MUST OMBUDSMEN RETAIN REMIT OVER PRIVATISED SERVICES?

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As services are privatised there are several possibilities as to how consumer complaints can be handled:

- Public Ombudsmen can retain remit;
- There can be special arrangements for Public Ombudsmen
- Private/Industry Ombudsmen can be created; and
- Other types of scheme can be created.

Experience in the UK has not seen retention of remit but redress for poor service has been a feature of the regulatory framework for privatised utility services. Yet despite this special provision even in the UK the situation is one in which there is a blurred public/private boundary. The contention of the author is that Ombudsmen whether public or private do not have to be involved in redress for privatised services provided that certain desirable features are present in the scheme and these are features usually found in ombudsman schemes:

- Putting It Right (on complaint handling and remedies,);
- Getting It Right (on offering guidance and feedback) and
- Setting It Right (the accountability and independence arrangements).

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INTRODUCTION

It is generally accepted that services provided by public bodies should be within the remit of an ombudsman whose role it is to resolve complaints about those services. But for reasons of economy, efficiency, and political ideology these services are, in a growing number of countries, no longer exclusively delivered by public bodies. Where there has been privatisation, that is the body delivering the service is no longer a public body, this may mean that the ombudsman has lost jurisdiction as the ombudsman legislation usually stipulates the bodies rather than the services which are within remit.

In this paper I will outline four possible options for dealing with complaints about services which have been privatised and I argue that while the preferred arrangements are 'ombudsmanlike', this does not require retention of remit by an ombudsman whether a public services or a private sector/industry scheme.

The four options to be discussed are (a) No change; (b) Specific Arrangements for a Public Services Ombudsman; (c) Private Sector/Industry Ombudsman (d) Other Complaints Schemes and are informed by my knowledge of the situation in the UK and to a lesser extent in Australia.

In the UK privatisation really began to have an impact in the 1980s with the arrangements for key utilities, telecommunications, gas and electricity. Subsequently water and sewerage services in England and Wales, and transport were privatised. In the early stages there was limited competition in the provision of these services so that a regulatory framework was required, and one of its important functions was to control price-setting. The regulatory arrangements required that the companies had complaints schemes and there could be escalation of unresolved complaints to the regulator. Initially each industry was governed by its own legislation. The Competition and Service (Utilities) Act 1992 was an early measure seeking to have a degree of common arrangements in utilities in relation to consumer protection. This included a three tier structure for resolving grievances starting with the service provider, then a consumer council committee and finally the Director General of the regulatory authority. The regulatory authorities were within the remit of the UK's Parliamentary Ombudsman.

The current framework is prescribed by the Consumers, Estate Agents and Redress Act 2007 and it authorises the Secretary of State to require regulated providers in the gas and electricity sector (in Great Britain), the postal services sector (in the United Kingdom) and the water sector (in England and Wales) to belong to approved redress schemes, providing resolution

and redress for their consumers. Redress schemes already exist in the financial services and telecommunications sectors and the power in the 2007 statute does not relate to those sectors.

NO CHANGE

As the preceding section has shown practice in the UK has not been to carry on as before where services have been privatised. This probably reflects one of the range of reasons which led to the programme of privatisation in which the aim of removing the state from the delivery of services has also been applied to the public services ombudsman. If the ombudsman were to retain remit over privatised services, then questions would arise about the mixing of public and private, including the appropriateness of using public funding to pay a public services ombudsman to resolve complaints about a fully privatised service.[1] This is a good question and, as will be shown in the next section, it is possible to 'retain' the public services ombudsman but have the privatised industry pay for the operation of the redress scheme. What, apart from experience and expertise, might the arguments be for retention of remit?

An important point is the public's knowledge and awareness of the possibility of escalating a dispute beyond the service provider to an independent institution. If a service is privatised will customers expect that redress arrangements will also change? In the UK this issue is complicated because of the requirement for a Member of Parliament to refer complaints to the Parliamentary Ombudsman.[2] While the design of ombudsman schemes usually requires the complaint to be raised first with the service provider, the dissatisfied customers usually want to take the dispute immediately to an independent body, as their perception is that the complaint will not otherwise be taken seriously and handled appropriately and impartially. If this further stage in the process is not conducted by the public service ombudsman, will it be perceived to be sufficiently independent?

It is suggested that these questions about awareness, access and independence are constant and that the context of privatisation does not raise anything new. The logic underpinning the requirement that a customer raises a grievance first with the service provider, is that resolution should be quicker and it provides a better learning opportunity for the improvement of service delivery. Escalation of a dispute should only occur because of unusual factors such as an irretrievable breakdown in the provider-customer relationship, or the complexity or systemic nature of the particular case, as resolution should, ideally, be as close as possible to the time and place of the grievance.

[1] As opposed to one which was delivered by a private body but commissioned by a public body. In the UK this is known as contracting out, where for example, a local council is responsible for refuse collection but they awarded the contract to a private company to provide the service following a compulsory competitive tendering exercise. The tender could be awarded to the council's in-house service if it was the best value bid. Sometimes the in-house service is 'spun-out' to become a private body.

[2] The so-called ' MP filter'.

Guiding dissatisfied customers to the appropriate dispute resolution scheme requires good information networks including, a duty on service providers to explain options, educating those who may be approached for advice, and redirecting complainants from those who do not have jurisdiction to resolve their complaints to those who do. And, of course, there must be a completely independent element in the redress scheme. It may not and indeed, should not, be handling the bulk of the complaints, but the absence of an independent element whose interventions are complied with by the service provider, will deprive the scheme of legitimacy.

While UK experience has not seen public services ombudsmen retain remit over privatised services, retention would not be inappropriate in theory but practical considerations may mean that it would require different arrangements.

SPECIFIC ARRANGEMENTS FOR A PUBLIC SERVICES OMBUDSMAN

The boundary between the public and private sectors is not always clearly defined but is, in some areas, blurred. As was mentioned earlier public bodies may retain responsibility for the provision or commissioning of some services, but their delivery may be carried out by private bodies and sometimes services in the private sector can be within remit of a public services ombudsman.

In Western Australia the public services ombudsman, whose statutory title is the Parliamentary Commissioner for Administrative Investigations, has been contracted to operate an ombudsman service in relation to gas and electricity providers in the private sector.[3] The ombudsman recovers the cost of providing this service from private industry ombudsman scheme. A variety of reasons can support such a decision, the view that it is quicker, easier and cheaper to use an existing institution and that the work would not be of a nature or volume that it would interfere with the core business of dispute resolution in public services.

A variation on this is a situation where it is thought appropriate for a public services ombudsman to have within remit both public and private providers of the same type of service. In England adult social care is provided by both public and private sector bodies. The remit of the Local Government Ombudsman was amended so that privately arranged or funded adult social care was brought within remit[4] to join children's social care and publicly funded adult social care. This allows for existing expertise to be deployed in what is potentially a more efficient, economic and effective arrangement. The cost of discharging this additional responsibility within the Local Government Ombudsman's remit is covered by a grant from the Health Ministry.

This efficiency logic has not been rigorously pursued so that privately funded health care is not brought within the remit of the UK's separate Health Service Ombudsmen even though it

[3] The Parliamentary Commissioner Act 1971 was amended to permit this first for gas in 2003 and then for electricity in 2004 with operations commencing in the years following the amendments.
[4] Under the Health Act 2009 and it came into effect in 2010.

is policy to have greater integration of health and social care. In Scotland, Wales and Northern Ireland publicly funded health and social care are within the remits of their integrated public services ombudsmen. This demonstrates a point that the organisation of government according to national, regional and local levels, may play a significant part in the allocation of services to ombudsmen. It is not surprising therefore that, in legal/governmental jurisdictions which have a small population size, some public bodies, including public services ombudsmen, may find that they are given a wider range of responsibilities as a cheaper alternative to establishing specialised state agencies. Although care must be taken that such 'mission creep' does not lead to any conflict of interests or diminution in independence and impartiality.

Perhaps there is a distinction, or more accurately a gradation to be drawn between care and utilities. This relates to the social importance of some services which may take priority over purely economic factors so that there is a role for public involvement in health and social care because of their personal nature and significance for wellbeing. Whereas utilities, particularly energy, are regarded as less personal, and more susceptible to competition. Yet energy for heating, cooking and washing are important factors in wellbeing and this is reflected in regulatory provision governing the procedure for the disconnection of supply due to non-payment of bills. Whether it is a public services ombudsman or not, there must be an independent element in a redress scheme which can deal with disputes about these particularly significant and sensitive aspects of services.

It seems likely that where special arrangement are made, it will be necessary to ensure that where certain activities are not paid for out of the public services ombudsman's general grant but by specific funds, then there should be adequate controls in place to ensure that the specific funds do not pay for other activities, or vice versa.

PRIVATE SECTOR/INDUSTRY OMBUDSMAN

In the UK the first private sector/industry ombudsman was created by and for the insurance industry. Subsequently banks and other parts of the financial services industry established ombudsmen or similar institutions. They have all been amalgamated into the Financial Ombudsman Service which, while there is statutory authority for it,[5] is entirely funded by the industry. A common arrangement is an annual levy or subscription determined by the company's number of customers or revenue and/or a handling fee for cases which can be on a pay as you go basis or calculated on the number of complaints handled in the previous year. This funding model has as an aim the encouragement through a financial incentive to the service providers to resolve complaints to their customers' satisfaction so that the case does not escalate to the ombudsman.

Under the provisions of the Consumers, Estate Agents and Redress Act 2007, there are approved private ombudsmen schemes for telecommunications and energy (gas and

[5] Financial Services and Markets Act 2000.

electricity). As it happens both of these private ombudsman schemes are operated by a not for profit company which provides other ombudsman services.[6] In telecommunications there is another approved redress scheme, the Communications and Internet Services Adjudication Scheme (CISAS) which is also operated by a not for profit company.[7]

The telecommunications and energy private ombudsman schemes, like their longer established counterpart in financial services, will receive complaints either because the service provider has (a) made its final response following its complaint handling efforts which results in 'deadlock' with the aggrieved customer, or (b) no resolution has been achieved after eight weeks from receipt of the complaint. Additionally the ombudsman may exercise discretion in accepting a complaint. All of these private ombudsman schemes seek to do more than resolve complaints which were not dealt with to the complainants' satisfaction in the service providers' own procedures. They seek to assist service providers to improve their customer service and complaint handling through feeding-back information and advice. In addition to reports there may be meetings with representatives of the industry to discuss high level policy, trends in complaints and possible improvements in complaints handling and customer service. It is probably a good idea that a private sector/industry ombudsman scheme has an equivalent stakeholder relationship with consumers. This will most likely be with representatives of advisory bodies whether general consumer advice or related specifically to that industry.

In private sector/industry schemes the service providers are members and by joining they have agreed to accept the ombudsman's determination, however, if the complainants are dissatisfied they may seek to pursue the dispute, perhaps by going to court.

Given that the private sector/industry ombudsman arrangement is a membership scheme, how can the complainant be satisfied about the independence of the ombudsman? The governance arrangements will provide for a governing body, board or council which will have a mixture of stakeholders, usually equal numbers of industry and consumer representatives as well as independent members, or as in the case of Ombudsman Services, independent members plus the ombudsman and another executive. These bodies will be chaired by an independent member and will be responsible for upholding the scheme's independence, to ensure that the scheme is conducted in a lawful, ethical and responsible manner and that it sets strategic direction, and the operational planning including budget-setting to achieve those objectives. It is providing an accountable framework for the resources with which the ombudsman resolves disputes independently and impartially. It is the ombudsman who is responsible for the casework and the governing body has no role in individual complaints.[8]

[6] Ombudsman Services Ltd. The name of their ombudsman scheme for telecommunications has been rebranded as Ombudsman Services: Communications to reflect the development of the market beyond the provision of solely telephony into internet services and its revised regulatory framework.

[7] CISAS is part of IDRS Ltd which was sold to the Centre for Effective Dispute Resolution (CEDR) in late 2011. CEDR also acquired in this purchase the Postal Redress Scheme (POSTRS) which is the only approved scheme for postal services. CISAS and POSTRS will be discussed in the next section.

[8] In the UK and Ireland the Ombudsman Association, formerly the British and Irish Ombudsman Association, is a membership organisation of public and private ombudsman schemes, as well as other dispute resolution

The major difference between public service and private sector/industry schemes is that in the latter it is usually the case that the ombudsman makes a determination which is binding on the service provider but not on the complainant.

Telecommunications is unusual because it has two approved schemes. It is unclear if the desire to have competition amongst service providers, was also applied to providers of redress. It is suggested that this type of competition is confusing to consumers. In these circumstances where the provider of the redress scheme seeks companies to be members from whom unresolved complaints are referred, there is a danger that the redress provider seeks to maximise attractiveness to the companies rather than the companies' complaining customers. The regulator has reviewed these two schemes and

> 'identified that some aspects of decision making at the Schemes were leading to inconsistent outcomes for consumers in some circumstances, in particular in cases where evidence was lacking and where small awards of compensation might be considered appropriate for poor customer service.' [9]

The regulator decided to address these issues of inconsistency by modifying the conditions for approval and requiring the schemes to adopt a set of 'Decision Making Principles' including the development of guidelines on awarding compensation. These principles would be intended to act as a guide to decision-makers by providing a common reference point. The principles would not fetter discretion and it is expected that they would feature in the schemes' staff training. The regulator has recommended that the schemes appoint champions for these principles and to keep them under review. The regulator would agree with the schemes work on a common approach to compensation and would formally review the principles some 12-18 months after they had been implemented.

OTHER COMPLAINTS SCHEMES

In the UK in this field of privatised utility services, telecommunications, energy, transport, water and postal services, the statutory redress provision may be said to fall into two broad classes, those which have not developed much from the pre-privatisation arrangements and those which have undergone more change, with this second group coming under the Consumers, Estate Agents and Redress Act 2007.

When utilities were in public ownership there were bodies which represented consumer interests often called consumer councils, and this was reflected in the early stages of privatisation development with a three tier redress structure of the Competition and Service (Utilities) Act 1992. In water it is the Consumer Council for Water (in England and Wales), and for transport and postal services it is a body called Consumer Focus, which is known in its transport role as Passenger Focus. For these bodies their role in dealing with complaints which have not been resolved by the service providers is but one aspect of their

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practitioners, has key criteria for membership: independence, fairness, effectiveness and public accountability, and has adopted Principles of Good Governance which are designed to cover both public and private schemes.

[9] Ofcom 2012, para 1.5. The review process comprised research into the schemes by a consultancy which led to a consultation paper by the regulator and the statement was made after taking into account the consultation responses.

responsibilities to advance the interests of consumers. For example, the Consumer Council for Water currently has five topics on which it takes action: *Seeking Value for Money* in charges while securing sustainable supply; promoting a *Right First Time* approach to complaint resolution by service providers; providing *Water on Tap* a safe, secure and sustainable water supply; delivering *Clearing Up* through a sustainable wastewater service, and by *Speaking Up* securing service improvements for consumers and making local consumer views a key factor affecting water services bills.

The primary work of Passenger Focus is on broader aspects of the passenger experience including the National Passenger Rail and Bus Passenger Surveys, how closures for repairs and alternative arrangements are consulted upon and implemented and fares and differences in modes of purchase, including international comparisons, and practice in dealing with passengers who cannot produce a valid ticket.

In terms of the resolution of complaints there is a difference between the very much more fragmented arrangements for regulating bus services than for trains. This reflects the more localised nature of bus services.

The information provided by Passenger Focus on the service they provide in dealing with complaints where the passenger is dissatisfied with the outcome in the train operating company's complaints procedure, says very little about how the complaint will be handled in terms of resolution techniques, but gives more information on the issues which are and are not within remit, the timeliness targets, as well as privacy issues and how a complaint may be escalated up the organisation from the initial handler to a senior executive and finally to the chief executive. After which the dissatisfied complainant can refer the matter to his or her Member of Parliament.

Both of these councils are public bodies covered by procedures on the making of public appointments, are accountable to ministers and are independent of the industries in the interests of whose customers they act. They produce reports and are audited by the National Audit Office.

A not for profit company CEDR now owns IDRS Ltd which had secured approval for the schemes it operates in postal services POSTRS, and CISAS in telecommunications and internet services. POSTRS is the only approved scheme in its field and CISAS is one of two approved schemes in its sector.

In both POSTRS and CISAS the adjudicator's decision will not be binding upon the company unless the complainant has indicated acceptance which must be communicated within a time limit otherwise the determination lapses. Under the schemes the adjudicator will make a decision that is in line with the relevant law and any relevant regulations. They promise that they will act quickly and efficiently, settling the dispute in a fair and reasonable way. The dispute can be escalated to a more senior person and ultimately to an independent reviewer.

POSTRS has a Council with industry representatives, executives from IDRS Ltd, and two independent members, one of whom chairs it. The major role of the Council is to safeguard the independence of the scheme but the Council also considers information from adjudicators and whether lessons can be learned and passed on to service providers.

DESIRABLE FEATURES FOR A REDRESS SCHEME

As the preceding material demonstrates it is possible to have consumer redress arrangements for privatised services in which a public services ombudsman does not retain remit. The question posed in this paper's title is directed to desirability rather than the possibility of public services ombudsmen resolving disputes in the delivery of privatised services. I would suggest that while it is not necessary for public services ombudsmen to retain remit over privatised services, it is imperative to have certain features in the redress arrangements. Normally public services and private industry ombudsmen schemes will provide these characteristics.

The source of these important features lies in the work which my colleagues and I have done on administrative justice and the administrative justice system.[10] The concept of administrative justice is not new but its use as a term is relatively recent in the UK and it is now being used as part of a delineation of different fields of justice, criminal, civil, family. In this sense it is *descriptive*, identifying the decision-making interface between government agencies and people, particularly in the relationship of service provider and customer. The second sense in which administrative justice may be used is *normative*, detailing how such decision-making ought to be delivered. It might be thought that this normative sense is more problematic than the descriptive sense but while there is a plurality of models for principles of justice, so there is a difficulty in mapping the territory in which they are to be applied because, for example, the boundary between public and private is not always clear as where the state responds to issues in the private sector as with misselling of financial services products.[11]

In the UK the idea of the administrative justice system has evolved from a critique of existing arrangements for redress. It has been argued that the current dispute resolution methods comprising courts, administrative tribunals, initial complaints handling procedures and ombudsmen is haphazard, confusing to the user with the different rules on the nature of the claim or challenge, its accessibility in terms of time limits, on who may complain about which issues, cost, and the type of remedy which may be obtained, which may be financial, or an opportunity for a new decision or another course of action and whether binding or a recommendation. The idea of a system not only seeks to deal more holistically and coherently with remedies or 'Putting It Right' but also to take that approach to the decision-making which gives rise to disputes which have to be resolved and learn the lessons in order that disputes can be prevented because the decision-making is right first time, or 'Getting It

[10] Buck et al. 2011. This study looked at public services ombudsmen and some private sector/industry ombudsman schemes in the UK, Ireland, Australia and New Zealand.

[11] See Merricks 2010 and Oliver 2010.

Right'. This is now reflected in a statutory definition of administrative justice system. My colleagues and I have added a third element to this framework, 'Setting It Right', which is the network of governance and accountability arrangements which form a key part of the operating environment for agencies and institutions which make decisions and provide remedies for disputes which arise from those decisions. I now examine the content of these three aspects of the administrative justice system in terms of desirable features in customer redress schemes for privatised services. These features will seem familiar because they are derived from the practice of public services and private sector/industry ombudsmen.

Putting It Right

The first points to make are that the redress scheme should be free to use by the customers and not be restricted to their legal rights but, as with ombudsmen in the public and private sectors, the concern is that the customer is treated properly and reasonably. This can, of course cover lawfulness but it is very important that it is wider than this. In the private sector companies understand that good customer service is important, and some of their complaints schemes set benchmarks which are higher than those for public services ombudsmen schemes.[12] This can be done for a variety of reasons which are good for business. These may range from the positive, for example, a company ethos of providing good service, to a more negative concern that a bad experience will induce the customer to go to a competitor in the future.

The process for redress should be flexible so that it can deal quickly with minor matters but can also cope with a major investigation if the circumstances of the particular complaint merits such a course of action. The point is that a 'one size fits all' process is not appropriate, rather it is the characteristics of the particular grievance which should regulate the choice of method of resolution or 'the forum fitting the fuss'.[13] Just as with initial complaints handling procedures, it is important that cases which are resolved quickly, are recorded and analysed so as to be able to report on trends and lessons to be learned.[14]

The remedy should also tailored to fit the loss or harm which the complainant has suffered. The usual principle is that the complainant should, as far as possible, be returned to the position that he or she was in before the poor service occurred. A remedy could be an apology, an explanation, financial compensation or other action. It could include any combination of these which would be appropriate to the loss or harm sustained. Where it is clear that others may have suffered similarly but may not have complained, then it will be

[12] For example a comparative study of private and public sector complaints schemes done as part of an exercise in reforming UK's National Health Service complaints procedures, noted that in the private sector there was a quicker response time, better use of information and communication technology, with complaints systems and data linked to management information systems and customer relationship management systems and delegation of power to junior managers to waive fees and/ or offer financial compensation, such as vouchers redeemable against that company's services and/or products. See Wilson 1994.

[13] See Sander and Goldberg 1994.

[14] See further in the next section on 'Getting It Right'.

appropriate to identify those people and to offer them the appropriate remedy in their particular circumstances.

One difference between public services and private sector/industry ombudsmen is that in redress schemes for the private sector, it is usually the case that the ombudsman's remedy is not a recommendation but is binding on the body within jurisdiction. If the service providers are unhappy with the decision then they will have to go to court to challenge it. On the other hand in these schemes, it is usually open to the complainant to decide to seek a judicial remedy if unhappy with the ombudsman's determination. It would therefore seem appropriate in the context of privatised services, that the redress scheme is binding on the service providers in that industry.

The scheme should also have a mechanism enabling a complainant whose remedy has not been provided either in full or in part, to have it enforced.

Getting It Right

One of the features which marks out ombudsmen from some other institutions of redress is their concern not only to provide a full and appropriate remedy to a complainant, but also to help the bodies within remit to improve their service by learning the lessons provided by complaints (whether upheld or not) as well as improving their handling of complaints.

Feeding back can be done at both the individual and systemic level by including particular points in the determination of complaint to complainant and service provider, and in a more general report to the industry or sector. Accordingly the determination should clearly record the causes of the poor service and the loss or harm it caused and the remedy, including action that the body within remit should take, such as reviewing procedures. Private sector/industry ombudsmen do regard it as part of their role to identify and disseminate lessons. This can be achieved through special reports which can group together a series of complaints and distil points of concern. Such an approach can go further and offer guidance on particular topics.

A further step could be the adoption of a power of own initiative or own motion allowing the launch of an investigation which is not prompted by a complaint. The use of such a power by public services ombudsmen is usually triggered by information that they have, perhaps an aspect in some cases which was not central to those complaints but it is suggestive of an issue, possibly systemic, which is worth investigating. It is possible that there might be some resistance to this by the providers of privatised services as the financing model for private sector/industry ombudsmen is often a levy based on a fee per case and there may be reluctance to allow for another element to be added to the fees which would cover the exercise of an own initiative/motion power of investigation. In addition to the cost, it may be the view that this goes beyond the role of a redress scheme. In the UK the public services ombudsmen do not have such an own initiative power of investigation, although they have

asked for it. If there were such a power its exercise could have repercussions for the accountability and independence of the second stage in a redress scheme. This will be explored in the next section.

It is the author's view that the UK public services ombudsmen should have a power of own initiative or own motion investigation and the lack of this power makes its inclusion difficult in redress schemes for privatised services in the UK. A possible way of launching this type of investigation would be for the lead adjudicator in an approved scheme to suggest to the regulator that a particular topic deserves investigation which the regulator would be able to commission. It is suggested that such a power of recommendation to the regulator should be a feature of the redress scheme.

Setting It Right

In the governance arrangements for public services ombudsmen, our research suggested that best practice was that the ombudsman should be established through a constitutional or legislative provision. This signals the importance to be attached to an institution which is, not only an aspect of access to justice, but it also relates to disputes arising out of the delivery of public services for which people as citizens and consumers have expectations of high standards. Therefore independence is required to ensure that there is legitimacy, but the other side of the coin is that there must be accountability for the exercise of this service which is paid for out of public funds.

These considerations also apply in a modified form in private sector/ombudsman schemes, where the industry is paying for the service and so they will want to be assured that this is being spent on an economic, efficient and effective service, while on the other hand the complainants will have no confidence in it if they perceive that the industry as the paymaster for the redress scheme, exercises an influence which would compromise the impartiality of those handling the complaint.

In private sector/industry ombudsman schemes the governance arrangements usually provide for operational autonomy, a governing body supervising the scheme will seek to ensure that the service is impartial and accountable. The governing body will usually be chaired by an independent member. Other types of redress schemes also have a governing body.

It seems appropriate that the legislation providing for redress schemes should require that their governance arrangements have a supervisory body chaired by an independent member. This body must ensure the independence of the scheme as well as providing for its accountability. Annual reports must be produced along with publication of business plans and key performance indicators.

In relation to public services ombudsmen, my colleagues and I were quite clear of the need for the involvement of parliament both to buttress independence and accountability. Achieving the appropriate balance between these two requirements is difficult but the delivery of public services requires this as an aspect of its redress arrangements and also such parliamentary involvement. But where services have been privatised, such a direct

parliamentary involvement may not be regarded as appropriate. This sort of role may be discharged by the regulatory authority which must approve redress schemes and the arrangements should allow for fixed term approvals and for oversight during the currency of the period of approval of a scheme. The regulator must be assured that the governing body is protecting the independence of the ombudsman or lead adjudicator and this will include the arrangements for appointment and tenure and also for ensuring accountability for the delivery of the service. Parliament may be involved by periodically reviewing the regulatory framework for the industry or sector which will include the redress scheme.

CONCLUSION

This discussion, while it has been drawn from the UK, should have broader applicability not least because it is drawn from practice common to many public services ombudsmen. Understandably private sector/industry ombudsmen schemes have drawn on this wealth of experience and it seems to me that what my colleagues and I have termed 'the Ombudsman Enterprise', can play a significant role in the future development of alternative dispute resolution (ADR).

I conclude this paper by summarising proposals for legislation made by the Health and Consumers Directorate-General (SANCO) of the European Union (EU). Such proposals, if enacted, would be a minimum which the 27 Member States could supplement. These EU proposals are, I suggest, in keeping with my 'Putting It Right', 'Getting It Right' and 'Setting It Right' factors. It is anticipated that these proposals might start their journey through the EU legislative process in early 2013.

The concern prompting the proposals is the effective functioning of the internal market of the 27 Member States and that this will aided by promoting ADR for consumer disputes both within and between the Member States. The proposals are for ADR for consumer disputes and online dispute resolution for cross border online sale of goods and provisions of services.[15] I will focus on the first set of proposals for consumer ADR which, if enacted would require that ADR procedures exist for all consumer disputes; that the consumer will be able to discover the relevant body providing this service, the ADR entity, in material provided by the trader and the trader will have to indicate if they will commit to using ADR in relation to complaints lodged against them by consumers; the ADR entities will have to respect the quality principles of impartiality, transparency, effectiveness and fairness; and national authorities must monitor the ADR entities established in their territory and report on their development and functioning. The European Commission will make triennial reports to the European Council and Parliament on the application of this legislation.

The effectiveness principle is to mean that the ADR procedures should not last longer than 90 days, but that this can be extended if the dispute's complexity so requires. The service should be free or of moderate cost for the consumer. There is no obligation to use a legal representative but parties may be represented or assisted by a third party at any stage in the process. Member States are to ensure that those providing the ADR service are expert and impartial by ensuring that they
(a) possess the necessary knowledge, skills and experience in the field of alternative dispute resolution;

[15] Commission 2011a and 2011b respectively.

(b) are not liable to be relieved from their duties without just cause;
(c) have no conflict of interest with either party to the dispute.

The principle of transparency requires that the ADR entities should publish information about those in charge of the service
(a) the method of their appointment and the length of their mandate;
(b) the source of financing, including percentage share of public and of private financing; (c) where appropriate, their membership in networks of ADR entities facilitating cross-border dispute resolution. There should also be information on the types of disputes they cover, their procedural rules, the types of rules used as the basis for resolution, the approximate duration and the legal effect of the ADR outcome, costs borne by the parties and the languages which may be used.

The ADR entities should report on
(a) the number of disputes received and the types of complaints to which they related; (b) any recurrent problems leading to disputes between consumers and traders;
(c) the rate of dispute resolution procedures which were discontinued before an outcome was reached;
(d) the average time taken to resolve disputes;
(e) the rate of compliance, if known, with the outcomes of the ADR procedures;
(f) where appropriate, their cooperation within networks of ADR entities facilitating the resolution of cross-border disputes.

The principle of fairness requires that Member States shall ensure that in ADR procedures:
(a) the parties have the possibility to express their point of view and hear the arguments and facts put forward by the other party and any experts' statements;
(b) the outcome of the ADR procedure is made available to both parties in writing or on a durable medium, stating the grounds on which the outcome is based.

Member States shall also ensure that in ADR procedures which aim at resolving the dispute by suggesting a solution
(a) the consumer, before agreeing to a suggested solution, is informed that:
    (i) he has the choice as to whether or not to agree to a suggested solution;
    (ii) the suggested solution may be less favourable than an outcome determined by a court applying legal rules;
    (iii) before agreeing or rejecting the suggested solution he has the right to seek independent advice;
(b) the parties, before agreeing to a suggested solution, are informed of the legal effect of such agreement;
(c) the parties, before expressing their consent to a suggested solution or amicable agreement, are allowed a reasonable period of time to reflect.

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MUST OMBUDSMEN RETAIN REMIT FOR PRIVATISED SERVICES?

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OUTLINE

- Introduction
- Four Options
- Desirable Features of a Redress Scheme
- Conclusions

Introduction

- Privatisation in the UK
- Provision for approved redress schemes
- Options
  - No Change
  - Specific Arrangements for a Public Services Ombudsman
  - Private Sector/Industry Ombudsman
  - Other Complaints Schemes

No Change

- Not the UK position
- Possible problems mixing public & private?
- Customers' knowledge & awareness?
- Not a barrier to change
- Practicalities may force change

Specific Arrangements for a Public Services Ombudsman

- Blurred public/private boundary
- Public Ombudsman if still public responsibility
- Western Australia the Public Ombudsman acts as Private Energy Ombudsman
- English Local Government has had private adult social care added to remit
- Services to be paid for by appropriate funds

Private Sector/Industry Ombudsman

- Recourse to it after ‘deadlock’ or 8 weeks
- Financed by industry but free to consumer
- Decision binds company but not consumer
- Consumer can choose not to accept decision and could go to court
- Good Governance

Other Complaints Schemes

- Adjudicators
  - Telecommunications (and internet)
  - Postal Services
- Consumer Councils
  - Railways and Buses
  - Water Services
- Governance

Competition in Redress Schemes?

- Theory
  - Improves standards
  - 'Race to the bottom'
- Telecommunications
  - Legislative base
  - Review of ADR led to changes in schemes to reduce inconsistencies in compensation

Desirable Features of a Redress Scheme

- Putting It Right
- Getting It Right
- Setting It Right

Putting It Right

- Free to complainant
- Not just ‘rights’ but also ‘proper conduct’
- Flexible process of intervention from phone call to investigation
- Tailored remedy
- Binding if in private sector

Getting It Right

- Improving service & complaint handling
- Making special reports
- Offering guidance
- Own initiative investigation?
- Power of reference to regulator

Setting It Right

- Constitutional/Legislative provision
- Independence
  - Governing Body
  - Appointment ,Tenure, No role in case work
- Accountability
  - Governing Body
  - Reports, Planning
  - Role of Regulator

Conclusions

- Broad applicability as common practice
- Ombudsmen Enterprise & ADR future
- EU proposals on consumer ADR
  - Access
  - Impartiality
  - Transparency
  - Effectiveness
  - Fairness
  - Monitoring