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# Settling public sector disputes

Margaret Doyle discusses the pros and cons of informal resolution through the Parliamentary Ombudsman

In his Annual Report for 1999-00, the Parliamentary Commissioner for Administration, better known as the Parliamentary Ombudsman, reported that he had settled 121 complaints through 'early' (or informal) resolution, compared with 313 in which full investigations were reported. This reflects a new approach being taken in order to increase the number of complaints in which a satisfactory resolution can be reached. Advantages of this approach include speed and a less adversarial process for reaching a result.

In principle, informal resolution fits neatly with the aims of 'appropriate dispute resolution' (as ADR is increasingly being called) because it starts with the premise of what the complainant wants to achieve, not what s/he is entitled to or might expect from a judicial ruling. Informal resolution raises some concerns, however, especially in regard to a perceived lack of clarity about how and when it is used. This article examines those concerns and suggests that advisers should consider the advantages informal resolution can offer. The article focuses on informal resolution by the Parliamentary Ombudsman and applies to England, Wales and Scotland.

## Current problems

The most common complaints about the public-sector Ombudsmen are the time it takes to complete an investigation and the confusion about which complaints can be investigated by these schemes.

It is true that investigations by the Parliamentary Ombudsman take a long time: an average of 44 weeks in 1999-00, although this is down from 91 weeks in the previous year. Generally, all the public-sector Ombudsmen schemes take much longer to resolve complaints than their counterparts in the private sector: eg. up to a year compared to an average of four months for the Insurance Ombudsman.

Furthermore, legislation under which the public-sector schemes operate restricts them to taking on only those complaints where there is at least some indication of maladministration on the part of the public body. 'Maladministration' in itself is a difficult concept for complainants to grasp. It is not the same as illegality and has a potentially wider application. An action taken by a public body might be legal, but might be unfair or contrary to good practice, in which case it can be deemed to be maladministration. On the other hand, even if a decision appears to be wrong and unjust, if it was taken according to the policies and procedures of the organisation and without avoidable delay, it is likely not to have been maladministrative.

The action also must have caused an injustice to the complainant. An injustice might be financial loss, a delay in receiving a service, distress or gross inconvenience. Even if an injustice has occurred, if it is considered minor, the Ombudsman might still decide not to investigate.

Under the governing legislation the Parliamentary Ombudsman can only reject or investigate a complaint. This means that, if a complaint does not fall

within the Ombudsman's remit, the complaint must be rejected. In recent years fewer than 10% of complaints have been taken on for investigation. This year, according to the Ombudsman's office, the figure is around 19% and a further 16% are being dealt with by informal resolution.

One improvement that has been taking shape over the past few years - and one that advisers should be aware of - is the increasing use of informal resolution. This is a settlement negotiated by an investigator or other Ombudsman case worker and agreed by both parties; it never reaches the Ombudsman himself and is not subject to a full investigation. In 1999-00 more than a quarter of the complaints accepted and concluded by the Ombudsman (121 out of 434) were resolved informally, achieving compensation and/or apologies for complainants.

## Concerns about informal resolution

There are downsides to informal resolution. Most notably, without a full investigation a complainant can sometimes be left without an adequate explanation of what went wrong. There is always the risk that the settlement achieved is less than would be achieved through a full investigation. Apart from mentions in the Parliamentary Ombudsman's Annual Report, individual informal resolutions are not published in full (as are full investigations), so lessening their impact on good practice and on encouraging other complainants to come forward.

The Ombudsman does not publish

the criteria on which he bases a decision to pursue an informal resolution. This can make it difficult to determine whether complainants are being well served by this route. Are adequate assessments being made of the merits of the complaint? Perhaps the only way to know this is to consider the settlements that are published.

The plus side of this lack of clarity, however, is increased flexibility. Without spelling out the criteria they use, case workers and investigators are freer to pursue informal resolution where it might be appropriate.

It is also important to remember that a fundamental principle of any form of ADR is that it starts with what the complainant wants to achieve. If a complainant's priority is to obtain speedy redress, this should not be done at the cost of fairness, but it can mean that less emphasis needs to be placed on a thorough uncovering of what went wrong.

There is also a safeguard in that no complainant is forced to accept the outcome of informal resolution. If a complainant does not accept the outcome of an informal resolution by the Parliamentary Ombudsman, her/his case will be considered again by a more senior case worker and, if necessary, a full investigation can be done.

Some very general guidance might be:

- Does the complainant want to have an explanation of what went wrong? If so, the complaint probably needs to be investigated.
- Does the complainant need to get something s/he is entitled to now, eg. compensation for benefit lost as a result of misdirection? Does s/he need speedy redress? In such cases, the complaint might be best suited to informal resolution.

Instances of systemic maladministration are more likely to be uncovered through a formal investigation than an informal resolution.

### Needing an explanation

A full explanation of what went wrong is undoubtedly important to some complainants, but there are many other

situations in which the complainant is less concerned with an explanation than with quick redress. An informal resolution can be reached more quickly than an investigation: in weeks rather than months in many cases. For some complainants this is important, eg. in some immigration complaints the complainant primarily wants a quick result, such as having travel documents returned. Many advisers are aware that simply getting the Ombudsman involved can lead to a quick result, because it can force a Government department to sit up and take notice of a previously ignored complaint. Sometimes this is enough to get a concession or acknowledgement from the department and an agreement to rectify the mistake. The Ombudsman gives an example of a complainant who has not received necessary child maintenance because of maladministration by the Child Support Agency: she 'is likely to be more concerned that the maintenance, and any arrears, should be paid - and paid quickly - than to receive a blow-by-blow account of just how the maladministration occurred after many months, let alone years, have passed her wearily by'.<sup>1</sup>

### Less compensation

Is there a risk of lower compensation being achieved?

It is important to remember that the Ombudsman will not award punitive compensation in either informal resolutions or in full investigations. The aim of redress is to put the complainant as much as possible back in the position s/he would have been in had the maladministration not occurred. There is no evidence that compensation recommended through informal resolution is lower than that achieved via full investigations, but this is something that needs exploring.

Because only a selection of informal resolutions are published in summary form, it is impossible to gain a complete picture. Compensation figures from the informal resolutions published in the 1999-00 Annual Report range from £50 to about £250. In exceptional cases the department at fault makes a 'special' or

ex gratia payment, in which case it can be much higher. In one case, this payment was nearly £6,500, the amount of Invalid Care Allowance the claimant should have received but for Benefits Agency error.<sup>2</sup>

Even if complainants are found to achieve lower compensation through this route, this does not necessarily argue against its use. In exchange they are obtaining a much quicker resolution and, if the redress includes a financial element, they will be receiving their money much more quickly. In addition, as discussed below, their burden of proof is much lower.

As well as financial redress, informal resolutions can include most of the remedies available after an investigation and report, such as compensation, apologies and an agreement to take action.

### Settlements not made public

All Ombudsmen have a role in influencing good practice and making their recommendations public is key to this. A concern about informal resolution is that the wider ramifications of a finding of malpractice will be lost if the settlement is not made public. The Ombudsman does publish summaries of some informal resolutions in his annual reports, however.

Informal resolutions can have a wider impact beyond the single complainant. Miss B complained that the Benefits Agency helpline misdirected her and that, consequently, she did not make a claim for Invalid Care Allowance until her daughter had been awarded Disability Living Allowance. She also complained that the BA's Guide to Benefits handbook was misleading. After an inquiry by the Ombudsman's staff, the BA accepted that, despite the lack of any record of the conversation between Miss B and their helpline, she had probably been misdirected. The BA agreed to pay her a sum to compensate her for loss of entitlement to ICA plus an ex gratia payment (in effect interest) for the delay in paying ICA. The BA also said that, to remove any ambiguity, the next edition of the handbook would include advice that those intending to claim ICA

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should not delay making a claim, even if the person cared for had not yet received a decision on the DLA claim. The handbook has now been amended.<sup>3</sup>

### Advantages

Informal resolution has the advantages of being faster and less adversarial, and case workers may pursue complaints where the initial evidence of maladministration is less robust.

### Urgent action

Informal resolution can be the answer when urgent action is needed. A full investigation by any of the public-sector Ombudsmen can take several months or a year. Settlements, however, can be negotiated within weeks and sometimes the involvement of the Ombudsman's office can spur a public body into immediate action.

### Lower burden of proof

Maladministration is notoriously difficult to prove. Often decisions that are being challenged are discretionary ones and it can be hard to determine what was taken into account when reaching them. Also, evidence can be lost or non-existent. Short of tape recording a conversation, how can a complainant prove what s/he alleges was said or not said? It can come down to one person's word against another. Ombudsmen assess such cases on the balance of probability (rather than demanding absolute proof of an allegation). The case worker will look at the complaint as a whole and judge whether it seems likely that the complainant is telling the truth.

With informal resolution the burden to prove maladministration is lowered. The Ombudsman will pursue informal resolution where, for example, there is no evidence of maladministration, but it is clear that the public body has not provided an adequate explanation to the complainant. In these cases, the mistakes can be identified and the Government department concerned can agree to put such mistakes right and, where appropriate, to provide sufficient redress.

The Ombudsman recognises that complainants are at a disadvantage

when it comes to providing evidence of maladministration. In addition to the problems of 'he said, she said', complainants usually do not have access to the relevant files. It is, therefore, welcome that the Ombudsman has lowered the 'evidential hurdle'.

Unless a complaint is clearly outside the Ombudsman's jurisdiction - because, for example, it relates to a body outside the remit of the scheme or to a matter such as a personnel issue - it will be assigned to a case worker who will take appropriate action and make enquiries in order to try to reach a just resolution, either as an informal resolution or a full investigation. This is a welcome change.

### Importance of getting advice

In spite of the lowering of the evidential hurdle, lack of prima facie evidence of maladministration is still the main reason given for concluding a case without a full investigation. In 1999-00, 42% of the cases not investigated by the Parliamentary Ombudsman were discontinued for this reason. Just under 10% were settled through informal resolution, although, according to the Ombudsman's office, that figure is likely to increase to 20% for the year 2000-01.

This highlights the importance of making the initial complaint as fully as possible. Complainants need advice and help to make sure their complaint spells out what went wrong in a way that is likely to be taken on by the Ombudsman. The Ombudsman has indicated that his office can be proactive in uncovering evidence - by, for example, pursuing less obvious routes for evidence to be found in letters and files - but, ultimately, it is the complainant's responsibility to make a case. The complainant and her/his adviser must provide some evidence, or at least a reason to believe that evidence exists somewhere. This might include dates and times of telephone conversations, and notes of what was said. Consistency is important, because where there is no hard and fast evidence the complainant needs to build a convincing case for the investigator.

The Ombudsman is much more likely to take on a complaint that has been properly prepared. Help from an experienced adviser in preparing complaints is important for complainants and it also results in better use of the Ombudsman's resources. These are strong arguments in favour of making advice and assistance for putting a complaint to the Ombudsman eligible for funding under the CLS Fund. Currently, the Legal Services Commission will fund advice and assistance with mediation, arbitration, and early neutral evaluation in eligible cases, but not with complaints to Ombudsmen. With the Government's stance of promoting appropriate dispute resolution, this is an anomaly that needs to be rectified.

### Further reading

The Parliamentary Ombudsman, Annual Report 1999-00 (July 2000), London, The Stationery Office.

### Footnotes

1. p.8 Annual Report 1999/00
2. C.373/00
3. C.237/01

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