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The common law theory and practice of the Ombudsman/judiciary relationship

Richard Kirkham and Anita Sthumcke

Abstract

In both Australia and the United Kingdom the ombudsman sector plays a specific role in the oversight of the administration of government, but there exists no clear overarching theoretical framework within which the institution is aligned with common law constitutionalism. An ombudman's functionality is secured by gaining legal authority from parliament and effective power through executive acquiescence, but simultaneously to function effectively it must maintain a degree of separation from the executive and parliament. This situation creates a regulatory gap which the courts fill by acting in a supervisory relationship over the ombudsman sector. In turn, this raises the danger that the legitimacy gained through judicial oversight results in a loss of flexibility and uniqueness in the ombudsman institution. Through an empirical study of the case law on the sector this article confirms that the courts have shaped and legitimised the role of the ombudsman institution under the common law constitution. Yet this study also suggests that there is a risk that over reliance upon the judiciary to perform a retrospective, reactive and intermittent control function can lead to both an inappropriate imposition of judicial values on the ombudsman sector as well as the courts performing an unsuited regulatory role.

Keywords

Ombudsman, common law theory, regulation, judicial review, accountability, courts, government

Introduction

Through an empirical study of the case law on the ombudsman sector in Australia and the United Kingdom, the claim of this article is that the augmentation of Anglo-Commonwealth systems of government with the ombudsman institution created a regulatory gap in constitutional arrangements that the judiciary has been required to fill. The article further explores the nature of this relationship and raises the question as to whether this is an appropriate role for the judiciary to perform, or a temporary flexing of relationships which requires further adaptation to preserve a robust distribution of powers between the legislature, the executive and the judiciary.

The focus of this paper is upon ombudschemes.[1] This label takes in a broad spectrum of institutions, which may be public or private or a hybrid of both, either statutory or voluntarily organised, and including ombudschemes with very different cultures and practices.[2] The

[1] Our writing is mindful of the gendered use of the term 'ombudsman'. Throughout this article the term 'ombudschemes' or 'ombudsman sector' is used as a descriptor to capture the breadth and range of the sector, 'Ombudsman' is used to indicate reference to a singular office and 'ombudsmen' as a plural is avoided.

[2] Margaret Doyle, Varda Bondy and Carolyn Hirst, *The use of informal resolution approaches by ombudsmen in the UK and Ireland: A mapping study* (Hot off the Press, 2014) 4; Australian Productivity Commission, *Access to Justice Arrangements*, Inquiry Paper No 72 (2014).

continuing growth and proactive role of ombudschemes has been dubbed an 'enterprise'[3] in the UK and in Australia it is an ongoing debate as to whether some dispute resolution bodies should carry the title 'ombudsman'. In this study the title was not deemed an important consideration, instead included are all schemes which meet the definition deployed by the International Ombudsman Institute:[4] an ombudsman is a body which 'offers independent and objective consideration of complaints, aimed at correcting injustices caused to an individual as a result of maladministration'.

The UK and Australia are the chosen common law jurisdictions for this comparative study. This is due to the shared government preference to promote and utilise ombudschemes across multiple sectors and geographical areas. Evidence of this is the proliferation of ombudsman-like bodies operating across both jurisdictions. Ombudsman bodies and functions have been both established or disestablished on the basis of fast moving (and sometimes conflicting) political, legal, social and commercial regulatory goals. Subsequently, the creation and application of ombudschemes in the UK and Australia has led to a demand for a judicial response. This similarity in trend makes the selection of Australia and the UK for a comparative study pressing, as case law across both jurisdictions builds in quantity and develops into a distinct 'ombudsprudence'.

[3] Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate, 2011).

[4] International Ombudsman Institute (2012) *Bylaws*, Adopted by the General Assembly in Wellington, New Zealand, 13 November 2012, preamble. See also the definition of the Ombudsman Association and the Australian and New Zealand Ombudsman Association.

While focused on case law concerning ombudschemes in Australia and the UK this article is illustrative of wider debates about the nature of Anglo-Commonwealth common law, particularly in public law.[5] Anglo-Commonwealth common law is built upon a set of interrelated traditions, grounded in the 19th Century Westminster model. That model has been revised and revisited to suit modern day needs.[6] Most relevantly, this has included the addition of civil law innovations in administrative justice such as the ombudsman institution. The evolution of the ombudsman sector however has been both rapid and remarkably ad hoc, with each new institution introduced to serve a specific purpose at a specific time. There has been little attempt by policy-makers to conform to a particular theoretical model of an 'ombudsman' or a systematic plan as to how to structure the institution within the Anglo-Commonwealth common law tradition.[7] This approach creates risks.

A shared theme behind the introduction of ombudschemes is that modern government implicitly accepts that courts are not necessarily the best or the final recourse to justice for citizens and uses the ombudsman sector to block the growth of litigation in both the public and private domain.[8] Thus the value and deliverability of civil justice may have been expanded through the rise of the ombudsman sector, yet the trend also represents a trade-off in how justice

[5] Dean Knight, *Vigilance and Restraint* (Cambridge, CUP, 2018).

[6] RAW Rhodes, John Wanna and Patrick Weller, *Comparing Westminster* (Oxford, OUP, 2009).

[7] For example, most recently in the UK, see Robert Gordon, *Better to Serve the Public: Proposals to restructure, reform, renew and reinvigorate public services ombudsmen* (UK Cabinet Office, 2014). For an overview of the Australian context see Anita Stuhmcke, 'Ombuds Can, Ombuds Can't, Ombuds Should, Ombuds Shan't: A Call to Improve Evaluation of the Ombudsman Institution', in Marc Hertogh and Richard Kirkham (eds), *Research Handbook on the Ombudsman* (Edward Elgar Publishing, 2018).

[8] On the resistance of the UK Government to judicial solutions in public law in the post WWII period, see TT Arvind and Lindsay Stirton, 'The Curious Origins of Judicial Review' (2017) 133 *Law Quarterly Review* 91.

is provided.[9] Legal systems are holistic however. Change one part and the whole is simultaneously impacted and new challenges thereby created. The trade-off in favour of the ombudsman method has, in some respects, introduced a more expansive and interventionist justice model than the courts, and thereby has given rise to a fresh regulatory dilemma for governments, namely how to ensure an acceptable quality of justice provision in the ombudsman sector. This task has generally been left unaddressed in most legislation and to fill the consequent gaps in oversight and reputational risks, a variety of solutions have been adopted. For example, absent of a robust government-led regulatory response, the ombudsman sector itself has often taken the initiative in developing 'ombudsnorms'.[10]

Additionally, however, we suggest that across the Anglo-Commonwealth, the critical role of courts in maintaining the accountability of the sector is both overlooked and underestimated. With respect to ombudschemes accountability is a term typically used to refer to the accountability of other bodies to ombudschemes, and to its jurisdiction to oversee and make binding or non-binding decisions in response to breaches of industry standards or maladministration. Less typical is the use of the term to describe the mechanisms which render ombudschemes accountable, this is the focus of this paper which explores their accountability to the courts.

To illustrate the point, we use a study of the case law in Australia and the UK to show that courts have restrained the informality and expediency of ombudschemes. Arguably, the solutions developed have been mostly constructive and necessary, and have bolstered the

[9] This was a 'danger' warned of since the inception of the institution, see Ian G MacLeod (1966) 'The Ombudsman' (1966) 19(1) *Australian Law Reports* 93, which contains statements such as 'establishment of the office would only delay much needed reform of our system of public law'.

[10] For example, standards have been developed by ombudschemes in the UK through the Ombudsman Association and in Australia through the Australian and New Zealand Ombudsman Association (ANZOA).

autonomy of the institution and helped reshape the constitutional landscape to create a clear space for ombudschemes to operate within. But the use of the courts for this regulatory function throws up interesting challenges to standard theorising around the judicial/political division of labour in the Anglo-Commonwealth model, and the position of ombudschemes within this division. It also creates the risk that too much reliance on the judiciary to perform a retrospective, reactive and intermittent control function can lead to an inappropriate imposition of judicial values on the ombudsman sector.[11] Another concern is that the process by which the sector has adjusted to judicial decision-making is uncoordinated and the continuing weak regulatory regime makes it inevitable that future judicial interventions will be necessary.

We suggest that while the *ex-post facto* role of the courts is critical to the effective supervision of ombudschemes, additional forms of holistic regulatory oversight are also required. To make this argument we begin by outlining the theoretical and regulatory context in which ombudschemes are situated in both Australia and the UK. We then in two stages present and analyse the evidence of extensive judicial oversight of the institution in both countries. First we clarify the nature of that relationship, identifying the courts as performing a supervisory function, and then second we explore the intensity and nature of supervision applied. We conclude that the current reliance upon the judiciary to restrain ombudschemes, requires further adaptation. We advocate a considered regulatory response which will reduce the need for the courts to operate as a key regulatory restraint on ombudschemes, while maintaining the unique nature of the ombudsman institution across Anglo-Commonwealth systems of government.

[11] On this concern see *Shelly Maxwell v The Office of the Independent Adjudicator for Higher Education* [2011] EWCA Civ 1236, at [37-8] per Lord Justice Mummery; Buck et al (nx) ch.2.

The normative and regulatory context of the relationship between the judiciary and the ombudsman institution

The primary role of an ombudsman is to adjudicate upon complaints, with the model being introduced steadily in both Australia and the UK over a fifty-year period, across first the public and then the private sector. The diversity of schemes in operation is extraordinary, including public, industry or organisational forms, which have developed in both a reactive and disparate manner. The additions continue, with the latest in the UK being the Rail Ombudsman[12] and in Australia an Ombudsman heads the newly created Australian Financial Complaints Authority.[13] The result is that, as of June 2019, there were at least 18 ombudschemes in current operation in the UK that could in principle be subject to judicial review or other public law litigation. Ten of these ombudschemes have been a party to public law litigation already, all of which were established by statute. The Australian experience has been markedly analogous. As at June 2019 there are 17 Australian federal, state and territory Ombudsman, both public law and private industry,[14] and 12 of these have been a party to litigation.

Across both Australia and the UK, governments have adopted an approach towards delivering civil justice through ombudschemes which is best described as ad hoc.[15] Both governments have also assumed a minimal role in the regulation of the quality of services in the sector and a preference for detailing powers in broad discretionary form.

[12] Rail Ombudsman, < https://www.railombudsman.org/about-us/our-people/> accessed 15 January 2019.

[13] Australian Financial Complaints Authority, <https://afca.org.au/> accessed 7 January 2019.

[14] Not included in this study are offices that have been excluded from membership of ANZOA. Some of these offices feature heavily in litigation and have the title ‘Ombudsman’ such as the Fair Work Ombudsman.

[15] See further Varda Bondy and Andrew Le Sueur, ‘Designing redress: a study about grievances against public bodies’ (Public Law Project, 2012 <http://repository.essex.ac.uk/7416/1/SSRN-id2154195.pdf> accessed 25 October 2019.

In Australia, while legislation exists to establish and circumscribe the operation of most public and industry ombudsman, the role that government has performed in overseeing the sector has been limited to 'a handful' of external inquiries and statutory reviews.[16] Where a thorough government-led rethink of the institution does occur it is generally in response to crisis,[17] or is generated by a narrow window of opportunity to move forward reforming legislation. The main ongoing controls that do exist are budgetary in nature.[18] Likewise, although Parliamentary oversight does occur and can be effective, such as where the New South Wales Ombudsman operates with oversight of a NSW parliamentary committee, it tends to be driven by events and is rarely systematic.

In the UK, a similar dynamic applies.[19] The Government had the opportunity to impose a tough and autonomous system of regulation for the ombudsman sector under the EU Directive on Consumer ADR (2013/11/EU.), which required industry ombudschemes to report to a 'competent authority'. However, the choice was made to adopt a non-specialised approach towards ADR regulation by making a series of pre-existent sector specific market regulators 'competent authorities'.[20] The Government simultaneously encouraged competition in ADR provision. Through this light-touch and market-led approach, not only has the competent authority role had little to no impact on *public* ombudschemes, in the consumer/private sector

[16] Stuhmcke (n 7).

[17] Anita Stuhmcke, 'Australian Ombudsman: A Call to Take Care' 44 *Federal Law Review* 531.

[18] Stuhmcke (n 7).

[19] For example, the UK Parliament's review of the Local Government Ombudsman in 2012 led to reform but was the first review for seven years. See (Communities and Local Government Committee, 2012, *The work of the Local Government Ombudsman*, 2012-13, HC 431).

[20] Richard Kirkham, 'The consumer ombudsman model and the ADR Directive: Lessons from the UK' in Pablo Cortes (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford: OUP, 2016).

the result has been the imposition of minimal standards largely focused on reporting requirements and easy to measure performance standards.

To complete the regulatory picture, in both Australia and the UK the ombudsman sector has moved towards a measure of voluntary regulation through the work of ombudsman associations which provide a framework of 'light touch accreditation',[21] built upon the common history and shared characteristics and norms of the institution. However, these associations, while normatively important, are non-governmental and have neither the power nor backing to create and enforce a framework of practice for ombudschemes. They have also shown little appetite for regulatory activity and have tended to operate more as forums for debate and sharing best practice.[22] The end result is that schemes themselves have been left to create their own control environment through the introduction of such devices as boards and advisory forums.

It is into this diverse, loose and generally 'light-touch' regulatory environment that the judiciary interacts with ombudschemes. It is the nature of this interaction which is of interest in this article, with the possibility that the relationship between the two bodies could be one of partnership between justice providers, or some form of accountability hierarchy. The potential for a strong partnership relationship, whether through the division of labour or establishing prospective standards of good administration, is not explored here. Instead, the focus is on the degree to, and manner in, which the courts have taken on a hierarchical oversight role of the ombudsman sector, and the risks identified in that role.

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[21] John McMillan, 'What's in a Name? Use of the term 'Ombudsman'? (Presentation, 22 April 2008). <https://www.ombudsman.gov.au/__data/assets/pdf_file/0008/30104/22-April-2008-Whats-in-a-name-Use-of-the-term-Ombudsman.pdf> accessed 13 June 2018.

[22] Stuhmcke (n 7).

The Judge and the Ombudsman: a hierarchical relationship?

Theorising the constitutional status of ombudschemes

To understand the nature of the hierarchical relationship that exists between ombudschemes and the courts, it is necessary to appreciate the loose constitutional status of the ombudsman. The ombudsman institution has been described as a 'constitutional misfit',[23] an account supported by the lack of formal 'constitutional' reference to the institution in either Australia or the UK, and the reliance of most schemes on statutory mandates. Thus it is expected to play a powerful role in delivering administrative and civil justice, and additionally to contribute towards the wider advancement of good administration and systemic learning.[24] Yet despite the import of this role, within the Anglo-Commonwealth constitution the ombudsman is a second order institution whose power, independence and continued existence is dependent on the ongoing retention of Parliamentary support.[25]

What this status means for the ombudsman sector and its relationship with the courts is unclear. Each individual scheme has its own legislative mandate and unique features, but one generalisable feature of ombudsman legislation is that it is mostly silent on the nature of the ombudsman/court relationship. This silence leaves considerable scope for disagreement as to the preferred relationship. We suggest that four explanatory models provide a useful typology

[23] Rick Snell, 'Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma', in Chris Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (Canberra: Australian Institute of Administrative Law, 2000).

[24] Buck et al (n 3) ch.4.

[25] Chris Gill, 'The evolving role of the ombudsman: a conceptual and constitutional analysis of the "Scottish solution" to administrative justice' (2014) *Public Law* 662.

of the options available, and help us understand both how the ombudsman fits into the legal order and how the courts perceive its role.

- Under the first model (*the small-claims court model*) an ombudsman is fully integrated into the existing judicial branch of the constitution. Here the ombudsman operates as a specialised substitute service to the courts, but is heavily interlinked with the judicial branch in terms of the boundaries of what it can decide (ie decisions made broadly in line with legal principles) and through an appeal process.

- By contrast, the second model (the *political model*) situates the work of the ombudsman firmly in the political branch of the constitutional order.[26] To this extent it has influence on the political process of administrative decision-making yet creates no new administrative rights or expectations and therefore should not be subject to judicial control, other than against standard legal obligations eg employment and contract law. Further, oversight and regulation of an ombudsman is exercised purely through the political domain, whether Parliamentary or Executive organised.

- By a third model (*the supervisory model*) both the courts and the political branch have oversight responsibilities over the ombudsman sector. The judicial input to this supervisory arrangement is very much focused on isolated instances of ombudsman decision-making, but importantly not on the merit of individual grievance. Instead, the court has a role to play in testing the legality of the decisions made, but it may also

[26] Jason NE Varuhas, *Judicial Capture of Political Accountability* (London, Policy Exchange, 2016), 50 <http://judicialpowerproject.org.uk/wp-content/uploads/2016/06/Judicial-Capture-of-Political-Accountability-.pdf> accessed 5 June 2019.

perform a quality assurance test, or even a regulatory role, particularly with regard to the processes applied.[27]

- Finally (*the integrity model*), an ombudsman could be treated by the court as a discrete, and equal, provider of justice operating entirely separately to the judicial branch. This model involves a radical reconceptualization of the constitutional order to conceive various specialised autonomous watchdog agents as sitting within a bespoke integrity branch operating alongside the political and judicial branches,[28] upholding an ever more settled range of constitutional values.[29] Within such a model, given its autonomous status, arguably the ombudsman should be seen as immune from judicial supervision.

The law on the ombudsman sector: routes towards judicial oversight in Australia and the UK

The value of explanatory theories lies in their capacity to reflect accurately practice on the ground.[30] To establish which of the explanatory models of the ombudsman/judicial relationship best captures the real practice of the courts towards the ombudsman sector, for this article we interrogated the case law that has evolved around ombudschemes, first in terms of the throughput of cases and second with regard to the context of the case law. Our study identified legal action initiated both by ombudschemes and by others (the public, agencies etc) which

[27] Bondy and Le Sueur (n 15) 6.

[28] JJ Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724.

[29] Buck et al (n 3) ch.2.

[30] Denis Galligan, 'Legal Theory and Empirical Research', in Peter Cane and Herbert Kritzer, *The Oxford Handbook of Empirical Research* (Oxford: Oxford University Press, 2010).

provide the judiciary with opportunities for direct and indirect hierarchical control over the ombudsman sector.

(a) Judicial acceptance of legal claims against ombudschemes

Although legislation provides little detail on the nature of the ombudsman/court relationship, in both jurisdictions some express statutory references to judicial input can be found. In Australia the judiciary has upheld judicial review of public Ombudsman decision making[31] yet restrict the appeal of private contractual disputes most often determined by an industry Ombudsman into the court system, holding that such ombudschemes do not exercise judicial power as their jurisdiction is administrative rather than judicial.[32] The result in Australia is that many industry ombudschemes may be viewed as outgrowing, at least with respect to judicial review, much of the existing judicial accountability framework of judicial review.

In the UK, legislation says virtually nothing about the role of the courts, but there are two schemes which prescribe a process of 'appeal' to the court from an ombudsman decision.[33] For the Scottish Legal Complaints Commissioner (SLCC), this appeal remit has led to eight recorded appeals to date since its introduction in 2007, and over 150 recorded appeals for the Pensions Ombudsman, which has been operating since 1993.[34] This provision for appeal may suggest a 'small-claims court' role for the ombudsman concerned, but the grounds for appeal

[31] C Wheeler, 'Judicial review of Administrative Action: An administrative decision-maker's perspective' (2014) 88 *Australian Law Journal* 740.

[32] *Mickovski v FOS and Metlife* [2012] VSCA 185.

[33] A similar arrangement is in place for Financial Services and Pensions Ombudsman in the Republic of Ireland, Financial Services and Pensions Ombudsman Act 2017, ss 63-72.

[34] Access to all the UK cases for all UK based ombudschemes can be made through this online database, <https://caselaw.ombudsmanassociation.org/> accessed 25 October 2019.

are heavily circumscribed. For the SLCC the available grounds broadly map those in judicial review,[35] whereas for the Pensions Ombudsman, the appeal remit is 'any point of law'.[36]

Despite the relative lack of legislative reference to the judicial role, in both Australia and the UK the courts have, from an early stage, claimed as part of its inherent jurisdiction a responsibility to provide supervisory oversight. In the UK, whilst initially reluctant to accept the invitation to review decisions of an Ombudsman,[37] in *R v Parliamentary Commissioner for Administration Ex Parte Dyer*[38] Lord Justice Simon Brown considered 'the proper ambit of this Court's supervisory jurisdiction over the PCA [Parliamentary Commissioner for Administration]' and went on to 'unhesitatingly reject' the argument that judicial review did not apply.

> Many in government are answerable to Parliament and yet answerable also to the supervisory jurisdiction of this Court. I see nothing about the PCA's role or the statutory framework within which he operates so singular as to take him wholly outside the purview of judicial review.[39]

Nor did Lord Justice Simon Brown accept the argument that 'the Court should intervene only in the most exceptional cases of abuse of discretion'. This broad conclusion has been followed in cases on other ombudschemes.[40] Similarly in Australia, the judiciary have claimed the power to determine issues of jurisdiction as there are no limitations upon judicial review offered to

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[35] Legal Profession and Legal Aid (Scotland) Act 2007, s 21 (4).

[36] Pensions Schemes Act 1993, s 151(4).

[37] *Re Fletcher's Application* [1970] 2 All ER 572.

[38] [1994] 1 WLR 621.

[39] Ibid, 625.

[40] *Argyll & Bute Council, Re Judicial Review* [2007] ScotCS CSOH 168. See also *R (Siborurema) v Office of the Independent Adjudicator* [2007] EWCA Civ 1365 [50], per Pill LJ.

any Federal, State or Territory public ombudschemes. In a series of early Victorian cases,[41] this absence of protection provided the court space to read the statutory powers of the Victorian Ombudsman to investigate narrowly. Judicial approaches have however since shifted towards adopting a broader approach to an ombudsman's powers.[42] Kirby P (with Sheller and Powell JJA agreeing) observing in one such case concerning the NSW Parliamentary Ombudsman that '[The powers of the Ombudsman], as the Ombudsman Act reveals, are, as they ought to be, extremely wide. They are not powers which this Court should read down.'[43] Nevertheless, it is clear that in Australia judicial review still applies to unreasonable decision making that occurs in the ombudsman sector.[44]

Therefore, across both Australia and the UK, the inherent power of the courts to conduct judicial review of ombudschemes has become the norm, and at no point has the political branch moved to respond to this development through legislation either by blocking such judicial oversight or to insert limitation clauses on the role of the courts.[45] The end result is the development of a broad body of case law on the ombudsman sector in which detailed reference has been made to the scope of an ombudsman's powersIn Australia, since the first Ombudsman was introduced in Western Australia in 1971 there have been 92 reported cases, where an

[41] *Booth v Dillon (No 1)* [1976] VR 291; *Booth v Dillon I(No 2)* [1976] VR 434; *Glenister v Dillon* [1976] VR 550.

[42] For example, *Anti-Discrimination Commissioner v Acting Ombudsman* (2003) 11 Tas R 343.

[43] *Botany Council v Ombudsman* (1995) 37 NSWLR 357.

[44] *City of Port Adelaide Enfield v Bingham* [2014] SASC 36.

[45] For example, see the Ombudsperson Act 1996 (British Columbia), s 28: "Proceedings of the Ombudsperson must not be challenged, reviewed or called into question by a court, except on the ground of lack or excess of jurisdiction."

Ombudsman was joined as a party, decided in Superior Australian courts. In the UK, there have been 110 reported cases heard by way of judicial review.[46]

This expanding body of case law confirms that the genie is out of the bottle in the ombudsman/court relationship, insofar as it has now become an established practice for courts to provide an oversight role. Nevertheless, with the exception of the Pensions Ombudsman in the UK, the quantity of cases taken against ombudschemes remains relatively small once the turnover of complaints is taken into account. Further, the success rate of claimants is relatively low in judicial review, albeit it varies between countries. In Australia, of the 92 decisions only 7% have found against an ombudsman,[47] and in the UK 32%.[48] Finally, even if we broaden the picture to factor in the potential for out of court settlements, a recent study in the UK has found little evidence of judicial review being a commonly used redress route for claimants.[49]

(b) Ombudsman generated use of courts

The case law in both countries reveals that the most common claimant in judicial review is an individual. The dominant incidence of claimant-led review may very well be due to the absence of a professional body to whom complainants may take a complaint concerning an ombudsman,

[46] Richard Kirkham, *The Ombudsman and the Courts* (Nuffield Foundation, 2020) (forthcoming).

[47] See: *Glenister v Dillon* [1976] VR 550; *Booth v Dillon (No 2)* [1976] VR 434; *The Ombudsman v Koopman* (2003) 58 NSWLR 182; *The Ombudsman v Laughton* (2005) 64 NSWLR 114; *Owen v Ombudsman (Boyce)* (1999) 131 NTR 15; *Moroney v The Ombudsman* [1982] 2 NSWLR 591 overruled on appeal in *The Ombudsman v Moroney* [1983] 1 NSWLR 317. There are examples of mixed findings such as *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 39 ALD 570.

[48] Kirkham (n 46) 26.

[49] Richard Kirkham, 'Judicial Review, Litigation Effects and the Ombudsman' (2018) 40 *Journal of Social Welfare and Family Law* 110.

reflecting the regulatory gap which the courts must then fill.[50] In other words, without an alternative oversight organisation, complaints to an independent tier can only be made to the courts. There may be other reasons for the disparity. For instance, public bodies may choose not to litigate against ombudschemes very often, as by law they are able to avoid recommendations they do not agree with. Likewise, industry bodies might litigate against ombudschemes less frequently because they calculate that commercially it is unlikely to be beneficial to take expensive and potentially long lasting court actions.

However, there are interactions between courts and ombudschemes which are legislatively prescribed and triggered by an Ombudsman.[51] In Australia ombudschemes generally have provision to apply to court for a determination as to questions of jurisdiction.[52] Such provisions have been both used and their use contested.[53] In the UK, only two ombudschemes possess such a reference power and in neither country has this power been used very often.[54] Another reason for an ombudsman to access court would be to enforce its legal powers to collate evidence during an investigation, including the attendance of witnesses. Due to the clarity of ombudsman legislation and institutional acceptance, this is an option that ombudschemes have only rarely been required to pursue. A small number of other cases are

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[50] Rob Behrens, *Being an Ombudsman in Higher Education* (ENOHE, 2018) <http://www.enohe.net/wp-content/uploads/2017/06/Being-an-ombudsman.pdf> accessed 4 January 2019.

[51] One such prescription is that judges and courts are explicitly excluded from the jurisdiction of the ombudschemes however registrars and staff of the courts or tribunals may be within jurisdiction.

[52] *Attorney-General v Glass (in her capacity as Ombudsman)* [2016] VSCA 306.

[53] For example, *McGuirk v NSW Ombudsman* [2008] NSWCA 357; *Kaldas v Barbour* [2017] NSWCA 275 discussing section 35B of the *Ombudsman Act 1974* (NSW).

[54] *Attorney-General v Glass (in her capacity as Ombudsman)* [2016] VSCA 306. In the Pensions Ombudsman scheme, this is allowed for under section 150(7) of the Pension Schemes Act 1993 but has been a rarely used provision, for example see *The Pensions Ombudsman v EMC Europe Ltd* & *Ors* [2012] EWHC 3508 (Ch).

initiated by ombudschemes, for reasons of striking out claims and pursuing costs.[55] Of the 8 Australian cases brought by an Ombudsman, 6 were appeals, in response to litigation originally brought against the Ombudsman office.[56] In the UK, there has only ever been one appeal brought by an ombudsman.[57]

The above actions suggest that ombudschemes, like other litigants, are not immune from using the court process to exert power and protect their position. However, the overall pattern of an Ombudsman's use of the law is one of low direct use of the courts, with more forceful legal arguments being deployed in only limited and reactive ways.

Conclusion: The judiciary's supervisory role in common law theory and practice

Albeit that the approaches adopted in Australia and the UK differ on the detail, in the judicial oversight of ombudschemes there are strong similarities. For both countries, the above overview indicates that the *supervisory* model is the strongest account of the Ombudsman/court relationship. Both the fully fledged *political accountability* and *integrity* models would be most obviously realised by the statutory exclusion of the judiciary from oversight of ombudschemes, but these are not present in legislation and the courts have not denied themselves jurisdiction. By contrast, the *small claims court* model would be evidenced by a predominance of appeal outlets from an Ombudsman decision, which again are not generally built into Ombudsman legislation. The only exceptions are the SLCC and the Pensions Ombudsman in the UK which

[55] For example, *Leach, Re* [2001] EWHC Admin 455.

[56] Anita Stuhmcke, 'Ombudsman Litigation: The Relationship between the Australian Ombudsman and the Courts', in Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts Essays in Honour of Robin Creyke and John McMillan* (Sydney, Federation Press, 2019).

[57] *JR 55* [2016] UKSC 22 [1].

both offer only heavily restricted appeals processes on points of law. The Pensions Ombudsman is the one scheme in this study that might fit within the *small claims model*, with appeals heard at a rate of less than one every 1,000 complaints.[58] However, the Pensions Ombudsman is atypical in the ombudsman sector, possessing a slightly broader remit than other schemes.[59]

Constitutionally, therefore, ombudschemes are treated by the courts as autonomously powerful in their own right but the court exercises a reserve oversight role on their operations, in addition to considering specific statutory obligations on an Ombudsman. However, questions follow from this observation as to how intensively the judiciary has performed this supervisory role, and indeed how intensively it should perform the role given an Ombudsman's specialised justice function. This debate is explored in the next section by reviewing what the case law tells us about the judiciary's approach.

The Intensity of Judicial Scrutiny

Judicial impacts: an analysis of the case law

The literature on the correct parameters of the judicial role in public law is wide and contains considerable disagreement.[60] One of the points of contestation is the extent to which the courts should depart from generalisable norms to construct contextual bespoke solutions depending upon the public body being reviewed.[61] By providing the judiciary with a new form of public

[58] Kirkham (n 46) 46.

[59] For example the Pensions Ombudsman can 'investigate and determine … any dispute of fact or law . . . in relation to an occupational or personal pension scheme …' (Pensions Schemes Act 1993, s 146(1)(c)).

[60] Eg J. A. King, 'Institutional Approaches to Judicial Restraint' (2008) 28 OJLS 409; Knight (n 5).

[61] Eg Compare Christopher Forsyth, 'Blasphemy Against Basics: Doctrine, Conceptual Reasoning and Certain Decisions of the Supreme Court' in Bell J, Elliott M, Varuhas J & Murray P (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016) with JR Bell, 'Rethinking the Story of *Cart v Upper Tribunal* and Its Implications for Administrative Law' (2019) *Oxford Journal of Legal Studies*, 39, 74–99.

authority to adjudicate over, the advent into the legal order of transplanted watchdog institutions, such as ombudschemes, illustrates one potential driver for such bespoke patterns in judicial decision-making.

The shifting nature of these patterns can be illustrated by the four explanatory models to the judiciary/ombudsman relationship described earlier in this paper: the small claims model, the political accountability model, the supervisory model and the integrity model. We hypothesise that the judiciary can shift its decision-making to any of these positions. Potentially the judiciary could adapt its role to be more proactively supportive of an Ombudsman's autonomous and specialised nature, as designed and intended by Parliament, either to confirm its full autonomous status from judicial oversight and/or to confirm the primary supervisory role of the political branch. Alternatively, the judiciary might be incentivised to be more interventionist in ombudsman judicial review because an Ombudsman lacks democratic legitimacy and/or should be held to higher standards because of its role as a provider of justice. These different results may be achieved through constraining or amplifying the statutory instrument which created the ombudsman in question. Moreover, such adaptations could be achieved through the judge departing from its traditional role as interpreters of statute law, in order to place more emphasis on the role of an Ombudsman within the common law constitutional landscape, including its unique history and nature.

To establish the practice of the courts and to look for evidence of an institutionally focused approach, we interrogated the reasoning applied in all case law on ombudschemes in Australia and the UK. This study indicated a number of common themes at play in the manner in which the courts scrutinise ombudschemes, which illustrate ongoing shifts in the judicial role caused by their introduction and the development of a bespoke body of jurisprudence around the ombudsman's bespoke role.

(a) Judicial deference to the political model

As noted above, courts in Australia and the UK have treated ombudschemes as within their general jurisdiction. Nevertheless, a central issue is the extent to which the ombudsman institution should be treated by the courts as a standard statutory creature only, or a special form of statutory creature with a unique history. This question goes to the heart of the generalist versus contextualist debate in administrative law.

Recent research from Australia and the UK has demonstrated that in the bulk of cases on ombudschemes, some form of exercise in statutory interpretation is the most common ground upon which the judgment is resolved.[62] In other words, legislative intention remains the main driving factor behind judicial decision-making just as in other areas of administrative law.

Despite this finding, we suggest that, on balance, the unique nature of the sector has been influential on the courts, with an appreciation of the special role of the ombudsman institution reflected in multiple judgments. For instance, in the most senior case on public services ombudschemes in the UK, Lord Sumption stated that ombudschemes, while statutory bodies, 'fulfil an increasingly important role in mediating between the state and the public service on the one hand and the citizen on the other'.[63] Similarly in Australia, Bathurst CJ and Basten JA have observed that the powers of the NSW Ombudsman is fundamentally different from decisions of courts because there is no determination of rights or liabilities and that the design of an Ombudsman 'is consistent with an intention that his or her activities be overseen by Parliament rather than the Courts.'[64] Indeed, across a large body of case law the approach in both jurisdictions may be characterised as one of 'hands off'. Sometimes this deferential

[62] Stuhmcke (n 56); Kirkham (n 45).

[63] *JR55* (n 56).

[64] *Kaldas v Barbour* [2017] NSWCA 275 [27]-[28].

stance has approached a position of non-justiciability, as in *Ainsworth v The Ombudsman*,[65] in which the court excluded judicial review due to a privative section, stating that the NSW Ombudsman office is a '…unique institution. It does not deal directly or in any legal way with legal rights'… and is 'a creature of a Parliament'.[66]

In the UK, in recognition of this special role, the courts have been careful consistently to issue deferential statements about the court's role in judicial review, even though it has never conceded the inherent jurisdiction to review all aspects of ombudsman decision-making.

> [T]he Court's supervisory jurisdiction should be exercised with sensitivity to the special nature of the [Scottish Public Services] Ombudsman's constitutional role and function.[67]

Equivalent statements can be found within the case law across multiple schemes in the UK[68] and also in Australia. For instance, *Telecommunications Industry Ombudsman Ltd v Commissioner of State Revenue*[69] the Victorian Supreme Court upheld the charitable status of the Telecommunications Industry Ombudsman (TIO), acknowledging that it exists '…to redress the power imbalance between the consumer and the industry.'[70]

Thus although it is too much to claim that the courts characterise ombudschemes to possess some form of special legal status, there is in the majority of ombudsman cases, a judicial recognition of a bespoke ombudsman role which is often expressed in terms of deference to their decision-making. This position at a minimum demonstrates that the courts

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[65] (1988) 17 NSWLR 276.

[66] *Ainsworth v The Ombudsman* (1988) 17 NSWLR 276, 283.

[67] *Argyll & Buter Council v SPSO* [2007] CSOH 168 [16].

[68] For example, *R (Crawford) v The Legal Ombudsman & Anor* [2014] EWHC 182; *Muldoon v Independent Police Complaints Commission* [2009] EWHC 3633 at para 19; *Martin, Re: Judicial Review* [2012] NIQB 89 at paras 28–30 (Northern Ireland Police Ombudsman).

[69] [2017] VSC 286.

[70] Ibid [22].

appreciate that the office has been established and specifically designed to deliver an essential function, and that the court is obliged to support and acknowledge that function.

(b) Judicial support for the integrity model

Ombudschemes, therefore, are recognised as a bespoke form of statutory body, whose broad function is neither ignored nor determinative of the court's reasoning. However, this approach has not entailed complete deference to the sector such that it can operate autonomously of judicial oversight. An underlying judicial purpose here has been to safeguard the superior authority of the courts and the flexible non-legal jurisdiction of the ombudsman. Hence, in at least one specific respect the courts in both Australia and the UK have been keen to detail the constitutional position of the ombudsman beyond that defined in legislation: namely, to confirm the boundaries of the ombudsman sector's operations as it relates to other institutions. For instance, in the UK the courts have been required to resolve disputes between an ombudsman and a regulator,[71] and the boundary lines between the competences of an ombudsman and the university sector.[72] More generally, the judiciary have worked to establish a coherent demarcation of responsibility between the courts and the ombudsman sector.

A good example of this activity from Australia are the challenges made to the constitutional legitimacy of industry Ombudsman schemes.[73] This case law confirms a clear judicial distinction between ombudsman and courts, specifically, that at the Federal level, where under the Commonwealth Constitution, industry Ombudsman are not considered courts and hence do not exercise judicial power. On this point, there is equivalent jurisprudence in the

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[71] *Council of The Law Society of Scotland v The Scottish Legal Complaints Commission* [2017] ScotCS CSIH 36.

[72] For example *Cardao-Pito v Office of the Independent Adjudicator for Higher Education & Anor* [2012] EWHC 203.

[73] For a state industry ombudscheme example see: *Citipower Pty Ltd v Electricity Industry Ombudsman (Victoria) Ltd* (1995) VSC 275.

UK. For instance, in *Maxwell v OIA*, the court found that the Independent Adjudicator could not be required to adjudicate on a matter under discrimination legislation as that was covered by a separate legal process.[74]

Safeguarding the authority of the courts also impacts the decision making standards applied by ombudschemes and has resulted in judicial endorsement of internal standards of 'ombudsmanry', with ombudschemes free to create norms to resolve disputes rather than necessarily applying only settled legal principles.[75] This was the issue in *Australian Communications Authority v Viper* where Justice Sackville held the Telecommunication Industry Ombudsman (TIO) to be free to resolve disputes according to 'what is fair and reasonable in all the circumstances', as well as apply 'the law'.[76] His Honour observed that many of the complaints the TIO might deal with – such as back-billing and lack of telephone number portability – would be difficult to resolve by the application of established legal norms. A similar line of reasoning has been applied to the ombudsman sector in the UK. *British Bankers Association v The Financial Services Authority & Anor*[77] held it to be lawful to oblige financial firms to abide by the bespoke rules issued by the Financial Services Authority even in the absence of specific legislative requirements. These rules shaped the manner in which insurance policies including Payment Protection Policies could be sold and the court also ruled

[74] *R (Maxwell) v OIAHE* [2011] EWCA Civ 1236 [32]-[33].

[75] *MASU Financial Management Pty Ltd v Financial Industry Complaints Service Limited and Julie Wong* (No. 1) [2004] NSWSC 826 and *Australian Communications Authority v Viper* [2001] FCA 637; *Wealthcare Financial Planning P/L v FICS & Norris* [2009] VSC 7; As such judicial review of some industry schemes is limited to decisions which are unfair and unreasonable see *Mickovski v FOS and Metlife* [2011] VSC 257; [2012] VSCA 185 and *Mickovski v FOS and Metlife* [012] VSCA 185 [51].

[76] *Australian Communications Authority v Viper* [2001] FCA 63 [72].

[77] [2011] EWHC 999 (Admin).

that it was lawful for the Financial Ombudsman Service (FOS) to base its decisions on those rules.

(c) Judicial provision of a supervisory model

The case law considered up to this point might be taken to suggest that the court's approach to ombudschemes is largely focused on policing its boundaries and carving out a discrete role for the office largely overseen by the political branch. Indeed, in terms of efficiency the courts have proven that they will not over-burden the justice system by considering only a small number of ombudsman disputes and, where possible, avoiding duplication of casework due to the existence of two potential opportunities for dispute resolution on ostensibly the same set of facts.[78] In the UK, multiple cases reflect upon the correct distribution of cases between the ombudsman sector and judicial review, and the question of admissability of a claim in court[79] or the nature of the ombudsman's work.[80]

Nevertheless, in some important ways the courts have additionally demonstrated a willingness to adopt a bespoke supervisory approach to ombudsman judicial review. In both countries judicial review by the courts, while retrospective in application, also offers external quality assurance of decision making by an Ombudsman, and in this field the courts have shown some willingness to operate in a more interventionist fashion. The level of quality control imposed is constrained by common law principles in order to avoid the court intervening too readily in public decision-making. The Australian approach is most recently applied in the South Australian decision *City of Port Adelaide Enfield v Bingham*,[81] where the standard applied when reviewing the South Australian Ombudsman decisions was that of

[78] For example, *Clark & Anor v In Focus Asset Management & Tax Solutions Ltd & Anor* [2014] EWCA Civ 118.

[79] For example *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406 [81].

[80] For example *Clark v Argyle Consulting Ltd* [2010] ScotCS CSOH 154.

[81] [2014] SASC 36.

Wednesbury unreasonableness. On the facts, it was held that the 'Ombudsman's opinion does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. This conclusion lacks an evident and intelligent justification.'[82] In Australia such decisions, which evaluate the standard of Ombudsman decision making, are rare and far more commonly dealt with (at least before the superior courts) is resolution of constitutional or jurisdictional issues as discussed above.

However, the evidence from the UK is that the courts can and do adjust the parameters of administrative law standards specifically in order to raise the expectations on the qualities of decision-making in the ombudsman sector in several respects. In particular, unlike Australia, in the UK the most common ground for a decision of an Ombudsman to be quashed is the quality of the explanation of its decision, either because of inadequate reasons (12 cases)[83] or because the decision was found to be irrational (10 cases).[84] Indeed, this approach to review accounts for more than half the cases in which ombudsman decisions have been quashed.[85] This outcome suggests that the court can adjust the parameters of their role to play a strong supervisory role in the context of the ombudsman sector. Far from being deferential, the courts are demanding of a partner justice institution high judicial expectations of 'adequate and comprehensible reasons' for decisions made.[86]

In line with these findings, multiple other cases in the UK provide added judicial instruction on the standards that can be expected of the decision of an Ombudsman.[87] This

[82] Ibid, [61].

[83] Kirkham (n 46) B16.

[84] Ibid, B 17.

[85] Ibid, B 12.

[86] *Bartos v A Decision of The Scottish Legal Complaints Commission* [2015] SC 690 [1].

[87] Kirkham (n 45) B17.

indicates a significant pattern of judicial behaviour, in which the courts have consistently required higher standards than legislation has provided for. Nor has there been strict adherence, or often even reference to,[88] the general case law on reasons, lending the impression that a bespoke legal standard is being developed for the ombudsman sector. Indeed, the operational and non-judicial context of the ombudsman institution has been regularly noted in determining the relevant standards of reasoning that should apply.[89] These standards are not akin to judicial standards,[90] but the expectations of the court have been regularly detailed in the case law,[91] and include an expectation of accessibility to all relevant parties.[92] Further, this duty to provide reasons extends beyond final reports to include other stages of the decision-making process.[93]

(d) Judicial support for small claims court standards

When considering the nature of the court's potential role as a supervisor, obiter and other statements of the court are also relevant. Here judicial guidance is sometimes used to deliver a public interest message of disapproval over and above the decision rendered, or to act as nudges to the ombudsman scheme in question to revise practices more in line with expectations of a quasi-judicial body operating alongside the court system. This form of guidance offers possible judicial support for ombudschemes acting as a modified version of a small claims court. By way of example, in the UK case of *Bartos v SLCC* the court reminded an ombudsman of the importance of impartiality and possessing within its team staff of 'appropriate background and standing' to perform the function it had been allocated, which in this case was dealing with

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[88] Ibid, B18.

[89] For example *Herd v Independent Police Complaints Commission* [2009] EWHC 3134 [37].

[90] For example *Rapp v PHSO* [2015] EWHC 1344 [38].

[91] *Stenhouse v The Legal Ombudsman & Anor* [2016] EWHC 612 (Admin) at para 36; *Cardao-Pito* (n 72) [29].

[92] *R (Dennis) v Independent Police Complaints Commission* [2008] EWHC 1158 (Admin) [20].

[93] *R v The Commission for Local Administration In England & Ors Ex p Adams* [2011] EWHC 2972 [34].

complaints against the legal profession.[94] Similarly, in *Stenhouse v The Legal Ombudsman* the judge expressed profound concern as to the formal legal costs of litigation involved in resolving the dispute which were 'out of all proportion to the sums at stake'.[95] Most recently the UK courts have provided guidance on the importance of not being seen to predetermine a decision when issuing a preliminary finding of fact.[96] In comparison there are only rare instances where Australian judicial commentary has recognised frailty of ombudspractice. Support for the notion of ombudschemes as small claims courts is difficult to glean in an Australian context. One such comment is that of Sackville AJ in *Commissioner of Police v The Ombudsman*[97] noting human frailty, 'the Ombudsman is fallible and may err. He or she may even fail to act in accordance with statutory requirements'.

As noted above, with the heavily qualified exception of two schemes, the courts do not directly integrate ombudsman decision-making into their hierarchy. However, there is a small, but significant, body of case law that has evolved in the UK which indirectly provides greater legal force to Ombudsman decisions. By statute, ombudsman determinations have no legal force. Yet in a series of cases the courts have concluded that it possesses the power to review not just decisions of ombudschemes, but also public authorities who have decided not to comply with the decision of an Ombudsman.[98] In this body of four cases, the power that the

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[94] *Bartos* (n 86) [87]-[91].

[95] *Stenhouse* (n 91) [1]-[5].

[96] *Miller & Anor v The Health Service Commissioner for England* [2018] EWCA Civ 144 [57]-[66].

[97] Unrep, NSWSC, 9 September 1994.

[98] *R (Bradley) v Secretary of State for Work and Pensions and Parliamentary Commissioner for Administration* [2007] EWHC 242 (Admin); *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin); *R (Gallagher & Anor) v Basildon District Council* [2010] EWHC 2824 (Admin); *R (Nestwood Homes Developments Ltd) v South Holland District Council* [2014] EWHC 863 (Admin). Alongside these cases should be considered *R v Commissioner for Local Administration ex p Eastleigh BC* [1988] QB 855, in which this

courts exert is in relation to the legality of the public body's response, with all four rulings making it clear that a public body cannot simply assert that the findings of the Ombudsman are wrong, and thereby refuse to implement an Ombudsman's recommendations on the basis that the report is flawed.

Australian case law is more tangential on this point and courts have directed the role of government bodies in relation to an Ombudsman through questions around the powers of the Ombudsman to issue reports or make findings rather than the refusal of government bodies to comply. For example, the decision in *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman*[99] was one where the Federal Court gave a narrow reading to the Commonwealth Ombudsman's power to make a 'finding' in a report, thus confirming that the finding did not apply to the individuals of the Government Department and the Ombudsman had acted beyond power.

Detailing the judicial role in case law on the ombudsman sector

Our study finds a reactive and limited supervisory role for courts in relation to ombudschemes. As with standard commonwealth common law constitutionalism, post-facto judicial controls of bureaucratic power are strong,[100] but control is generally limited. Relatively few cases are

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relationship principle was originally laid out. For a discussion see: Varuhas (n 26); and Richard Kirkham, Brian Thompson and Trevor Buck, 'When Putting Things Right Goes Wrong: Enforcing the Recommendations of the Ombudsman' (2008) *Public Law* 510.

[99] (1995) 134 ALR 238.

[100] Peter Cane, *Control of Administrative Power: An Historical Comparison* (Cambridge, CUP, 2016). Cane (n 8), while this reference refers specifically to Australia the commentary as to the ministerial responsibility and the Westminster system equally applies to the UK.

heard by way of judicial review, and the dominant mode of judicial reasoning is through formalist techniques of statutory interpretation. Not only is the case law highly deferential to the role of the ombudsman institution in language, but the low success rates for claimants suggest that courts are reluctant to overrule the decision of an Ombudsman.

However, case law on ombudschemes also indicates a subtle shifting of the judicial role towards a more interventionist and bespoke approach, which highlights the flexibility inherent in judicial review. For instance, in both jurisdictions the courts have tested the quality of decisions made by ombudschemes and there have been multiple instances of the courts determining the institutional boundaries between ombudschemes and other public bodies. In the UK at least, there is also clear evidence of the development of the law to infer more robust procedural standards of decision-making on the sector and the creation of a new remedy to make it more difficult for public bodies to resist the recommendations of an ombudsman. The intensity of the review has gone further in the UK than in Australia, reflecting a more conservative nature of administrative law encouraged by the Australian constitution. But even here, an extra-judicial statement by Chief Justice Bathurst hints that Australian jurisprudence could evolve further in this area:

> In many ways, our modern notions of accountability have outgrown our constitutional framework. As the landscape of public power continues to evolve, with the soft power of integrity bodies growing in importance, the question of whether we protect our modern expanded concept of accountability or limit the safeguarded territory to the much smaller ground it occupied in 1901 is a challenge we must increasingly confront.[101]

[101] Tom F Bathurst, 'New tricks for old dogs: the limits of judicial review of integrity bodies' (2018) 14 *The Judicial Review* 1.

We suggest that two main factors likely drive this move towards a bespoke approach for case law on the ombudsman sector, and that these factors illustrate the institutional drivers that influence judicial decision-making in the common law. Firstly, the work of the courts is driven by an interpretation of statute that ombudschemes are, if not situated in a distinct integrity branch of the constitution, distinct in their character and by their nature requiring of a special judicial approach. This claim is in part counter-intuitive, as in certain respects the influence of the judiciary has operated to restrict the autonomy of an Ombudsman, either by establishing clear boundary lines around its operations or adding detail to its procedural design or even in quashing the substance of its decisions. However, judicial recognition and evolution of the law around the existing institutional design can assist an Ombudsman's operation by making it more institutionally resistant, and embedded, in the constitutional order. Further, through the process of channelling disputes about an Ombudsman through the courts, the room for both public and private bodies to pressurise an Ombudsman in its operation is reduced, and the institutional status of the office is enhanced. In this sense the ombudsman institution is gradually removed from the direct oversight of the political branch and provided with a more secure autonomy. Hence, with the assistance of the judiciary, the ombudsman sector can become more capable of operating in line with an 'Integrity' vision of the common law constitution by which watchdogs are considered autonomous actors.[102] Autonomy for integrity institutions, in other words, is not necessarily best served by being outside the purview of the judiciary.

A second key factor behind the bespoke approach towards the ombudsman sector is the need to address an underlying problem of 'under-regulation'. In other words, the courts in both the UK and Australia are 'forced' to fill a gap that constitutional developments have created

[102] Ibid.

and that the remaining traditional institutions, the government and the legislature, have proved incapable or unwilling to address. In performing this institution-building and supportive role, the judiciary might inevitably be drawn into a regulatory role if it is regularly overseeing internal decision-making standards as well as adjudicating on jurisdictional boundaries between the plethora of dispute resolution schemes. In this respect, normative and pragmatic questions arise as to whether the constitutional positioning of courts in the Anglo-Commonwealth system of government means that they are well suited to perform this role.

Concluding thoughts

Through an empirical study of case law this article has explored the relationship between the judiciary and the ombudsman sector. It argues that in Australia and the UK the relationship is predominantly a supervisory one.

However, common law grounds of administrative law are inherently flexible, and in Australia and the UK the court has used its powers to develop an evolving bespoke ombudsman-focused body of legal reasoning and guidance. In many respects, this evolution of the law might be considered unremarkable and is built upon long entrenched features of the judicial role, such as principles of statutory interpretation and loyalty to presumed legislative intent. Nevertheless, in the context of ombudschemes, the court's capacity selectively to assume a role in filling in the gaps left undetailed by legislation in accordance with the presumed intention of the legislature has provided opportunities for the courts to shape the landscape in which an Ombudsman operates. Our study demonstrates that this gap-filling capacity, particularly in the UK but also in Australia, has at times drifted into an institutional design role. Its effects have been to strengthen the ombudsman institution and have helped

transition it from a graft on the Anglo-Constitutional system of government to become an integral part of UK and Australian administrative law.

The adoption of this role raises the issue of the impact of that judicial supervision upon the Anglo-Constitutional system of government. The nature of this supervisory role by and of itself highlights a binary anomaly in the placement of the ombudsman institution within common law constitutions. The first part of this binary is that the very informality, which is the essence of effective ombudsman dispute resolution, may be frustrated by the formality of the constitutional framework within which the schemes exist and were introduced to improve. As the judicial decisions evidence, ombudschemes through judicial review become part of the very structure they were created to supplement and remedy. At the extreme this may lead to a form of regulatory capture or incorporation of judicial standards into ombudsman norms. Here the concern is that courts become a de facto regulator for ombudschemes, weakening their intended operation through reducing the flexibility and informality that is their strength. The second anomaly is that judicial oversight masks existing gaps in regulation by the executive and parliamentary branches of government. Ombudschemes are part of the government and as such their decision making may be political in nature, having significant interaction with public policy. By contrast, judicial accountability forces a relationship between courts and ombudschemes that provides an apparent safeguard around the quality of decision-making. The risk here is that the existence of this safety net encourages the executive and legislature to continue with ad hoc and non-systematic reform of integrity institutions, and at worst facilitates the government in weakening or reducing the impact of the institutions intended to hold them accountable.

Current case law reflects a judicial awareness of this anomaly. Courts have created a jurisprudence around the institution, most often recognising it as a statutory creature with a special mandate. This highlights the difficulty for the judiciary in maintaining the line between

meaningful supervision and avoiding judicial overreach in the political positioning of the institution. However, it is difficult to see whether this challenging role can be avoided, particularly as we see the supervisory role of the judiciary, complemented by self-regulation of ombudschemes, as set to continue. Indeed, in both Australia and the UK there is no evidence that parliament will fill the regulatory gap any time soon and the case law uncovered in this article suggests that in a myriad of ways judicial practice will continue to evolve a bespoke body of law around the ombudsman sector. If this situation continues, at what point will this judicial role transform either the courts or ombudschemes into a justice mechanism they were never intended to be?

The answer we suggest is one best not waited for. Instead, we advocate a holistic regulatory review of the ombudsman sector to provide a proactive and timely solution to a regulatory issue which is currently resolved in an ad hoc manner across Anglo-Constitutional systems of government. Such reviews should be repeated on a periodic basis in order to reduce the pressure on the judiciary, and should lead to regular updating of parent legislation. A further necessary development, one which requires further discussion and which is already in train, is that the sector becomes gradually more professionalized and self-regulation more a feature of its operation.

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