

NI OMBUDSMAN 40TH ANNIVERSARY EVENT

'FUTURE CHALLENGES FOR THE OMBUDSMAN'

ANN ABRAHAM, UK PARLIAMENTARY OMBUDSMAN

Today is in part a day for looking back, for reflecting on the achievements of the Northern Ireland Ombudsman and for taking satisfaction in a job well done, frequently in the face of uniquely difficult social and political challenges, unique certainly within the recent experience of the Ombudsman community of these islands.

If I want to be reminded of that context, I need look no further than an old *Guardian* cartoon published in 1969 depicting Ian Paisley, Bernadette Devlin, Gerry Fitt, James Chichester-Clark and then Home Secretary Jim Callaghan, a stark reminder of the dark days that saw the birth of the Northern Ireland Ombudsman and a reminder too of how far we have come, of the historic events of which the Northern Ireland Ombudsman has been a part.

I take this opportunity to pay tribute to Tom, and to pay tribute also to his predecessors, their staff, and all those others who have kept faith with the Ombudsman ideal in the intervening years and given it life in the particular circumstances that have prevailed here. I am especially pleased to be together here today not just with those from Britain and Northern Ireland but with Emily O'Reilly, the Ombudsman of the Irish Republic. Not so very long ago, this is a gathering that would perhaps have been hard to envisage.

But the task Tom has given me today is the task of looking forward, of looking forward not so much to the particular challenges that will face his eventual successors in Belfast but to the shared challenges that face us all as Ombudsmen in these islands.

In setting the scene for this exercise in futurology, I am mindful of the multifaceted character of the role of Ombudsman and of the wide variety of challenges that lie ahead as a result. It is after all the unique place of the Ombudsman at the point where the executive, legislature and judiciary meet that gives the role of Ombudsman its particular weight but at the same time exposes it to the many forces that sweep the constitutional landscape. I want to say something about these constitutional forces, whilst keeping in view some of the broader global changes that continue to face us all.

The legislature

So let me start with the legislature, the source of the Ombudsman's remit and authority. It is the legislature that summons the Ombudsman into existence and the legislature that can bring that existence to an end. It is the legislature too that can starve the Ombudsman of oxygen and through indifference condemn it to a slow and painful death.

I am sure that Tom would not want this occasion to pass without some modest mention of the Ombudsman for Ontario, our mutual friend, Andre Marin. Andre Marin is on record in describing the challenge that confronted him when he was appointed Ombudsman - the threatened closure of his office. He faced up to that challenge by taking the bold step of adopting an aggressive and ambitious programme of own-initiative investigations into some of the hot social issues of the day in Ontario. He's never looked back.

Now, I am not suggesting that such drastic measures are invariably the answer. The occasional need for them does suggest, however, the importance of ensuring constructive dialogue between the Ombudsman and the legislature.

Without that dialogue there is a danger the activities of the Ombudsman will lose their salience and be marginalized to the political wasteland.

In my own context, this observation entails recognition of the critical importance of the Westminster-based Public Administration Select Committee, currently - although not for much longer - chaired by Dr Tony Wright MP.

Not so long ago, the UK Ombudsman had its very own Select Committee. In more recent years, the Public Administration Select Committee has combined that function with a broader remit. So far so good.

But there is always the risk that a change of personnel or political preoccupation could diminish interest in the Ombudsman, leaving my office dangerously cut loose from its parliamentary moorings. It is those parliamentary moorings that provide the authority and constitutional framework for what I do. Without them I am in danger of becoming just another complaint handler and selling short my statutory remit.

At a time when there is much talk of the 'democratic deficit' and of the breach of trust between electorate and elected, there is a particular challenge for the Ombudsman in making the connections and in finding an identity that reflects her deep constitutional roots.

The executive

If the legislature is the source of the Ombudsman's authority, the executive is the source of the Ombudsman's purpose. It is in the task of holding the executive to account that the Ombudsman comes into her own and finds the focal point for her daily activity.

Not surprisingly too it is with the executive that relationships are likely to be especially fraught. It is after all the executive that bears the brunt of the Ombudsman's censure.

In recent years, I have seen a significant increase in the number of judicial reviews brought against my office. Whilst individual complainants have been the chief source of this increase, it is the political challenges by the government that have been far more serious. Most telling of all was the attempt by the government to escape from my adverse findings about its role in the protection of occupational pensions by arguing that it could respond to the Ombudsman's findings on a 'take it or leave it' basis, free to prefer its own judgment to that of the Ombudsman without more ado.

It took the Court of Appeal to put a stop to this line of thought by making it clear that the executive is at liberty to discard the Ombudsman's findings only if it has 'cogent reasons' to do so. In that particular case, and more recently in litigation arising from my report on the collapse of Equitable Life, the court has found such 'cogent reasons' to be lacking. Nevertheless, executive resistance represents a serious challenge to any Ombudsman, threatening to rob the Ombudsman of ambition, and treating with damaging contempt the very core of the office's purpose.

In the particular cases I have mentioned, the judiciary has in fact proved to be a significant ally. Yet the judiciary is not always a source of sweetness and light in respect of Ombudsman matters. Too often I have been left with the sense that some judges know very little about the Ombudsman and at best regard the office as a pale imitation of the judicial process.

One of the success stories for Ombudsmen in recent years has been the way in which the expansion of alternative dispute resolution has made the Ombudsman the remedy of choice in a wide range of situations, leading to the considerable expansion of Ombudsman schemes, especially in the private sector.

At the same time, however, there is a danger that this positioning of the Ombudsman as just another source of ADR threatens to undermine the distinctive constitutional niche that in fact gives a national Ombudsman her credibility. It is of course an important part of that niche that it holds out the prospect to ordinary citizens of their seeking quick and cheap redress, without recourse to the courts and all that goes with it.

Yet the role of Ombudsman should go much further than that, reaching out beyond the limitations normally associated with the courts so that it can deliver systemic improvement and make effective sense of the task of holding the executive to account.

Complacency and underselling

It is here that I want to draw attention to what I see as the fourth source of serious challenge, namely, complacency on the part of Ombudsmen themselves. Too often, I suspect, Ombudsmen have been tempted to mimic the court process, to defer to legal advice that invariably takes the judicial system as the accepted paradigm of dispute resolution. In that case, instead of maximising the distinctive potential of the Ombudsman remit and the expansive reach of the Ombudsman suite of remedy, the Ombudsman too readily plays into the hands of those who see it as an adjunct of the courts, a rather marginal bit of quasi-judicial machinery for filling in the gaps on the judicial landscape otherwise left untouched.

Such an approach contains within it the seeds of self-destruction. When judged against the wholly inappropriate benchmark of the courts, the Ombudsman, not surprisingly, simply fails to match up:

- it is not the role of Ombudsman to make definitive legal findings;
- it is not the role of Ombudsman to facilitate an adversarial process that gives rein to the loudest and best resourced voices;
- it is not the role of Ombudsman to exercise judgment in strict accordance with precedent or with detailed rules of evidence;
- and it is not the role of Ombudsman to provide remedies that are legally enforceable.

But I should add that neither is it the role of Ombudsman to make the mistake of suggesting that any of these omissions is in fact a source of weakness or of diminishment in the exercise of the role. On the contrary, these negative definitions of role mask the positive strengths that help define the true function of Ombudsman. It is after all precisely functional flexibility, mandate of influence and ease of access that bestow upon the role of Ombudsman its distinctive quality: there should not be anything to apologise about in being different from the courts.

The broader political context: localism and fragmentation

Let me turn now from the constitutional remit of the Ombudsman to consider some of the implications of the broader political context in which we all operate within these islands. I want to consider here the impact upon our work of two complementary but apparently contradictory phenomena:

- on the one hand we have the various moves towards the creation of smaller political units, as witnessed for example by the processes of devolution, and of what some have referred to as 'the new localism' within countries;
- on the other hand, we have all those developments that have limited the sovereignty of the domestic state, for example, by the creation of supranational agencies and by the establishment of ethical expectations that find their origin in fundamental human rights rather than positive domestic law.

Both these phenomena pose challenges for Ombudsmen with which we are familiar in these islands. In the case of devolution it is not so much that the jigsaw of public service delivery becomes more complex, the logistics of accountability ever more difficult to put in place.

More importantly, the very ethos of devolution properly raises questions about the authority of a Westminster-based Ombudsman and about the best configuration for the delivery of meaningful accountability in a devolved context.

In other words, it is not just a question of whether we can work out for ourselves an intelligible distribution of functions between what might pass for the centre and the periphery; instead it is a question of how we conceive of the very notions of centre and periphery, and of how we attach credibility to our attempts to do so.

If, for example, the UK Ombudsman is to retain responsibility for those areas of executive activity relating to Westminster-reserved governmental functions, how can that responsibility command the level of credibility enjoyed by the public services Ombudsmen in Belfast, Cardiff and Edinburgh? By the same token, is there not a danger that too much dispersal of accountability will lead to dissipation of resource, of direction and of plain clout with those who hold influence and real power.

Or if the delivery of health and social care is increasingly configured so that it transgresses conventional service-delivery boundaries, how can the work of Ombudsman be co-ordinated so that it keeps up with the pace of change?

In my own jurisdiction, we have seen the creation in recent years of new powers for joint investigations between my office and the Local Government Ombudsman for England, and indeed the Public Service Ombudsman for Wales. I suspect that we will see more calls for similar initiatives and for even more creative solutions to as-yet unforeseen challenges in this area.

Yet we must remain vigilant that our attempts to counter any piecemeal drift towards fragmentation are themselves properly coherent and sustainable. On occasion it must seem to onlookers that the expansion of Ombudsman schemes, case reviewers and other complaint handlers is entirely haphazard, devoid of any rational plan or strategic direction.

The Leggatt review of the tribunal system was welcome and timely. I increasingly suspect that we need something similar for Ombudsmen, throughout Britain and Northern Ireland, and not confined just to the public sector.

Without such a review there is a real danger that we will lose sight of what is fundamental to Ombudsman practice and of what gives that practice its distinctive flavour.

Extra state organs of accountability

The obverse of the tendency towards localism, and indeed fragmentation, is the contemporary recourse to extra-state organs of accountability. We have of course become accustomed to operating in the shadow of the European Ombudsman. Yet that is a shadow that is, in my experience, wholly benevolent: the remit of the European Ombudsman is easily separated from that of any national Ombudsman, confined, as it is, to the administrative activities of the European Union.

Somewhat different, however, are the steps currently being taken by the EU to establish a European Health Ombudsman. If these plans go ahead, they will create a Brussels-based Ombudsman with responsibility for investigating certain activities of domestic health services insofar as they relate to cross-border EU obligations. This is, in a sense, an extension of the inevitable logic of human rights, as it encounters calls for cross-border enforcement of values that are rooted in what are perceived as universal standards rather than domestic law.

I do not say this is a bad thing, but I do say that it is a development that is likely to become more prevalent and that poses a challenge for any Ombudsman.

Globalisation, demographic change and technological revolution

Finally, let me turn to three factors that go beyond not just domestic constitutional considerations and international politics, but that are rooted

in larger social movements. Here I want to touch upon the related phenomena of globalisation, demographic change and technological revolution. The challenges are not to our remit but to our very way of doing things.

It is of the essence of the Ombudsman function that it delivers meaningful access to those who are entitled to raise a grievance. As globalisation becomes a reality, so the ability of the Ombudsman to field enquiries from every corner of the planet becomes more pronounced. We can no longer assume that the delivery of public services touches just the citizens of the home nation state. As the reach of global networks expands, the interconnection of lives previously regarded as quite separate becomes ever more apparent.

At the same time, the pace of demographic change entails that an ever-larger proportion of those aggrieved is likely to fall among the older sections of the population. That change in profile not only makes it necessary for the Ombudsman to devise new ways of giving access to older and disabled people, some of whom might need more than the usual levels of support in putting forward their complaints, but also to anticipate that the profile of complaints themselves will change to reflect their changing source.

And of course underpinning the implications of both these demographic and global phenomena is the ever-increasing pace of technological change. How do we as Ombudsmen, with our particular interest in open access, ensure that we are making the best possible use of technological innovation to ensure that those with grievances can communicate with us without impediment?

This challenge is not just technocratic, a matter simply of having the right 'kit'. It is also about having the flexibility to do things differently, of keeping in mind the fundamental purpose of the Ombudsman function, and of having the courage to go where technological change takes us, however unknowable in advance that destination might prove to be.

This demand for technological innovation is, I would suggest, one aspect of a broader demand for demonstrable professionalism, for objective assurances that Ombudsmen and their staff have the credentials not just to do the job properly but to be at the cutting edge of developments in the field, to maintain credibility and command respect.

We have in recent months seen the British and Irish Ombudsman Association take the first steps towards the accreditation of training for Ombudsman staff. Such a move takes seriously the suggestion that the work of Ombudsmen is sufficiently distinctive to warrant specific training and yet at the same time sufficiently homogeneous to be shared across boundaries of remit and geographical location.

Others have taken advantage of the specialist investigation training offered as far a-field as Canada and, nearer to home, in an increasingly large number of local colleges and universities.

What is clear is that Ombudsmen cannot afford to give up on the challenge of staying ahead of the game, even when it is not always entirely clear what game it is that we are going to have to play next.

Emily has spoken about the global recession and its impact on what we do. These are unlikely to be easy times either for our offices or for the people we serve.

Yet we can, I believe, look forward with confidence:

- confidence derived from the fact that the institution of Ombudsman, since its origins in Sweden 200 years ago, has shown itself well equipped to adapt to changing circumstance;
- confidence derived from the fact that, as in Northern Ireland, the office of Ombudsman has sufficient international weight to withstand the pressure of local circumstance, however demanding that might be;
- and confidence too derived from the knowledge that those coming forward to serve as Ombudsmen and their staff will continue to exhibit the admirable personal qualities that have enabled this small office here in Belfast to punch above its weight for so long and to such humane effect.

I congratulate Tom on this anniversary and take inspiration from his example.

Ann Abraham

November 2009