

JUSTICE Tom Sargant memorial annual lecture 2011

**The Parliamentary Ombudsman
and Administrative Justice:
Shaping the next 50 years**

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JUSTICE

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1. INTRODUCTION

Let me take you back 50 years to 1961. In 1961:

- The first edition of *Private Eye* was published;
- The farthing ceased to be legal tender in the UK;
- And Helen Shapiro was top of the charts with '*Walking back to happiness*'.

And it was 50 years ago this month – in October 1961 that JUSTICE published a report by Sir John Whyatt QC, former Attorney-General of Kenya and Chief Justice of Singapore, entitled *The Citizen and Administration: The redress of grievances*.

It is, of course, a great privilege to give this annual Tom Sargant Lecture, especially in this anniversary year: I know that Tom Sargant was the Secretary of JUSTICE for 25 years, from its foundation in 1957 to his retirement in 1982. And that in 1961 he played an important part in the commissioning of the Whyatt Report.

It is also a privilege to follow in the footsteps this evening of such distinguished predecessors, many of them Law Lords, Professors of Public Law or other senior legal practitioners.

I stand before you, however, as none of these things. I am not a lawyer by profession, although some of my predecessors as Parliamentary Ombudsman have been lawyers. Still less am I a member of the judiciary, although I am frequently called upon to make decisions that might easily have found their way to the Administrative Court.

One of my former Ombudsman colleagues, Julian Farrand, himself a law professor and one time Law Commissioner, once remarked that Judges and Ombudsmen are like chalk and cheese: superficially similar but fundamentally different. I trust that what I have to say will not prove too indigestible for this distinguished legal audience.

Although it took a change of government in 1964 before Whyatt's recommendation of a UK Parliamentary Ombudsman was implemented in the Parliamentary Commissioner Act 1967, it was the Whyatt Report, nonetheless, that should be credited with bringing to this country not just the Parliamentary Ombudsman but also the Ombudsman institution itself.

I want this evening, by glancing 50 years over my shoulder, to identify some themes that might help shape the Ombudsman agenda in the years that lie ahead.

In doing so, I want in particular to reassert the institutional importance of the Parliamentary Ombudsman - its importance as a democratic institution, part of our constitutional landscape, as well as its importance as an agent of social justice and fairness, part of our administrative justice landscape. It is with this inter-relationship between democracy and justice that I am primarily concerned and on which I want to propose a vision for the Ombudsman of the future.

2. WHYATT: 1961 AND ALL THAT

It was Harold Wilson's Labour government that introduced the 1967 Act, and Harold Wilson too who famously said that a week is a long time in politics.

We can, I'm sure, agree that 50 years is a long time in civil and administrative justice, even if the wheels of reform have not always turned as quickly and as smoothly as we would have wished.

We can capture something of the degree of change that has occurred since 1961 by recalling the sort of grievances that commentators in the late 1950s and early 1960s thought a Parliamentary Ombudsman might deal with.

One such case was dubbed the '*battle of the pylons*' by the tabloid press and led the local MP, Sir Lionel Heald QC, to condemn the Central Electricity Authority for displaying what he described as '*tyrannical bureaucracy of the worst degree*' by placing an electricity pylon on the land of one of his farming constituents.

And then there was the case of '*the Carlisle Publicans*'. Hard to imagine in these days of the shrinking state and an 'open all hours' drinking culture, but in 1961 there were actually 163 state-owned pubs in Carlisle, the residue of an experiment in nationalised alcohol regulation introduced by Lloyd George. When a dispute arose between the Carlisle Publicans and their employer, the Home Office, their MP had to secure the appointment of a special tribunal to hear the case following an adjournment debate on 30 June 1959.

And of course there was Crichel Down, the compulsory purchase dispute that in 1954 became a byword for maladministration and the abuse of power by government officials, and that more than any other case was cited subsequently as the mischief that the Ombudsman was designed to remedy.

As Lord Shawcross, then Chair of JUSTICE, put it in his preface to the Whyatt report:

'Too often the little man, the ordinary humble citizen, is incapable of asserting himself. The little farmer with four acres and a cow would never have attempted to force the battlements of Criche Down'.

We might now, I trust, add 'the little woman' too, and expand on Lord Shawcross's somewhat rustic characterisation of the 'ordinary humble citizen', but we can, I think, still take his point.

Whyatt's chief innovation was to recommend some form of '*permanent machinery*' to examine such cases and complete the work that had been commenced by the Franks Committee in its report on administrative tribunals and enquiries in 1957.

Sir Oliver Franks himself wrote the Foreword to the Whyatt report, pointing out that even after his own inquiry there remained considerable areas of public administration where the aggrieved citizen still lacked redress against the State. The entire field of maladministration had, in fact, fallen outside Franks's remit.

His Committee had therefore realised, he said, that '*here lay another and formidable task*'. In Whyatt, that task had been carried through. As Franks put it, '*the gap has been filled*'.

Whyatt's proposals for filling the gap had four features in particular to which I want to draw attention.

- The first was the constitutional position of the Ombudsman.
- The second was the distinctive nature of this new Ombudsman system of justice.
- The third was the creation of a coherent Ombudsman system within a broader integrated 'system' of administrative justice.
- The fourth and final feature was the close relationship between the Ombudsman and citizens' rights.

Let me say a little about each of those four features – starting with the constitutional position of the Ombudsman.

The constitutional position of the Ombudsman

Whyatt's substantive recommendation was the creation of what he called '*new machinery*' to supplement, not supplant, Parliament as a channel for the airing of citizens' grievances against the state.

Neither '*watchdog of the public*' nor '*apologist of the administration*', this new Ombudsman machinery would be '*the independent upholder of the highest standards of efficient and fair administration*', a guardian of good practice rather than a mere judicial combatant.

The constitutional significance was all too clear:

'We consider', said Whyatt, 'that a new institution, modified in the way we suggest, could be assimilated into our constitution and would be an important step forward in restoring the balance between the individual and the State, which, in this particular sphere of public administration, is still seriously disturbed'.

It is not surprising then that Lord Shawcross called the inquiry a '*really important constitutional exercise*' and that Sir Oliver Franks located the advent of the Ombudsman in what he described as that wider '*struggle between liberty and authority*'.

It was in this broadly libertarian climate of the early 1960s that Whyatt emerged to articulate the need for a new institution, the institution of Ombudsman.

A distinctive Ombudsman system of justice

The second feature I want to note is Whyatt's recognition that this new institution was, critically, to be different from the courts, the most familiar institution at the time for resolving disputes. The Ombudsman was to be a system of justice but a system modelled not on the domestic common law courts but on the inquisitorial approach adopted further afield. The chief characteristics of this new institution were to be '*impartiality*' and '*informality*'.

When it came to considering possible models for the Ombudsman, Whyatt, quite naturally, turned his gaze to Scandinavia, where the Ombudsman institution had existed in **Sweden** since 1809, in **Finland** since 1919 - and where in **Norway** in October 1961 a bill was before the Parliament for the creation of an Ombudsman office in Oslo.

Sandwiched between the Norwegian and Swedish models, and holding particular attraction for Whyatt, was the example of Denmark, where an Ombudsman had been in existence since 1955 and whose practice had also shaped a Bill before the New Zealand Parliament during that summer of 1961.

As Whyatt noted, however, there was an important difference between the Swedish and the Danish models. Whereas the approach of the Swedish Ombudsman was, in his own words, *'like that of a judge'*, applying objective legal standards to the grievance in hand, the Danish Ombudsman was more flexible, less constrained by strictly legal norms and expectations.

It was the Danish model that Whyatt favoured and put forward for emulation, what he called a *'tribunus plebis'* or *'representative of the people'*, impartial, open, informal, and of high reputation, guided by principles not rules and committed to norms based on what is fair and reasonable rather than a strict test of legality.

So attractive in fact was the Danish model, noted Whyatt, that in 1961 the Danish Ombudsman, Professor Stephan Hurwitz, was even receiving complaints from UK citizens who hoped that his remit extended across the North Sea.

It didn't.

A coherent Ombudsman system within a broader integrated 'system' of administrative justice

The third feature I want to draw attention to is the recognition by Whyatt of the Ombudsman as a comprehensive and coherent part of a broader integrated system of administrative justice.

As I said earlier, Sir Oliver Franks openly acknowledged that his own report covered only part of the administrative justice landscape. Whyatt was very conscious too of the function of his report as a complement to the Franks Committee Report and of the way in which the Ombudsman was closely implicated in the development of the wider administrative justice system of which Franks had been the instigator.

In the Whyatt vision, the new Ombudsman institution would itself lay claim to clearly-defined territory and comprehensive coverage. It would not only investigate complaints about central government departments, about the health service and about local government – but also about public-sector employee relations and the discharge of public sector contracts. In the event, the 1967 Act was far more modest in its proposals, unfortunately leaving in its wake a legacy of fragmentation and at times downright incoherence – about which I will say more in a moment.

The close relationship between the Ombudsman and citizens' rights

The fourth and final feature I want to mention is the explicit positioning of the Ombudsman institution in the context of citizens' rights and entitlements.

It was Lord Denning, cited by Whyatt, who had first made the connection, in his maiden speech in the Lords in 1958. Like Franks himself, Denning had spotted a gap, 'the Crichton Down cases', where the grievance was *'abuse or misuse of power in the interests of the Department at the expense of the individual'*.

This question of the misuse of power, or maladministration, could not, Lord Denning said, wait too long: it was after all, he said, the *'third chapter'* of this *'new Bill of Rights'*, a necessary complement to Franks and an expression of his *'three principles of good administration'*, namely, openness, fairness and impartiality.

To speak these days of a *'new Bill of Rights'* is of course to invite a somewhat different discussion. It is however significant to note that in 1961 the Ombudsman idea was explicitly linked to that broader assertion of citizen entitlement of which the Franks Committee Report in 1957 and the establishment of the Council on Tribunals in 1958 had formed an important part.

Summary

In summary then:

- the constitutional position of the Ombudsman;
- the distinctive Ombudsman system of justice along the lines of the Danish model;
- the recognition of the Ombudsman as a comprehensive and coherent part of a broader integrated system of administrative justice;
- and the close relationship between the Ombudsman and citizens' rights.

These four broad aspects of Whyatt's thinking continue to resonate 50 years later and, I suggest, should continue to provide essential bearings for our future vision and direction.

3. ADMINISTRATIVE JUSTICE: WHY IT MATTERS

Before I go any further, let me remind you why any of this matters. Administrative justice can sometimes seem the poor relation by comparison with the civil, criminal and family justice regimes. Yet citizens are just as likely, if not more likely, to come across administrative justice issues in their ordinary lives than civil or even family justice issues. The outcomes of decision making by a wide-range of public bodies on a daily basis affect family incomes, jobs, healthcare, housing, education and much, much more.

To illustrate the point – in 2010 in England and Wales:

- There were around 63,000 hearings/trials dealing with civil justice matters;
- There were over 200,000 criminal justice hearings/trials;
- There were over **650,000** administrative justice hearings – of which over 275,000 were about social security and child support.

In the circumstances it is inexplicable – some might even say perverse - that the Government has seen fit to seek to abolish the Administrative Justice and Tribunals Council whilst retaining the Civil Justice Council and the Family Justice Council. But Parliament has yet to take a final decision on that matter, so I will limit what I say about it here.

What I will say is that, based on my experience of the last 9 years, the task of humanising the bureaucracy, first articulated by the incoming Wilson government in 1964, remains as critical as ever.

Let me give you an example from my recent caseload of how the State bureaucracy can still conspire to rob an ordinary citizen of any sense of empowerment.

The case of Ms M and 'the system' out of control

This is a case that neatly involves three of my most regular customers. Ms M's address details were held by a number of different government agencies, including,

unsurprisingly, HM Revenue & Customs, the Child Support Agency and the Department for Work and Pensions. In 2006 her personal details were wrongly changed on one government agency's computer system to show her living at her former partner's address. In fact, she had never lived there.

With alarming efficiency, these false personal details instantaneously spread across an entire network of government computer systems and before long had fallen into the hands of her former partner. As a result, her child support entitlement was incorrectly reassessed and reduced without her knowledge.

When my office investigated Ms M's complaint we found it likely that her details had been incorrectly changed by the Tax Credit Office and then passed to other agencies' computer systems by the linked-in computer network.

But none of the bodies involved would accept responsibility, preferring instead to pass the buck to one another and, somewhat chillingly, arguing that since the mistake had been made by 'the system' there was nothing they could do about it.

We disagreed and recommended that HMRC pay her £2,000 compensation and correct the false entry on 'the system'.

Just as importantly, we also recommended that the three agencies concerned work with the Cabinet Office to decide how to respond in future to complaints of this sort which cross organisational boundaries. And that the Cabinet Office take steps to ensure that lessons are learned from Ms M's experience and that appropriate guidance is disseminated to all government departments.

What was especially disturbing about this case, however, was the disempowerment of the citizen, the sense of helplessness induced by the knowledge that the bureaucratic machine, now enhanced by a form of technology scarcely imagined in 1961, was out of human control.

It was striking too that in this instance the complainant's MP, not for want of trying, proved quite unable to sort it all out, thus providing an apt illustration of why, as Whyatt foresaw, there is a need for '*permanent machinery*', to assist Parliamentarians in holding the Executive to account.

It would be consoling to think that this was an exceptional case. But there is plenty of evidence from the Ombudsman's casebook that this sort of disempowerment remains a common fact of public administration.

'Pre-democratic' administration

Despite lots of attempts over the years to make public services more responsive and accountable to the citizens they serve, it is clear that too many people still feel helpless when pitched against *'the great juggernaut of the State'*; and that what we might call 'pre-democratic' patterns of administration still persist.

As one commentator concluded in 1961, but in words that still resonate fifty years later, it is sometimes *'difficult to feel that the spirit of democracy has been very deeply or widely learned'*.

And that I suspect is still a big part of the problem. We may have learned the basics of customer service, at least to the extent that our public administration as often as not now comes packaged with the veneer of client care and customer focus. And that is certainly progress of a sort.

Too often, however, we still seem to miss the connection between public administration and democratic practice, the recognition that it is in their encounters with officialdom that most citizens get a sense of what the democratic state is like; of whether they will be listened to and how much their voice and their experience counts; of what it means to participate in democratic society.

When we talk about the 'democratic deficit', we should not forget that the tone in which public life is conducted is largely set by the personal experience we share of public service delivery, whether in the job centre, the council offices, or the hospital ward.

We are, I fear, to a large extent still locked in to those 'pre-democratic' patterns that were all too evident even 50 years ago.

And whilst the language may be somewhat different, it seems to me that it is those 'pre-democratic patterns' of public service that the recent Open Public Services White Paper – which talks about *'choice'*, *'localism'*, *'diversity'* and *'fairness'* - is still seeking to tackle.

All this is by way of reminding ourselves why administrative justice matters, why it is not some arcane discipline best left in the shadows, but something that is fundamental to ordinary daily life with much wider implications for the ever-contested territory between state and society, the central and the local, the individual citizen and officialdom.

And it is because administrative justice matters that we must remain vigilant, alert to the implications of the changes that we make - and just as importantly - of the changes we fail to make.

4. THE LEGACY OF WHYATT TODAY

Let me return to Wyatt and its aftermath, to its legacy for today and for our attempts to chart a way forward for the Ombudsman and for administrative justice more generally.

It is sometimes said that the 1967 Act was an attempt to translate the Ombudsman idea into what was described at the time as an '*English idiom*'.

I want to suggest that something important was lost in translation, something important in respect of each of those four essential features to which I have drawn attention: the constitutional position of the Ombudsman, the distinctive nature of the Ombudsman system of justice, the Ombudsman as a comprehensive and coherent part of a broader integrated administrative justice system, and the close relationship between the Ombudsman and the protection of citizens' rights.

The constitutional position: the Ombudsman and Parliament

As I have said, the Whyatt Report was written very much in the spirit of constitutional reform, with the constitutional implications of what was being suggested central to the ensuing debate.

At the heart of that debate was the relationship between the Ombudsman and Parliament, and the role of MPs in mediating that relationship. It was, for example, variously stated that the Ombudsman should have 'Officer of Parliament' status and report to a dedicated Select Committee; that complaints should be put to the Ombudsman by MPs on behalf of those with grievances, at least for a period of five years; and that the role of the Ombudsman was in essence to serve as a check on the Executive branch, to assist Parliament in the task of holding the Executive to account.

That task and the challenge of discharging it effectively have become more, not less, acute with the passage of time. An abiding theme of political commentary in the last two decades has been the decline of Parliamentary sovereignty and the advance of untrammelled Executive power. Yet the constitutional position of the Ombudsman has at the same time been downplayed and denied the prominence it deserves.

Too often debate about the Ombudsman, especially in the wake of the civil justice reforms of Lord Woolf, has been about the ability to provide 'alternative dispute resolution' as a way of relieving the burden on the court system. This is, however, to sell short the Ombudsman's potential and to deny it the important function of transcending the inherent individualism of dispute resolution, with all the limitations that entails.

It is after all one of the unique selling points of any Ombudsman scheme that, unlike the courts, it has the inbuilt ability to get beyond the individual case, to spot patterns of deficiency and to make recommendations for systemic change that go much further than redressing the failings of a single individual's adverse encounter with an organ of the state – important as that remains.

More than that, the Parliamentary Ombudsman in particular has a place at the heart of the constitution, holding to account the Executive in its day-to-day encounters with citizens. The absorption, and success, of the Ombudsman model within the framework of consumer redress tends to obscure that recognition, leading instead to the characterisation of all Ombudsmen as a type of small claims court, and nothing more.

The Ombudsman's ability to make recommendations for systemic as well as individual remedy, to report directly to Parliament drawing attention to examples of poor administration and unremedied injustice, make it a much more significant player than that.

The Ombudsman system of justice: towards a ‘public institution’

This leads me nicely to the question, secondly, of what we have made of Whyatt’s insight that the Ombudsman comprises a different, non-judicial, system of justice; that within the administrative justice landscape the Parliamentary Ombudsman has a distinctive role to play.

The fact that the Ombudsman is free from the constraints of the court system means that ease of access and flexibility of process should be its hallmarks, that its method of fact-finding should be inquisitorial not adversarial, and that its findings should lead to recommendations rather than to binding judgments in the judicial style.

There is much of this that has survived the test of time, notwithstanding occasional calls for legally enforceable recommendations, conformity of process to judicial expectations and for the testing of oral evidence in an adversarial forum, none of which would significantly enhance the ability of the Ombudsman to fulfil its distinctive mandate.

The issue of access, however, remains a sore point. Much of the campaign for an Ombudsman in the late 1950s and early 1960s stemmed from the fact that MPs were becoming what were described as ‘*grievance chasers*’ on behalf of their constituents, not in any systematic way but on an entirely haphazard and ad hoc basis. The adjournment debate, preceded by sustained MP investigation, had become the last resort for taking up certain sorts of citizen grievance. As already indicated, it was largely to provide some permanent ‘machinery’ to discharge this potentially burdensome function that the Ombudsman idea gained currency.

Yet, when it came to the business of putting that Ombudsman idea into statutory form, what we ended up with was might be described as a ‘research and reporting’ office at the service of MPs, with MPs as the only route of referral and, on the face of it, with the sole entitlement to future involvement with the investigative and reporting process.

The citizen with a grievance was in danger of being air-brushed out of the process entirely.

The result was to make the Ombudsman what Douglas Houghton MP referred to at the time as a ‘*Parliamentary and not a public institution*’, somewhat remote from Joe or Jane public and of interest mainly to the Westminster and Whitehall elite, to politicians, bureaucrats and the occasional academic lawyer or political scientist – a challenge that is still with us today.

Whereas in places like New Zealand, and more recently South Africa, the Ombudsman was developing outreach programmes to target marginalised communities, going out into those communities to raise awareness and receive complaints, in the UK the citizen with a grievance had to make do with a copy of the Ombudsman's final report, the original having been sent to the referring MP.

When I was appointed in 2002 the practice was still to send a copy of the Parliamentary Ombudsman's report on a case to the referring MP – and rely on them to send it on to the complainant. And my then Legal Adviser was counselling me against departing from this long-established practice.

To their credit, at the time the office was created, JUSTICE and Whyatt argued that this so-called MP filter should be tried for a test period of five years and then, all being well, abandoned.

Here we are 50 years later with the MP filter still in place, albeit perhaps more precariously so than for some time. The Law Commission's report in July recommended its abolition and my own recent consultation on the subject confirms almost universal disenchantment with it – other than with MPs themselves.

More than anything else, the morbid after-life of the MP filter constitutes a derogation from what I take to be the original Whyatt vision of the Ombudsman as an institution that is both public and Parliamentary.

The Parliamentary credentials of the Ombudsman do not rest on an MP filter that looks increasingly out of place in the 21st-century UK. And indeed always looked out of place from pretty much anywhere else in the world.

As I have said my office recently carried out a consultation on whether the MP filter should be removed – and citizens given direct access to the Parliamentary Ombudsman.

This is a quote from the response to that consultation from the European Ombudsman, Nikiforos Diamandouros. Nikiforos is a distinguished political scientist – and was the first Greek Ombudsman.

He said:

'My colleagues from Sweden, Finland and Denmark, who represent the most long-established Ombudsman offices in the world – dating respectively from 1809, 1919 and 1955 – are quintessentially parliamentary ombudsmen. All of them would regard as, frankly, bizarre the idea that members of parliament should decide whether or not the Ombudsman may deal with a complaint.'

He went on to say:

'More generally, I am not aware of any democratic country, other than the United Kingdom, which places a political obstacle in the way of citizens who wish to complain to the Ombudsman.'

And neither am I.

The Ombudsman and administrative justice: an integrated 'system'?

Turning to the third limb of the Whyatt legacy, what do we find has become of the recognition that the Ombudsman would form a coherent and comprehensive part of a broader and inter-related set of functions, of, in other words, something that might credibly call itself a 'system' of administrative justice, with all the trappings of coherence and co-ordination that implies?

In the event, all the proposed parts of the Ombudsman's remit were in fact excluded in 1967, except for the investigation of complaints about central government departments - the other pieces in the administrative justice jigsaw being left to a process of ad hoc self-assembly over the next two decades.

Bit by bit the landscape has been populated: by the Local Government Ombudsman; by employment and other specialist tribunals; by the Health Service Ombudsman; by the Northern Ireland Ombudsman and more recently by the Housing Ombudsman in England and by separate Public Sector Ombudsmen in the devolved administrations in Scotland and Wales.

This incremental development, accompanied in the last decade by the emergence of a plethora of intermediate complaint-handlers and reviewers, has produced a fragmented and incoherent system for dealing with complaints about public administration.

At best, arm's length bodies, such as the Department for Work and Pensions' Independent Complaints Examiner, provide a specialist forum for resolving disputes – an independent voice within the system if you like. But there is a wide range of different models, introduced by separate government departments, at different

times, for different reasons – offering differential rights of access to dispute resolution – and so various in their remits that the citizen can hardly know where to start or what to expect.

At worst, the Ministry of Justice – which of all government departments should know better – sponsors the Prisons and Probation Ombudsman, which brands itself as an Ombudsman, whilst remaining in the Parliamentary Ombudsman’s jurisdiction – and for that reason alone (although I could cite others) failing to meet the British and Irish Ombudsman Association’s criteria for recognition of a bona fide Ombudsman scheme.

No wonder the punters are confused.

It is salutary to recall also that the most significant review of public sector Ombudsmen in this country was that conducted on behalf of the Cabinet Office by Colcutt in the year 2000. The Colcutt review called for, amongst other things, an integrated public sector Ombudsman for England. In the event, these proposals were overtaken by the devolution settlement – and the concept of an integrated public service Ombudsman scheme was taken up enthusiastically on their creation by the Scottish Parliament and the Welsh Assembly - but not the Westminster Parliament.

The result is a one-stop shop for complaints about public bodies in Scotland and in Wales but not in England, where the separate jurisdictions of Health Service Ombudsman and Local Government Ombudsman still exist, albeit modified by the possibility of joint investigation, for example, where a complaint crosses the boundary between health and social care.

This arrangement was put in place some years ago by way of a Regulatory Reform Order - which my Local Government Ombudsman colleagues and I try womanfully to operate in the best interests of our mutual complainants – but which I can only describe in polite company as ‘challenging’.

In Scotland, Wales and Northern Ireland, the UK Parliamentary Ombudsman retains responsibility for complaints about ‘reserved functions’, and in England for most public authority functions other than those in local government and the National Health Service. In practice, the same person has always held the offices of Health Service Ombudsman for England and UK Parliamentary Ombudsman, but there is no statutory requirement to that effect.

In addition, we have Housing Ombudsman in England who is a hybrid of public and private remit; in England and Wales we have an Independent Police Complaints

Commission, which is a sort of Ombudsman but doesn't call itself one; and a Prisons and Probation Ombudsman, who is not an Ombudsman at all.

So the public service Ombudsman system has developed in an incremental and incoherent way, to the extent that it might now be considered part of the problem rather than its solution.

The process of fragmentation has not, however, been confined to Ombudsmen. The ambition of an integrated administrative justice system has also faded. Administrative justice in the round has been prey to incremental change which has failed to recognise the inter-relationship between Ombudsmen, the courts, other forms of dispute resolution and first-instance decision-making.

It is telling in this context to note again that one of the proposed victims of the Public Bodies Bill is the Administrative Justice and Tribunals Council, created in 2007 to amplify the work undertaken since 1958 by its predecessor the Council on Tribunals. The creation of the AJTC in response to the 2004 White Paper *Transforming Public Services: Complaints, Redress and Tribunals* seemed at last to reaffirm Whyatt's vision of an integrated administrative justice system. If it is abolished, any such hope can only evaporate.

The supposition that the Ministry of Justice, with its historic emphasis on civil justice and its current preoccupation with criminal justice, might fill the gap is surely fanciful. The reality sadly is that with the disappearance of the AJTC the prospect of an administrative justice system worthy of the name is as remote as ever.

Citizens' rights: achieving a change of 'culture'

Let me turn finally to the fourth feature of Whyatt to which I want to draw attention - citizens' rights.

Despite the pointer provided by Whyatt, the language of rights is not the first language of Ombudsmen, at least not in the Anglo-Saxon world.

In Eastern Europe and the Hispanic countries, where my Ombudsman colleagues glory in the title of *Defensor del Pueblo*, the protection of human rights is frequently an explicit part of the job. The South African Public Protector, with whom my office has established strong links, operates with a broad concept of 'humanity' or 'Ubuntu' that comes close to human rights principle, and entails a constitutional right to good administration that is firmly within the human rights orbit.

Closer to home, the Danish Ombudsman, the model for Whyatt, was recommending as long ago as 1962 that prisoners' rights be extended to include the right to vote in parliamentary elections.

I like to think that here in the UK we have at least absorbed the underlying sentiment of Whyatt in this regard. The Principles of Good Administration that I published in 2007 gave concrete expression to the fundamental human rights principles of fairness, respect, equality, dignity, and autonomy.

As an example of the application of those human rights principles I would point to the policies and illustrative cases described in the report I published this week on complaints about disability issues.

Whilst making it clear that it is not my job to make findings of law, that report demonstrates the commitment to ensuring that public bodies within the Ombudsman's remit recognise and respond to the rights and individual needs of disabled people. This is an approach that is informed by, but distinct from, the legal enforcement of those disability rights contained in the Equality Act 2010 and formerly enshrined in the Disability Discrimination Acts.

The examples cited in that report, offering a snapshot across the whole spectrum of public service delivery from the NHS to the Children and Family Court Advisory and Support Service, to the UK Border Agency, demonstrate that it is also an approach capable of delivering not just meaningful individual redress but the potential for systemic reform, frequently in ways that are simply not available within the remedial straitjacket of the judicial process.

Let me share one of those stories with you. This is Mr R's story.

Mr R has learning disabilities and a mental health condition. He went overseas on holiday to stay with some family friends. His parents had intended to travel with him but were unable to do so because of his father's ill health. This was the first time that Mr R had travelled abroad alone.

On his return he was stopped at his local airport by two trainee customs officers because he was carrying a large amount of tobacco. He was then interviewed about his trip abroad, how it had been funded, and the tobacco.

Contrary to the UK Border Agency's own guidance, the customs officers did not check at the start of the interview whether Mr R was fit and well, or whether he had any medical condition they needed to be aware of. Nor did they ask him to read and

sign the notes of the interview. If they had done, they would have discovered that Mr R could not read or write.

The officers strip-searched Mr R - at one point leaving him naked.

One of the reasons given for the strip-search was that Mr R appeared '*nervous*' and '*evasive*' when questioned. Although Mr R had referred to his disabilities and one of the officers had written '*Mental health problems, disability*' in his notebook, the officers simply continued with the interview and the search.

No drugs were found. Mr R was eventually allowed to leave, but the tobacco he had been carrying was seized.

My investigation found that the UK Border Agency had not had regard to Mr R's disability rights in the way that it had carried out its functions. As soon as Mr R referred to his disabilities, the customs officers should have stopped the interview and re-arranged it so that an appropriate adult could be present. Instead they had pressed on regardless, they had failed to follow the Agency's own interviewing protocols, which might have helped them to identify Mr R's disabilities and deal with him appropriately as a vulnerable adult.

An appropriate adult should have been able to explain that Mr R's difficulties in answering questions were due to his learning disabilities and not evidence of evasive behaviour. Not only was it unlikely that the encounter would have progressed so far as a strip search, but Mr R would have had the support and protection he was entitled to in what for him was a terrifying situation. Not surprisingly, he never wanted to go near an airport again.

We upheld the complaint. The UK Border Agency apologised to Mr R and paid him £5,000 compensation for the distress, humiliation and anxiety they had caused him. In an attempt at restorative justice we asked the Agency to explore with Mr R and his mother what they might do to enable Mr R to feel comfortable using his local airport in future.

The Agency also agreed to review the disability awareness training provided to their customs officers, with a particular emphasis on identifying non-visible disabilities such as learning disabilities and mental health conditions.

So a good example of the Ombudsman providing redress for the individual – and also recommending systemic improvements for a wider public benefit.

But also a salutary reminder of Whyatt's observation all those years ago about the need to redress the balance between the individual and the State – which from my experience is still too often '*seriously disturbed*'.

Back in 2006 I was asked to address an international Ombudsman conference on the issue of human rights, but from what the organisers described as a '*negative perspective*'. The assumption of my international colleagues at that time was that a UK Ombudsman would be highly sceptical about the value of human rights in the conduct of investigations. I objected then and would object again now, and would vigorously rebut the assumption that an Ombudsman here or anywhere in the world for that matter could reasonably remain a stranger to the protection and promotion of human rights.

Even so, I must concede that by and large we in this country (not just Ombudsmen but most other people as well) do not seem to speak the language of human rights with any degree of confidence or fluency – or indeed any knowledge of why and how they came into being.

Despite Lord Denning's prophetic intervention in 1958, the subsequent discussion of the Ombudsman has rarely been couched explicitly in terms of 'rights' or social justice.

Yet the advent of the domestic Human Rights Act and the desire of the Council of Europe to engage Ombudsmen in the protection of human rights have, I believe, generated fresh interest even in this country about the potential role of public service Ombudsmen in upholding rights. Much still remains to be done to articulate that interest in compelling terms and to make human rights promotion and protection an accepted part of Ombudsman practice as well as of Ombudsman theory. But it is an aspect of the Whyatt legacy that has not been wholly ignored either.

5. THE VISION: TOWARDS DEMOCRACY AND SOCIAL JUSTICE

Which brings me to the vision for the future.

If we accept that in important ways we have in the last 50 years failed to deliver fully on Whyatt's legacy, can we now seek redemption by redefining our vision for the future by reference to those four central insights: the constitutional position of the Ombudsman; the distinctive, coherent and comprehensive Ombudsman system of justice and its place within a broader, integrated administrative justice system; and the notion of citizens' rights?

Can the twin goals of democracy and social justice still provide the basis for an institution that can see us well into the 21st century rather than founder as the expression of the misconceived idealism of the 1960s?

The constitutional position of the Ombudsman

The constitutional position of the Ombudsman is not a bad place to launch a reconstruction of the vision. If a national Ombudsman is about anything it is about the relationship between citizen and State, and more particularly about the humanising of that relationship in the face of ever-increasing complexity, bureaucracy and technology.

At the heart of any Ombudsman vision for the future must be the reinforcement of the link between the Ombudsman and Parliament as a means of holding the Executive to account on behalf of individual citizens, of drawing upon the empirical experience of individual citizens to shape public debate and deliberation as part of the democratic process, and of doing so with effective independence from the Executive itself.

By way of illustration, I have in mind in particular a sequence of reports I published on the tax credit system, which brought together in a strategic way the individual experience of aggrieved citizens and the ramifications of a government policy which, through maladministration, had, frankly, misfired. When translated to the constitutional arena, this generic feature of Ombudsman practice means that the Parliamentary Ombudsman becomes a potentially key source of intelligence about the impact of government policy on ordinary citizens and a source too of potential remedy that has a longer life than monetary compensation.

To fulfil that potential the Ombudsman must have a voice in Parliament, not directly, of course, but indirectly, through the dissemination of her reports and where necessary through debate of those reports on the floor of the House.

The Public Administration Select Committee, although lacking the dedicated Ombudsman focus enjoyed by its predecessor in the 1960s and 1970s, has proved over the years a staunch ally in the task of giving voice and adding weight to the Ombudsman's findings.

There remains even now considerable scope for enhancing the role of the Ombudsman, for example, by ensuring that time is found for consideration by Parliament of key reports, and by acknowledging that the most important sign of the Ombudsman's constitutional role is not the continuance of the MP filter but the active engagement of Parliament with the office and its work.

When we talk about the empowerment of citizens we should bear in mind that administrative justice provides privileged access to – and a rich source of evidence about - the daily encounters between individual and state and the opportunity to soften and smooth the rougher edges that so often blight those encounters.

The Ombudsman system of justice

The second component of the vision is a distinctive, informal Ombudsman system of justice that continues to resist the onslaught of judicialisation - and in fact conducts that campaign of resistance by going on the offensive.

It is hardly surprising, given the continued existence of the MP filter, that the far more radical power of 'own initiative' investigations, possessed by many national Ombudsmen, including in the Republic of Ireland, has so far been ruled out here in the UK. Yet if the Ombudsman is to extend its reach to all citizens and to adopt a genuinely inquisitorial approach, the ability to respond to public outcry on behalf of the most vulnerable will sometimes prove invaluable.

Without it, those for whom mounting an individual complaint is all but impossible - and I am thinking here for example of people detained in prisons or in psychiatric hospitals, of children in immigration custody - will remain beyond the pale. No doubt any such own initiative power would need to be used sparingly if it were to avoid falling foul of the law of diminishing returns. An 'own initiative' investigation would be an event, not something to be undertaken lightly and certainly not for the sake of self-aggrandisement - not that Ombudsmen go in for that sort of thing.

In the meantime, the Ombudsman system of justice would continue to distinguish itself by its ease of access, flexibility of process, inquisitorial method, deliberative ethos and resolution by recommendation rather than by direction.

Of particular urgency, however, is the need for continuing vigilance in respect of matters of substance as well as of process. Ombudsmen have for a long time said that they are not tied down to legal precedent or to the strict application of a set of inflexible rules. Instead, it has been their boast that like the original justices of equity they cut through the legalistic mire to the bright uplands of fairness and reason.

Sometimes, however, such aspirations have appeared to lack substance, leaving the onlooker to wonder if this was not a case of the emperor's new clothes, the Ombudsman body of principle left looking embarrassingly naked in the face of sustained scrutiny.

I am pleased to say that the last few years have witnessed serious attempts to clothe the Ombudsman's Principles and to create the foundations of what might be described as a form of 'Ombudsprudence' in which principles not rules are normative.

In my own office, this development has taken the form of publication of the Ombudsman's Principles trilogy:

- Principles of Good Administration
- Principles of Good Complaint Handling
- and Principles for Remedy.

When I first published and distributed my Principles for Remedy, I was encouraged to receive a thank you letter from Lord Justice Sedley, no less, who told me that he was:

'very much interested in the interface between judicial and extra-judicial remedies for shortfalls in proper standards of government' and that 'initiatives like yours give substance to the enterprise.'

Lord Woolf also wrote to me to say that he regarded the Ombudsman Principles as *'admirable'*.

'Ombudsprudence' is therefore getting recognition in some important places.

Whilst on the subject of Principles, the AJTC has produced its own Principles for Administrative Justice, aimed not so much at Ombudsmen in particular – although they resonate strongly with the Ombudsman's Principles - but at all four pillars of the administrative justice system as the Law Commission has described them: at Ombudsmen, yes, but at tribunals, the administrative court and at first-instance decision-makers too.

If the Ombudsman system of justice is to contribute to a compelling vision for the future it must build on such foundations of principle and take seriously the aspiration of establishing a form of Ombudsprudence that is both intellectually compelling and pragmatic, capable of satisfying at both the theoretical and practical levels. Without it, the Ombudsman system will remain prey to criticisms of inconsistency, vagueness and subjectivism.

A strong sense of what is 'fair and reasonable in all the circumstances' will only take us so far.

Administrative justice system

But a distinctive Ombudsman system of justice on its own is not enough. The vision for the future must include not only the prospect of integration and coherence across the Ombudsman landscape, but also the recognition of the Ombudsman's place within a coherent and co-ordinated administrative justice system of wider scope and ambition.

As I have already said, the number of Ombudsmen and other complaint handlers has developed incrementally over the five decades since Whyatt.

Even in the public sector alone that development has lacked strategic oversight within government, with changes to the reach and remit of individual Ombudsman schemes emerging from a range of separate departmental policy objectives over the years – in health, in social care, in education – but with no visible strategic policy objective relating to access to justice.

Added to which, the grasp within government of what constitutes the non-negotiable core of Ombudsman characteristics has frequently proven shaky - especially so in the Ministry of Justice where we might reasonably have expected it to be most tenacious.

With the establishment of a comprehensive set of Principles by the AJTC, an essential building-block for the structural reinforcement of administrative justice as a system is finally in place.

Beyond that, we must look for other unifying forces. The concept of alternative dispute resolution is an old friend and was central to the Woolf reforms of the civil justice system. In some contexts, Ombudsmen themselves are, understandably and not without some misgivings, described as forms of alternative dispute resolution, to the extent that they constitute an alternative to the courts.

More urgent now, however, is the need for forms of dispute resolution that are not merely alternatives to the courts but which are appropriate and proportionate to the dispute in hand. In other words, as the jargon would have it, '*let the forum follow the fuss*'.

Whereas the language of alternative dispute resolution implies a huge gulf between that which is orthodox and that which is 'alternative', the language of proportionate dispute resolution is more inclusive, an instrument of potential integration without the surrender of difference.

Appropriate and proportionate – rather than alternative - dispute resolution is, I suggest, a concept with which we can achieve systemic reach without the abandonment of that which is distinctive about our different styles of resolution.

And then there is the individual, lost amid the maze that is the current administrative justice environment. It is of course all too easy to lose sight of the user of any system, to let process and professional priorities take centre stage to the extent they become the only show in town. The courts are not alone in falling victim to this vice. They have, however, in the past been especially conspicuous offenders against the principle that the system exists for users - not users for the system.

Ombudsmen have certainly tried to be an ‘alternative’ in this sense, aiming to adopt procedures that are relatively flexible, informal and free of cost to the user.

In upholding the vision of an integrated administrative justice system, we must remain alert to the user perspective, put in place devices for capturing it and techniques for translating it into practical solutions, not least as a means of keeping in touch with the ever more bewildering consequences of globalised demographic and technological change.

It will invariably be the user who can tell us where we have gone wrong and applaud us when we get it right. We must court the user - not use the court - as the only benchmark of acceptable adjudicatory practice.

Citizens’ rights

And finally, there is the ever contentious issue of rights. I have already pointed to some encouraging developments. We live nevertheless here in the UK in a climate of suspicion about rights, whether human or otherwise. The native suspicion seems to be that to assert a right is to try to get away with something, to sneak some specious entitlement through the backdoor of privilege.

I recall Albie Sachs, the South African activist and constitutional court judge, describing his astonishment that the country that had given him refuge in the 1970s was the same country that had newspaper headlines running scared of ‘human rights’. Yet surely the tide of history will be with the concept of rights, so long as any sense of shared human destiny survives. The vision for the Ombudsman of the future entails keeping faith with the rights agenda, regardless of the shifting sands of political and journalistic fashion.

The language of rights, of course, returns me to the place where I started this lecture, to the freedom of the individual and the civil rights agenda of the 1960s. The

original libertarian strain of thinking lives on. Yet the language of rights reaches beyond the civil rights agenda. The South African experience reminds us that a right to good administration need not be a stranger to a modern democracy, nor should the right to basic social goods such as adequate healthcare, education and housing.

Closer to home, the establishment of the NHS Constitution on a 'rights' foundation demonstrates that, even in the absence of 'justiciable' social rights, the underlying principle of entitlement increasingly permeates our expectations of public service delivery and public administration. This then is a rights agenda that transcends the individualism of much civil rights talk and brings with it instead a social dimension that requires more than conventional legal protection to give it force.

It is here that the institution of Ombudsman can play a decisive part in upholding the rights of citizens, and of others, in their dealings with the state. When the Human Rights Act was first introduced it was prefaced by the government's stated desire to embed a 'human rights culture'. The prospects of such a culture emerging were no doubt severely shaken by the events of 9/11 and 7/7, by the wars in Iraq and Afghanistan, and by atrocities across the globe from Bali to Madrid. If anything, we appear further away from an acceptance of human rights as the bedrock of public administration than at any stage in the last decade.

The Bill of Rights Commission may yet advance the debate. It is notable for the Ombudsman vision that one of the Commission's specific terms of reference is to take account of the Interlaken Declaration, which is the successor to the discussions within the Council of Europe in 2006 that in turn led to the designation of national Ombudsman institutions as part of a nation's human rights 'structure' alongside the relevant national human rights institution, in our case the Equality and Human Rights Commission.

In the meantime, the Principles of Good Administration which my office has established as normative stand as proxy for the more legalistic formulation contained in the European Convention and adopted domestically through the Human Rights Act.

In developing the Ombudsman's Principles, it was deliberate policy on my part to shift attention from the ill-defined concept of 'maladministration' to the more positive notion of good administration, to a genuine sense of what *'getting it right'* and *'acting fairly and proportionately'* might mean. In making that shift, we can more readily see that an organisation that is practising good administration will invariably be promoting and protecting the rights of those it serves.

The Ombudsman's remit of investigating complaints of maladministration can then be seen for what it is, another way of upholding the rights of complainants, not the same as the judicial process of deciding questions of human rights and equality law but effective nonetheless in giving force to human rights principle.

Our vision for the future, then, pitches the activities of the Ombudsman within this broad framework of human rights principle and in so doing links the work of the Ombudsman to a much broader field of fair play, not just domestically but internationally too.

6. MAKING THE VISION A REALITY

Let me start to draw this lecture to a close. What I have described in outline is an Ombudsman journey spanning half a century from individual liberty to a broader notion of social justice, a path that has run in parallel with the evolution of administrative justice more generally, a process of evolution that has, however, too often lacked any sign of intelligent design.

In the course of that 50-year journey we have at times lost sight of the basic insights that shaped the Whyatt Report and indeed the Franks Report before it. In particular, we have failed to remember, that the Parliamentary Ombudsman has a constitutional role that cannot simply be confined to the function of dispute resolution, important though that is; that the Ombudsman system of justice is distinctive yet integral to a broader administrative justice system as a whole; and that the framework of values within which the work of the Ombudsman can be located is that of the protection and promotion of citizens' rights.

From that recognition we can extrapolate a number of more concrete proposals.

First, I would echo the recommendations of the Law Commission that the MP filter as sole gateway to the Ombudsman, and other barriers to access such as the need to put complaints in writing, must go - especially in an era of rapid technological and demographic change that constantly demands that we rethink the way we do things. There are better ways than the MP filter to ensure the serious engagement of Parliament with the Ombudsman.

Secondly, I propose that the time has finally come to acknowledge the power of own initiative investigation, to accept that, in the absence of a specific individual complaint, the Ombudsman should not stand idly by. The ability from time to time, not all the time, to seize the initiative, to catch the whiff of a scandal and run with it, is now a necessity not a luxury, especially if social justice is to reach some of the most vulnerable and marginalised people in society.

Thirdly, we must accept that if we are to achieve a genuine 'system' of administrative justice, with Ombudsmen as an integrated and coherent part, we must pay close attention to the currently fragmented structures of regulation, inspection and accountability throughout the UK and across the devolved administrations, protecting the Ombudsman 'brand' whenever necessary and making sense of the disparate and disjointed structures that so frustrate aggrieved citizens and at times defy all logic.

And that means, incidentally, that we cannot wait any longer for a genuine focal point within government to oversee the development of ‘Ombudsman policy’ across the public and private sectors, to replace the notional oversight exercised from time to time by the Cabinet Office, the abdication of any real responsibility by the Ministry of Justice and the departmental ‘ad hocery’ that is therefore allowed to prevail.

And finally, if we are to maintain the distinctive qualities of the Ombudsman system of justice within that broader administrative justice landscape, we must resist any temptation to model the Ombudsman process on that of the courts.

And resist also those changes that would reduce the Ombudsman function to just a form of dispute resolution, a mechanism of consumer redress devoid of systemic and structural bite.

What matters is that the Ombudsman is a just alternative - not just an alternative.

In short, we must recognise that the origins of the Ombudsman system in the contested territory between individual and State are especially salient at a time when the boundaries of the State itself - and of the public services delivered in its name - are under daily scrutiny.

Both the Law Commission’s report on Public Sector Ombudsmen and the Government’s White Paper on Open Public Services, published in July, go some way towards that recognition.

The need for a fundamental review of Ombudsmen in this country, to match Sir Andrew Leggatt’s review of tribunals, is more urgent than ever.

I suggest we get on with it.

7. CONCLUSION

And finally then, if we are to continue the task of humanising the bureaucracy, of maintaining public relationships that bear the stamp of democratic values, and of protecting the entitlement of ordinary citizens to dignity and respect, we should acknowledge the insight of ‘Whyatt’ and remain protective of its legacy, not just now but in the future, and if necessary for the next 50 years.

I do not expect to be here to witness it, but I would like to think that in the centenary year of ‘Whyatt’ my then successor will come before an audience like this,

at JUSTICE'S invitation, and that she will still find much to admire in the vision of those who in 1961 inaugurated a new chapter in the history of democratic participation and of social justice in these islands.

I am pleased here tonight to acknowledge my own debt to those people – and this organisation - and to commend to you the example of your predecessor members of JUSTICE in taking seriously the Ombudsman idea.