

# THE OMBUDSMAN TODAY - AN INTERNATIONAL CONTEXT

KEYNOTE ADDRESS - ANZOA CONFERENCE - 5 MAY 2016

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1. Thank you for inviting me to speak at your conference. I feel very privileged to be here. My aim in this address is to share some of my thinking on the work and the role of Ombudsmen. I will do this from the perspective someone who works in the UK as both a dispute resolution practitioner and an academic. And I will manage your expectations from the start by saying that I probably have more questions to ask than I have answers to give you.
2. I have some understanding of the work you do in Australia and New Zealand, but would not presume in this address to comment or venture a view on it. I am keen to learn more about what you do and to take my learning from this conference back to share with colleagues in the UK. And I hope that some of what I have to say today has a relevance to you.
3. I would like to tell you a little about Queen Margaret University, where I work part-time as a Lecturer in Ombudsman and Complaint Handling Practice. We are based in Musselburgh near Edinburgh and we are named after Margaret, Queen consort of King Malcolm Canmore of Scotland. Margaret was known to be a fine scholar with a formidable intellectual capacity, who often debated the affairs of state with the King's nobles and clerical advisers.
4. QMU was founded in 1875 by two women, Christian Guthrie Wright and Louisa Stevenson, as the Edinburgh School of Cookery. This came about as part of the UK-wide mid Victorian "Women's Movement", a campaign for better education and improved career opportunities for women.
5. I work in the Consumer Dispute Resolution Centre at QMU, where we design and deliver courses for first and second tier complaint organisations. This includes a fairly new online MSc in Dispute Resolution, which we have created specifically for complaint handlers.
6. We also carry out research on issues relating to the work of Ombudsmen, administrative justice, consumer behaviour and dispute system design.
7. So in sharing my thoughts with you today, I will be borrowing heavily from the work of colleagues within the Centre, and also from others from the UK who I have had the honour of working with. But they cannot be held responsible for the views and inferences which are my own.

8. The theme of your conference is *'The Ombudsmen in Australia and New Zealand - one model, many applications'*. And I thought about calling this talk *'Ombudsman - a Fabulous Monster?'* after this quote from *Through the Looking Glass* by Lewis Carroll, where the Lion and the Unicorn first come across Alice:

*"'Ah, what is it, now?' the Unicorn cried eagerly. 'You'll never guess! I couldn't.' The Lion looked at Alice wearily. 'Are you animal – or vegetable – or mineral?' he said, yawning at every other word. 'It's a fabulous monster!' the Unicorn cried out before Alice could reply."*

9. I do believe that Ombudsmen organisations, like Alice, are fabulous monsters. And this quote has particular resonance for me, as when working as a Deputy Scottish Public Services Ombudsman, my Ombudsman there was an Alice - Professor Alice Brown.
10. More recently, I worked as the Interim Principal Ombudsman for Ombudsman Services, the UK Energy and Telecoms Ombudsman (along with many other roles), who are based at Daresbury near Warrington in England. This is the birth place of Lewis Carroll.
11. I think that *Alice in Wonderland* and *Through the Looking Glass* should be required reading for all those who work in ombudsman organisations.
12. And when thinking about what to say in this address, I was reminded of a story told to me by a fellow Deputy Ombudsman after he visited Buckingham Palace in London. Standing next to him was a woman with a young child, and this boy was looking with interest at one of the guardsman in his ceremonial uniform. Then turning to his mother he asked "Mummy, what is that man for?" And I think we need to answer that question in relation to Ombudsmen.
13. So in this address I want to explore what an Ombudsman is, does and is for. It is often put forward that the word 'Ombudsman' is a gender neutral term. I am not convinced. And while I am certain that the word needs to be both cherished and protected, I am less persuaded about the 'man' designation.
14. So in this address you will hear that I sometimes use the word Ombudsman, but I am also experimenting with using the word Ombuds. And in relation to language, you will also hear me talking about public and private Ombudsmen, which equate broadly with your Parliamentary and Industry Ombudsmen.
15. When the White Rabbit in *Alice in Wonderland* asked:

*"Where shall I begin, please your Majesty?", the King said gravely "Begin at the beginning, and go on till you come to the end; and then stop"*.

16. So I am going to start by saying a little about the evolution of Ombuds in order to set some context. You may be relieved to hear that I am not going to rehearse the whole history of ombudsmen, other than to note that it is now a global institution.
17. But I do want to outline the development of Ombuds in the UK. And I think their development can best be illustrated by this quote from US academic Carolyn Stieber, who when considering in 2000 whether the Ombudsman concept had become diluted, noted that:

*“the development of the ombudsman field was like a scattering of wild flowers, not an orderly design for a garden”*<sup>1</sup>
18. Phase 1 of UK Ombuds evolution involved the emergence of ombudsman schemes in the public sector in the 1960s and 1970s, with a remit to deal with complaints from citizens about maladministration on the part of public administrators. The approach of these ombudsmen, such as the Parliamentary Commissioner for Administration and the Local Government Ombudsman, was investigation, reporting and recommendation.
19. Phase 2 involved the emergence of Ombuds in the private sector in the 1980s and 1990s, such as the Insurance Ombudsman Bureau and the Pensions Ombudsman. These were largely established on a voluntary basis and dealt with complaints from consumers about businesses. These ombudsmen had new features, particularly the ability to make binding decisions and a jurisdiction which went beyond maladministration to allow the merits of decisions to be reviewed.
20. Phase 3 involved consolidation of existing private sector ombuds schemes in the financial services sector to form the Financial Ombudsman Service, as well as an expansion to cover professional services such as the law and estate agents.
21. Phase 4, during the 2000s, included the development of ombuds schemes to cover hybrid public and private services, such the Housing Ombudsman Service, as well as privatised regulated industries such as the Energy Ombudsman and the Telecommunications Ombudsman.
22. Phase 5, also in the 2000s, came about as a consequence of devolution in Scotland and Wales, and resulted in a new breed of one-stop-shop public ombudsmen, such as the Scottish Public Services Ombudsman, who have since significantly developed the traditional UK public service ombudsman model.

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<sup>1</sup> STIEBER C. 2000. 57 Varieties: Has the Ombudsman Concept Become Diluted? *Negotiation Journal*. vol. 16, pp. 49-57.

23. The context in which UK Ombudsmen currently operate has been changing at a pace in recent years. In a 2013 study on *The future of ombudsman schemes: drivers for change and strategic responses*<sup>2</sup>, which colleagues at QMU produced for the English and Welsh Legal Ombudsman, three particular drivers of recent ombudsman changes in the UK were identified. These drivers are developments in consumer behaviour, in service provision and in the policy environment.
24. Firstly to consider changes in *consumer behaviour*. Our experience in the UK is one of changing consumer demand, with increasing levels of complaint and increasing (but still fairly low) levels of ombudsman awareness. There are also changes in the diversity of the consumer base, with some move away from the 'traditional' older, white, middle class and male demographic. There are changes in consumer expectation, in part driven by advances in technology, with some consumers becoming increasingly demanding and resourceful, and with greater expectations relating to speed, simplicity and online provision. It is also the case, however, that some consumers remain passive or vulnerable.
25. In relation to demanding behaviour, I acknowledge the excellent work carried out in Australia on *Managing Unreasonable Complainant Conduct*. We refer to the associated Manual<sup>3</sup> in many of our courses at QMU. And you may want to take a look at some research carried out recently by two academics whose work in general I would commend to you: Chris Gill from QMU and Naomi Creutzfeldt who is now at the University of Westminster in London.
26. In 2015 these academics presented preliminary findings<sup>4</sup> relating to an exploratory project on online activism relating to Ombuds schemes.
27. And they identified four broad themes in terms of the criticisms that these 'ombudsman watchers' have about ombudsman schemes. These are a lack of accountability; concerns about procedural and practice issues, such as Ombuds moving towards a call centre model (which was seen as being more about reducing demand than having complaints investigated thoroughly); the staffing and qualifications of those working in Ombuds schemes; and the negative impact that the Ombuds system had on complainants. I will come back to the concern about qualifications later in this address.

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<sup>2</sup> GILL, C., WILLIAMS, J., BRENNAN, C. and O'BRIEN, N., 2013. *The future of ombudsman schemes: drivers for change and strategic responses*. Edinburgh: Queen Margaret University.

<sup>3</sup> <https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/unreasonable-complainant-conduct-manual-2012>

<sup>4</sup> CREUTZFELD, N., and GILL, C. 2015. *Critics of the Ombudsman System: Understanding and Engaging Online Citizen Activists* [online]. Policy Brief. 16pp. [viewed 5 April 2016]. Available from: [https://www.researchgate.net/publication/287815344\\_Critics\\_of\\_the\\_Ombudsman\\_System\\_Understanding\\_and\\_Engaging\\_Online\\_Citizen\\_Activists?channel=doi&linkId=5679aaa008ae7fea2e989340&showFulltext=true](https://www.researchgate.net/publication/287815344_Critics_of_the_Ombudsman_System_Understanding_and_Engaging_Online_Citizen_Activists?channel=doi&linkId=5679aaa008ae7fea2e989340&showFulltext=true)

28. A second change driver impacting on UK Ombuds is the way in which organisations are providing services. There are changes in operational practice, such as in the increasing use of new technology and a move to a more relational approach which is focused on outcomes. The boundaries between services within sectors are changing, with increasingly integrated service provision.
29. Also, the boundaries between the public and private sectors are changing, with some public ombudsmen now investigating private companies, and other former public services becoming privatised.
30. The third change driver identified by the QMU study centres on changes in the *policy environment*. There are policy changes relating to austerity and funding restraints, including budget cuts, and there are changes to both consumer advice and regulatory policy. There is also more public and critical scrutiny of ombudsmen schemes, such as the Public Administration Select Committee of the UK Parliament carrying out two recent inquiries relating to Ombudsmen, both of which had associated Reports.
31. The first PASC Report in 2014, called *More complaints please!*<sup>5</sup>, was prompted by the Francis Report<sup>6</sup> on the tragic deaths at the Mid-Staffordshire NHS Foundation Trust in England. It demonstrated the need for health and social care to work together and to provide systemic solutions to systemic defects. The second report, called *Time for a People's Ombudsman Service*<sup>7</sup>, was also published in 2014, and had the central finding that the PHSO was 'stuck in time' and urgently in need of modernisation.
32. UK Ombuds have also felt the impact of the recent European Union Directive on Consumer Alternative Dispute Resolution<sup>8</sup>.
33. This Directive, which became 'live' in the UK in 2015, imposes a requirement on businesses to point consumers to a certified ADR entity if they cannot resolve a dispute in-house about the sale of products and services.
34. And its impact is resulting in procedural change for private sector Ombudsmen schemes in particular. It is also having an influence across the UK redress landscape by impacting on existing models of redress and encouraging new and often rival ADR providers to emerge.

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<sup>5</sup> House of Commons, Public Administration Select Committee, Twelfth Report of Session 2013-14a, *More complaints, please!*, HC 229, 14 April 2014.

<sup>6</sup> Francis, R. (2013). Report of the Mid-Staffordshire NHS Foundation Trust public inquiry. HC 947 (2012-13).

<sup>7</sup> House of Commons, Public Administration Select Committee, Fourteenth Report of Session 2013-2014b, *Time for a People's Ombudsman Service*, HC 655, 28 April 2014.

<sup>8</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF>

35. For example, when writing about the impact of the ADR Directive, Pablo Cortes from the University of Leicester commented recently about the dangers of ‘forum shopping’, saying that:

*“those who pay the fees and choose the ADR entity will have economic incentives to choose one that is more likely to decide in their favour”<sup>9</sup>*

36. And a number of commentators consider that a major failing of the UK’s implementation approach to the ADR Directive is not to have appointed a single competent authority to ensure that certified ADR providers meet certain standards relating to independence, impartiality, and quality of expertise. As Richard Kirkham, a valued colleague from Sheffield University, has pointed out in a blog for the UK Administrative Justice Institute<sup>10</sup>:

*Further complexity will be built into the overall system by making a series of sector regulators responsible for performing the overarching role of the competent authority, whose duties will include monitoring the performance of certified ADR providers against the requirements of the Directive.”*

37. These various change drivers have led to increasing overlaps between ombudsmen, the courts, tribunals and other forms of dispute resolution in the UK, and also have resulted in a more fragmented and confused dispute resolution landscape.

38. And the ensuing issues facing UK Ombudsmen as they change and proliferate is whether the ombudsman concept is still a distinct ‘brand’ and whether Ombuds remain able to promote and restore trust in the bodies within their jurisdictions.

39. I think that a unique characteristic of Ombuds, particular those in the private sector, is their ability to consider what is fair and reasonable in particular circumstances, and to balance this approach with the need for consistency.

40. And I think that we need to make sure that in all this change we do not lose sight of this unique approach.

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<sup>9</sup> CORTES, P. 2015. The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity? [online]. [viewed 5 April 2016]. Available from: <https://lra.le.ac.uk/bitstream/2381/33050/4/ADR%20in%20Italy,%20Spain%20and%20UK,%20and%20art%205.pdf>.

<sup>10</sup> KIRKHAM, R. 2014. The Government’s Plans for Consumer ADR - Innovation or More of the Same. [online]. [viewed 5 April 2016]. Available from: <http://ukaji.org/2014/11/26/analysis-kirkham-the-governments-plans-for-consumer-adr-innovation-or-more-of-the-same/>

41. Currently, there seems to be two contrasting views expressed in the UK about public and private ombudsman schemes. One is that they are very similar and increasingly converging and that the existence of both models is broadly a 'good thing'.
42. For example, Walter Merricks, a former Chief Ombudsman at the UK Financial Ombudsman Service writing in 2010<sup>11</sup> stresses the similarities between private and public ombudsmen, commenting that while private Ombudsmen are often seen as part of the consumer protection regime, they could also be seen as 'non court justice dispensers' and as such, part of the administrative justice system.
43. The other view sees clear differences between the two models, with some concerns that developments in private sector ombudsman schemes might lead to a loss of identity for public ombudsmen. For example, Peter Tyndall, the Ombudsman for Ireland and Vice Chair of the International Ombudsman Institute, has expressed concern about the impact of privatisation on dispute resolution and about competition between ombudsmen.
44. In a speech to the Irish Chartered Institute of Arbitrators AGM in April 2015<sup>12</sup>, he argues that the increasing tendency to out-source the delivery of public services to private entities can lead to less oversight, and the loss of truly independent complaint and redress mechanisms for the public.
45. Peter Tyndall also considers that the growing complexity in service provision should be counterbalanced by simplicity in accessing redress. Implicit in his argument is a question mark over the quality and democratic accountability of private Ombuds schemes and the values they will apply. And he advocates the use of the hybrid Ombuds model, a mixture of state, independent and private bodies, which I know will be familiar to this audience.
46. Nick O'Brien, a former Deputy Legal Services Ombudsman and a former Legal Policy Adviser to the PHSO, is another researcher whose work I would recommend warmly. Writing in 2015 on *What Future for the Ombudsman?*<sup>13</sup>, he has a concern that responses to the ADR Directive could result in public Ombuds settling for being 'ADR entities', with their main business being the simple resolution of disputes as a relatively cheap, accessible and swift alternative to the civil courts. For example, he says that:

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<sup>11</sup> MERRICKS, W. 2010. Where and how should the private sector ombudsman be seen in the administrative justice landscape? In: *Administrative Justice in Context*, Michael Adler (ed.), Oxford: Hart

<sup>12</sup> TYNDALL, P. 2015. Resolving Disputes about Public Services: Speech by Ombudsman Peter Tyndall to the Chartered Institute of Arbitrators AGM on 24 April 2015 [online]. [viewed 5 April 2016]. Available from: <https://www.ombudsman.gov.ie/en/news/speeches-articles/2015/resolving-disputes.html>

<sup>13</sup> O'BRIEN, N. 2015. What Future for the Ombudsman? *The Political Quarterly*, Vol. 86, No. 1, pp. 72-80.

*“What we see is the apparent subordination of the social-democratic aspiration of an earlier generation of public sector ombudsmen to a unifying faith, shared with private sector ombudsmen, in consumerism. No longer is the role of an ombudsman conceived as part of a broader social, and indeed political, vision that would seek to re-balance power between citizen and state, and thereby – through a process of adjudication that is deliberative and reasoned – restore trust and confidence, as an aspect of the common good.”*

47. Nick O’Brien goes on to say that:

*“Instead, an ombudsman institution increasingly serves the less ambitious function of enabling the already empowered individual consumer more effectively to command the delivery of ‘quality services’ from both public and private ‘providers’, and thereby of contributing by effective investigation of an individual complaint to the efficient reinforcement of consumer ‘choice’.”*

48. And in relation to the issue of trust, I am reminded about Marc Hertogh’s finding in his 2013 paper,<sup>14</sup> which focused on studies of ombudsmen in Belgium and the Netherlands, that there is already very little support for what he calls the ‘ombudsman-trust’ hypothesis.

49. His reasons for this include that people using ombudsman processes are confronted with a process that does not really recognise their needs and is overly focused on individual redress and outcomes, and insufficiently helpful in making things accessible for citizens.

50. And more recently, Naomi Creutzfeldt, in an initial report from the findings of her comparative research project on *Trusting the middle-man: impact and legitimacy of ombudsmen in Europe*<sup>15</sup>, has reported on what people expect from ombudsmen in the UK.

51. This 2015 report focuses on two UK public ombudsmen (the Local Government Ombudsman and the PHSO) and three private ombudsmen (Legal Ombudsman, Financial Ombudsman Service and Ombudsman Services). Her full Project Report is soon to be published, so I will just tantalise you with some initial findings.

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<sup>14</sup> HERTOIGH, M. 2013. Why the Ombudsman Does not Promote Trust in Government: Lessons from the Low Countries. *Journal of Social Welfare and Family Law*, Vol. 35, No. 2, p.245

<sup>15</sup> CREUTZFELDT, N. 2015. What people expect from ombudsmen in the UK: A report from the findings of the project on ‘Trusting the middle-man: impact and legitimacy of ombudsmen in Europe’. University of Oxford: Centre for Socio-Legal Studies. 53 pp.

52. These are that respondents in public Ombuds schemes were far less likely than those in private schemes to be satisfied with how their cases were dealt with, with almost 60% being 'very dissatisfied'. Also that "57% of those in public schemes felt the procedure was 'somewhat unfair' or 'very unfair'. This compared to 25% of those in private schemes. I think that these outcomes are possibly a little less stark when considering that respondents reported an outcome in their favour for only 11% of public cases, compared to 53% of private cases which tended to relate more to individual redress.
53. In relation to private ombudsmen, Chris Gill and I recently carried out some research for the UK Ombudsman Services. Our task was to try to identify whether private Ombudsmen had distinctive features, and if so, what this might mean. In our research we prefer the term 'Consumer Ombudsmen' to describe ombudsmen who have a jurisdiction over disputes arising from consumer-business contracts and transactions.
54. Our approach was to compare consumer ombudsmen to four other forms of dispute resolution: to the courts, to consensual dispute resolution, to other forms of consumer dispute resolution (such as arbitration schemes, adjudication schemes and conciliation schemes); and to public ombudsmen.
55. Our resulting report *Defining Consumer Ombudsmen Schemes*<sup>16</sup>, can be found on the Ombudsman Services web site. Our findings include that consumer ombudsmen do have distinct functions, forms and limits, which we think affords them a particular zone of competence.
56. And our conclusion is that consumer ombudsmen constitute an 'added value' form of dispute resolution which is particularly suited in the following areas: where there is a significant power imbalance; there is a strong public interest (for example, where sectoral regulation required); there is evidence of significant vulnerability among consumers; there is high potential for consumer detriment; and where human as well as contractual rights may be engaged (such as in the supply of basic utilities).
57. Our research also concluded that this perspective brings into relief a set of urgent issues which require attention in relation to consumer ombudsmen in the UK - and possibly elsewhere. These are: the increasing dominance of market ideology; the use of competition between providers; the subservience of consumer ombudsmen to regulatory interests; the emphasis on redress/satisfaction rather than justice; the extent to which consumer ombudsmen effectively fulfil their functions; and the knock-on effect on public sector ombudsmen.

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<sup>16</sup> GILL, C AND HIRST, C. 2016. *Defining consumer ombudsman schemes*. Warrington: Ombudsman Services.

58. Turning now to what it is that Ombuds do. To be honest, I thought I was fairly sorted about this until relatively recently. In my own business I have been a practising mediator for about ten years, but must admit to not giving too much thought to mediation theory until I started reading about it in preparation for writing the Mediation Theory Module for the QMU MSc in Dispute Resolution.
59. And I think that some of the mediation criticisms I have read about have a direct relevance to a number of the current issues and debates about Ombuds organisations in the UK.
60. For example, a question which has been bothering me for a while is whether the purpose of an Ombuds is to determine disputes by way of adjudication or to resolve conflicts by enabling parties to come to a consensual agreement? Or is it both? For me, this goes to the core of what it is that an Ombuds does. And I think that associated with this are the increasing tensions for Ombuds between the concepts of right, fair, just, and reasonable.
50. Ann Abraham, a former UK Parliamentary and Health Ombudsman, was clear in 2008 about the Ombudsman role when she said that
- “The Ombudsman way is different from other ADR processes, in that it is in essence an adjudicatory and not a negotiated form of justice: ombudsmen make decisions rather than merely brokering settlements.”<sup>17</sup>*
51. However, from my reading, from working with a number of Ombuds schemes in the UK and through discussions with students on various QMU courses, it is clear that many Ombuds organisations are now more in the business of ‘brokering settlements’ and informally resolving complaints. Many Ombudsmen in the UK now practice a two-stage process of first using informal resolution, followed by adjudication if the complaint is not resolved at the first stage.
52. My mediation readings also drew my attention to concerns raised by Hazel Genn, a leading UK authority on civil justice, about the impact of ADR, and about mediation in particular. She says that:
- “Mediation .... is not about substantive justice. Concern for ‘justice’ and ‘fairness’ is not relevant to the goals of mediation..... the legal merits of cases are not relevant to the process of mediation.”<sup>18</sup>*
53. Hazel Genn has also said that:

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<sup>17</sup> ABRAHAM, A. 2008. The Ombudsman and “Paths to Justice”: a Just Alternative or Just an Alternative. *Public Law*, Spring 2008, pp. 1 - 11.

<sup>18</sup> GENN, H. 2008. *Judging Civil Justice: The Hamlyn Lectures*. Cambridge: CUP

*“The mediator’s role is to assist the parties in reaching a settlement of their dispute. The mediator does not make a judgement about the quality of the settlement. Mediators define a successful outcome as a settlement that the parties can live with. The outcome of mediation is not about just settlement it is just about settlement.”*

54. And I do wonder whether some of her concerns about rights and the privatisation of justice in relation to mediation could also be levelled at Ombuds with their increasing use of informal resolution?
55. In 2014, in order to find out more about informal resolution by Ombudsmen in practice, I worked with two other independent researchers and treasured colleagues, Margaret Doyle and Varda Bondy, to carry out a descriptive mapping study on the use of informal resolution by second-tier complaint handlers.<sup>19</sup> This study was funded by the Nuffield Foundation.
56. In particular, we wanted to find out what the drivers were for using informal resolution rather than investigation. And also what selection criteria were applied to decide whether informal resolution or investigation was used.
57. Our resulting Report analyses the responses received from 48 of the 52 ombuds and complaint-handling organisations in UK and Ireland who were members of the Ombudsman Association at the time. 36 of the responding organisations (which is 75%) reported that they used some form of informal resolution in handling complaints, most often for reasons of expediency.
58. Our study also found that only 11 of the 36 Schemes who used informal resolution had written criteria relating its use. And that in only three of these Schemes were these criteria in the public domain. Decisions in many Schemes were made on a case-by-case basis with the case handler applying their own discretion.
59. And it was clear from the responses received that the term ‘informal resolution’ was being used to describe very different approaches. For example, ‘mediation’ was being used to describe both a full process conducted by a qualified mediator, and a settlement brokered by way of shuttle negotiations.
60. But does terminology matter if the process results in the complaint being ‘resolved’?

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<sup>19</sup> BONDY, V., DOYLE, M., AND HIRST, C. 2014. *The use of informal resolution by ombudsmen in the UK and Ireland*. [online]. [viewed 5 April 2016]. Available from: <https://administrativejusticeblog.files.wordpress.com/2014/10/the-use-of-informal-resolution-approaches-by-ombudsmen-in-the-uk-and-ireland-a-mapping-study-1.pdf>

61. Rob Behrens, another valued colleague who has just stood down as Adjudicator for the Office of the Independent Adjudicator for Higher Education in England and Wales, wrote in 2015 about Public Trust and the Ombudsman.<sup>20</sup> In this paper he quotes Deng Xiaoping as saying

*“It doesn’t matter whether the cat is black or white as long as it catches the Mouse”.*

62. We say in our Informal Resolution Report that we think that terminology does matter. A lack of clarity about what the processes actually consist of can lead to misplaced expectations by complainants and a resulting sense of injustice. Those looking for the weight of authority behind a decision and a sense of vindication may be disappointed to find themselves in a brokered situation emphasising compromise.

63. I do believe that there are benefits in Ombuds using consensual dispute resolution. These include: complainants valuing a more personal approach such as telephone contact with ombuds staff; the direct involvement of parties in resolution helping to restore trust and confidence in an on-going relationship; a lower ‘evidential hurdle’, so reducing the burden of proof on the complainant, who may lack access to evidence; and that bodies in jurisdiction may need to invest less time by cooperating with informal resolution.

64. However, I think that there are also risks. For example, that the pressures of achieving targets and reducing backlogs might take precedence over adopting the most appropriate approach to the complaint. In my experience, low value transactional complaints are not always simple or best suited to informal resolution.

65. I also have concerns about substantive justice, in that complainants may be settling for less in the absence of opinion to the contrary. And that the concepts of fair and reasonable are in danger of being replaced by ‘whatever it is that the parties want.’ Other risks relate to how ombuds can ensure consistency when adopting a variety of approaches to complaint-handling and I think there is a strong case for Ombudsmen having common principles, standards and practices.

66. Writing in 2014, Anna Nylund, when considering access to justice issues in the Nordic countries<sup>21</sup>, has suggested that:

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<sup>20</sup> BEHRENS, R. 2015. Public Trust and the Ombudsman: The Case of the OIA. Reading: OIA. [online]. [viewed 5 April 2016]. Available from: <http://oiahe.org.uk/media/98008/public-trust-and-the-ombudsman-10th-anniversary-series.pdf>.

<sup>21</sup> NYLUND, A. 2014. Access to Justice: Is ADR a Help or a Hindrance. In ERVO, L. and NYLUND, A. *The future of civil litigation: access to courts and court-annexed mediation in the Nordic Countries*. Cham: Springer. pp. 325 - 344.

*“ADR is a hindrance to justice when the organisation, funding, legislation, training and general structure of the dispute resolution system are not clear. In order to work properly, each ADR process used should be clearly defined in terms of what the goal of the process is, what the results will be, what the role of the third party is and what the process will be like”.*

67. I think there are also questions for Ombuds about what the increasing use of informal resolution might mean for complaints which are in the wider interest to investigate. This is a particular issue for public Ombuds. ‘Micro-justice’ or individual redress can work well, but Ombuds also need to consider the needs of ‘macro-justice’ and the interests of citizens who are not party to the individual dispute, but who may be affected by the matter complained about.
68. In our Informal Resolution Report we also express concern that the increasing use of informal resolution could lead to a lack of transparency. Decisions (or determinations or rulings) are often made public, but complaints resolved informally may not be.
69. And if only decisions are published, and these become the minority method of closing complaints, then there is less opportunity for Ombudsmen to give feedback which might lead to learning and systemic improvements.
70. So the questions I would pose to Ombuds who do not have a clear rationale for using ‘informal resolution’ are:
- Do your informal resolution processes have the informed consent of the parties to a complaint?
  - Are you providing a ‘just solution’ or ‘just a solution’?
  - Are your complainants ‘settling’ for less?
  - What about good practice/learning from complaints?
71. Returning to my mediation theory readings, and their relevance to the work of Ombuds, I have been drawn to what Kimberlee Kovach and Lena Love<sup>22</sup> have written about the more determinative forms of mediation. Their view is that mixing mediation functions with those traditionally associated with arbitrators, case evaluators, and judges can lead to overlaps and a blurring of distinctive processes. Kovach and Love agree that entities inevitably evolve and change, but say they should assume a new name when their mutation alters their fundamental characteristics. They give the example that we do not call butterflies caterpillars.

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<sup>22</sup> KOVACH, K.K., and LOVE, L. P., 1998. Mapping Mediation: The Risks of Riskin's Grid. *Harvard Negotiation Law Review* [online]. vol. 3, no. 71, pp. 71-110. [viewed 5 April 2016]. Available from: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2350957](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2350957)

72. I am not saying Ombudsmen who evolve need a new name, although I am reminded about a UK Parliamentarian saying that a collective noun for Ombudsmen should be a 'Grump'. But I do think that we need to be brave about saying that an entity either does not have, or no longer has, the characteristics which define it as being an Ombudsman. In this I include the ability to determine what is right and just and fair and reasonable.
73. And we say in our Informal Resolution Report that Ombuds should have a distinct place in the wider ADR landscape as an ADR process in its own right. Also, that there should be distinctive Ombuds norms and principles. Unless we understand 'ombudsing' as a distinct process, we have a confusing lack of clarity about what it is that ombudsmen are actually offering, and this also leads to confusion as to what it is that Ombuds are for.
74. In relation to this, when recently at a Civil Justice conference in Oxford, England<sup>23</sup>, I was interested to hear Carrie Menkel-Meadow, a US academic and mediator, speaking about 'semi-formal' justice in relation to Ombudsmen schemes, describing this as being a 'smart-casual' third way between informal and formal justice.
75. I want to turn now to what ombudsmen in the UK are doing in response to these various issues and challenges.
76. The UK Ombudsman Association has responded by lobbying hard to protect use of the word Ombudsman. In response, Companies House has now updated its Guidance<sup>24</sup> on the criteria for registering a company in the UK with the title 'ombudsman', or trading as such. Companies now have to be certified by the relevant competent authority, have Ombudsman membership of the Ombudsman Association, and have a proven track record in that area. Those who use the term Ombudsman without permission are liable to a fine of up to £1000, with a further £100/day fine until the offence is resolved.
77. The 2013 QMU study on *The future of ombudsman schemes* mentioned earlier considered that the key strategic responses to change fell into two areas: changes required of individual ombudsmen schemes (such as increasing awareness and accessibility, improving customer service, greater focus on sharing learning and improving services, and on operational efficiency), and changes required of the Ombudsman community (such as increased co-operation between schemes to influence government and increased sharing, integrating and merging of resources to simplify the redress landscape).

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<sup>23</sup> The Centre for Socio-Legal Studies of the University of Oxford held the Fourth Annual Civil Justice Conference on ADR and ODR on 18-20 April 2016

<sup>24</sup> OMBUDSMAN ASSOCIATION. 2015. Ombudsman Association Rules [online]. [viewed 5 April 2016]. Available from: <http://www.ombudsmanassociation.org/docs/BIOA-Rules-New-May2011-Schedule-1.pdf>

78. Some Ombudsmen, such as the Financial Ombudsman Service, are responding by raising the Ombudsman profile: increasing their advertising and making all of their decisions public.
79. Others, like Ombudsman Services, are working to broaden their remit, branding themselves as being the Consumer Ombudsman. In relation to this, a 2013 study by the UK Energy Regulator Ofgem<sup>25</sup>, about Ombudsman Services, found that consumers were much more likely to use the ombudsman if they know that an ombudsman exists before they have a complaint.
80. In England, the PHSO and the Local Government Ombudsman have been working together in support of a new combined Public Services Ombudsman scheme. Their main aim is to establish simpler access for the public and a more efficient seamless service. It is their hope that draft legislation will be in place by the end of June with possible royal assent next year. These two Ombudsmen have already established a joint team of investigators working from the LGO London office to handle all joint health and social care cases. And if successful, they hope that other ombudsman schemes might also be combined in the interests of giving the public a clear route for redress when public services go wrong.
81. In Northern Ireland, there has already been consolidation, with the new Office of the Northern Ireland Public Services Ombudsman (NIPSO) being created this April. The functions of the Northern Ireland Local Government Commissioner for Standards and the Judicial Appointments Ombudsman have been transferred to this new Office. And their jurisdiction is further broadening, to include colleges and universities in October 2016, publicly funded schools from April 2017, and from April 2018 to be able to investigate own initiative matters.
82. In Scotland, 2010 legislation gave the Scottish Public Services Ombudsman a Complaints Standard Authority role, with the power to publish standardised model complaints handling procedures for bodies within jurisdiction, and to monitor and promote best practice in complaints handling.
83. The main work of the CSA to date has involved the publication of model complaints handling procedure models. These have all followed the same pattern - a five working day informal resolution stage and a twenty working day formal investigation stage. After this complaints may be referred to the SPSO.
84. The SPSO also supports the development of good practice through delivering face to face training and e-learning. Scotland is also considering the possibility of having a single point of contact for all public and consumer complaints.

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<sup>25</sup> 4GfK NOP (2013) 'Complaints to Ombudsman Services: Energy, Report for Ofgem exploring why few consumers refer their complaint to Ombudsman Services: Energy'

85. And in Wales, the office of the Public Services Ombudsman for Wales already provides the Complaints Wales telephone and web based signposting service, offering advice on how to complain about public services. This Ombudsman is seeking legislative change to have a Complaints Standard Authority role like Scotland, along with own initiative powers of investigation.
86. And what about the future? Alice says to the Cheshire Cat:
- “Cheshire Puss, ....Would you tell me, please, which way I ought to go from here? That depends a good deal on where you want to get to, said the Cat.”*
87. So where do we want to go? I think that one of the biggest challenges ahead for UK Ombuds is to decide what they want to be. And in doing this they need to be out, loud and proud in clarifying their place and role as a distinctive and integral part of the dispute resolution landscape. Also, in these times of financial constraint, I think that Ombuds need to be able to better demonstrate, quantify and justify the benefits and costs of what they do.
88. I also believe that dispute system design will become increasingly important for Ombudsmen.
89. At QMU in 2014 we did some research into *Models of Alternative Dispute Resolution*<sup>26</sup>, and one of the outputs from this work is an ADR Design Toolkit. This Toolkit sets out a set of ten design choices and associated questions to help dispute system designers identify key aspects of a new system. It can also be used to analyse existing systems.
90. For example, a question that Ombudsmen may want to ask relating to the design choice of Emphasis is *“Where public interest in the efficient operation of a scheme is high, how will the scheme ensure it operates transparently?”*
91. But as well as individual design we also need to do more to integrate dispute resolution systems. I am mindful that it is now forty years since the first Pound Conference in 1976 in the USA, where Frank Sander introduced his concept of the multi-door courthouse. He proposed that disputants should first be assisted to analyse their disputes, with the multiple doors representing a spectrum of dispute resolution options from which those entering the courthouse could choose.

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<sup>26</sup> GILL, C., WILLIAMS, J., BRENNAN, C. and HIRST, C. 2014. *Models of Alternative Dispute Resolution (ADR)*. [online]. [viewed 5 April 2016]. Available from: <http://www.qmu.ac.uk/be/Research/cic/Doc/Models-Alternative-Dispute-Resolution-Report-141031.pdf>

92. Sander and Goldberg later expanded this concept in their 1994 paper '*Fitting the Forum to the Fuss*'<sup>27</sup>, describing this future courthouse as having seven rooms, with a Screening Clerk in Room 1. This Clerk would use five criteria to determine which dispute resolution process would best fit the incoming dispute: the nature of the dispute, the parties' relationship, the amount in dispute, the cost of each process, and the speed of each process.
93. And more recently in 2012, Timothy Heeden<sup>28</sup> considered that there should be further investment in the screening process in Room 1, saying that we should do more to make sure that the process suited the disputants by 'fitting the forum to the folks'.
94. So questions for me here are whether Ombudsmen should be a room in a multi-door court-house, or should they take on the role of Clerk? There are also questions about how online this multi-door court-house or dispute resolution centre could or should be?
95. In relation to all I have said so far, I want to touch on questions which trouble me as an educator. These are whether the work of Ombudsmen is a profession, what key qualities and skills are needed to do this work, and whether the recent changes impacting on Ombuds schemes affect what is needed in Ombudsmen staff training, development, and education.
96. I recently saw a notice in the window of a restaurant in Edinburgh, which said Staff Wanted: the Energetic, Informed, Experienced with Character, which I thought made a good starting point for Ombuds. And my own view of the ideal complaints handler is someone who combines a passion for researching family history with a love of ordering supplies from office stationery catalogues. Someone with both an inquisitive and a tidy mind.
97. In his 2015 paper, Nick O'Brien talks about the need for the more explicit articulation of ombudsman norms. He says that a related consequence of developing ombudsprudence is the submission of ombudsmen to a measure of professionalization that has so far been avoided. And he argues that if ombudsmen are to take a more prominent part in dispute resolution, they must expect their own credentials, and those of their staff, to be exposed to serious interrogation and review in the public interest.

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<sup>27</sup> SANDER, F. E. A. and GOLDBERG, S. B. 1994. *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*. *Negotiation Journal*, 10: 49-68.

<sup>28</sup> HEDEEN, T. 2012. *Remodeling the Multi-Door Courthouse To "Fit the Forum to the Folks": How Screening and Preparation Will Enhance ADR*, [online] 95 Marq. L. Rev. 941 [viewed 5 April 2016]. Available from: <http://scholarship.law.marquette.edu/mulr/vol95/iss3/10>

98. And a related finding from the Chris Gill and Naomi Creutzfeldt study mentioned earlier on Ombuds-watchers, was that participants thought that the qualifications and backgrounds of ombudsman staff could be problematic. Some perceived a lack of knowledge over the matters being investigated or, more generally, a lack of life experience. It was thought that staff often did not have professional qualifications in the area being investigated nor did they have the legal qualifications to allow them to consider more general legal issues in cases.
99. My personal view is that Ombuds staff should be able to say that their particular area of professional expertise relates to complaint and dispute resolution, drawing as needs be on experts from other fields to provide legal, technical or sector specific knowledge.
100. So can Ombudsman work be a profession? Turning again to my mediation reading, Nancy Welsh, in her Chapter on *Institutionalization and Professionalization*<sup>29</sup> in The Handbook of Dispute Resolution, has written that:
- “A profession is characterized by a number of factors. Professions have a shared body of knowledge, often imparted in an institutional setting that certifies competence and quality”.*
101. She goes on to explain that this distinct knowledge system binds together the members of a profession and serves as the basis for their practical techniques. Also that this shared sense of professional identity enables the profession to determine appropriate mechanisms for training, regulation of entry, and enforcement of ethical and competent practice.
102. Welsh considers that there is no consensus regarding the approach, skills and norms that mediators should share, and that there is no agreement regarding a systematic body of esoteric, abstract knowledge upon which the work of mediation is based.
103. And that if ADR neutrals wanted to be recognized as professionals, they must reach consensus regarding the forms, goals and interventions that should characterize their processes. I think that this situation currently applies to Ombudsmen.
104. So maybe not a profession yet, and my sense is that it might be more important for those heading an Ombuds organisation to have integrity, be demonstrably independent and to be trusted than it is for them to have a professional Ombuds qualification. But there is definitely the need for education and to demonstrate professionalism.

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<sup>29</sup> Welsh, N. 2005. *Chapter 30 Institutionalization and Professionalization*. In: MOFFIT, M. L., AND BORDONE, R. C. (eds). *The Handbook of Dispute Resolution*. San Francisco: Jossey-Bass.

105. I also think that practitioners and academics need to work more closely together on research to both deepen and broaden the Ombuds knowledge-base. If we do not do this, then there is no clear foundation from which a profession with related and relevant qualifications can emerge. I also believe that the increasing use of consensual resolution processes means that additional principles, norms and skill sets are now required in Ombuds schemes.

106. And as educators, we do need to teach complaint handling skills and processes, but we also need to teach the underlying theories. I think it is vital for Ombuds staff to be reflective practitioners, and to understand both what they are doing, and why they are doing it. I think that Michael Lang, in his article *Becoming Reflective Practitioners*<sup>30</sup> sums this up well by saying that:

*“I realized that without understanding the underlying theoretical principles of practice, we are merely skilled mechanics trying out one tool after another without understanding what tool would be appropriate to the task. We apply techniques and interventions without full consideration of the reasons behind such approaches, without understanding their likely consequences, without the ability to evaluate the success or failure of those interventions, and without the tools and resources to learn from each experience.”*

107. In drawing this address towards a close, I want to reinforce that I believe in what Ombuds are and in the positive impact they can have.

108. Emily O’Reilly, the European Ombudsman, summed up the power of Ombudsmen in her 2015 keynote introduction to a seminar in Brussels on the *Role of the Ombudsman in Modern Parliamentary Democracies*. She said that an Ombudsman has:

*“great powers potentially at their disposal. The power of their own personality, the power of the quality of the staff in their institution, the power of their investigative tools, the power of the moral authority of the role itself, the power of its alliances with parliament and with civil society, the power of public opinion and the power of the media.”*<sup>31</sup>

109. So to conclude, I think that the fabulous creatures which are Ombudsmen can be one model with many applications, as long as there is both clarity and confidence about who they are and what they stand for.

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<sup>30</sup> LANG, M., 2000. *Becoming Reflective Practitioners*. *Mediate* [online]. [viewed 15 February 2016]. Available from: <http://www.mediate.com/articles/reflect.cfm>

<sup>31</sup> O’REILLY, E. 2015. Keynote introduction - 18th November 2015. Seminar of The Role of the Ombudsman in Modern Parliamentary Democracies. Brussels. [online]. [viewed 5 April 2016]. Available from: <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/61362/html.bookmark>

110. Lewis Carroll wrote:

*“When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean – neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master - that’s all”.*

And the on-going challenge for Ombudsmen is to make these choices, and to be that master - or indeed that mistress.

111. I am at the end, so I will stop. I am keen to hear your views about anything I have said and also any thoughts you may have relating to this. Although to quote another favourite author, this time Douglas Adams, it may be the case that

*“I refuse to answer that question on the grounds that I don’t know the answer”.*

112. Thank you.

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