008] EWCA Civ 36 at [112]-[126].
61. [2008] EWCA Civ 36 at [108].
62. [2008] EWCA Civ 36 at [139] (Wall L.J.).
63. The Commissioner for Complaints (Northern Ireland) Order 1996 (SI 1996/1297, NI 7) arts 16 and 18. Originally an Act of the devolved Northern Ireland Parliament, the Commissioner for Complaints Act (Northern Ireland) 1969 s.7. This power has not been used since 1985. The incidence of such cases in the ombudsman's workload declined with the passage of legislation dealing with discrimination in the workplace, the Fair Employment (Northern Ireland) Act 1976 and its successors; see C. White, "Enforcing the decisions of the ombudsmen--the Northern Ireland Local Government Ombudsman's experience" (1994) 45 N.I.L.Q. 395. Although the Public Services Ombudsman (Wales) Act 2005 s.20, creates a similar power, it seems destined never to be used as it was not brought into force with the remainder of the Act when the Assembly for Wales approved the Public Services Ombudsman (Wales) Act 2005 (Commencement No.1 and Transitional Provisions and Savings) Order 2005.
64. Welsh Affairs Committee, *Oral Evidence*. HC Paper No.234 (Session 2004/05), Ev.30, q.164 (Ann Abraham).
65. Welsh Affairs Committee, *Oral Evidence*, Ev.19, q.112 (Adam Peat).
66. See, e.g. Commission for Local Administration in England, *Local Government Ombudsmen Annual Review 2006-07*, p.17.
67. See, e.g. *R. v Parliamentary Commissioner for Administration Ex p. Dyer* [1994] 1 W.L.R. 621.
68. By way of example, see the Financial Ombudsman Service.
69. *The Channel Tunnel Rail Link and Exceptional Hardship* at [1].
70. [2007] EWHC 242; [2007] Pens. L.R. 87 at [58].
71. e.g. the Health Service Ombudsman for England has conducted formal hearings in Case 483/1981-2, reported at pp.47-63 of Health Service Commissioner, Third Report (Session 1983/84), published on December 13, 1983; Case 309/1983-4, reported at pp.94-113 of Health Service Commissioner, First Report (Session 1984/85), published on December 3, 1984.
72. e.g. Parliamentary Commissioner Act 1967 ss.8 and 9, similar powers are possessed by the other Ombudsmen.
73. Parliamentary Commissioner Act 1967 s.7(2).
74. [2007] EWHC 242; [2007] Pens. L.R. 87 at [58] (Bean J.).
75. Parliamentary Commissioner Act 1967 s.7(1).
76. See, e.g. Parliamentary and Health Service Ombudsman, *Annual Report 2006-07*. HC Paper No.838 (Session 2006/07), pp.51-52.
77. In November 1973 the PO reported that there had been nine such cases, *Hansard*, HC Vol.864, col.470 (1973-74). These cases generally related to the question of whether or not the government, and in particular the Inland Revenue, had the power to make ex gratia compensation payments. This problem persisted throughout the 1970s before a final resolution was arrived at, see *Annual Report of the PCA*. HC Paper No.402 (Session 1977/78), pp.43-52; Select Committee on the PCA, *Official Error in Tax Matters*. HC Paper No.406 (Session 1979/80), paras 5-25.
78. e.g. *Annual Report of the PCA*. HC Paper No.248 (Session 1986/87), para.4; Select Committee on the PCA, *The Powers, Work and Jurisdiction of the Ombudsman*. HC Paper No.33 (Session 1993/94), q.733 (William Waldegrave, Chancellor of the Duchy of Lancaster). The PO's former responsibility under the Code of Practice on Access to Government Information is not discussed here.
79. *The Channel Tunnel Rail Link and Exceptional Hardship-The Government Response and Observations by the Government on the Report of the Parliamentary Commissioner for Administration*.
80. *Court Line*, para.92.
81. *Hansard*, HC Vol.469, col.100WS (December 17, 2007) (Peter Hain, Secretary of State for Work and Pensions).
82. Parliamentary and Health Service Ombudsman, Press Release 07/07, December 17, 2007.
83. In 2007 the Court of Session overturned a report of the Ombudsman in *Argyll and Bute Council, Re Judicial Review of a Decision of the Scottish Public Services Ombudsman* [2007] CSOH 168. See also the brief career of the Scottish Parliamentary Commissioner for Administration 1999-2002.
84. A special report has been issued by the ombudsman to register that a local authority had failed to implement its

- recommendation, as promised, within an acceptable period, Public Services Ombudsman for Wales, *Special Report under section 22 of the Public Services Ombudsman (Wales) Act 2005 into two complaints of maladministration made against Gwynedd Council*, November 16, 2006.
- [85.](#) e.g. in 2005-06 the HSO reported that a GP had failed to apologise following one of her recommendations, *Annual Report 2005-06*. HC Paper No.1363 (Session 2005/06), p.36.
- [86.](#) Commission for Local Administration in England, *Local Government Ombudsmen Annual Report 2006-07*, p.9, "Table 9: Compliance with recommendations 1997/98-2006/07", which records 1,531 reports finding maladministration and 11 with an unsatisfactory outcome and 55 awaiting settlement.
- [87.](#) Commission for Local Administration in England, *Annual Report 1995-96*.
- [88.](#) e.g. JUSTICE, *Administrative Justice: Some Necessary Reforms* (Oxford: Clarendon Press, 1988), Ch.5; JUSTICE, *Administrative Justice: Some Necessary Reforms* (Oxford: Clarendon Press, 1988), Ch.5; C. Himsworth (ed.), *Judicial Teeth for Local Ombudsmen* (Edinburgh University, 1985).
- [89.](#) Local Government and Housing Act 1989 s.25(1).
- [90.](#) Sir Geoffrey Chipperfield, *The Financial Management and Policy Review of the Local Commission for Local Administration in England: Stage I* (London: Department of the Environment, 1995).
- [91.](#) John Halford, Bindman and Partners, *Written Evidence to the Public Administration Select Committee*, Annex to *A Debt of Honour*, Ev 37, para.16(e).
- [92.](#) *The Ombudsman in Question*, paras 59-79.
- [93.](#) *Tax Credits: Putting Things Right*. HC Paper No. 124 (Session 2005/06).
- [94.](#) *The Ombudsman in Question*, para.3 and [2008] EWCA Civ 36 at [146] (Wall L.J.).
- [95.](#) See A. Abraham, "The Ombudsman as Part of the UK Constitution: A Contested Role?" (2008) 61 *Parliamentary Affairs* 206 and A. Abraham, "The Ombudsman and 'paths to justice': a just alternative or just an alternative?" [2008] P.L. 1.
- [96.](#) e.g. White Paper, *Transforming Public Services: Complaints, Redress and Tribunals*. 2004. Cm.6243 and A. Le Sueur, "Courts: Tribunals, Ombudsmen, ADR: Administrative Justice, Constitutionalism and Informality" in J. Jowell and D. Oliver (eds), *The Changing Constitution*, 6th edn (Oxford: OUP, 2007).
- [97.](#) The Channel Tunnel Rail Link and Exceptional Hardship-The Government Response and Observations by the Government on the Report of the Parliamentary Commissioner for Administration.
- [98.](#) *The Ombudsman in Question*.
- [99.](#) HC Paper No.680 (Session 1974/75).
- [100.](#) See *Congreve v Home Office* [1976] Q.B. 629 and *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293; [2006] 1 W.L.R. 3213.
- [101.](#) See also the ECJ ruling in *Robins v Secretary of State for Work and Pensions* (C-278/05) [2007] All E.R. (EC) 648.
- [102.](#) Public Administration Select Committee, *Oral evidence*. HC Paper No.884-v (Session 2005/06), q.249 (Sir Gus O'Donnell).
- [103.](#) [2008] EWCA Civ 36 at [139].
- [104.](#) Note the recent amendment of the Local Government Act 1972 s.23A(3A) by the Local Government and Public Involvement in Health Act 2007 s.170, which now requires the LGO to lay a copy of their annual report before Parliament.
- [105.](#) Local Government Act 1974 s.31(2E).

Appendix 7 Parliamentary Ombudsman's section 10(3) reports

Name/Issue/Year/Dept	Disputed PO Findings and/or Recommendations	Governmental Objections	Select Committee View	Outcome/Reason
Rochester Way, Road Administration of compensation, 1978 Dept of Transport	Defective arrangements for publicizing details of compensation scheme led to applications being rejected as out of time	To make <i>ex gratia</i> payments would override the will of Parliament	The commitment to inform people about the compensation scheme was not met	Amendments made to the legislation authorizing payments for late claims
Channel Tunnel Rail Link, planning blight, 1994 Dept of Transport	There was exceptional uncertainty about an unusual project which gave rise to general blight but this caused exceptional hardship for some people	The project, the uncertainty and the hardship were not so exceptional as to override policy of not compensating for general blight	Dept had not considered identifying those who were inequitably affected by rigid adherence to the letter of law	Ombudsman satisfied as government indicated it was prepared to discuss terms of compensation but nothing done until change of government in 1997
Wartime Detainees, Administration of compensation, 2005 Ministry of Defence	Both the scheme's terms and its announcement were unclear; new criterion not reviewed to check for equal treatment; no information provided to applicants on clarification of criteria; no review undertaken	Challenged PO's decision to investigate new 'bloodlink' criterion given an unsuccessful judicial review; complainant's case should not have been accepted	In preparing for select committee appearance, new evidence found suggesting unequal treatment; committee hoped MoD would pay	Ombudsman satisfied following the subsequent ministerial statement
Occupational Pensions, Compensation for poor regulation, 2006 Dept for Work and Pensions, Treasury National Insurance Contributions Office (HMRC), Occupational Pensions Regulatory Authority	Misleading information on degree of protection; maladministration in not following advice on disclosing risks; maladmin in changing Minimum Funding Requirement and so contributed to losses in winding-up process	Rejected findings which were not substantiated; leaflets not comprehensive guide and no causal link to loss in the winding-up of companies	Agreed that maladmin had occurred, govt should engage properly with PO's recommendations rather than assuming too large a burden on the public purse	Ombudsman satisfied as Government Actuary Department (GAD) review found ways to improve Financial Assistance Scheme

<p>Equitable Life, Compensation for poor regulation, 2009 HM Treasury</p>	<p>PO found a total of 10 instances of maladmin by DTI, GAD, FSA and recommended apology and compensation scheme. In s.10(3) report the terms of reference for the judge's advice will restrict those eligible for compensation and the likely amount will not be adequate</p>	<p>Accepted most findings, not accepting proposed compensation but asking judge to advise on a narrower <i>ex gratia</i> scheme for those who had suffered disproportionate impact</p>	<p>Select Committee supported PO's initial report before govt response report; their reaction to it made before s.10(3) report; disliked disproportionate impact test, not simple or quick</p>	<p>Ombudsman satisfied as following 2010 election new coalition proposed better terms</p>
<p>Single Payments Scheme and Rural Land Register, 2009 Department for Environment, Food and Rural Affairs (Defra)</p>	<p>Maladmin by not determining issues in stipulated period; did not react appropriately following indications of problems which led to delay and these two cases were representative, so apply recommendations to 22 others similarly placed</p>	<p>Dept concerned that indications on targets for decisions had become legitimate expectations; compensation had been paid, which was adequate and to provide the recommended compensation for other cases was a distraction</p>	<p>Following its evidence session with Permanent Secretary, the chair wrote to minister advising the dept had misunderstood basis for PO's decisions on targets; compensation for other 22 cases within Treasury guidance</p>	<p>Ombudsman satisfied as minister completely accepted recommendations following Select Committee chair's letter</p>

Note: * See also Appendix 1, col. 2, which lists the principal Acts in each jurisdiction.