

OMBUDSMEN 2000

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INTRODUCTION

THE GROWTH OF OMBUDSMEN SCHEMES in both the public and private sector has been a feature of modern life. In the United Kingdom, these schemes originated in the public sector, their origin normally associated with a 1961 report, *The Citizen and the Administration*.¹ That report resulted in the setting up of the office of the Parliamentary Ombudsman, or rather, as he was named in the Act, the Parliamentary Commissioner for Administration, in 1967. Since then, the public sector has acquired ombudsmen for local government and the health service. The 1980s and 1990s have seen their development in the private sector as a consumer redress mechanism, so that they now cover such diverse areas as financial services, estate agents, funeral services and legal services.

The name "ombudsman" reveals the origin of the concept. Ombudsmen are a Scandinavian import. The word is Swedish and it means a representative or agent of the people, or a group of people. Sweden was the first country to establish an ombudsman's office, in 1809, which was to investigate citizens' complaints against public officials. A century later, the idea was taken up by another Scandinavian country, Finland, which created an ombudsman in 1919. In 1955, Denmark established an ombudsman scheme. Norway followed suit in 1963, basing its ombudsman for civil administration on the Danish model. It was the introduction of the Danish ombudsman, in 1955, which marked the beginning of the world-wide interest in such schemes. As well as providing the model for Norway, the Danish scheme was also the model for New Zealand, the first country outside Scandinavia to establish an ombudsman. The introduction of an ombudsman in New Zealand, a common law country, in 1962, sparked off a great deal of interest in the ombudsman concept throughout the world.

By the 1970s, ombudsmen had appeared in many parts of the world, and by 1983, the ombudsman idea had been accepted by almost every country in Western Europe. In the past 20 years, there has been an extraordinary spread of ombudsman systems across the world, the major exception being the USA. The European Union also has an Ombudsman, set up in 1995, who has the unique status of being the only supranational ombudsman in existence. His role is to deal with complaints about maladministration by European Community institutions and bodies.²

Why has this institution, established nearly 200 years ago and unheard of outside Scandinavia until 150 years ago, proliferated to this extent in the second half of the twentieth century? One explanation is the expansion of state activity during and after the Second World War, the new concern for the protection of human rights, and the growth of public education and participation.³ Ombudsmen came to be seen as useful in helping to meet the problem of an expanded bureaucracy in the modern welfare state,⁴ the activities of which had grown in range and complexity. The increase in the

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¹ JUSTICE, *The Citizen and the Administration: the Redress of Grievances* (Stevens, 1961) (The Wyatt Report).

² See M. Seneviratne, "The European Ombudsman" (1999) 21(3) *Journal of Social Welfare and Family Law* 269-278.

³ D. Rowat, *The Ombudsman Plan* (University Press of America, 1985), at p. 131.

⁴ *Ibid.*, at p. 3.

powers of discretion given to the executive side of government led to a need for additional protection against administrative arbitrariness, particularly as there was often no redress for those aggrieved by administrative decisions.

So, we can see how this 200 year-old institution has developed into new territories from its origins in the appointment of an officer appointed by one pole of government, the legislature, to handle complaints against the other poles, administrative and judicial action. Its modern equivalents have adapted to suit local conditions. The ombudsmen themselves, and their operating methods and objectives, vary from country to country. This is not surprising, given their different constitutional positions. The popularity of the institution can be seen from the way this public sector institution has been “flatteringly copied” by the private sector.⁵

OMBUDSMEN IN THE UNITED KINGDOM

As I have indicated, in the United Kingdom, ombudsmen were introduced in the public sector in the 1960s and 1970s, with the Parliamentary Commissioner Act 1967, the National Health Service Reorganisation Act 1973, and the Local Government Act 1974.⁶ The first incursion into the private sector⁷ was in 1981, with the establishment, by the insurance industry, of the Insurance Ombudsman’s Bureau.⁸ The banks followed in 1986, with the Office of the Banking Ombudsman.⁹ These were voluntary schemes, set up by the industries themselves. Building societies had a different model. Their scheme, established in 1987, was set up by statute, the Building Societies Act 1986.¹⁰ In the 1990s, the use of ombudsmen was extended to legal services (1990),¹¹ estate agents (1990),¹² pensions (1990), investments (1994),¹³ funeral services (1994),¹⁴ rented housing (1997).¹⁵

Some of these ombudsmen are not so easily categorised as public or private. For example, the Building Societies Ombudsman, although created by statute, had

⁵ H. Woolf, *Protection of the Public – A New Challenge*, Hamlyn Lecture (Stevens, 1990), at p. 87.

⁶ See generally, M. Seneviratne, *Ombudsmen in the Public Sector* (Open University Press, 1994).

⁷ See generally, R. James, *Private Ombudsmen and Public Law* (Dartmouth, 1997).

⁸ See generally, J. Birds and C. Graham, “Complaints Mechanisms in the Financial Services Industry” [1998] *Civil Justice Quarterly* 313; P. E. Morris, “The Insurance Ombudsman Bureau and Judicial Review” [1994] *Lloyds Maritime and Commercial Law Quarterly* 358.

⁹ See generally P. Morris, “The Banking Ombudsman” [1987] *Journal of Banking Law* 133; P. Morris, “The Banking Ombudsman – five years on” [1992] *Lloyds Maritime and Commercial Law Quarterly*, 227; C. Graham, M. Seneviratne and R. James, “Publicising the Bank and Building Societies Ombudsman Schemes” [1993] 3(2) *Consumer Policy Review* 85; M. Seneviratne, R. James and C. Graham, “The Banks, the Ombudsman and Complaints Procedures” [1994] *Civil Justice Quarterly* 253.

¹⁰ Part IX and Schedules 12 and 13. See generally, C. Graham, M. Seneviratne, R. James, “Publicising the bank and building societies ombudsman schemes” [1993] 3(2) *Consumer Policy Review* 85; R. James, C. Graham and M. Seneviratne, “Building Societies, Consumer Complaints, and the Ombudsman” [1994] 23(2) *Anglo-American Law Review* 214.

¹¹ See R. James and M. Seneviratne, “The Legal Services Ombudsman: Form versus Function?” (1995) 58(2) *Modern Law Review* 187-207; M. Seneviratne, *The Legal Profession: Regulation and the Consumer* (Sweet and Maxwell, 1999), Ch. 6.

¹² See generally, P. E. Morris, “The Ombudsman for Corporate Estate Agents” [1994] *Civil Justice Quarterly* 337; R. James, “The Ombudsman for Corporate Estate Agents – Putting Half the House in Order” [1995] 3(5) *Consumer Law Journal* 188; M. Seneviratne, “Estate Agents, the Consumer and the Ombudsman for Corporate Estate Agents” [1997] *Consumer Law Journal* 123-133.

¹³ The Personal Investment Authority was set up as a self-regulatory body under the Securities and Investment Board, and it is within the regulatory framework set out in the Financial Services Act 1986. The Authority set up the Personal Investment Authority Ombudsman Bureau to deal with complaints against its members. The Investment Ombudsman deals with disputes between members of the Investment Management Regulatory Organisation and their customers.

¹⁴ Funeral Ombudsman Scheme.

¹⁵ The Independent Housing Ombudsman scheme, which deals mainly with social housing, although some landlords who are not social landlords are also members of the scheme.

jurisdiction over private sector organisations.¹⁶ The Legal Services Ombudsman is a complete hybrid: set up by statute,¹⁷ publicly funded, accountable through the Lord Chancellor to Parliament, her jurisdiction is over the legal profession, which operates mainly in the private sphere. The Pensions Ombudsman, too, is a hybrid, imposed by statute¹⁸ over the pensions industry in both the public and private sectors. In addition, it has been argued that he is more like a tribunal than an ombudsman, and his work is partly subject to the supervision of the Council on Tribunals.¹⁹ Now that the ombudsman schemes operating in the financial services area²⁰ are to be combined into one Financial Ombudsman Service, it seems that there will be few truly private sector schemes left – perhaps only the estate agents and funeral ombudsmen.

In addition to this plethora of Ombudsmen, there are organisations carrying out ombudsman-like functions, which, although they fulfil the criteria²¹ for acceptance as full members of the ombudsman community, do not bear that name. For example, the independent organisation dealing with complaints against the police is known as the Police Complaints Authority. The Broadcasting Standards Commission provides redress for those who complain that they have been unfairly treated or subjected to unwarranted infringement of privacy by the broadcasting authorities. This variety of nomenclature may cause confusion, and it has been suggested that any organisation or individual admitted to full membership of the British and Irish Ombudsman Association²² should be required to take the title “ombudsman”.²³

On the other hand, there are organisations called ombudsmen,²⁴ which do not satisfy all the accepted criteria for ombudsman schemes, usually because they are not independent from the body they investigate. By way of example, the Prisons Ombudsman does not meet the criteria of independence, because he is appointed by and accountable to the Home Secretary. He is also subject to the overall jurisdiction of the Parliamentary Ombudsman. This is in no way a criticism of the office-holder, who has fought hard to maintain the independence of the office.²⁵ And it may be that

¹⁶ This is one of the schemes which will be incorporated into the Financial Ombudsman Service.

¹⁷ Courts and Legal Services Act 1990.

¹⁸ Social Security Act 1990, section 12 and Schedule 3, consolidated in the Pensions Schemes Act 1993, and amended in the Pensions Act 1995.

¹⁹ R. James, *Private Ombudsmen and Public Law* (Dartmouth, 1997), at p. 154. This is not the place to discuss the differences between ombudsmen and tribunals in any detail. Both are mechanisms for dealing with those areas where, on the one hand the dispute should not be resolved by litigation, but on the other, may not be amenable to settlement by negotiation. The Pensions Ombudsman believes that ombudsmen combined with final determination powers are a better mechanism than tribunals for dealing with these areas. However, he also believes that ombudsman schemes and tribunal systems “should not be separated by semantics but co-ordinated in substance” (J. Farrand, “Ombudsman or Tribunal? The Ombudsman as an Adjudicative Mechanism” in M. Harris (ed.) “The Ombudsman and Administrative Justice”, in M. Harris and M. Partington (eds.) *Administrative Justice in the 21st Century* (Hart Publishing, 1999), at p. 141).

²⁰ These are the Banking Ombudsman, the Building Societies Ombudsman, the Insurance Ombudsman the Investment Ombudsman, the Personal Investment Authority Ombudsman, the Personal Insurance Arbitration Service, SFA Complaints Bureau and arbitration scheme, the Financial Services Authority Direct Regulation Unit and Independent Investigator.

²¹ The British and Irish Ombudsman Association, set up in 1993 (as the United Kingdom Ombudsman Association – the name change in 1994 followed the inclusion of three ombudsman schemes from the Irish Republic as members), on a self-regulatory basis, has set out criteria which an ombudsman scheme must meet in order to be a full voting member of the organisation. These are: independence from those whom he or she has power to investigate; effectiveness; fairness; public accountability.

²² The British and Irish Ombudsman Association was formed as a result of concern that the title “ombudsman” was being used inappropriately.

²³ J. Farrand (Pensions Ombudsman and former Insurance Ombudsman), *Symposium on Consumer Redress* Office of Fair Trading, 27 September 1995.

²⁴ In New Zealand, the title is restricted by law. There is no such restriction in the United Kingdom.

²⁵ See M. Seneviratne, “Prisons Ombudsman: Annual Report 1996” (1998) 20(1) *Journal of Social Welfare and Family Law* 95-97; M. Seneviratne, “The Prisons Ombudsman: Annual Report 1998-99” (1999) 21(4) *Journal of Social Welfare and Family Law* 389-396.

the status of the Prisons Ombudsman will soon be rectified, as there has been an assurance that the post will be put on a statutory basis at the next legislative opportunity.

WHAT IS AN OMBUDSMAN?

It should be clear from the above discussion, that there is some concern that the title "ombudsman" should be strictly defined. This is not only to avoid confusion, but also to ensure that its currency is not undervalued. In 1974, the International Bar Association, resolved that an ombudsman was:

An office provided for by the constitution or by an action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.²⁶

This comprehensive, if unwieldy, definition describes traditional, or classical, ombudsman schemes. It is clearly not appropriate for private sector or hybrid schemes. Even in respect of the traditional ombudsmen, it has been noted that the search for definitions disguises the fact that there are "significantly different interpretation of what exactly the Ombudsman's functions are" in the world community.²⁷ The focus in the United Kingdom is on maladministration, whereas in some countries, the emphasis is on human rights. The latter role is often adopted in emergent democracies, where ombudsmen are seen as "instruments of good government", "protectors of human rights" and leaders of the "fight against corruption that is endemic in many developing and transitional economies".²⁸

In the United Kingdom, ombudsmen are complaint-handlers, providing "an impartial, accessible, informal, speedy and cheap means of resolving complaints".²⁹ It was the proliferation of ombudsman schemes which focused attention on the characteristics which must be displayed by such complaint-handling schemes, before they are deemed to be worthy of the title.

In 1991, following the United Kingdom Ombudsman conference,³⁰ a working party³¹ was set up to agree criteria for the use of the term "ombudsmen". Four key criteria were identified: independence from those investigated, effectiveness, fairness and public accountability.³² In order to be effective, the ombudsman should be accessible, the right to complain should be adequately publicised, and those complaining should be able to do so free of charge. Ombudsmen should have adequate powers of investigation, with

²⁶ Quoted in W. Haller, "The place of the ombudsman in the world community" (1988) *Fourth International Ombudsman Conference Papers*, Canberra, at p. 29.

²⁷ K. Friedmann, "Realisation of ombudsman recommendations" (1988) *Fourth International Ombudsman Conference Papers*, Canberra, at p. 105.

²⁸ G. Drewry, "The Ombudsman: Parochial Stopgap or Global Panacea?" in P. Leyland and T. Woods (eds.) *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, 1997), at p. 94.

²⁹ P. Giddings, "The ombudsman in a changing world" (1998) 8(6) *Consumer Policy Review* 202-208, at p. 203.

³⁰ This was held at Meriden on 17-18 October 1991.

³¹ The working party consisted of five members: the Secretary of the Commission for Local Administration, the Scottish Local Government Ombudsman, the Director of the National Consumer Council, an academic and the Banking Ombudsman, who chaired the group.

³² Full voting membership of the British and Irish Ombudsman Association is restricted to those who meet these criteria.

the ability to make recommendations. Where ombudsmen do not possess the authority to make binding awards (which is the case in the public sector), they should have the moral authority to secure redress. In other words, there should be a reasonable expectation that those investigated will comply with the ombudsman's decisions. Independence is a very important characteristic of ombudsmen schemes. Ombudsmen in the United Kingdom do not see their role as consumer champions, or complainants' advocates. It is the fact that they are impartial that gives them their authority, and the respect of those who are the subject of their investigations.

POPULARITY OF OMBUDSMAN SCHEMES

There are several reasons why ombudsmen, who were unknown in this country before the 1960s, have expanded, and become such a phenomenal success. First, on grounds of cost alone, they are a valuable mechanism for dispute resolution. They are free to the users of the scheme, the consumers. In terms of the volume of cases they deal with, they are probably cost effective for those funding them, whether they are private sector industries, or public bodies. They therefore present good value for money for all the parties. Costs are kept to a minimum because, unlike the courts, legal representation is neither required nor advantageous.

Their operating methods also account for their success. Each scheme has a different way of operating, but they can all be characterised by two words – informality and flexibility. Although ombudsmen must act fairly, they are not constrained by rules of evidence. In the private sector, most deal with matters by correspondence. Some allow for telephone and/or personal contact. Their procedures tend to be inquisitorial rather than adversary. Ombudsmen can attempt a negotiated settlement, and can use conciliation techniques. They aim to be accessible and user-friendly. A particular advantage for consumers is that there is no risk to complainants using the schemes. The complainant has nothing to lose financially by using an ombudsman to deal with her or his grievance. Importantly, complainants do not lose their right to take the matter to court, if appropriate, after a case has been decided by an ombudsman.

It will be apparent that the advantages of ombudsmen mirror the disadvantages of the courts. In other words, some of the problems of the civil justice system can be side-stepped by the use of ombudsmen. It would be a mistake however to assume that ombudsman schemes are a panacea for all the problems associated with litigation. Although the problems of cost and complexity are overcome, many ombudsman systems still suffer from problems of delay. However, ombudsman schemes clearly present an alternative to the courts, which many complainants find attractive. This attraction is not limited to procedural difficulties. Ombudsmen are also successful because they provide remedies where none may be available in the courts.

ALTERNATIVE TO THE COURTS

Ombudsmen, as originally conceived in the public sector, were not intended to present an alternative dispute resolution mechanism to the courts. They were established to deal with grievances where no remedy was available in court, because the matter was not justiciable, as no legal right was infringed. The Parliamentary Ombudsman was originally established as an adjunct to Parliament, and thus a part of the political and

administrative regimes.³³ The ombudsman thus supplements “the work of Members of Parliament in investigating complaints from members of the public regarding injustices caused by maladministration in a Government Department of Agency”.³⁴

The remit of the Parliamentary Ombudsman (along with the other public sector ombudsmen) is essentially to provide remedies for maladministration,³⁵ rather than to adjudicate legal claims or appeals against the merits of discretionary decisions. Maladministration has never been defined in legislation, but was referred to during the debate on the Bill which established the Parliamentary Ombudsman as including “bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness”.³⁶ It is a flexible concept, and to this list can be added: “failure to give proper advice, harassment . . . discrimination and failure to handle claims to benefit properly”.³⁷ Its shifting boundaries means that a “failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment” can also constitute maladministration.³⁸ Even a departure from good practice has been held to be maladministration by the Local Government Ombudsman.³⁹

The public sector ombudsmen, it should be noted, provide additional remedies, rather than an alternative mechanism for pursuing legal rights. Indeed, they cannot investigate a complaint where there is a legal remedy.⁴⁰ The grievances they investigate have no cause of action in court, except perhaps judicial review. The powers granted to the ombudsmen in the public sector thus allow them to address administrative problems that the courts cannot effectively resolve.

In the private sector, many of the schemes were established on a voluntary basis to improve the image of the industry,⁴¹ although for some, it was the threat of statutory intervention⁴² which encouraged their introduction. By contrast with ombudsmen in the public sector, they are generally not confined to issues of maladministration. They frequently deal with issues of a contractual nature, where court action, although theoretically possible, would be inappropriate, because for example the amount at stake is small. Private sector ombudsmen do however go beyond issues of illegality, and can

³³ P. Birkinshaw, *Grievances, Remedies and the State* (Sweet and Maxwell, 1985), at p. 127.

³⁴ M. Buckley, “The Parliamentary Ombudsman” (1998) 68 *Adviser* 6-8, at p. 6.

³⁵ Remedies are provided where injustice has been caused by maladministration. The Health Service Ombudsman can also investigate: complaints of “hardship”; that there has been a failure of service or a failure to provide a service that should have been provided; complaints about clinical judgment. As both the Parliamentary and Local Government Ombudsmen regard “hardship” as a possible injustice consequent on maladministration, it is confusing that the legislation establishing the Health Service Ombudsman expressly mentions “hardship” in addition to injustice. It is also the case that the Parliamentary and Local Government Ombudsmen find that a failure of service or a failure to provide a service amounts to maladministration. It is therefore confusing that the Health Service Ombudsman legislation expressly refers to these failures in addition to maladministration (See “A Commission for Public Administration in England”, a note by the Local Government Ombudsmen for England and the Parliamentary and Health Service Ombudsman. Annex A in the *Review of the Public Sector Ombudsmen in England*, a Report by the Cabinet Office, conducted by P. Collcutt and M. Hourihan. April 2000, at pp. 81-82, para. 16).

³⁶ This is sometimes referred to as the *Crossman catalogue*.

³⁷ M. Buckley, “The Parliamentary Ombudsman” (1998) 68 *Adviser* 6-8, at p. 6.

³⁸ *Maladministration and Redress*, First report of the Select Committee on the PCA. 1994/5 (HMSO, 1994) para.10.

³⁹ The Commission for Local Administration in England, *Report on an Investigation into Complaint No 98/A/4244 against London Borough of Enfield*.

⁴⁰ They have a discretion to investigate even if there is a legal remedy where it would not be reasonable for the complainant to go to court.

⁴¹ For example, corporate estate agents, anxious to improve the image of estate agency practice, set up the Ombudsman for Corporate Estate Agents scheme. See M. Seneviratne, “Estate Agents, the Consumer and the Ombudsman for Corporate Estate Agents” [1997] *Consumer Law Journal* 123-133.

⁴² For example, the banking industry. See P. Morris, “The Banking Ombudsman – five years on” [1992] *Lloyds Maritime and Commercial Law Quarterly* 227.

base their decisions on a “fair and reasonable” outcome.⁴³ It has been said that they are dealing with cases which “go well beyond the type of complaint for which ombudsmen were traditionally invoked”.⁴⁴ Moreover, their caseload is no longer confined to resolving “comparatively ‘minor’ grievances”.⁴⁵ The private sector schemes therefore often do present a genuine alternative dispute resolution mechanism to the courts, both for consumers and the industries concerned.⁴⁶

THE OMBUDSMAN’S ROLE

It would be a mistake to conclude from this, however, that the only function of ombudsman schemes is dispute resolution. It is true that in both public and private sectors, ombudsman schemes were set up as a method of handling individual grievances. Indeed, it has been said that the modern ombudsman institution is “primarily a client-orientated office, designed to secure individual justice in the administrative state”.⁴⁷ But their work is not confined to this. All the ombudsmen in the United Kingdom claim that they are also in the business of improving standards and practice in the sector or industry over which they have jurisdiction. This is unlike the courts, which do not claim to be in the business of improving standards.

Ombudsmen therefore have two roles. They provide redress for individual grievances, but they are also concerned to improve standards.⁴⁸ Thus, an ombudsman is not merely an instrument of redress, but also has the function of quality control.⁴⁹ By investigating individual cases, ombudsmen may highlight more generalised weaknesses in practices, rules and attitudes. Uncovering these weaknesses is of advantage to individuals who have not complained, because the resulting improvement in the system is a generalised benefit. These two functions are not in conflict, nor can they be separated. Indeed, it could be suggested that anyone who handles complaints is only performing half the task if they are not using the casework function to provide feedback to the organisation concerned. This feedback can relate to improvements in the way the organisation deals with complaint handling internally, so that fewer cases need to involve the ombudsman. It can also relate to improvements in other procedures, where for example the complaints reveal a failure in the system.

Of these two functions, which should take precedence? Most ombudsmen see the dispute resolution function as being the primary role. For example, the present Parliamentary Ombudsman notes that his “primary objective is to obtain a remedy for those who have suffered injustice”; working to ensure good public administration is

⁴³ Many ombudsmen are able to use “fairness” as an overriding consideration in making their decisions. Thus, “where the legal provisions work against the interests of the consumer most ombudsmen are able to “trump” the legal rules by recourse to what is “fair in all the circumstances” or “unfair treatment” or good practice” (R. James *Private Ombudsmen and Public Law* (Dartmouth, 1997), at p. 210. See generally pp. 210-212).

⁴⁴ *Ibid.*, at p. 223.

⁴⁵ *Ibid.*, at p. 225.

⁴⁶ Perhaps the common factor, in relation to the courts, is that both public and private schemes provide an alternative means of obtaining access to justice.

⁴⁷ K. Friedman, “Realisation of ombudsman recommendations” (1988) *Fourth International Ombudsman Conference Papers*, Canberra, at p. 105.

⁴⁸ In a world-wide survey of ombudsmen, conducted in 1988, 41 of 43 ombudsmen throughout the world said that one of their functions was to improve administrative practices. The same number included proposals for improving legislation and administrative rules as one of their functions. Indeed, only six respondents to survey regarded the seeking of satisfactory action for the individual as their prime task. The majority (27) believed that this task was as important as ensuring that the authorities within their jurisdiction fulfilled their duties (W. Haller, “The place of the ombudsman in the world community” (1988) *Fourth International Ombudsman Conference Papers*, Canberra, at p. 29.

⁴⁹ G. Drewry, “The Ombudsman: Parochial Stopgap or Global Panacea?” in P. Leyland and T. Woods (eds.) *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, 1997), at pp. 88-89.

stated to be “another important aim”.⁵⁰ There is clearly a strong linkage between these two roles, but the question, particularly for the public sector ombudsmen, is whether they should be devoting their main energies into resolving individual cases, or to tackling the systemic faults in public administration which produce such cases.

Most individual ombudsman cases have limited significance. On the other hand, ombudsmen can with justification be categorised as a “deterrent to maladministration”, and cumulatively their decisions “help to propagate principles of good administrative practice”.⁵¹ In view of this, it can certainly be argued that ombudsmen should see their main task as seeking out systemic causes of injustice in a way courts and tribunals are ill-equipped to do.⁵² Raising standards is the most appropriate way of improving consumers’ position in general. The resolving of individual disputes, while clearly of great importance, should be one of the means to this end, rather than an end in itself.

RETHINKING THE SYSTEM

Ombudsmen are a huge success story. Between them, they have handled thousands of cases, and brought redress to thousands of consumers and citizens, where none may have been available. They have helped to improve industry practice and administrative procedures. They have demonstrated that informal, inquisitorial methods of dispute resolution can provide access to justice in both quality and quantity. But the institution is not sacrosanct. Indeed, there are few institutions which “work so well that they cannot be improved”.⁵³ The time perhaps has come when the present system needs rethinking.

In some ways it is their very success which necessitates this. In both sectors, ombudsmen have increased and multiplied. Their proliferation has occurred with little thought as to how they relate to each other, the civil justice system, or the administrative justice system. There is now a need for rationalisation, as this proliferation of schemes causes confusion for consumers, as well as jurisdictional overlaps and gaps.

Consumerism is also driving the impetus for change. In the public sector, the acceptance that citizens have rights to redress for poor service delivery⁵⁴ has led to a proliferation of internal adjudicator schemes, and internal redress mechanisms. The place of the ombudsmen in this new approach to service complaints needs to be addressed. In the private sector, there have been calls for a consumer ombudsman, which raises the question of the extent to which ombudsmen can solve the problems of dubious trading practices.

FINANCIAL SERVICES

“Rationalisation” was one reason for the reform of the system of ombudsmen in the area of financial services. Eight separate schemes have been integrated, in order to rationalise the existing arrangements through the creation of a single ombudsman

⁵⁰ M. Buckley, “The Parliamentary Ombudsman” (1998) 68 *Adviser* 6-8, at p. 7.

⁵¹ G. Drewry, *op.cit.*, at p. 83.

⁵² N. Lewis *The Classical Ombudsmen* (1992) University of Sheffield, Centre for Socio-Legal Studies (unpublished).

⁵³ R. Gregory and J. Pearson, “The Parliamentary Ombudsman after twenty-five years: problems and solutions” (1992) 70 *Public Administration* 469-498, at p. 484.

⁵⁴ The Citizens’ Charter has been important in this respect.

scheme and a single compensation scheme.⁵⁵ In this sector, there will now be one single scheme, the Financial Ombudsman Service, which will operate under the supervision of the Financial Services Authority. Now, not only will consumers be able to have one point of entry, whoever the provider of the financial services, but jurisdictional gaps and overlaps may also be removed. This should produce a more efficient and comprehensive system of investor redress.

The role of the ombudsman within this new scheme is also of interest. The Financial Ombudsman⁵⁶ is closely attached to the regulator of the industry, the Financial Services Authority. Although the authority will not be concerned with individual complaints, the ombudsman will report complaints statistics to the complaints authority. He will also be expected to report systems failures to the authority. Thus, the ombudsman will deal with individual complaints and provide redress to consumers, but these will be used (by another body) to perform a regulatory function. Ombudsmen are not, and should not be, regulators, but they should see their role as providing a means of suggesting improvements in systems, where the casework reveals systems failures.

Current concerns for the those private sector schemes which still exist,⁵⁷ are in relation to the coverage of the schemes, and what should be done about those in the industry who are not prepared to join the scheme.⁵⁸ Outside the public sector, there are also questions to be addressed in relation to ombudsman schemes which deal with professional services. At present, there is a scheme for legal services. Should other professional services operate ombudsman schemes? If so, what is the appropriate role for such ombudsmen, how should their jurisdiction relate to the self-regulatory mechanisms of the professional bodies for dealing with complaints, and to regulation of the profession in general?

JOINED-UP OMBUDSMEN

Rationalisation is also needed in the public sector. Here, ombudsman systems developed when citizen problems could be categorised into central government, local government and the health service. The relevant legislation creating the public sector ombudsmen assumed that any publicly provided service would be the discrete responsibility of either central government, local government or the National Health Service. This is no longer valid. There are complaints which cross these jurisdictional boundaries. This is especially so in the area of health and social services, but similar problems can arise in other areas.

By way of an example, a recent Local Government Ombudsman investigation⁵⁹ involved a complaint about the care an elderly woman received in a private nursing home, where her place had been purchased by a local authority. There are some legal concerns in relation to the respective responsibilities of local authorities and the health

⁵⁵ *Financial Services and Markets Bill: A Consultation Document*, HM Treasury, July 1998, para 10.

⁵⁶ The first Financial Ombudsman is Walter Merricks.

⁵⁷ These are the estate agents ombudsman and funeral ombudsman.

⁵⁸ There is some disappointment that only a few independent estate agents have joined the Estate Agents Ombudsman scheme. The DTI and the OFT see increased membership of the scheme as a way of ensuring that consumers have a better deal from estate agents. Take up of membership of the scheme is to be reviewed in May 2000. If there has been no voluntary increase in membership, the option of a statutory scheme will be explored (*The Ombudsman for Estate Agents 1999 Annual Report*, p.10).

⁵⁹ The Commission for Local Administration in England, *Report on an Investigation into Complaint No 97/A14002 against the London Borough of Bexley*.

services, which can only receive a definite answer through the courts. However, a concern in this case was the fact that the complainant⁶⁰ was “forced to go to two Ombudsmen”, the Health Service Ombudsman and the Local Government Ombudsman, about what was “essentially, the same complaint”.

Has the time now come to have a single, public sector ombudsman system, bringing together the present three systems? Some 25 years ago, the then Parliamentary Ombudsman, Sir Alan Marre, recognised that in the long term there would need to be consideration of how a more co-ordinated total system, more directly related to the interests of the public, could be brought about.⁶¹ This idea was examined in 1988, to explore whether there should be an integrated service, under which all the ombudsmen would operate under the same legislation. The decision then was against recommending the creation of a single scheme.⁶²

The proposal now however is that there should be an integrated service for the public sector ombudsmen in England. This recommendation is the result of the review⁶³ conducted by the Cabinet Office, which reported on 13 April 2000. The review, which was announced in March 1999, was into the organisation of the public sector Ombudsmen in England. It was the ombudsmen themselves, who had suggested a review, on the basis that the present boundaries between their work no longer reflected service delivery in the public sector. The jurisdictional boundaries were confusing for the public. The review considered whether the present organisational arrangements of the ombudsmen were in the interests of complainants, given the move towards integrated provision.

The review acknowledges that now that there is greater emphasis on collaboration in the delivery of public services, there should be a more integrated avenue of redress. Although the public sector ombudsmen have always maintained the closest co-operation, conducting composite investigations, and re-routing complaints where necessary, the time seems to have come for a one-door approach, a “one-stop shop”, as it is often described, for consumers. The review recommends that a new Commission be established,⁶⁴ which will bring the three ombudsman schemes together. A collegiate structure is suggested, with all the ombudsmen being able to cover the complete jurisdiction. The review does however acknowledge the advantages in retaining functional roles, for example, for local government and the health service.

Another model would be that adopted in financial services, with a chief ombudsman, and regional or sectoral ombudsmen operating under an umbrella structure. The review rejected this model, believing that each ombudsman should be responsible for her or his own cases, and not subject to any other ombudsman. It was suggested that the new integrated service⁶⁵ would be chaired by one of the ombudsmen for the purposes of representing it externally, for management purposes, and when there is a requirement to answer to Parliament. The English public sector ombudsmen have warmly welcomed the recommendations of the Cabinet Office review. There can be little doubt that an integrated service is the way forward for the public sector ombudsmen.

⁶⁰ In this case, the complainant was the grandson of the elderly woman, who had died in the nursing home.

⁶¹ *Parliamentary Commissioner for Administration Annual Report 1975*.

⁶² JUSTICE, *Administrative Justice: Some Necessary Reforms. Report of the Committee of the Justice-All Souls Review of Administrative Law in the United Kingdom* (Clarendon, 1988).

⁶³ *Review of the Public Sector Ombudsmen in England. A Report by the Cabinet Office, April 2000, conducted by P. Colclutt and M. Hourihan*.

⁶⁴ This would have to be done by primary legislation.

⁶⁵ No name is suggested for the new Commission, but Commission for Public Administration in England seems appropriate.

THE COMPLAINTS PYRAMID

In addition to integrating the public sector ombudsmen into one system, attention needs to be paid to their role and function. One of the considerations of the Cabinet Office review was the interaction between the ombudsmen and other relevant complaints authorities. In well-established ombudsman systems, the ombudsman is at the top of a pyramid of grievance handling machinery, the last port of call when other complaint-handling procedures have been exhausted.

The Citizens' Charter has been particularly influential in the area of consumer rights and complaints systems in the public services. There has been a change in the culture of service delivery and complaint handling. In the public sector, this has led to an intermediate layer of complaint handling, adjudicators funded by the relevant department or organisation, but operating independently of them.⁶⁶ Ombudsman systems are now one among many schemes for handling complaints.

The growth of these systems for internal and external reviews calls into question the appropriate function of ombudsmen. In view of this intermediate layer of complaints handling, should the ombudsman's function be moving towards that of quality assurance for these external review systems? If these external mechanisms are providing consumer satisfaction, there will be less need for the ombudsman to become involved in routine complaints. The ombudsman could then reserve her or his investigative function for the more complex cases, or those that were resistant to resolution at this level.⁶⁷ This approach, sometimes referred to as super-escalated complaints environment,⁶⁸ is not without its problems. It can be a lengthy process before there is a final outcome in resistant cases. This can be a source of dissatisfaction for complainants, which has consequences for the credibility of the system.

CONCLUSION

In all this rationalisation and rethinking, what really matters must not be forgotten. Any change must be made with the aim of making the system more effective rather than simply in order to be seen to making change. Consumers and citizens with a justified complaint must be able to obtain redress within a reasonable length of time. A rationalised system must not become more bureaucratic. One of the strengths of the ombudsman system has been its informality and flexibility. These must not be

⁶⁶ Examples of such schemes include the Revenue Adjudicator, appointed for complaints against the Inland Revenue in June 1993, in response to the Citizen's Charter initiative. The remit was extended in 1995 to include Customs and Excise and the Contributions Agency. The office is now known as "The Adjudicator" and its current holder is Dame Barbara Mills. Her role is to act as an "impartial referee" where people feel their affairs have been poorly handled, or they have been badly treated by the organisations within the remit (Adjudicators' Office *Annual Report 1998*, p. 8). The remit does not extend to complaints about the law, government policy, matters which are currently or have been before the courts, nor disputes about the amount of tax people pay. The latter disputes are dealt with by statutory procedures. The service is free. In 1997/98, the Adjudicator dealt with 2494 cases, at an average cost £94 per case. There is also a Child Support Agency independent case examiner, established in response to criticism by the Parliamentary Ombudsman of the agency's complaint handling procedures. The case examiner is Anne Parker, and the service started in April 1997. Over 1000 complaints were received in the first year of its operation, of which over 80% were cleared. Despite this, the Parliamentary Ombudsman still receives a large number of Child Support Agency complaints.

⁶⁷ The Parliamentary Ombudsman has been described as providing a Rolls-Royce service. If the office is primarily client-orientated, such an approach is probably unnecessary. It deals with too few complaints, and handles them too thoroughly. If it is primarily for individual remedies, there needs to be more cases put through the system. However, if it is a mechanism for drawing attention to administrative deficiencies, with the primary role of seeking out injustice at a systemic level (in a way a court could not do), this thorough approach is appropriate.

⁶⁸ *Satisfaction in a super-escalated complaint environment*. A report by the Customer Management Consultancy Ltd to the Office of the Legal Services Ombudsman (1998). Lord Chancellor's Department, Research Programme.

jeopardised in any proposed reforms. Ombudsmen are a great success. They have proved themselves capable of performing the tasks for which they were appointed. One of their great strengths is their remarkable adaptability to suit a wide range of political and constitutional contexts. Ombudsmen in the U.K. are capable of adapting themselves to meet the challenges of the twenty-first century.