

Private sector ombudsman schemes and the administrative justice system

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Ten years ago private sector ombudsman schemes were seen as something of a backwater in the mainstream of public life. Apart from those of us in the financial sector, there was the estate agents scheme - and the funerals scheme that was sadly doomed for an early grave two years later. There was also the housing ombudsman – dealing with housing association disputes. Hardly a solid foundation.

A decade on I think we can say that we are here to stay. But for how long? And how strong a place are we in and what might to be done to make it more secure?

And before I that I'd like to sneak in a few words about my new role – and the place of professional disciplinary proceedings in the administrative justice system.

OHPA – professional disciplinary proceedings

The Office of the Health Professions Adjudicator is established to provide independent adjudication on the fitness to practise of doctors – a function we will take over from the GMC in April 2011 – and in due course that of the General Optical Council in relation to opticians. This decision emerged following Dame Janet Smith's Shipman enquiry. The Government accepted that a modern approach to the separation of functions required that it was no longer seen as right for a professional regulatory body – the GMC - at the same time to be responsible for investigating allegations of unfitness, launching formal proceedings, and also for the arrangements under which the outcome is determined. We will be funded by the GMC and the other regulators under statutory levies we will make – so ultimately by their professional registrants, not by taxpayers.

The government has also opened the way for us in due course to take over the adjudication function from the bodies regulating nurses, pharmacists, dentists, and other professionals allied to medicine.

The model has been that of three (or more) person panels, usually chaired by a lay member, but always including a professional member – and with a lawyer as legal assessor or adviser to the panel rather than as a panel member, let alone as chair. We are asked to consider moving to what would more easily recognised as a tribunal model – with a legally qualified chair.

The AJTC's recent paper "The Developing Administrative Justice Landscape" records carefully that tribunals concerned with regulation and discipline in the professions have for the most part lain outside the remit of the Council on Tribunals and the AJTC, although it accepts that there is a strong case for regarding them as being part of the administrative justice landscape – if they are created by statute. I am pleased that it has now been accepted that we the OHPA will be firmly within the remit of AJTC and will be listed as a tribunal. That of course begs the question of the status of the other healthcare regulators – all established under statutory authority.

And of course there are also disciplinary arrangements for accountants, architects, veterinary surgeons, solicitors, barristers, teachers and social workers – all established under statutory authority – and I see little joined up practice or communication across the field. While I am loathe to add to the workload of the hard pressed Council and its staff, I do hope that this area of the administrative justice system can in due course receive some focus.

Who knows? One day a Professional Disciplinary Chamber?

Private sector ombudsman schemes

This model of service - the offer of free independent dispute resolution to customers paid for by providers as an alternative to court - started 28 years ago as something of a voluntary experiment by the insurance industry in cooperation with the consumer movement. It is a personalised office – a named ombudsman - operating at a distance largely without hearings, but empowered to make decisions on unresolved disputes – a last resort not a first resort.

Since then in the past decade Parliament has approved the establishment of a number of schemes. The Financial Services and Markets Act 2000 set up the Financial Ombudsman Service; the Telecommunications Act 2003 provided for the formal recognition of Otelco; the Higher Education Act of 2004 provided for a scheme for student complaints; the Consumers, Estate Agents and Redress Act 2007 for that of the surveyors scheme and estate agents scheme (now the property ombudsman), and also that for energy providers; and the Legal Services Act 2007 for a single law professionals scheme.

There is clearly a common appetite for offering consumers an alternative to the civil courts through an accessible free service for resolving disputes arising from primary decision making. A common thread that characterises these fields is the imbalance of power and resources between the consumer and the business – and that is similar in conception to the imbalance between the citizen and the government department that was recognised as justifying the establishment of the Parliamentary Ombudsman in 1967. But in the private sector schemes we provide for redress both for legal wrongs and for maladministration, whereas the landscape of public redress is characterised by separate systems - tribunals for legal redress and ombudsman schemes for maladministration.

But what is it that brings together the customers of banks, estate agents, universities, phone companies, housing associations, solicitors, and electricity providers, yet excludes those of rail companies, airlines, vets, accountants, supermarkets and used car traders. Given that all the former group have been the subject of statutory schemes, we need look no further than the attention and interest that particular government departments have given, or in some areas been required to give. Pension schemes fall within the remit of the Department for Work and Pensions; banks and financial companies that of HM Treasury; estate agents, phone and electricity companies that of the Department for Business Innovation and Skills (in relation to telecommunications companies as a result of an EU Directive); housing associations that of Department for Communities and Local Government; higher education institutions that of what was the Department for Education; lawyers that of the Ministry of Justice (MoJ). But it is painfully clear that none of these departments see beyond their own departmental interest or have much understanding of the administrative justice context into which their scheme is now seen – at least by the AJTC.

Cross departmental coherence and joined-up government are often seen by students of public administration and connoisseurs of Whitehall as the graveyard of public policy, and this area of consumer redress provides a classic example. Developments have proceeded in a blinkered and haphazard way. The British and Irish Ombudsman Association, largely on the receiving end of these unstructured developments, has sought to engage government with limited success it must be admitted, with the aim of finding a home for more joined-up thinking through dialogue with the Cabinet Office, the MoJ and the Business Department.

Within the administrative justice system?

It was in the Lord Chancellor's 2004 White Paper, "Transforming Public Services: Complaints, Redress, and Tribunals"¹ that the first connection was made in official policy between the dispute resolution model of private sector ombudsmen and the world of tribunals and administrative justice. The White Paper contained a description of the operating model of the Financial Ombudsman Service, and drew attention to some of its key features. These it saw as the inquisitorial style, the graded tiers of intervention from conciliation to final ombudsman decision, the paper and telephone interaction, and the absence of hearings. It contrasted these with the adversarial, hearing-based model operated by tribunals. The paper called for a new approach to resolving disputes, and promised that the Lord Chancellor would take the lead on coordinating redress policy across Government. His department would "take a systemic view across the various means of tackling disputes, and the roles of the different organisations that provide them (courts, ombudsmen, tribunals, independent complaint handlers etc)". (para 6.3) Now we have the AJTC with a remit to keep under review the administrative justice system, by which is meant "the overall system by which decisions of an administrative or executive nature are made, including the systems for resolving disputes and airing grievances in relation to such decisions".

¹ Cm 6243

We can also look to the common function of ombudsmen and tribunals – to deal with appeals from disputed primary decision making. Neither ombudsmen nor tribunals are primary decision makers. What is distinctive is the common approach of both public and private ombudsman schemes to dispute resolution – little reliance on hearings, a graduated flexible approach including early evaluation, an inquisitional rather than adversarial model and a deliberate policy of feeding back lessons learned from the complaints seen and decisions made to the institutions within remit. The White Paper deliberately set out to encourage tribunals to see if aspects of this model could profitably be adopted as part of their decision-making – the “new approach to resolving disputes”. “We believe that government has much to learn from the success of ombudsman schemes,” the White Paper declared, “our purpose is to reclaim the idea of flexible dispute resolution for a new era”.² The legislation now requires the head of the new Tribunal Service to develop “innovative methods of resolving disputes” of the type that come before tribunals.

Size, volume and cost

In the early days the ombudsman himself (it was virtually an all male business then) saw all the cases and made all the decisions. There were some misgivings about whether what seemed like a massive organisation with 350 staff dealing with 25,000 complaints annually (that was how the Financial Ombudsman Service started) could maintain the ethos and function of *ombudsmanry* in what was inevitably going to be something of an industrialised bureaucracy.

This year the FOS has workforce of 1,300 dealing with nearly 800,000 enquiries, upwards of 170,000 cases with a budget of over £90 million. The other schemes are much smaller. The combined operation servicing the telecoms, energy and surveyor schemes (The Ombudsman Service Limited) handled 15,000 cases last year on a budget of £3.5 million, while the property ombudsman handled 800 cases on a turnover of £1.5m. The higher education scheme handled 900 cases on a budget of £1.6m.

Both the property and the TOSL schemes helpfully publish the number of cases in which awards are made and their financial value. Awards in the telecoms scheme average around £100, while those in the energy scheme range between £400 and £1000. In the property agency scheme they are around £650. The FOS has not published such figures but is considering doing so. Part of the problem is that many of its awards are for amounts that cannot easily be specified – requiring the firm to pay compensation according to a formula.

Does the model still work?

But whether large or small, the key elements of the model can still work, and that the values of fairness, speed, reasonableness and informality can be maintained at much larger volumes. But this can only be done with the help of

² White Paper Para 4.20

high level management skills and systems - for business planning and budgeting, advanced IT, personnel training, quality audit and customer service delivery.

And we can say that the model still works for consumers. Of the people the Service will help this year, I would argue that few would dare to go to court, and if they did the outcomes would be inconsistent to say the least, huge amounts of money would be wasted on court time and lawyers fees, and there is a real question of whether just outcomes would be achieved. The offer of a free service levels the playing field for the consumer. In addition pooling all the cases in one place can be said to generate benefits of scale – in terms of accumulated expertise, consistency of decisions, dedicated customer service, feedback to and engagement with providers, and operational economies. Unlike the court system where costs pressures force most cases to be reluctantly settled without a judicial opinion, the ombudsman services offers a reasoned opinion on the merits of all the disputes brought before it at a far lower unit cost.

Despite what one can enumerate as our successes, we should be cautious in assuming that private sector ombudsman schemes are all safe. That which parliament has put in place, parliament can just as easily take away. Most government departments see their schemes as just that – theirs to amend, merge, contract or abolish should their own policy or political pressures dictate – and parliamentary time allow. In the financial world there have been calls from some providers to alter the free access nature of our scheme: why, it is argued, shouldn't consumers at least make a down-payment, returnable if their complaint succeeds? The fact that free access is a fundamental requirement of BIOA recognition would not be seen as the slightest obstacle to reform by civil servants or politicians – even if they knew it existed. Few MPs or peers would take a holistic view of the ombudsman sector or of the damage that might be done to the model or the brand by an ill-judged reform to a single scheme.

The Administrative Justice and Tribunals Council, we may hope, might offer some protection. But what we may need are some better ways of demonstrating our added value in economic and social policy terms, both within and outside the sectors in which we operate. In return for our operational cost, what benefits can we show - against a counter-factual scenario assuming either that we were not here or that something different was.

Where is the added value?

Where would additional costs or social disadvantages be felt in our absence? What benefits do we bring that would be difficult to replicate elsewhere? Are there defects in the service offering we provide?

We may say that in our absence, the only alternative would be for consumers to take their cases to court, and that evidence shows that most people are extremely reluctant to take disputes to court against what is assumed to be a better armed opponent. A long line of academic study has followed Marc

Galanter's contrast between the experience in litigation of "one shotters" against "repeat players". A critical policy analyst might say that if that is the problem, the right answer is a strategy to improve the perception, accessibility, procedure and service offering of the civil courts rather than the proliferation of ombudsman schemes designed as alternatives to them on the pessimistic assumption that the courts will never be capable of performing the job.

Some value for money assessment might also be appropriate. The FOS has committed itself an external review every three years - next year by the NAO on the VFM theme. It must be clear that if a scheme is finding only a tiny proportion of complaints to be valid, and that the unit cost of each case vastly exceeds the average award, some questions would be asked about whether it is justified to require the sector to pay for it.

We may argue that the pooling of all the cases in single schemes allows for the development of consistency and expertise thus giving rise to opportunities for sectoral feedback, and for a more rapid and economical dispatch of cases. This might point to a specialised tribunal or branch of the courts rather than alternatives thereto.

As far as disadvantages compared to the courts or tribunals, we would have to accept that we offer a distance service with virtually no opportunities for local presence or hearings. The Financial Ombudsman Service is in London, the property ombudsman is in Salisbury, the Telecoms, Energy and Surveyor schemes are in Warrington, and the Higher Education scheme is in Reading. I would argue that hearings are not essential for the fairness of disposal or even customer satisfaction in the vast majority of the disputes we see, and that consistency is best assured operating from a single office base. But I would expect to be challenged and put to proof of my assertions.

As I develop these themes, I hope that some of you in the tribunal world are shifting uneasily. Why exactly is it that access to employment dispute resolution is offered in a no cost no risk tribunal environment rather than in a branch of the courts where cost disciplines might reduce the impact nuisance claims? Are there no employers arguing for this? And why do taxpayers bear the burden of it while the cost of financial, property, energy and law services dispute resolution falls on providers in those sectors?

Back to ombudsman. We may argue that we have developed a unique brand through this unusual name, and that it carries strong public recognition and association with fairness, independence, and a personalised champion offering accessibility and redress. OK we had better prove it. Mere assertions will not be enough.

All public institutions will be required to evaluate themselves – or it will be done for them. The notion of an external review every three years was borrowed from the Australian financial ombudsman sector – and has similarities with the quinquennial effectiveness reviews of NDPBs that used to be conducted here.

A challenge for BIOA and for the AJTC would be to see how regular critical evidence-based analysis can be produced that would either vindicate our right to places in the administrative justice system on the model we have developed – or show if and where the claims we make have less substance than we may like to think, and if so what action might be taken in response. The time will come when we might want to see a Leggatt style review of the ombudsman landscape, leading to more commonality – even more joining up of services and filling of the gaps. And so far I have only spoken on private sector schemes. But before that I think there is work that the ombudsman schemes, BIOA and AJTC could usefully do to prepare for it.