

# OMBUDSMEN COMPARED

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FRANK STACEY

CLARENDON PRESS . OXFORD  
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## FOREWORD

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FRANK Stacey died on 4 October 1977. On that day the copy-editor's comments on this book reached the University of Nottingham. With the help of his colleagues and in consultation with his files and sources which were at our house I have tried to do for him what he would have done in the final stages of the publication of *Ombudsmen Compared*. It is clear that he would have brought the work more up to date at the galley proof stage than I have been able to do. However, I have preferred to preserve his contribution as he left it where I have been unclear what amendments he might have made.

There were certain areas where it was clear that he had intended improvements. One in particular was with regard to the German military Ombudsman which, just before his death, he was discussing with David Childs. Dr. Childs has himself kindly written a contribution which I am sure Frank Stacey would have accepted and acknowledged.

It would not have been possible for me to complete this task without the help of Professor Pear and the Department of Politics at the University of Nottingham. In addition to David Childs, whom I have already mentioned, I would like to thank Peter Morris for his contribution. Special mention must be made of Peter James who worked as Frank Stacey's research assistant and who in addition to particular contributions was responsible for the comprehensiveness of the bibliography. Very special thanks are due to Ann Morris, Frank's secretary, who not only helped him so much, but who helped me to pick up the threads of his work. In addition I would like to thank Wyn Grant of the University of Warwick for his advice on the local commissioners and his contribution on the devolution bills.

The edges may be rougher than Frank Stacey would have left them, but with the help of these his friends and colleagues I have done my best to see that the volume is as nearly as possible as he would have wished it to be.

*Husbands Bosworth*  
December 1977

MARGARET STACEY

## PREFACE

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IN an earlier book, *The British Ombudsman*, published by the Clarendon Press in 1971, I discussed the campaign for an Ombudsman in Britain, the passage of the Parliamentary Commissioner Bill through Parliament, and the first four years of operation of the Parliamentary Commissioner's office. In the latter part of the book I made some comparisons between the Parliamentary Commissioner and Ombudsmen in other countries, but necessarily only briefly. I was keenly aware that to make any worthwhile comparisons it would be necessary to visit other countries with Ombudsmen systems, to interview the Ombudsmen and members of their staff, and to make a close analysis of their annual reports and other documentary material, where it was available.

This I resolved to do. But so rapid has been the development of the Ombudsman idea, and so rapid its implementation in countries throughout the world, that clearly I would not have been able to take in all the countries, and states in federal countries, since to visit them all would have meant going to more than twenty countries and places as far apart as Alaska, Fiji, Israel, and Australia. I decided therefore to take for comparison a group of countries which have much in common in their institutional and historical background. I visited Scandinavia first, choosing to go to Sweden because it is there that the Ombudsman idea originated, and Sweden has the most developed Ombudsman system in the world. Next I visited Denmark whose system was modelled on the Swedish Ombudsmen, but with some important differences, and Norway whose Ombudsman for Administration is similar in style to the Danish Ombudsman, while the Norwegian Ombudsman for the Armed Forces has features which are quite unique.

I then went to Canada which is the federal country in which there was the earliest, and most thorough, development of Ombudsmen systems at state level. Eight out of ten Canadian provinces now have Ombudsmen and whereas in Australia, by comparison, five out of six states now have Ombudsmen, the first Australian

Ombudsman was appointed as recently as 1972, while in Canada two provinces appointed Ombudsmen in 1967 (Alberta and New Brunswick), one in 1968 (Quebec), and two in 1969 (Manitoba and Nova Scotia). I decided to make a special study of the Quebec *Protecteur du Citoyen* (Public Protector) since Quebec is the most populous province in Canada to have a long-established Ombudsman. Out of the three prairie provinces, I chose to go to Manitoba, and from the maritime provinces, I chose New Brunswick. I am very grateful to the Nuffield Foundation which provided most of the finance which enabled me to visit Canada and conduct interviews there.

Next I visited France to interview the *Médiateur*. The developments in France are of interest in many ways, but there are two special reasons for studying the *Médiateur*. First, France has one of the most admired systems of administrative law in the world, and some critics of Ombudsman proposals in Britain had argued that an Ombudsman would be superfluous in France. Second, the *Médiateur* is, to some extent, modelled on the British Parliamentary Commissioner since he can only be approached through parliamentarians.

Finally, I have made an extended study of developments in the Parliamentary Commissioner's office in the ten years which it has now been in existence since 1967. I have also studied the Health Service Commissioner's office, set up in 1973, and the operation of the Local Commissioners for England, Wales, and Scotland who began to receive complaints against local authorities and water authorities in 1974 and 1975. This book is therefore a comparison of Ombudsman systems in Britain, Scandinavia, Canada, and France and of the three forms of the British system which have developed since 1967.

I have found the research for this study not only fascinating but most enjoyable since all the Ombudsmen I have interviewed have co-operated fully in the research, and have received me with great courtesy and interest. In Stockholm I interviewed Mr. Ulf Lundvik, who is now the Chief Ombudsman in Sweden, Mr. Anders Wigelius, who is now one of the three other Ombudsmen and was then a Deputy Ombudsman, and Mr. Tor Sverne, who was the other Deputy Ombudsman. In Copenhagen I interviewed Mr. Nordskov Nielsen, the Danish Ombudsman, and in Oslo Mr. Ture Sinding-Larsen, the Head of Office of the Ombudsman for Administration,

and Mr. Jack Helle, the Head of Office of the Ombudsman for the Armed Forces. In Quebec I interviewed Dr. Louis Marceau, who was *Protecteur du Citoyen* until 1976, and in Montreal his Deputy, M. Robert Lévêque. In Manitoba I interviewed the Ombudsman Mr. George Maltby and two of his investigators, Mr. Dick Glover and Mr. Max Regiedzinski. When I visited New Brunswick, the Ombudsman at that time, Mr. Charles Léger, was seriously ill, but I was fortunate to be able to interview the legal advisers to Mr. Ross Flemington, the first New Brunswick Ombudsman, Mr. Eric Appleby and Mr. David Olmstead. They were acting in the place of Mr. Léger during his terminal illness.

In Paris I interviewed the *Médiateur*, M. Aimé Paquet, his *Délégué général* (until November 1975), M. Jacques Legrand, and his Constitutional Adviser, M. Henri Desfeuilles. The co-operation I have received from Ombudsmen in the United Kingdom has been equally good. For my previous study I had interviewed the first Parliamentary Commissioner, Sir Edmund Compton. For the present book I interviewed the second Parliamentary Commissioner, Sir Alan Marre, and his successor Sir Idwal Pugh. I have interviewed his Deputy, as Parliamentary Commissioner, Mr. Henry McKenzie Johnston, on three occasions, and his Deputy, as Health Service Commissioner, Mr. Geoffrey Weston. The co-operation I have enjoyed with the Local Commissioners has been particularly close. Mr. Clifford Pearce, who was in charge, at that time, of the Local Government Division in the Department of the Environment, kindly suggested that I should meet the three Local Ombudsmen for England at an early stage. I had an excellent preliminary discussion with the chairman of the Commission, Lady Serota, the two other English Commissioners, Mr. Denis Harrison and Mr. Patrick Cook, and the Secretary to the Commission, Mr. Michael Hyde, in November 1975. I have since seen all of them again on several occasions, either together or individually, and I have been able to enjoy a continuing dialogue with them on the development of their office. I have also had valuable discussions with Mr. Dayfdd Jones-Williams, the Local Commissioner for Wales, and the Secretary of his Commission, Mr. Hywel F. Jones, as with the Scottish Local Commissioner, Mr. Robert Moore.

All the Ombudsmen have seen drafts of the chapters in this book and I am very grateful for the many helpful corrections and comments they, and their staffs, have sent to me. The responsibility

for all the statements of fact and interpretation in this book is, however, entirely my own.

*Department of Politics*  
*University of Nottingham*  
*May 1977*

FRANK STACEY



# CONTENTS

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List of Tables	xii
I The Swedish Ombudsmen	i
II The Danish Ombudsman	18
III The Norwegian Ombudsman for Administration	32
IV The Norwegian Ombudsman for the Armed Forces	40
V The Provincial Ombudsmen in Canada	51
The Quebec Public Protector	52
The Manitoba Ombudsman	70
The New Brunswick Ombudsman	78
Ombudsmen in the other Provinces	85
VI The French Médiateur	92
VII The United Kingdom: The Parliamentary Commissioner for Administration	122
VIII The United Kingdom: The Health Service Commissioner	176
IX The United Kingdom: The Local Commissioners for Administration	195
X Conclusion	227
Select Bibliography	240
Index	247

## LIST OF TABLES

---

I	The Swedish Ombudsmen in 1975	7
II	Reasons for rejection of cases by the Danish Ombudsman in 1975	21
III	The Danish Ombudsman, 1965 to 1975. Cases rejected as a percentage of Cases Received	29
IV	The Danish Ombudsman, 1965 to 1975. Cases in which the Ombudsman found cause for criticism or recommendation	30
V	The Norwegian Ombudsman for Administration, 1963 to 1976. Cases received and cases investigated	37
VI	Quebec Public Protector, 1974. Complaints fully investigated (ranked by department)	58
VII	Manitoba Ombudsman, 1974. Complaints dealt with (ranked by department)	76
VIII	New Brunswick Ombudsman, 1974. Complaints dealt with (ranked by department)	83
IX	The French Médiateur, 1973-1975	101
X	Complaints to the Médiateur submitted by Deputies and Senators in selected regions	105
XI	Complaints to the Médiateur and the Parliamentary Commissioner in 1973 and 1974 (ranked by department)	118
XII	United Kingdom Parliamentary Commissioner, 1967-1975	163
XIII	United Kingdom Parliamentary Commissioner, 1974-1975. Complaints investigated (ranked by department)	172
XIV	Complaints to the Health Service Commissioner from England, Scotland, and Wales, 1973-1976	181
XV	English Commission for Local Administration, 1975-1977. Complaints received and reports issued	207
XVI	English Commission for Local Administration, 1975-1977. Reports issued by the English Commissioners in which they found maladministration causing injustice	214
FIG. I	Parliamentary Commissioner and Health Service Commissioner's Office, April 1977	140

# I

## THE SWEDISH OMBUDSMEN

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THE Swedish Ombudsmen are at once the longest established and the most powerful of all Ombudsmen. It is therefore logical to look at them first. In 1713 the Swedish King appointed an officer, who came to be known as the Chancellor of Justice, to investigate complaints against royal officials. When Sweden gained a democratic Constitution in 1809, Parliament appointed its own officer, the Justitieombudsman, to investigate complaints from citizens. In 1915 the office of Parliamentary Ombudsman, or Justitieombudsman, was modified by Parliament's decision to set up a second Ombudsman, known as the Militieombudsman, who took over from the Justitieombudsman the task of investigating complaints against the armed services.

After the Second World War, however, it became increasingly clear that the Justitieombudsman was overburdened with work while the number of complaints reaching the Militieombudsman was declining. Consequently, in 1968 Parliament decided to do away with a separate military Ombudsman and instead to establish three Ombudsmen in the office of Justitieombudsman. One of the Ombudsmen was to be concerned with complaints against the armed forces as well as against certain sectors of civil administration. The three Ombudsmen themselves determined how responsibility for investigating complaints against government agencies was divided. Also in 1968 Parliament decided to set up two Deputy Ombudsmen who were not formally allocated sectors of government, but gave general assistance to the three Ombudsmen. The Deputy Ombudsmen were not full-time members of the Ombudsmen's staff and, when not standing in for one of the Ombudsmen, they presided as judges in one of the common law or administrative courts. They were therefore 'reserve' Ombudsmen who could be called upon to take over the work of an Ombudsman when he was sick or on holiday, or to take on part of his case-load when he was engaged in one or more particularly difficult and time-consuming

investigations. They did not 'understudy' specific Ombudsmen, indeed this would hardly have been possible with three Ombudsmen and only two Deputy Ombudsmen.

Another disadvantage of the organization in the Ombudsmen's Office, on the 1968 pattern, was that, formally speaking, all three Ombudsmen were of equal rank. Problems of co-ordination therefore had to be sorted out between them without any one of them having a designated role as mediator or chief co-ordinator. These difficulties, coupled with a steady rise in the volume of complaints to the Ombudsmen, led to a recognition that some kind of re-organization and expansion of the Ombudsmen's office was necessary. In 1972 Parliament (the Riksdag) appointed a Committee to look into the problem and in 1975 it recommended a new form of organization and a number of amendments to the statutes regulating the Ombudsmen's work. These were approved by Parliament in November 1975 and the new system came into effect in the spring of 1976.

Under the new organization there are four Ombudsmen and no Deputy Ombudsmen. One of the Ombudsmen is elected by Parliament to hold the office of Chief Ombudsman and Administrative Director of the Ombudsman's Office. He co-ordinates the work of the other Ombudsmen and, in consultation with them, decides on the areas of government for which they have responsibility in investigating complaints and initiating investigations.

Before we consider how the areas of government are now allocated between them, it is important to note how wide is the total area for which they are responsible. Between them, the four Ombudsmen cover all agencies of government, both central and local. This is a situation which seems remarkable to the British observer familiar with all those sectors of government from which the British Parliamentary Commissioner for Administration is excluded by the 1967 Act. These are some of the areas which are, in whole or part, exempted in Britain but not in Sweden: the Swedish Ombudsmen can investigate all kinds of complaints against the police, they can investigate complaints against all the activities of the Foreign Office and the security services. They can investigate complaints against nationalized industries, although not against industries which are wholly, or partly, state owned but are run as private companies. They can investigate complaints against administration by local authorities, they can investigate complaints which arise in the health

service. Local authorities and the health service are now covered in Britain by Local Commissioners and the Health Service Commissioner but these Commissioners do not, in general, have such extensive powers as are possessed by the Swedish Ombudsmen. (See below in Chapters VIII and VII.)

The Swedish Ombudsmen are excluded from investigating the decisions of elected members, that is Members of Parliament and elected members of local authorities. They are also excluded from considering action taken by Cabinet Ministers. In this respect, then, the British Parliamentary Commissioner has a wider authority since he can investigate the actions of Ministers and has done so in a number of important cases, for example in the Sachsenhausen case in 1967, the Duccio painting case in 1969, and in the Court Line case in 1975.<sup>1</sup> Part of the rationale of Swedish Ministers being exempt from investigation by the Ombudsmen is that most areas of central government in Sweden are administered by boards and do not come under the direct control of Ministers. The conduct of administration by the boards is subject to investigation by the Ombudsmen.

In May 1976, when the new organization of Ombudsmen came into operation, Mr. Ulf Lundvik was elected Chief Ombudsman and Administrative Director of the Ombudsmen's Office. It was, in effect, a *de jure* recognition of a *de facto* leadership in the Ombudsmen's Office which he had long possessed. His experience is unrivalled. Before being appointed an Ombudsman he was a Judge of the Supreme Court. Earlier in his career he had served as a Deputy Ombudsman and earlier again had worked in the Ombudsmen's Office as a legal assistant. He also contributed to one of the academic studies of Ombudsmen. He wrote part of the chapter on Sweden in the symposium on Ombudsmen edited by D. C. Rowat in 1965.<sup>2</sup>

The other three Ombudsmen elected in May 1976 were Mr. Anders Wigelius, who had been one of the two Deputy Ombudsmen under the old system, Mr. Karl-Erik Uhlin, who was previously Secretary of the Ombudsmen's Office, and Mr. Leif Ekberg, who had previously served as president of an Administrative Appeal

<sup>1</sup> See F. Stacey, *The British Ombudsman* (Clarendon Press, 1971), pp. 248-58 and 311. See also below, pp. 152-162, *passim*.

<sup>2</sup> See Ulf Lundvik, 'Comments on the Ombudsman for Civil Affairs', in D. C. Rowat (ed.), *The Ombudsman. Citizens' Defender* (Allen and Unwin, 1965), pp. 44-50.

Court. The division of responsibilities which Mr. Lundvik then arranged with the other Ombudsmen is as follows. Mr. Lundvik himself is responsible for oversight of the law which ensures access by members of the public to official documents at all levels of government. He is also concerned with problems caused by data processing and with personnel matters in central and local government. In addition, he investigates cases of special importance. Mr. Wigelius supervises the courts of justice, public prosecutors, the police, and prisons. Mr. Ekberg is concerned with taxation cases and social welfare. Mr. Uhlin supervises the armed forces and all matters in civil administration not allotted to the other Ombudsmen.<sup>1</sup>

The new legislation adopted in 1975 limits the role of Ombudsmen in prosecuting officials. It also places rather more emphasis on their right to institute disciplinary proceedings against officials rather than to prosecute.<sup>2</sup> It remains to be seen how far the Ombudsmen may decide to start disciplinary proceedings in cases where before they would have prosecuted. The number of prosecutions each year was anyway quite small in relation to the total number of cases investigated.<sup>3</sup> When I interviewed Mr. Lundvik I asked him to give me some examples of cases where the Ombudsman had prosecuted an official. One example which he gave me seemed of particular interest. A headmaster was prosecuted because it was claimed that he had behaved illegally in three respects. First, he was said to have suspended two boys from school because of their political (left-wing) sympathies. There was an election in the offing and he had told the boys not to come to school during the election period, the implication being that they would be a harmful influence at this time. Second, he was said to have cancelled the school sports day and given the whole school a day's holiday. Third, although he was bound by law to teach for three hours a week, he had not in fact been teaching for these three hours.

The court in which the headmaster was prosecuted found that all three allegations against him were true and fined him 1,800 kronor. This was then deducted from his salary. He also had to pay 1,500 kronor in costs. He therefore suffered a monetary penalty of 3,300 kronor of which the sterling equivalent was at that time about £290.

<sup>1</sup> The Swedish Parliamentary Ombudsman, Report for the period 1 January 1976 to 30 June 1976. Summary in English, p. 338.

<sup>2</sup> *The Swedish Parliamentary Ombudsmen* (Stockholm, 1976), p. 6 (pamphlet in English on the operation of the Ombudsmen's office).

<sup>3</sup> See below, p. 6.

This prosecution, and its outcome, seem doubly surprising to a British observer since public servants are not liable to prosecution by the Parliamentary Commissioner and, under the 1974 Local Government Act and the 1975 Local Government (Scotland) Act, the internal administration of schools is excluded from investigation by the Local Commissioners. The case well illustrates the Swedish system in which public servants are not entitled to behave in an arbitrary fashion or to exceed their powers which are, as far as possible, clearly defined. It should also be noted, that, in this case, the Ombudsman would not have prosecuted had it not been for the fact that the headmaster had been unwilling to accept that he had been at fault. The Ombudsman therefore concluded that he would be likely to continue in such arbitrary behaviour if he were not prosecuted.

I was also interested to establish with Mr. Lundvik just what are the powers of an Ombudsman in prosecuting, or admonishing, judges. He confirmed that it would generally be the behaviour of a judge in presiding over a case which would be the subject of complaint and investigation. The Ombudsman is not, however, confined to looking at procedural questions and sometimes, but not often, may need to scrutinize the judge's decision in the case.

A judge is always prosecuted by an Ombudsman in the court superior to the court over which he himself presides. Here I was able to get clarification of one point which had been obscure to me. Some of the literature on the Swedish Ombudsmen gives the impression that judges of the Supreme Court are not liable to prosecution by an Ombudsman. This is not strictly so, although such a prosecution would be extremely unlikely. An Ombudsman could, in law, prosecute a judge of the Supreme Court but, since there is no court superior to that court, he would have to resort to impeachment of the judge.

Some emphasis has been given here to the Ombudsmen's power to prosecute since it is somewhat unusual and does need clarification to the outside observer. Only in Finland, to my knowledge, does an Ombudsman have power to prosecute public servants in a similar way.<sup>1</sup> But prosecutions are very unusual in Sweden and in the

<sup>1</sup> The Danish Ombudsman in law has power to order prosecution of officials. In practice, this power is rarely, if ever, used. It was not used at all in the first nine years of operation of the Ombudsman's office. See I. M. Pedersen, 'Denmark's Ombudsmand', in D. C. Rowat (ed.), *op. cit.*, p. 81.

great majority of cases the Ombudsmen are able to secure redress for the individual without resort to prosecution, or without undertaking disciplinary action against the public servant concerned. Thus in 1975, out of 2,293 cases investigated by the Ombudsmen, there were only 3 cases in which they found it necessary to prosecute the public servant or to recommend that disciplinary proceedings should be taken.<sup>1</sup> Mr. Lundvik told me that, in all his experience, he could recall no occasion when a central or local government agency had failed to act upon a recommendation of the Ombudsman. On the other hand, the Government did not always act on an Ombudsman's suggestion for changing the law.

The function of the Ombudsmen in initiating investigations is also important. In 1975 the Ombudsmen completed 400 cases which they had investigated on their own initiative. In 202 of these cases they admonished the government agency concerned and in 6 made proposals to Parliament or the Government for legislative or policy changes. It is not surprising that the proportion of the cases they initiated in which they found fault with the government agency was much higher than in those cases which were investigated as a result of complaint from a member of the public.<sup>2</sup> The Ombudsmen often initiate investigations after reading press reports which give them cause to think that something has gone wrong in an administrative agency, and in a fairly high proportion of such cases their concern is found to be justified. Sometimes the cause for investigation may not be a press report but may still arise from study of the media. For example, a member of the Ombudsmen's staff recently found that a government agency was advertising in the press for employees in terms which appeared to contravene the law which forbids discrimination against women. He reported this to one of the Ombudsmen who then decided to initiate an investigation.

The Ombudsmen also have power to inspect courts, administrative agencies, hospitals, prisons, military units, etc. Before the 1975 reforms each Ombudsman used to spend about thirty working days a year on inspections. The increasing case-load has made it necessary to reduce the time spent on inspections. The new instructions to Ombudsmen indicate that each Ombudsman is authorized to undertake inspections whenever he wants to, but it is understood that he will only inspect an agency or institution where he has reason to

<sup>1</sup> The Swedish Parliamentary Ombudsmen, Annual Report for 1975. Summary in English, p. 612.

<sup>2</sup> See Table I, p. 7.



believe that the situation there is unsatisfactory.<sup>1</sup> The British Parliamentary Commissioner does not have power to initiate investigations or to carry out inspections and has a very limited power, in practice, to recommend changes in legislation.

TABLE I  
The Swedish Ombudsmen in 1975

<i>Complaints dealt with by the Ombudsmen during the year</i>	<i>3,202</i>		
They were handled in the following manner:			
Rejected (outside jurisdiction, etc.)			1,214
Referred to other state agencies			95
Investigated by the Ombudsmen			1,893
<i>Cases initiated by the Ombudsmen</i>	<i>400</i>		
<i>The results of investigations:</i>			
	Investigated	Found justified*	Found justified %
Complaint cases	1,893	440	23.2
Ombudsmen's initiatives	400	208	52.0
Totals	2,293	648	28.7

*Source:* Derived from tables published by the Swedish Ombudsmen in their Annual Report for 1975, pp. 611 and 612.

\* The category 'Found justified' is compiled from those investigations which resulted in either a prosecution or disciplinary proceedings, criticism of a government agency, or proposal to the Government or Parliament.

I was particularly interested to find out about the procedure followed by the Ombudsmen in making an investigation. It is clear that in the majority of cases the Ombudsmen and their staff make their recommendations on the basis of documentary material and do not interview the public servants who are the subject of complaint. Mr. Lundvik told me that in an increasing number of cases interviews are now being conducted. Such interviews are sometimes undertaken by the Ombudsmen, but more often by members of their staff, or by Public Prosecutors or Chiefs of Police, at the request of the Ombudsmen. The Ombudsmen's office also has a former police official on its staff who, Mr. Lundvik told me, had made some very valuable investigations on the instructions of the Ombudsmen.

The Ombudsmen can call for all the documents in the case from

<sup>1</sup> *The Swedish Parliamentary Ombudsmen*, p. 12.