The Ombudsman Enterprise and Administrative Justice

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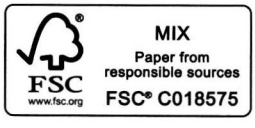

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THE OMBUDSMAN ENTERPRISE AND ADMINISTRATIVE JUSTICE

This important new book presents an overview of one of the key institutions of administrative justice: the ombudsman. It presents a well argued thesis based on a thorough review of the literature and some new empirical research concerning the changing role of, and future prospects for, ombudsmen. It makes excellent use of international comparisons with a particular emphasis on Commonwealth experience. It will be invaluable to academics and policy-makers working in the field whilst also being accessible to students.

Tom Mullen, University of Glasgow, UK

List of Abbreviations

AJTC	Administrative Justice and Tribunals Council
ADR	Alternative Dispute Resolution
AOA	Asian Ombudsman Association
AONI	Assembly Ombudsman for Northern Ireland
ABCIFER	Association of British Civilian Internees Far East Region
ANZOA	Australian and New Zealand Ombudsman Association
BIOA	British and Irish Ombudsman Association
CQC	Care Quality Commission
CAROA	Caribbean Ombudsman Association
CTRL	Channel Tunnel Rail Link
CIPFA	Chartered Institute of Public Finance and Accountancy
CSA	Child Support Agency
CIC	Citizen Information Centre
CSCI	Commission for Social Care Inspection
CO	Commonwealth Ombudsman of Australia
DCA	Department for Constitutional Affairs
DWP	Department for Work and Pensions
ESRC	Economic and Social Research Council
EPA	Environmental Protection Agency
ECHR	European Convention on Human Rights
EU	European Union
FOS	Financial Ombudsman Service
FSO	Financial Services Ombudsman
FTT	First-tier Tribunal
FoCO	Forum of Canadian Ombudsmen
HSO	Health Service Ombudsman
HC	Healthcare Commission
HMRC	HM Revenue and Customs
HO	Housing Ombudsman
IDeA	Improvement and Development Agency
ICE	Independent Case Examiner
IPCC	Independent Police Complaints Commission
IOA	International Ombudsman Association
IOI	International Ombudsman Institute
LGO	Local Government Ombudsman
LCD	Lord Chancellor's Department
MOD	Ministry of Defence

NAO	National Audit Office
NPM	New Public Management
NSWO	New South Wales Ombudsman
NZO	New Zealand Ombudsman
NICC	Northern Ireland Commissioner for Complaints
NIO	Northern Ireland Ombudsman
NIPrO	Northern Ireland Prisoner Ombudsman
NTO	Northern Territory Ombudsman
Ofsted	Office of Standards in Education, Children's Services and Skills
ODPM	Office of the Deputy Prime Minister
OFMDFM	Office of the First Minister and Deputy First Minister
OBC	Ombudsman British Columbia
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
OECD	Organisation for Economic Co-operation and Development
PHSO	Parliamentary and Health Service Ombudsman
PO	Parliamentary Ombudsman
PALS	Patient Advice and Liaison Services
PONI	Police Ombudsman for Northern Ireland
PPO	Prisons and Probation Ombudsman
PDR	Proportionate Dispute Resolution
PASC	Public Administration Select Committee
PSOW	Public Services Ombudsman for Wales
QMI	Queensland Mines Inspectorate
QO	Queensland Ombudsman
RRO	Regulatory Reform Order
SPSO	Scottish Public Services Ombudsman
SCC	Services Complaints Commissioner
SAO	Southern Australian Ombudsman
SORT	Special Ombudsman Response Team (Ontario)
TO	Tasmanian Ombudsman
TCEA	Tribunals, Courts and Enforcement Act 2007
UT	Upper Tribunal
VO	Victorian Ombudsman
WAO	Western Australian Ombudsman

Foreword

It is now over 40 years since Parliament agreed, with apprehension in some quarters, to the Wilson Government's modernising proposal to establish a Parliamentary Commissioner for Administration, as the Ombudsman was rather off-puttingly called. The apprehension centred on a belief that this new office was a dangerous constitutional departure, which threatened to subvert the traditional role of Parliament and its Members in the redress of grievances.

It was to allay fears of this kind that it was agreed that the services of the office could only be accessed through a Member of Parliament; and that the office itself would be anchored to Parliament through the oversight of a select committee. The former provision has so far survived all attempts to remove it, despite its obvious absurdity (as shown by the fact that it was not applied to the NHS role). The latter provision has proved to be more useful, and has helped to strengthen the effectiveness of the office.

It is only necessary to recall these origins to see at once how far the Ombudsman institution – or 'enterprise' as it is described here – has travelled. It is now ubiquitous, in all its various forms, around the world. Yet what is more interesting is the way in which it has come to be seen not as a singular constitutional and administrative innovation but as part of a network of accountability mechanisms that have developed in the modern democratic state. Far from subverting the constitution, it was in fact the harbinger of a whole array of watchdogs and scrutineers that together enlarge and deepen accountability.

It is the great merit of this book that this is the perspective adopted by the authors, which makes it a valuable contribution not just to Ombudsman studies but to this wider terrain. The Ombudsman is firmly situated within the larger arena of administrative justice, but also as a key ingredient of what the authors describe as the 'integrity branch of the constitution'.

I am sure this is the right approach, and enables much fruitful analysis both of developments around the world and of new thinking about administration, law and the constitution. In this way it admirably succeeds in its ambition to bring the Ombudsman – and Ombudsman studies – into the mainstream.

Tony Wright

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Currently Visiting Professor in Government and Public Policy, University College, London; and Professorial Fellow in Politics, Birkbeck College.

Preface

As a collective endeavour, the seeds of the idea for this book derived from a chance meeting at an academic conference in 2006, and was further inspired by a Nuffield Foundation sponsored seminar series on administrative justice. At the time of the meeting it was becoming clear that in their work a generation of ombudsmen in the UK and elsewhere were pursuing bolder strategies than their predecessors. This was a trend that we identified as requiring research. What we were also clear about was the need to locate any such study of the ombudsman community within developments in the wider administrative justice sector as a whole. Often academics have criticized governments in the past for the lack of rounded thinking, yet there has also been a tendency for academics to study the administrative system within institutional and disciplinary silos. It was this desire to establish a broader analysis of the ombudsman enterprise that led to the team approach in this project, which incorporated our respective expertise.

The core of the research was a series of interviews with leading ombudsmen (public and private sector) in the UK, Ireland, Australia and New Zealand, and we gratefully acknowledge the funding awarded by the Economic and Social Research Council (ESRC) (Thompson, Buck and Kirkham 2008: (Res-000-22-2133)). From the knowledge obtained we have presented and taken part in numerous presentations, lectures, seminars and discussion groups, which has included an engagement with the ombudsman community itself in an attempt to feedback our findings. Articles have been published jointly and individually. The authorship credit of this monograph is distributed Kirkham (50 per cent), Buck (35 per cent) and Thompson (15 per cent).

Fate does not respect publication schedules. Two significant developments occurred as we were correcting proofs in Autumn 2010. First, the Law Commission published a consultation paper, Public Services Ombudsmen (Law Com CP 197), which develops earlier proposals for the ombudsmen in England and Wales. Many of their proposals resonate with the arguments made in this monograph. But they generally represent a more modest housekeeping exercise than the wider 'Leggatt-type' review we propose (p. 232). One of their proposals goes further though than our defence of Bradley (216-19), that public authorities must provide satisfactory 'cogent reasons' in order to reject the findings of the ombudsman; it strikingly asserts that the Parliamentary Ombudsman's findings should be binding unless judicially overturned. We do not think that this is the right approach.

Second, there were leaks of the coalition government's intention to abolish the Administrative Justice and Tribunals Council. This proposal risks removing from the administrative justice system the capacity to provide an ongoing

holistic overview of administrative justice and an approach that was sensitive to the complexities of devolution in this field. As some of our recommendations demonstrate, we are not against rationalisation, but whatever the outcome of the Coalition Government's programme of cuts we would strongly advise that some form of intellectual capacity is retained in the system to provide the holistic overview that we have argued for.

During the conduct of this research we have incurred a major debt of gratitude to all those who have happily given us their time, answered questions and follow-up questions, provided us with material and further contacts, and have been kind and thoughtful hosts to visitors. We thank everyone, in the list below, for their various contributions to our research endeavour.

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Richard Kirkham would like to thank the support and patience of his wife, Coralie, and two daughters who were born during the project. Trevor Buck would like to record his appreciation of the many ways his wife Barbara assisted him during the writing of this book.

Brian Thompson offers his views in this book in an individual capacity and not as a member of the Administrative Justice and Tribunals Council.

Trevor Buck
Richard Kirkham
Brian Thompson

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The Ombudsman Enterprise

In a relatively short space of time the ombudsman[1] has become one of the essential institutions that a constitution should possess. Few countries today operate without at least one ombudsman and the idea has also been experimented with at the global level within regional and international organizations (Reif 2004; French and Kirkham 2010). In some countries, such as the UK and Australia, the concept has been adopted wholeheartedly right across the public and private sector, with the result that for some forms of complaint the ombudsman has become the dispute resolution mechanism of first choice. This rapid evolution of the ombudsman enterprise means that the institution is deserving of reanalysis.

The use of the phrase 'ombudsman enterprise' in the title of our book is not accidental. Although the focus of this book is mainly the developing role and relationships of the UK ombudsman community, we also refer extensively to the ombudsmen bodies in other jurisdictions. According to the context of the discussion, therefore, the 'ombudsman enterprise' may refer to the UK situation or more broadly to the developing and active role of ombudsmen offices in other jurisdictions. In both cases, the word 'enterprise' reflects our general view that has arisen from this study – that the ombudsman community in the UK (and in some other jurisdictions) figures as a much more significant element in the delivery of public services and in our constitutional arrangements than has hitherto been recognized in academic literature. The word 'enterprise' has been used deliberatively to communicate this sense of a proactive approach adopted by ombudsman bodies, and that it is currently a 'work under construction'.[2] It is in this context that this book attempts to examine and analyse the ombudsman enterprise as constituted in the early twenty-first century.

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1 There is some disagreement as to the correct term for the institution (Rowat 2007, 44-5). In different texts reference can be found to ombudsman, ombuds or ombudsperson. This book adopts the predominant term used in the UK, the ombudsman, which continues to be used despite a significant proportion of female British ombudsmen in recent years. The term ombudsman derives directly from Sweden where the first ombudsman was established, once described as 'the best known Scandinavian after Hammarskjold and Canute' (De Smith 1962, 9).

2 'Enterprise' is defined as 'a project or undertaking, especially a bold one' (*OED*).

Although this is a book about ombudsmen, it does not contain a detailed exposition of the various powers and remits of the various ombudsmen that exist in the UK or around the world.[3] Such detailed information can be found elsewhere in a number of commendable texts (Gregory and Giddings 2000; Seneviratne 2002; Kucsko-Stadlmayer 2008). Instead, what this book attempts is an analysis of the technique of ombudsmanry and an evaluation of its potential for growth. The prime reference point is the UK public sector ombudsman community, with the term 'ombudsman' being used to describe fully independent institutions only.[4] Yet the book is partially inspired and informed by developments in both the private sector and outside the UK, in particular in Australia, New Zealand and Ireland, where the ombudsmen operate within very similar legal systems to the UK (Thompson, Buck and Kirkham 2008). The hope is that because the book explores theory and methodology more than technical questions of jurisdiction, it should be useful to ombudsman communities around the world and across sectors.

An underlying argument of the book is that the ombudsman is now an established feature not just of systems of administrative and civil justice, but also of the constitution. In one respect, this is an uncontentious proposition. If the bigger constitutional picture is taken into account then the ombudsman is only one of a range of institutions that have been devised over the years to heighten the accountability of governments to their citizens and, latterly, private bodies to their customers. Where there is a difficulty, however, is in establishing the full strength of the ombudsman's constitutional worth. This difficulty is perhaps more pronounced in the UK than elsewhere, as administrative lawyers generally have struggled to convince the legal community of the importance of their work. Fortunately we have moved on from the 1930s when Lord Hewart, the Lord Chief Justice of England, described administrative law as 'continental jargon' (Hewart 1937, 96). Until recently, however, the subject remained the poor relation of the common law system and it was left to a relatively small cohort of academics to investigate the merits of dispute resolution procedures outside the courts.

The situation is much improved today, not least because there is now an assigned Administrative Court in England and Wales, and few would doubt the constitutional importance of judicial review. Yet amongst legal scholars there remains some division in understanding and appreciation of the role of the ombudsman institution within the wider 'administrative justice system'; the latter notion is itself a contested one (see Chapter 3). In much standard work on administrative law the predominant view of the ombudsman is that it represents an important variant form of dispute resolution. It is a lead example of what

3 Brief summaries can be found in Appendices 1-3.

4 For instance, full membership of the British and Irish Ombudsman Association (BIOA) is only open to those schemes that can demonstrate 'independence from those whom the Ombudsman has the power to investigate. The word "ombudsman" does not have to appear in the title of the scheme.' <http://www.bioa.org.uk/about.php> (accessed 16 February 2010).

has become termed 'alternative dispute resolution' (ADR), which in essence means dispute resolution outside of the courts. In private law too the work of the ombudsman has belatedly begun to gain recognition (James 1997; Gilad 2008), although probably not as much as is merited by the sheer volume of work carried out by the ombudsmen concerned. In political science and public administration circles there has also been much good work done on the ombudsman (Drewry 1997; Gregory and Giddings 2002). The work of a range of ombudsman advocates in the past, therefore, has been successful in raising awareness to the extent that dispute resolution is no longer considered solely in terms of judicial redress.

Although the ombudsman institution has received greater recognition in academic texts in recent years, there is still a tendency for it to appear as a marginal topic and an overwhelming sense that the ombudsman remains an institution inferior to the courts (Abraham 2008c, 541). Others are much more sceptical of the effectiveness of the institution. From the original inception of the ombudsman onwards, there have always been some who have not accepted the notion that a body, largely without enforcement powers, can effectively promote justice. Sceptics within the academic and professional legal communities tend to view with suspicion the inquisitorial method of the ombudsman, placing much greater faith in the more traditional adversarial safeguards adopted through the courts. Today the most vocal critics are dissatisfied users of the ombudsman service who congregate on the internet in organized discussion forums,[5] but in the past distinguished academics have also argued that the entire ombudsman enterprise is a distraction from where real reform should be introduced in the administrative justice system – the courts and the law (Mitchell 1965).

There are those, however, who have consistently presented a much more positive view of the institution. Thus the claim has been made separately that the ombudsman is 'the jurisprudential development' (Lewis 1993, 676) and 'the most valuable institution from the viewpoint of both citizen and bureaucrat that has evolved during' the twentieth century (Pearce 1993, 35). There have also been a considerable number of scholars who have devoted their energies to arguing the merits of the ombudsman institution (e.g. Caiden 1983; Rowat 1985). Others have chartered the extensive twentieth and twenty-first century move towards ever more

5 Take for instance the critique applied by the Local Government Ombudsman Watch organization. 'The objective of Local Government Ombudsman Watch is to motivate others into campaigning for the abolition of the LGO [local government ombudsman] or its replacement with a truly independent local government complaints commission, where no commissioner previously worked as a council Chief Executive Officer. One that doesn't bury complaints and maladministration for their friends and ex colleagues. For the first time, councils will have something to fear when citizens threaten to complain to the local government watchdog.' Available at: <http://www.ombudsmanwatch.org/> (accessed 8 March 2010). See also Local Government Ombudsman (LGO) Watcher [York Office], available at: <http://lgowatcher.blogspot.com/> (accessed 16 February 2010); and Public Service Ombudsman Watchers, available at: <http://www.psow.co.uk/> (accessed 16 February 2010).

sophisticated administrative justice systems composed of a variety of non-judicial modes of redress, including the ombudsman (e.g. Birkinshaw 2010; Mullen 2010). Meanwhile the ombudsmen themselves have worked hard to develop their own profile, as well as improve the ombudsman technique. Perhaps the best evidence of this process can be seen in the work of a series of regional and international ombudsman associations across the globe.[6]

In terms of the sheer number of ombudsman bodies now in operation and the workload that is currently undertaken by them, the argument appears to be moving in the direction of enhanced recognition for the institution. In the UK in 1993, when the British and Irish Ombudsman Association (BIOA) was first formed,[7] there were 14 voting members, three of whom were local government ombudsmen (LGOs). There were also 14 associate members, a category which included complaint-handling schemes, and 19 ordinary members. By 2010 the number had risen to 32 voting members (representing 28 member schemes). There is now also a corporate associate membership divided into the following categories: consumer and professional organizations (3); complaint-handling bodies – large (17); complaint-handling bodies – medium (9); complaint-handling bodies – small (14). There is also an individual associate membership (51).[8]

The expansion of ombudsman institutions has occurred both in the public and private sectors. These are, respectively, those concerned with the administration of government and the delivery of public services funded by the taxpayer, and those operating in the goods and services economy and funded by industry stakeholders (Brooker 2008, 3). Although, as stated above, the focus of attention in this book is the public sector, we agree with other commentators that drawing a categorical distinction between public and private sector ombudsmen is not a helpful approach, and ombudsmen themselves (e.g. O'Donnell 2007) emphasize the features of their offices which are shared rather than those which differ.

> It would be wrong to take too narrow a view of what constitutes the state. For example, the privatisation of a range of public utilities led to the establishment by Parliament of a range of regulatory bodies that may properly be regarded as emanations of the state. There are other regulatory bodies that have been established in such fields as charities, financial services or gambling to which the same applies. Furthermore, as more of central and local government business is

6 See for instance the work of the British and Irish Ombudsman Association (BIOA), the International Ombudsman Institute (IOI), the International Ombudsman Association (IOA), the Australian and New Zealand Ombudsman Association (ANZOA), the Forum of Canadian Ombudsmen (FoCO), the Caribbean Ombudsman Association (CAROA) and the Asian Ombudsman Association (AOA). All these associations maintain websites.

7 The association was initially called the United Kingdom Ombudsman Association but was later renamed to include ombudsmen from the Republic of Ireland in 1994.

8 We are grateful to Mr Ian Pattison (Secretary to BIOA) for supplying details about the membership of BIOA: personal communication 19 February 2010.