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THE OMBUDSMAN, TRIBUNALS AND ADMINISTRATIVE JUSTICE SECTION

Designing an English Public Services Ombudsman

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This article explores the question of how to integrate the ombudsman community in England, a proposal for which there is much support but less agreement on the way forward. It is argued that, in the long-term, successful reform will not occur unless three distinct perspectives on administrative justice are incorporated into the proposal to form a single public services ombudsman for England. This approach points to a set of strong principles that should direct redesign of the ombudsman sector in England in order to establish an institution capable of responding to current and future demands.

Key words: administrative justice; public services ombudsman; harmonisation; public services; redress design.

Introduction

The formation of an integrated Public Services Ombudsman (PSO) for England is a familiar and ageing constitutional reform proposal which has recently reappeared on the radar of the policy making community (eg PASC 2013-14). At its strongest, the proposal entails the harmonisation of multiple schemes and the reconsideration of the powers operated by the ombudsman. Given the potential scale of the project and its need for new legislation, the formation of an English PSO should be considered a major exercise in reform. But major reforms require a high degree of political will to secure implementation and are hampered by the lack of a clear narrative in the administrative justice system as to how such projects should be conducted (Bondy and Le Sueur 2012; Le Sueur 2012). In response to this dilemma this article highlights both the reasons why major reform in the ombudsman sector is necessary, and the different perspectives on administrative justice that should be accounted for within that reform process. It is also argued that a minimalist approach to ombudsman reform will reduce the chances of meaningful reform being implemented. Anything other than a full reform of the sector also enhances the likelihood of it being restructured in a manner insufficiently robust or flexible enough to meet the challenges of the future.

We conclude the paper by drawing together some principles which should inform the creation of an integrated ombudsman scheme. So long as sufficient political capital in the project can be secured, combined these principles have the potential to align the capacity of the ombudsman system with the public service model that has evolved in modern England and in so doing allow it to contribute fully to the promotion of administrative justice.

The English approach to ombudsman design: the first 50 years

The basic argument for harmonisation in the ombudsman sector is that there are multiple schemes in England which do not always map onto the delivery of 21st century public services in a comprehensible, efficient or possibly even effective manner (Sampson 2013). A number of subsidiary claims for harmonisation can also be identified, such as the unnecessary complexity that the existing system presents users of ombudsman services and the potential for the ombudsman enterprise to achieve more than it currently does (PASC 2013-14). In

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short, the time has come to redesign the structure, and perhaps the role, of the ombudsman sector in a manner that is appropriate for the way that public service is delivered today and into the near future.

As bold an innovation as the ombudsman was when the Parliamentary Ombudsman (PO) was first introduced almost fifty years ago, the reason why this debate is occurring now is because the idea of an overall public *sector* ombudsman (a concept which today has largely been replaced by that of a public *services* ombudsman) for either England or the UK was never seriously considered in 1967. This was not an inevitable conclusion given that there was awareness at the time of the need for an ombudsman across many branches of government (Utley 1961; Gregory and Giddings 2002, pp. 33-124).

To be fair to the founders of the original ombudsman in the UK, the practicalities of implementing a bold new initiative into a largely conservative system of public administration meant that even would-be reformers focussed on a restricted model of ombudsmanry in the first instance (Whyatt 1961). The decision not to introduce a general PSO in 1967 partly reflected a widespread concern that the ombudsman would struggle to handle the amount of complaints that would come the office's way. There was also a constitutional desire for the ombudsman to be a Parliamentary office given the historical role of the MP in handling constituency complaints. This aspiration for a connection with Parliament became enmeshed in the question of whether or not MPs should be seen as the gateway to the new institution and fears that the doctrine of ministerial responsibility would be compromised. These debates led to the conclusion that the ombudsman's jurisdiction should be restricted to government departments which were capable of being directly answerable to Parliament through ministers.

The introduction of new ombudsman schemes during the seventies could have been the opportunity for a unified ombudsman to emerge, but instead a trend for bespoke ombudsman schemes became embedded. Tellingly, in proposing a separate ombudsman scheme for local government, the campaign group Justice concluded that 'Parliament would not wish ... to seem to be passing judgment on the manner in which discretionary decisions have been exercised by local authorities' (Justice 1971, para. 21). Likewise, when the Health Service Ombudsman (HSO) was introduced (NHS Reorganisation Act 1973, Part III), although thought was given to expanding the jurisdiction of the PO to cover health issues, adopting the MP filter as the route into complaining about bodies only indirectly accountable to Parliament was seen as problematic (HL Deb, vol.328 cols.419-24 (1972)). The result was that arguments for specialist jurisdictions for local government and health won out over a general PSO (Gregory and Giddings 2002, pp. 493-515). Over the following two decades, as different government departments were forced to address the demand for complaint systems, new specialised schemes were introduced for policing, housing, prison and probation services and for complaints against other branches of government, such as the Department of Work and Pensions and the Inland Revenue.¹

From the outset, the bespoke model of the ombudsman drew criticism (Select Committee for PCA 1979-80). The potential for a diversity of ombudsman schemes to cause confusion to the public was noted, as was the likelihood of complaints being made that would require investigation by two or more ombudsman schemes. By the nineties a proliferation of ombudsman schemes existed in both the public and private sectors and the benefits of harmonisation had become mainstream thinking, not just in academic circles, but within government (Cabinet Office 2000) and the ombudsman community (*Ibid*, Annex A). The amalgamation of eight existing schemes into the Financial Ombudsman Service (Financial Services and Markets Act 2000, Part X) raised the possibility of two super-ombudsman schemes being established to cover the public and private sector worlds (FSA 1997, pp. 9-10). Indeed, a Cabinet Office report concluded in 2000 that the three leading public sector

ombudsman schemes in the UK should be merged and that the opportunity should be taken to amend and update various legislative features of the existing ombudsman design (Cabinet Office 2000, pp. 5-6).

Whilst seen as insufficiently bold by some, the Cabinet Office report's core themes were almost universally welcomed and a consultation was subsequently conducted on its recommendations (Cabinet Office 2000a). But a series of significant questions were left open by the report, questions which any future integration effort would be required to confront. Perhaps the most important of the issues left unresolved was the lack of clear direction or analysis of the impact of devolution. The Cabinet Office report proposed that the harmonised ombudsman scheme could be situated within the one commission, but such a solution went entirely against the logic of devolution.

With the government citing the pressures of obtaining Parliamentary time the integration idea was dropped in favour of more quickly realisable goals (PASC 2002-03; PASC 2002-03a). Following further consultation, in 2007 a much less ambitious reform measure, the Regulatory Reform (Collaboration etc Between Ombudsmen) Order 2007, was introduced in an attempt to deal with the jurisdictional overlaps between the three leading ombudsman schemes with an English jurisdiction. Yet despite the Order, the goal of harmonisation remains stubbornly prominent in the list of reforms most regularly cited as necessary in the ombudsman sector (AJTC 2012).

Why has ombudsman reform proved so difficult in England?

The most often advocated solution to the problems of the English ombudsman sector is the unified ombudsman model, as has been introduced in Scotland and Wales (The Scottish Public Services Ombudsman Act 2002 and the Public Services Ombudsman (Wales) Act 2005) and is planned in Northern Ireland (Committee for the Office of the First Minister and deputy First Minister 2013). Other countries too tend to favour a general purpose ombudsman over the specialised ombudsman model, which is dominant in England. Yet to date reform of the network of ombudsman schemes in England has proved elusive. Three background factors help explain this apparent inertia in decision-making.

First, as the above historical outline illustrates, the design process in the ombudsman system in England has often been dominated by tangential concerns about the ultimate location of constitutional authority, rather than a holistic vision of administrative justice.

Second, the UK has historically lacked a centralised coordinating focus point in the administrative justice system to drive forward an agenda such as ombudsman reform. It might be thought that the Ministry of Justice would be the natural home for administrative justice issues generally and redress mechanisms in particular, but in practice that role has always been spread around separate government departments. For instance, the responsibility for legislation on the Parliamentary Ombudsman lies with the Cabinet Office and for the Local Government Ombudsman (LGO) with the Department for Communities and Local Government. A consequence of this organisational structure is that, absent of a focus point, a natural bias has been generated in the administrative justice system towards function specific, as opposed to holistic, solutions.

As noted above, however, it is not as if the government or the ombudsman sector has been unaware of the risks, difficulties and inefficiencies caused by the existence of multiple bespoke schemes. For some years there has been sufficient agreement as to the respective goals of harmonisation and reform to suggest that a temporary coordinated initiative could be constructed to take forward the project. This leads to the third key explanatory factor which obstructs ombudsman reform, which is that ombudsman schemes are generally legislative creatures, an attribute that offers protection but also places significant obstacles in the way of

would-be reformers. This last point is particularly pertinent when we consider the practicalities of implementing reform of the ombudsman sector.

Co-operative reform

Of the procedural options for reform a number exist, each requiring differing levels of input from varying numbers of participants.² The least intensive version of reform, and the easiest to implement, would involve enhanced practical cooperation between existing ombudsman schemes within current legal arrangements. A strength of the cooperative approach is that it enables those stakeholders most aware of the need for reform, namely the ombudsman schemes themselves, to take the initiative and control both the pace and direction of change. Within the cooperative approach, the need to rely upon the impact of government departments can also be kept to a minimum, provided that the ombudsmen operate within the law.

Up to a point, the cooperative approach is viable, as legislation does allow for a significant degree of flexibility in the operation of ombudsman schemes. Indeed, this approach to reform is a long-standing feature of the ombudsman sector. Ombudsman schemes share ideas, information and best practice all the time, through such forums as the Ombudsman Association and the Public Sector Ombudsman Group. Through further co-operation, perhaps, better connectivity could be established between ombudsman and complaint-handling schemes, as well as with regulators. It might even be possible to form a shared customer service centre to receive complaints. But although more progress in the English ombudsman sector could probably be made through enhanced cooperation between ombudsman schemes, there are limits to what can be achieved.

A key practical limitation is the different legal provisions in place for each ombudsman scheme. For instance, most schemes have subtly different requirements for the submission of a complaint and varying processes for dealing with, resolving and reporting on complaints. Even if such technical differences in legislation can be worked around, the effort in doing so will always be less efficient than a single PSO solution. More significantly, there are major restrictions in existing legislation which go to the heart of arguments for reform in the sector and which could not be overcome through the cooperative approach alone. In other words, where it is outdated legislation that enshrines the most significant weaknesses in the ombudsman sector, the cooperative approach is not capable of matching the potential implicit with the single ombudsman solution backed up by a fresh Act of Parliament.

Incremental change

If legislative amendment is required then government must be more firmly engaged in the process of reform in the ombudsman sector, which immediately presents problems. Engaging government effectively is particularly difficult to achieve both because of the lack of a coordinating focal point for administrative justice issues in Whitehall and the high competition for legislative space in the Parliamentary timetable. But two potentially effective methods of reform do exist to get around such difficulties, which combined could be used to alter incrementally the legal framework within which ombudsman schemes operate. The first is to use the government's residuary powers to issue regulatory orders to amend existing legislation, which is what happened with the Regulatory Reform (Collaboration etc. between Ombudsmen) Order 2007. This Order was introduced primarily to allow for different ombudsman schemes to collaborate on investigations that cross over the jurisdiction of more than one ombudsman scheme. The second method is to attach new ombudsman provisions on to other items of primary legislation that the government plans to introduce. This latter tactic has occurred on a number of occasions in the ombudsman sector. For instance, in recent years

the powers and jurisdiction of the LGO have been altered by amendments contained in the Local Government and Public Involvement Act 2007, the Health Act 2009 and the Education Act 2011.

What might be termed incremental legislative amendment can make a difference to the powers and remit of an ombudsman scheme. But in terms of addressing the core arguments which underpin the need for a single public services ombudsman it is doubtful that they can have more than a limited impact. With regard to the 2007 Regulatory Reform Order, this outcome is hardly surprising as it was only ever designed to address part of the core arguments for harmonisation and no clear strategy was laid out for anticipating future reform measures which might address additional shortcomings in the sector. Further, as was specifically noted by the government when the Regulatory Reform Order was introduced, the powers of delegated regulatory reform are not appropriate for more fundamental measures that would change the purpose of the original Act. One such example is the removal of the MP filter for the Parliamentary Ombudsman scheme, but others exist, such as granting ombudsman schemes the power of own-initiative inquiry.

Tagging ombudsman reform measures on to Bills already going through Parliament potentially has a much more powerful impact than regulatory reform orders, as for instance demonstrated by the recent amendments to the LGO's legislation. Through these amendments, the LGO's jurisdiction has been altered; the process for submitting a complaint has become more user-friendly; the ombudsman's practice of concluding complaints informally and providing guidance on good administration have been clarified in law; and the ombudsman now has the power to consider service failure as a ground for finding against a local authority. All of these amendments were significant gains but without an overarching strategy of reform, in terms of the ombudsman sector as a whole, the end product of such opportunist legislative revision has been to refine and alter its existing complexity and inconsistency rather than tackle directly the problems that complexity causes.

Major reform

In contrast to such relatively small scale attempts at reform as outlined above, a full response to the calls for harmonisation and reform in the sector would almost certainly require a new ombudsman focussed Act of Parliament. Given the range of issues that could potentially be dealt with, such an approach would amount to a major exercise and possibly entail a paradigm shift in thinking on the methodology, organisation and purpose of the sector (Le Sueur 2012, pp. 19-20). This scale of ambition would encounter a number of natural barriers.

One challenge would be overcoming considerable engrained bureaucratic self-interest. For the harmonisation of ombudsman schemes to be achieved a series of affected parties would have to be either persuaded, or forced, into accepting the reform. Of the schemes that would most likely be involved in the formation of a PSO, currently both the LGO and the PO/HSO have publically expressed interest in the idea of an English PSO, as did some of their predecessors. But to be implemented other parties would also have to be involved and their interests recognised, in particular a whole range of public service providers and several government departments. The scale of the ombudsman community's interaction with public sector provision means that within any reform effort there will be much potential for resistance and protectionism. For instance, the local authority community has often expressed support for the work of the LGO (LGiU 2013) and might have practical and constitutional concerns about the LGO being seen to be integrated into a larger parliamentary ombudsman scheme. Similarly, MPs have been traditionally reluctant to allow direct access to the Parliamentary Ombudsman.

Harmonisation would also have to tackle significant constitutional debates. The MP filter debate is so intransigent because it touches upon the role of Parliamentarians in the UK

constitution, but possibly a more sensitive issue still is how to handle investigations currently dealt with by the UK Parliamentary Ombudsman but which relate to Northern Irish, Scottish and Welsh citizens. The number of such complaints resolved by the Parliamentary Ombudsman is relatively small, but the symbolism of an English Ombudsman being empowered to resolve the complaints of non-English residents would contradict the devolution settlement (Elliott 2006) and probably lead to resistance if attempted.³

Perhaps the biggest challenge facing would-be reformers, however, is that once ombudsman legislation is being rewritten for the purpose of harmonisation, it opens up the possibility of additional reforming measures being introduced. But how far should this process go in introducing new functions or removing existing powers? A whole array of new potential solutions exist. Depending on the levels of trust of the various stakeholders in those in charge of the reforming process, the prospect of a bolder or a more timid model of ombudsman being introduced might be a good reason for some not to embark upon the reform route at all.⁴

A final factor to consider is the simple matter of politics and the priorities of those driving the legislative agenda. It is an inconvenient truth that administrative justice reform rarely makes it to the top of the ministerial agenda unless it involves saving money or can be demonstrably linked to a programme to improve public services. But for major reform in the ombudsman sector to occur significant government energy would have to be committed to the project. The Scottish and Welsh experience with reforming the ombudsman sector demonstrates that this task is surmountable. However, in Northern Ireland, despite widespread agreement on the benefits of harmonisation since at least 2004 (Thompson 2006, p. 281), new legislation has yet to be passed. This latter experience illustrates the challenges in introducing even relatively uncontentious reforms in the administrative justice system.

Using an administrative justice centred approach to drive ombudsman reform

Of the options for implementing reform in the English ombudsman sector outlined above, the cooperative approach is not capable of solving the core problems that need to be addressed. By contrast, incremental reform might help alleviate the worse problems associated with the current English ombudsman sector, but will only achieve the sort of results aimed for from the agenda for a single public services ombudsman if set within an agreed wider strategy. Such an agenda does not exist at present. Attempting a full reform of the sector through fresh ombudsman legislation offers the most potential, but is by far the most difficult route.

The harmonisation of ombudsman schemes, therefore, is a ‘wicked’ problem (Grint 2009, p. 11) in which most of the key stakeholders can recognise the merits of change but the lack of a central focus of authority within the administrative justice system to drive the agenda forward hampers the coordination of that energy. Even if sufficient momentum could be created there exists a myriad of conflicting concerns that provide a strong incentive for one or more parties to disengage from the process. Such disengagement reduces the likelihood of meaningful reform being introduced but in addition the chances of unwanted side-effects occurring are increased if the various concerns involved are not properly addressed at the outset.

Despite the difficulties, in this section we consider what a fully rounded approach to thinking about ombudsman reform would look like. We argue that to combat the problems of the English Ombudsman sector either a major exercise in redress design is required or a series of smaller initiatives should be proposed set within a well worked out framework of principles.

Unsurprisingly, we suggest that the starting premise for undertaking reform in the ombudsman sector should be that the ombudsman is designed with the core objective of contributing to the delivery of administrative justice (Buck et al 2011, chs. 2 and 3; Gill

2014). This chimes with standard works on the ombudsman and the White paper that originally introduced the ombudsman to the UK with its vision of humanising bureaucracy. Although an uncontroversial premise, the challenge in choosing the goal of administrative justice as the launch pad for redress design is that the concept is short of substantive meaning. Thus the public may expect ‘justice’ to be delivered by public sector providers (Kagan 2010, p. 161), but it is improbable that a theory could be devised that could explain the substantive meaning of administrative justice in every instance of administrative decision-making. Instead, the idea of administrative justice captures a wide variety of competing values and aspirations, about which there will always be contested interpretations of fact and policy viewpoints at play, and limitations on the resource capacity of administrative agents to deliver (Adler 2010, pp.132-3). Even human rights jurisprudence has limits in its ability to order these various polycentric challenges to public service provision.

In response to this apparent relativity of values, therefore, administrative justice is ordinarily understood to be upheld through an extended series of procedural protections which aim to ensure that all relevant interests are properly factored into decision-making. Thus there are processes that oversee the manner in which laws and rules are made; administrative discretion is exercised; citizens acknowledge or resist those decisions; and the veracity of those decisions are checked, reviewed, amended and verified (eg Adler 2010; Scott and Halliday 2013; AJTC 2012).

This expanded conception of administrative justice is not uncontroversial, as it risks diluting its core meaning.

[S]uch broad definition may, in fact, mask the extent to which administrative justice (in England and Wales, at any rate) has been allowed to change in response to differing pressures and drivers, at times leading to contradictory principles being promoted, making it increasingly difficult to understand and articulate the roles of the various institutions and the principles that govern, or ought to govern, their operations (Bondy and Le Sueur 2012, p. 4).

Nevertheless, when thinking about what the goal of administrative justice means for ombudsman reform, the broad approach can be justified on the basis that it matches the real experiences of citizens attempting to secure what they perceive of as justice (Mullen 2009, p. 2). This is so largely because it is illogical to construct goals for a dispute resolution mechanism without reference to the nature of the administrative decisions that it is charged with investigating, the influences behind those decisions, the processes employed and the viewpoints of users. Without proper alignment to the forces and criteria by which services are provided, external redress mechanism, such as the ombudsman, are likely to have only a limited impact on administrative decision-making and the promotion of desired administrative justice goals (Adler 2003; Hertogh and Halliday 2004). An alternative risk is that inappropriate values will be imposed on public service providers which will compromise the core goals that they are responsible for delivering (Ison 1999).

To facilitate a coherent response to ombudsman reform, therefore, here it will be argued that when conducting major redress design an approach is required that is transparently informed by a diversity of procedural perspectives on administrative justice. This can be achieved by taking into account three distinct, albeit overlapping, models of administrative justice. These three models are introduced here and referred to as the ‘pragmatic’, the ‘radical’ and the ‘constitutional’. In essence, what these models describe are the pragmatic forces that drive policy on administrative justice, the practical impact of the delivery of that policy on administrative justice and the constitutional safeguards within which the administrative justice system should ideally be delivered.

The pragmatic model of administrative justice

The first unavoidable factor that needs to be incorporated into any reform of the ombudsman sector is the power the prevalent administrative justice model retains in the executive. The experience of users of public services is that administrative justice is largely implemented by a complex array of hard-pressed service providers, some public and increasingly many private, using what discretionary power they possess to juggle the demands of restricted budgets, diverse targets and the expectations of citizens (Adler 2003). This dynamic picture of public service delivery suggests that the meaning of administrative justice is often fluid and context dependant on the circumstances found at the administrative coal-face. Indeed, this influence of the ‘administrative coal-face’ can be found in the work of ombudsman schemes themselves, making decisions on a daily basis that impact on the real delivery of administrative justice.

But notwithstanding the work of a range of service providers and dispute resolution mechanisms, overseeing the operation of the administrative justice system the UK constitution endows large scale power to Parliament and the executive to set the framework within which administrative justice is delivered, commensurate with the demands and the politics of the day. Through this power different cultures of decision-making can be imposed or encouraged from above (Halliday and Scott 2010). Ultimately, therefore, administrative justice remains under the control of the executive, subject to whatever checks and balances it has conceded or Parliament has imposed, including the rule of law and a range of redress mechanisms and regulators.

The background influence of the executive on administrative justice in the UK dictates that for major reform to happen would-be reformers are required to build into their efforts a proper appreciation of the strategic drivers which dominate government thinking. This practical reality is illustrated by past efforts to harmonise or reform the English Ombudsman sector. In this sector the challenge has always been to engage government in the merits of reform and then to retain sufficient momentum behind the project to implement proposals. Without such support only relatively small-scale and incremental improvements can be made, as evidenced by the 2007 Regulatory Reform Order. By contrast, any significant reform of the ombudsman sector in England will have to be managed by the government as it will involve fresh legislation. Yet Parliamentary time for new legislation will only be found if a government is persuaded that various discrete and/or short-term measurable solutions exist that appeal to its overall strategy.

But although focussing on the government-related benefits of reform might be an effective strategy to secure reform, unless channelled through a specific government organised commitment to administrative justice as a whole, the risk is that it encourages issue-specific and incremental policy-making to occur in silos. The very pragmatic evolution of the various ombudsman schemes in England is strong evidence of the inefficient legacy of this approach to administrative justice reform (Gill et al 2013, pp. 9-13). Hence, considering ombudsman reform through the pragmatic lens of the current administrative justice system, by itself, offers a limited framework through which to conduct reform, as it inevitably favours consideration of the short-term objectives of either the government or the institution implementing the process. The design of the current system also does not encourage the systematic consideration of the wider consequences of reforming one branch of the administrative justice system on other branches.

The radical model of administrative justice

What is referred to above as the ‘pragmatic’ model of administrative justice is dominant, as it is entrenched in the constitutional DNA of the UK, but it offers a very unambitious framework for reform. For the long-term success of the project, therefore, major reform should pay due consideration to other approaches to administrative justice.

What we term here the ‘radical’ model is less a single model of administrative justice and more an approach to thinking about the subject that challenges the status quo. The radical model starts from current practice, is as far as possible based on empirical evidence, and is the model most closely connected to the everyday experience of public services today. A radical approach to administrative justice, therefore, is one that is grounded in contemporary notions of the public good and is closely aligned to the socio-economic and political context of the public domain in which administrative justice is delivered. Within this approach, questions as to how justice *is* achieved and *for whom* are fundamental and more important than what the system may have been originally designed to deliver. What it requires of reformers is an evidence based process that properly considers the impact of current systems before offering solutions.

The strength of viewing administrative justice through the prism of the radical model is that it allows would-be reformers to address squarely the question of whether or not current arrangements are fit for purpose. Ideally, within a major reform process there should be an attempt to break away from existing solutions and ask provocative questions about the aims and purposes of administrative justice, free from standard mantras or current political fashion. Without such a willingness to engage in radical thinking there is a risk of stagnation in the administrative justice system, as the institutions within it become increasingly less and less relevant to the needs of the day. This risk is enhanced in the case of administrative justice, given the relative rarity in which systemic reform in the sector occurs.

Despite being sometimes contentious, the radical model provides us with a rich store of ideas with which to advance the cause of administrative justice, ideas which should be considered and responded to within a major exercise in reform.

The Constitutional model of administrative justice

Despite its tendency towards piecemeal reform, the British constitution is capable of embracing radical new ideas, provided that the government can be persuaded of their merits. For instance, the introduction of both the Parliamentary Ombudsman and the Citizens Charter illustrate that radical solutions can be adopted as a pragmatic response to public policy concerns. These solutions, embracing as they do the right of citizens to complain, have gone on to become permanent features of the British constitutional settlement.

But there is an inherent danger that the mixture of the pragmatic and radical approaches towards administrative justice reform alone could foster an unconstrained focus on innovation, at the expense of fundamental constitutional understandings. Within any major reform process, therefore, there should be an off-setting safety net that ensures that lessons from the past are not overlooked and overriding constitutional objectives are not side-lined by a narrow focus on perceived problems and short-term objectives. Such a safety net is provided by the constitutional model of administrative justice which describes the way that observers and institutions have tended to rationalise the administrative justice system and embed certain values within it to form a settled order. Whereas a radical approach to administrative justice generally argues for change to enable the delivery of a better service to individual citizens, the constitutional model seeks to embed and protect certain safeguards in the administrative justice system. In particular, the purported value of the constitutional model is that it entrenches into the foundations of administrative justice provision a fair relationship between the individual citizen and the government of the day, in line with the basic principles of the British Constitution.

That the constitutional model operates in the administrative justice system is largely evidenced by the manner in which built into the rule of law and the practice of a range of institutions certain administrative principles have taken hold that it would be extremely difficult to deny. Thus even though British constitutionalism endows each new Parliament

with remarkable power to introduce change, properly applied, the constitutional model of administrative justice provides a template of standards against which changes to the provision of administrative justice can be evaluated (Le Sueur 2012, p. 17).

A framework for considering ombudsman reform

What is being argued for in this article is that major reform in the ombudsman sector is necessary to address the underlying problems of the sector, and that this exercise should be constructed as a process within which competing visions of administrative justice are discussed side by side. Inevitably there will be tensions in the process, but if any reform is to be effective in finding long-term workable solutions it must integrate all perspectives.

In this section we apply this broader way of thinking about administrative justice reform to work through the key issues that should direct reform in the ombudsman sector, before arriving at a set of principles that come out of that reflective process.

Step One: identifying the pragmatic drivers for change

Given the costs of effecting change and its relatively low political profile, major redress design in the administrative justice system must address the pragmatic drivers for change which are likely to attract government attention. With regard to the harmonisation of ombudsman schemes, there are arguably three such primary drivers, which connect very closely to current government agendas.

First, the reduction of public expenditure and an increased focus on value for money looks likely to be an ongoing feature of government policy for some time. The LGO, for instance, is currently managing a 35% cut in expenditure (LGO 2012, p. 4). So far the pressure on budgets in the ombudsman community has largely been pursued through existing institutions, but as noted in a recent evaluation of the LGO:

[a]ny further radical budget cut to the LGO would test the store of energy and commitment in the organisation to its limits, and would likely lead to a situation that the LGO would no longer be able to meet the standard of effective and expeditious complaint-handling for the scale of functions that it currently is responsible for (Thomas et al 2013, p. x).

This background pressure suggests that within the current budgetary climate, more radical solutions, including harmonisation, will become inevitable (Gordon 2013, paras. 25-35).

Second, there is a growing body of evidence that there is dissatisfaction with current arrangements for complaints handling (Simmons and Brennan 2013; PASC 2013-14) and that complainants expect more from ombudsman schemes and better access to justice (Buck *et al* 2011, ch.4; Gill *et al*, 2013, pp. 15-22). A particular problem is the overall structure of the administrative justice system, which has become unnecessarily complicated to anyone navigating a route to redress through the current 'complaints maze'. Pragmatic incrementalism is largely the cause of such complexity, not least in creating additional routes to redress in response to changes in public service delivery. By contrast:

[t]he direction of travel for the provision of services across all Whitehall departments and local authorities is towards integration, increasingly blurring the lines between services. This is most visibly demonstrated by the new government website, which brings all departments under one online roof creating a single point of access and demonstrating a joined up approach. The argument is that it is more effective, more efficient, better value and easier to understand for the user (Gordon 2013, para. 26).

Simultaneously, the Coalition Government is pursuing an agenda of open public services, which involves localising service delivery and making increased use of a diversity of providers (Cabinet Office 2013). To assist in facilitating this agenda and offering meaningful support to users of services, complaint processes will need to be flexible enough to oversee complaints that cross over traditional public service boundaries and the increasingly integrated nature of governance. But it is questionable whether current arrangements provide citizens with either a user-friendly or an appropriate set of redress opportunities.

Third, such a confused landscape not only creates a barrier to justice but also fails to address the need for more effective public accountability in a consumer democracy. The focus here should be on enhancing democratic accountability, particularly local democracy as the ‘localism’ agenda implies. But the need for improved redress mechanisms to bolster existing regulatory and accountability mechanisms is strong. An erosion of public confidence in the complaints system as a whole, such as demonstrated in the large scale public outrage in response to failures in public services (Francis 2013), has led to an urgent need to once again legitimise the authority of the ombudsman pillar of administrative justice. This issue has become difficult for the government to ignore, culminating in the Minister of State’s 2013 promise to review the coordination of practice in the complaints branch as part of his responsibility in the Cabinet Office (PASC 2013-14, pp. xx).

The fundamental principle that users and their interests are central to administrative justice, and that the system should enable people to challenge decisions and seek redress (AJTC 2013), is supported by the findings of a series of reviews into public service provision. In particular, the Francis Report (Francis 2013) delivered the most challenging criticism of failure in complaints handling in relation to one particular hospital trust, but echoed earlier inquiries calling for a more responsive system (eg Smith 2003). The key message from Francis was that consumer voice leads to better public accountability and service improvement. If the hospital under scrutiny had made it easier for patients to make their voices heard in relation to concerns in the quality of care, and had listened and acted upon those concerns, then service failures could have been addressed at a much earlier stage.

Step Two: Ask radical questions about the real needs of users

The drivers of efficiency, enhanced consumer service and improvements in public accountability are themes closely aligned to this and past government strategies on administrative justice. But in order to meet the challenges posed by these drivers for change, it is necessary to factor in properly the administrative justice context in which ombudsman schemes now operate. By doing so, rather than providing short-term responses which store up problems for the near future, radical solutions can be considered which are an accurate reflection of, and relevant to, the current socio-economic and political context.

Applying the radical approach to the ombudsman sector requires asking first what has changed in the delivery of administrative justice since the older ombudsman schemes were introduced, before then asking what needs to be done to realign the ombudsman enterprise with the current landscape. In this respect, at least three major paradigm shifts in public services have occurred which undermine the existing legislative design of ombudsman schemes in England.

The first is the tendency for the public today to see themselves as consumers of public goods, benefits and services in a ‘transactional’ relationship with the local and central state (and those bodies providing services on their behalf), rather than as citizens. The changes in public expectations of public services from the 1980s onwards - from compliant recipients of a post-war welfare state to the current onus on customer-focused rather than producer-driven services - is well documented (Burton 2013). This shift has been encouraged by the increasing tendency for goods, for example adult social care, to be purchased directly in a

privately funded relationship designed to enhance consumer choice of provision in local market economies. This trajectory of public policy reform has been in place over successive governments, and has led to a prevalent understanding that taxpayers who fund public services regard themselves as customers and expect a customer-focused service (Burton 2013, p. 88).

The second paradigm shift in administrative justice is the ever increasing delivery of public services by private providers, in particular in health and social care, as well as education and housing. In what has become a multi-agency delivery environment, the public interest in the fair allocation of scarce resources (in terms of statutory duties to provide), especially to the most vulnerable, remains a key administrative justice consideration. Yet unlike with public service providers, the individual user cannot rely upon the ballot box to call the private provider to account. Hence, this shift towards private sector provision has left a deficit in accountability and reinforced the need for redress mechanisms which can achieve an effective remedy. Increasingly the pressure is for remedies capable of dealing with service failure, as well as procedural fairness.

The third shift is the complexity of the regulation of public services today. The increasing use of private sector providers has not led to full de-regulation. Instead, regulatory systems are designed to accommodate the need for lighter-touch (and less expensive) central inspectorates, whilst maintaining regulatory frameworks which provide public confidence and assurance in a mixed economy of state and private provision. But light-touch regulation risks failing to reassure the public that the diversification of public service provision has not led to the endemically inconsistent provision of administrative justice. To compensate for this risk, part of the solution is the added confidence in a system that can be provided by the timely and effective local resolution of complaints. Further, as the Clwyd Report into complaints systems in the NHS demonstrated (Clywd and Hart 2013), such confidence will be difficult to secure without the potential for speedy escalation of the dispute to an independent body. This requirement for individualised justice has always been present, but in the current regulatory context there is arguably a heightened need for service providers to comply with standards within a framework which guarantees access to justice and holds providers to account.

The remit of Healthwatch, the new body established to support local complaints handling in health and social care, provides further evidence of this consumer focused approach to administrative justice. Healthwatch aims to reinforce the 'rights and responsibilities of the consumer', with a mission to be the 'national consumer champion' and to influence the design and delivery of services, as well as ensure that local insight has national impact.⁵ Likewise, it is now being proposed that local authorities, who have a statutory duty to provide an independent complaints advocacy service for health, should widen this role to include social care,⁶ a role that should arguably extend to cover all aspects of public service delivery aligned to the local council scrutiny function. In response to the Clwyd report, the Local Government Association has also committed to support local councillors as advocates for complainants and scrutinisers of local services. An increased role to support consumer rights sits comfortably with the local authority role in consumer protection which has traditionally provided a route of redress through the courts to ensure public health and safety.

This call for a better focus on local resolution is balanced by a recognition of the need for a more effective feedback mechanism to regulators who need to continue to secure an appropriate and robust standards framework. Both elements are needed to secure consistent and comprehensive administrative justice which covers both the statutory duties and functions of public bodies and the private and independent providers acting on their behalf. The Care Quality Commission, for example, has committed to developing the way it uses complaints' information to assure the quality of services (Care Quality Commission 2011).

A radical approach to administrative justice recognises that these three significant changes in the context of public service provision – namely the needs of consumers, the increasing privatisation of services and new forms of public accountability - cumulatively drive an increased public expectation for responsive services, which are designed and delivered with the service user in mind. Consequently, services are expected to be transparent and open, as well as capable of offering timely redress and changes to practice when concerns are raised. Neo-liberal concepts of privatised consumerism now permeate the democratic relationship in which the statutory duties and powers of the state are exercised. An ‘I want my money back’ culture cannot be disregarded in the forms of administrative justice which are required to address service failure, as much as procedural fairness. Indeed, safeguarding administrative justice should be regarded as one of the key mechanisms by which government regulates a market economy of public services designed to deliver increased choice and personalisation.

The most radical challenges to thinking on administrative justice in recent years flow from this dynamic shift in the foundations of the administrative state. Looked at through the prism of this changed administrative justice environment, it can be easily understood why the current ombudsman sector struggles to respond in full. The Francis report, already mentioned, has highlighted the cultural lack of seriousness given to complaints in the current system, a view echoed in a recent Parliamentary inquiry. But in a similar vein, other recent reviews have found that the Health Services Ombudsman was operating too far removed from local resolution (Clywd 2013) and that the LGO was unresponsive and taking too long to complete investigations (Communities and Local Government Committee 2012-13). In short, the role of the ombudsman in supporting local redress mechanisms should be focussed on real-time resolution, rather than time-consuming retrospective redress.

Cumulatively, it has become increasingly evident that the existing legislation allows for a structure which is too inflexible when compared to the modern landscape of administrative justice. Further, the ombudsman method is too procedurally formal in places and does not allow sufficiently for the ombudsman to be proactive. Thus radical approaches to complaint systems focus on the interests of the aggrieved party aggressively by seeking ways to make it easier for grievances to be registered and resolved, with all the current potential of modern information technologies deployed to enhance the ‘consumer’ experience. As a minimum, citizens should have access to a one-stop shop at which all grievances can be registered, with this one-stop shop capable of delivering a triage service to advise, assist and redistribute the grievance to its most appropriate home (PASC 2007-08, para. 42).

Some would go further. The most radical of all arguments is to proclaim that when a citizen challenges the appropriateness of the service they have been provided with, they should be entitled to a clear and all-encompassing process of redress as appropriate to the circumstances (Merricks 2010, p. 249). If necessary existing legalistic barriers to joined-up dispute resolution should be removed as what matters most is the resolution of grievances, whether by the adoption of one of a range of alternative dispute resolution techniques or through more formal processes. It has even been argued that to service the expectations of the citizen, existing distinctions between appeal and complaints processes should be removed (Dunleavy et al 2010, p. 421).

Developments at the ‘coalface’ of administrative justice should ideally be backed-up by an appropriately designed ombudsman system. The risks of not repositioning the ombudsman to meet the public services context of the 21st century are extensive. At a time when austerity measures have imposed limitations on access to justice through the courts, reduced budgets are resulting in greater rationing of welfare benefits and service provision and the public service delivery chain is more complex than ever, the need for a clear and accessible route to redress through informal independent dispute resolution has never been more important. In this context, the focus of public policy should be on enhancing consumer rights and consumer

protection. Such goals should be mirrored in any attempts to reform the ombudsman sector and necessarily this will mean going beyond isolated incremental measures.

Step Three: Establishing radical solutions which meet constitutional norms

It is generally accepted that the ombudsman sector needs to be restructured (PASC 2013-14a) and various different solutions have been mooted. There is not the space here to explore all potential reform measures but two generic sets of issues flow from the goals raised above and where appropriate need to be reconsidered within current constitutional norms. The measures discussed here would all be of value in addressing the leading administrative justice agendas of the government and better reflecting the landscape of the changing administrative justice system.

Refocussing the ombudsman's core role: The evidence from recent reports on complaint systems suggests that the ombudsman's role as a complaint-handler and a genuine point of accountability remains essential. As local complaint systems alone struggle to enhance trust, any proposal to reduce the ombudsman's complaints-handling role (DoE 1995) would contradict standard constitutional understandings of the role of the ombudsman, which in the EU Directive on alternative dispute resolution for consumer disputes was confirmed as an independent complaints-handler.

More boldly, what should be at issue in any reform is the potential for the ombudsman to move beyond this role to offer a more powerful contribution to administrative justice which would tackle some of the pragmatic drivers for change identified above. Here there are a series of measures that could strengthen the ombudsman's capacity.

First, as in Scotland, the ombudsman could become a standard setter for complaints handling for all public bodies (Public Services Reform (Scotland) Act 2010). This role could be dovetailed in legislation with the role of relevant regulators, such as the National Audit Office and the Care Quality Commission, to audit compliance with the complaint standards set.

Second, the pursuit of administrative justice would be strengthened further if there was a champion and voice for the administrative justice system (as opposed to the individual). Effective systems are often the outcome of effective leadership, for which role the PSO would be the most obvious candidate. The PSO could have a duty to submit a report to Parliament on the quality of administrative justice provided within the complaints branch and the impact of complaints on strategic decision-making. As part of this role, the PSO might have a duty to report to Parliament on all refusals of public service providers to implement recommendations made by complaints handlers.

Third, in this latter respect, one reform proposal that might require a revision of the current standard conception of the public sector ombudsman is the need to adjust the ombudsman's powers to take into account the enhanced use of private sector providers. Against private sector providers at least, consideration should be given to granting the PSO the discretion to seek judicial enforcement of recommendations and recover the costs of investigating complaints about non-public bodies from the providers themselves. Such measures would reduce the burden on the public purse and help to ensure that all providers are accountable.

Fourth, there is an urgent need to find ways to enhance the capacity of the ombudsman to interact with regulators and service providers to identify areas where improvement is required. The ombudsman is well-suited to being the body that pools together the messages coming out of the complaints process and disseminating the lessons to be learnt from complaints. There are bold models of ombudsmanry elsewhere in the world that could be reflected upon, with a reoccurring proposal that the ombudsman should be endowed with a power to launch investigations even before a complaint is received or to continue investigations long after the

original complaint has been resolved. A corresponding duty could be placed upon the PSO to refer issues to the appropriate regulator where it is felt that the regulator is in a better position to pursue systemic improvements.

Mapping the 'new' ombudsman to the administrative terrain: Given the modern day multi delivery model of public services, the rationale for the harmonisation of a number of ombudsman schemes is hard to resist, although the extent of that integration and the corporate governance arrangements that would be required to manage and call to account the PSO is beyond the scope of this article. Harmonisation should still allow for the delivery of ombudsman services to be managed through specialised branches within the PSO, but it would have the potential benefit of dramatically raising the profile of the ombudsman enterprise, securing significant economies of scale. If sufficient economies were made the regionalisation of ombudsman offices might become a realistic possibility, a goal which could enhance ombudsman efforts to 'localise' justice and work with service providers to promote learning from complaints (Dunleavy et al 2010).

A primary goal of integration should be to enhance public access to and awareness of the ombudsman. The right to complain directly to the PSO about all but specifically exempted public services should be enshrined in law and consideration of human rights concerns should be expressly brought within its remit. The new ombudsman could be given the duty to be responsible for promoting the office to all sectors of the public; to ensure that there is a centralised source of information and advice about all public service complaints in England; and, as with the Public Sector Ombudsman for Wales,⁷ to establish a single portal for complaints about public services. Simultaneously, the duty of all providers of public service to establish, operate and advertise a complaints system should be enshrined in law, together with a duty to comply with suitable timescales as set by the PSO. As recommended by the Law Commission, in built into this structure should be a process to manage the overlaps between the PSO and the delivery of administrative justice by other dispute resolution providers (Law Commission 2010-11).

Finally, to avoid the errors of the past, the devolution riddle would have to be solved. This means that the role of the current Parliamentary Ombudsman, insofar as it applies to complaints from Northern Irish, Scottish and Welsh citizens, should not be included in the jurisdiction of the PSO. Alternative solutions for dealing with non-English UK complaints do exist, such as: retention of the Parliamentary Ombudsman; delegation to the relevant devolved ombudsman depending on the residence of the complainant; or transferral to an existing UK officer, for instance the Parliamentary Commissioner for Standards. All of these solutions have drawbacks, but would respect the devolution settlement and should be considered in the context of the relatively low numbers of complaints currently handled by the PHSO's office that do not involve English residents.

Conclusion: principles for a radical vision

This article has had two major objectives: to understand why meaningful reform in the ombudsman sector is so hard to achieve; and to lay out a principled structure to channel thinking on the formation of an integrated PSO for England. In doing so, the article has made the argument that the harmonisation of ombudsman schemes in England should be considered a major exercise in redress design that should embrace a wider set of administrative justice concerns than mere structural components of the PSO.

Drawing on the analysis above we conclude that a radical vision for change is needed to meet the fundamental challenges to the current system, challenges that are becoming increasingly difficult to meet within the outmoded complexity of the ombudsman sector today. We propose a vision which responds to pragmatic drivers for change and maintains

the essential building blocks of the constitutional model. In summary, reform should be based on the following principles.

Increased public awareness and access: The public need to know about the role of the ombudsman, what can be achieved to remedy their concern and how to access the service.

Seamless service: A single PSO for England would require a common business model and service standards about public services which are not confined to administrative or other sector boundaries.

Maximise knowledge and expertise: An independent and impartial PSO should operate with lead ombudsmen overseeing complaints about specific sectors to provide public confidence and assurance in the quality of the scheme.

Authority to remedy injustice and require service improvement: The PSO should have a duty to refer concerns uncovered in the course of its work to the relevant regulator for action, and where appropriate to Parliament as the relevant organisational board.

Strong local complaint handling with independent oversight: A PSO should have a duty to set common standards for complaints handling with a role for the relevant regulators to audit compliance.

Value for money: An ombudsman service must be free of charge to the complainants. Differing funding models should apply depending on whether the body investigated is publically or privately funded.

Independent corporate governance: An ombudsman scheme must be independent of the body complained about. This is best delivered by a governance structure which ensures proper accountability, usually a unitary independent board responsible for appointing a chief ombudsman.

Increase scrutiny and accountability of services locally and centrally: The relationship between the ombudsman, local councils, Parliament and other public service providers should be strengthened to support democratic scrutiny of public services.

Notes

1. For a summary of the evolution of ombudsman schemes in the UK, see Gill et al. 2013, pp. xx.
2. Applying the work of P. Hall, 'Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain' (1993) 25(3) *Comparative Politics* 275 and T. Kuhn, *The Structure of Scientific Revolutions* (1970), Le Sueur argues that redress design tends to come in three layers: first, second and third order change, op. cit., n.2, pp.18-26.
3. Eg Jim Martin (Scottish Public Services Ombudsman), in evidence to the Public Administration Select Committee, HC 655-ii (2013-14), 10 December 2013.
4. When the AJTC staged a conference to discuss the prospects of harmonisation in the ombudsman community, this was precisely the response of the majority of the participants who were drawn from all sectors of the administrative justice community (AJTC 2012).

5. See <http://www.healthwatch.co.uk/>.
6. See the submission of *Which* to PASC (2013-14).
7. See Complaint Service Wales, at <http://www.complaintswales.org.uk/>.

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