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# Critical Junctures: Regulatory Failures, Ireland's Administrative State and the Office of the Ombudsman

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In the aftermath of global financial crisis, the importance of effective regulatory interventions by government has come into sharp relief. The failure of public administration and political oversight that underwrote the collapse of the Irish economy in 2008 has provoked widespread reflection on the need for increased administrative review in the country. This has extended beyond the specific financial sphere, to broader public law reform targeting executive power by building an improved parliamentary culture, greater independent oversight and concentrating democratic participation. In this article, we critique the Irish regulatory state through the prism of the pressures, conflicts and reforms to the Office of the Ombudsman over the past decade.

The Office of Ombudsman has been a distinctive nodal point in the interest conflicts and oppositionalities that marked the past decade in Irish constitutional and political order.<sup>1</sup> In response to the crash, political leaders have promised “root and branch reform”, with the incoming government appointing Ireland’s first Minister of State for Public Sector Expenditure and Reform. The Minister, Brendan Howlin TD has stated that the aim is for “a new maturity in our approach to government’s relationship with the citizen”, and to “contribute to opening up the ‘black box’ of government to a much greater degree than heretofore.”<sup>2</sup> This represents an acknowledgement of Ireland’s deep governance crisis, which underwrote experiences of liberalised financial regulation and a political culture whose failure to correct property bubbles reflected the predominance of “retail politics”.<sup>3</sup> The Office of the Ombudsman is at the centre of resultant reforms, well positioned to deliver a “ripple effect for notions of democratic accountability and the relationship between the citizen and the state”.<sup>4</sup>

<sup>1</sup> Throughout this article we focus largely upon the main instance of ombudsmanry in Ireland/the Office of the Ombudsman.

<sup>2</sup> B. Howlin, “Reform of the Public Service” (2012) 60(1) *Administration* 15, 26.

<sup>3</sup> Trust in government in Ireland fell to just 18% in 2012, see Autumn 2012 Eurobarometer survey at [http://ec.europa.eu/public\\_opinion/archives/eb/eb78/eb78\\_anx\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb78/eb78_anx_en.pdf) [Accessed May 2, 2014].

<sup>4</sup> A. Stuhmcke, “Changing Relations between Government and Citizen: Administrative Law and the work of the Australian Commonwealth Ombudsman” (2008) *Australian Journal of Public Administration*, vol.67(3), 321–339, 321.

While traditional accounts often reductively focus on the Ombudsman as a form of alternative dispute resolution, increasingly it is regarded as an essential supplement to the classical branches of judiciary, legislature and executive. This additional “integrity branch”, first championed by Professor Bruce Ackerman, seeks to combat the gaps and inertia produced by traditional judiciary-executive-legislature divisions.<sup>5</sup> For Buck, Kirkham and Thompson, the existence of Ombudsman institutions “provides strong evidence that in the modern administrative state the institutions of the tripartite model by themselves are incapable of upholding the full range of values that underpin the constitution”.<sup>6</sup> We argue that Irish experiences and reforms endorse these outlooks, and integrity institutions will be core to future efforts to diversify and re-centre traditional Irish administrative philosophies.

### **The Ombudsman and Ireland’s administrative state: heritage and failings**

The institution of the Ombudsman enjoys a prominent place globally as a core element of constitutional design, of legislative enforcement and in securing governmental accountability, offering flexible and independent redress. While unities of nomenclature exist, Ombudsmen bear differing nation-specific emphases, with some jurisdictions relying upon the office for human rights protection, or others seeking to employ the institution to improve accessibility to justice. Within this spectrum, the Irish Office of the Ombudsman combines a number of functions:

- Standard setting for the civil service.
- Investigation power.
- Alternative dispute resolution between complainants and public sector bodies.

In assessing the impact of the Office and the barriers it faces, it is necessary to critically reflect on the distinct regulatory philosophies of the Irish public sector and the State’s constitutional order.

For Irish society, a deeply engrained tradition of clientelism had, historically, the potential to negate calls for the foundation of the Ombudsman and, more broadly, any systematised administrative review outside of the courts. This was most clearly seen in a speech by, then Finance Minister, Charles Haughey in 1966:

“Ireland is a small compact community. There is hardly anyone without a direct personal link with someone, be he Minister, T.D., clergyman, county or borough councillor or trade union official, who will interest himself in helping a citizen to have a grievance examined and, if possible, remedied. . . The basic reason therefore why we do not need an official Ombudsman is because we already have so many unofficial but nevertheless effective ones.”<sup>7</sup>

<sup>5</sup> See B. Ackerman, “The New Separation of Powers” (2000) 113(3) *Harvard Law Review* 694–696.

<sup>6</sup> T. Buck, R. Kirkham and B. Thompson, *The Ombudsman Enterprise and Administrative Justice*, (Farnham: Ashgate, 2010), p.18.

<sup>7</sup> As Mr Haughey was not able to attend the event, held by the Solicitors’ Apprentices Debating Society, the speech was read by the Secretary to the Department of Finance, T. K. Whitaker. “We do not need an Ombudsman says Whitaker: T.D.s extremely assiduous” *Irish Times*, November 12, 1966, p.11.

Professor John Kelly heavily criticised this statement as promoting “the primitive system of clientship and patronage”. He argued that:

“this phenomenon was, in the distant past, a sure sign of a society where a weak man had no hope of justice without the aid of a strong one, and its general replacement in civilised countries by a regular, strong, and impartial process of law is a major social milestone.”<sup>8</sup>

A further feature of the Irish regulatory landscape has been the failure of parliamentary structures to effectively oversee executive actions. This challenges the traditional Westminster model tenet that “Parliament is the place for ventilating the grievances of the citizen”.<sup>9</sup> Former chair of the Committee of Public Accounts, Gay Mitchell acknowledged that the Oireachtas and its Committees had not, in general, been effective in holding the Executive and state agencies accountable and that the spate of tribunals of inquiry in recent years underlined the weakness of parliamentary structures.<sup>10</sup>

In 2011, attempts to pass a constitutional amendment to empower the Oireachtas to establish full parliamentary inquiries into matters of general public importance,<sup>11</sup> failed in the face of a public who are fundamentally distrustful of their political representatives. The idea that the powers of the Oireachtas should be strengthened<sup>12</sup> offering an effective Parliamentary forum for in-depth examinations of key issues such as the banking scandals provided initial public support for this reform proposal. However, in a referendum required to pass the amendment, a majority rejected a poorly worded provision that, rather than encouraging public confidence in politicians, tended to provoke distrust. The offending section was found in the proposed art.15.10.4 which stated:

“It shall be for the House or Houses concerned to determine, with due regard to the principles of fair procedures, the appropriate balance between the rights of persons and the public interest for the purposes of ensuring an effective inquiry ...”

This triggered a significant NO campaign involving lawyers, NGOs and academics who regarded it as a limit to judicial supervision of such inquiries, particularly on the basis of constitutional justice and the right to reputation. The vote, thus, represented a demand for proper political reform rather than a rejection of political reform per se.

The difficulty of drawing lines of accountability at the interface of administrative-ministerial roles has complicated oversight. The Programme for Government 2011 indicated a wish to reformulate the Public Service Management

<sup>8</sup> As quoted by the Ombudsman, Emily O'Reilly at the Free Legal Advice Centres 2006 Conference, “Public Interest Law in Ireland—the Reality and the Potential” at [http://www.flac.ie/download/pdf/flac\\_pil\\_proceedings\\_final.pdf](http://www.flac.ie/download/pdf/flac_pil_proceedings_final.pdf) [Accessed May 2, 2014].

<sup>9</sup> The Parliamentary Commissioner for Administration, *White Paper*, Cm.2767, October 1965 para. 4.

<sup>10</sup> G. Mitchell, *By Dáil Account: Auditing of Government, Past, Present and Future*, (Dublin: Institute of Public Administration, 2010).

<sup>11</sup> A constitutional amendment was required following a decision of the Supreme Court in *Maguire and Ors v Ardagh* [2002] 1 I.R. 385 which ruled that the Oireachtas has no inherent power to hold inquiries that can make findings which adversely affect the reputation of individuals. The power is reserved to its legislative functions.

<sup>12</sup> M. Marsh, J. Suiter and T. Reidy, *Report on Reasons Behind Voter Behaviour in the Oireachtas Inquiry Referendum 2011*, (2012) at <http://per.gov.ie/wp-content/uploads/OIReferendum-Report-Final-2003-corrected.pdf> [Accessed May 2, 2014].

Act 1997, to clarify the doctrine of the minister as corporation sole in a modern governmental context.<sup>13</sup> In relation to Ireland's Health Services Executive, there have been parliamentary tensions regarding the transparency of decisions and the degree to which a rigid policy/implementation separation insulates civil servants from taking responsibility. Minister Howlin has acknowledged: "what is needed here is clarity—who is responsible for what within the complex public administrative system".<sup>14</sup>

The Civil Service has also been identified as suffering from key failings, particularly a tendency towards elite integration between regulators and those regulated.<sup>15</sup> The receptivity of the Irish administrative state to "principles based regulation" reflected an affinity with discretion and unproblematised trust in self-regulation. In 2008, the OECD noted the existence of an insular administrative culture it described as "most similar to the village life type model" with politicians and bureaucrats being "jointly socialised", with "informal networks" where "information tends to circulate outside of traditional formal communication channels."<sup>16</sup>

Accompanying these flaws is an overarching need for greater reflection upon Ireland's administrative review system. Regulatory mechanisms have, over the years, developed through piecemeal responses resulting in individualised reform without a wider understanding of the overall system. The haphazard landscape of tribunals, appeals, commissioners and Boards results in Ireland's administrative review system remaining overly reliant on judicial review, having thus far failed to embrace merits based appeals on a more systematised basis. Even where systemic reforms do occur, the enforced obsolescence of United Kingdom's Administrative Justice and Tribunals Council indicates how centrifugal reform forces can coalesce to offer partial innovation only for it to be swept back by the tides of administrative convenience and political expediency.

Despite these governance challenges, the Office of the Ombudsman has developed a rich typology of maladministration offering an established reservoir of discourse and practice to draw upon in rebalancing Ireland's administrative state and governance networks. At the same time, the relationship of the Office with political and administrative actors underlines countervailing forces, which could undermine such progress.

### *The history of the Ombudsman in Ireland*

The first steps towards the creation of an Ombudsman in Ireland are found in the formative Devlin Report 1969.<sup>17</sup> The relevant sub-group identified the possibility of establishing a *Commissioner for Administrative Justice*. However, the Committee

<sup>13</sup> Taoiseach, *Programme for Government 2011* (2011). Taoiseach.gov at [http://www.taoiseach.gov.ie/eng/Publications/Publications\\_Archive/Publications\\_2011/Programme\\_for\\_Government\\_2011.pdf](http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011/Programme_for_Government_2011.pdf) [Accessed May 2, 2014].

<sup>14</sup> Howlin, "Reform of the Public Service" (2012) 60(1) *Administration* 15, 26.

<sup>15</sup> Such regulatory capture was seen in the interrelationship of the Central Bank, the Irish Financial Services Regulatory Authority and the banking industry. See R. Chari and P. Bernhagen, "Financial and Economic Crisis: Explaining the Sunset over the Celtic Tiger" (2011) 26(4) *Irish Political Studies* 473–88.

<sup>16</sup> Organisational for Economic Co-operation and Development, *OECD Public Management Reviews: Ireland—Towards an Integrated Public Service*, (OECD Publishing, 2008), p.264.

<sup>17</sup> Public Services Organisation Review Group, *Report of the Public Services Organisation Review Group* (Dublin: The Stationery Office, 1969), p.792.

regarded such a body as ill-matching the country's administrative tradition, reflecting the prevalent fear of diluting Ministerial authority and accountability over departmental affairs. Nevertheless, the Ombudsman model became more established globally during the 1970s and by 1977, an All-Party Committee on Administrative Justice recommended establishing an Ombudsman. Although the Ombudsman Act was passed in 1980, the incoming Fianna Fáil Government was less enthusiastic, with the result that it did not come into force until 1984 under a new Fine Gael/Labour Party Coalition.

Initial political mistrust of the Ombudsman was reflected in two early crises. First, when Fianna Fáil returned to Government in 1987 it dramatically reduced the budget of the Office as part of wider public sector funding cuts.<sup>18</sup> The first Ombudsman, Michael Mills,<sup>19</sup> regarded this as a political attack on the Office and countered by presenting a special report to the Oireachtas attesting that further budget cuts would lead to the closure of the office.<sup>20</sup> Although the budget situation was resolved when the Department of Finance undertook a review, a second crisis arose as the first six year term<sup>21</sup> of Michael Mills drew to a close in 1989. Only on the last day before the Dáil rose for the Christmas break did the Finance Minister recommend extending Mills' appointment for a second term. Without this action, his appointment would have lapsed at the start of 1990 and he would have been too old to satisfy the legislative criteria for a new appointment.<sup>22</sup>

The resilience of the Ombudsman during these early years may ultimately be traced to both its credibility amongst the public and the significant legislative provisions that enhanced the independence of the office. Appointment to, and removal from, the post is made by the President, following a joint resolution of the Dáil and the Seanad.<sup>23</sup> Section 4(1) of the Act formally enshrines the general principle that "The Ombudsman shall be independent in the performance of his functions". The Office does not have constitutional status however, and conflicts between the Office, Government and Civil Service outlined later in this article, highlight that this is a significant institutional constraint on the Office.

### *The institutional remit of the Ombudsman*

The political tensions underlying the Office's foundation also manifested themselves in the circumscribed ambit of its purview. The body was focused initially only upon central civil service administration—with jurisdiction over local authorities, state sponsored bodies and health boards only being incrementally acquired later.<sup>24</sup> Each body had to be expressly added to its jurisdiction, which given the ad hoc sprawl of agencies with discrete functions, "termed semi-state bodies", encouraged pragmatic exclusions. As early as 1980, Barrington identified

<sup>18</sup> The Ombudsman was regarded as disproportionately affected. In 1987, the Office's budget was cut by 20% (IR£100,000) with the loss of 5 staff. In 1988, the cut was repeated with similar staffing impacts.

<sup>19</sup> M. Mills, *Hurler on the Ditch: Memoir of a Journalist who Became Ireland's First Ombudsman*, (Dublin: Curragh Press, 2006), pp.142–47.

<sup>20</sup> Mills, *Hurler on the Ditch*, p.145. Ombudsman Act s.6(7) empowers the Ombudsman to submit a report to the Oireachtas regarding the Office's functions.

<sup>21</sup> A term set down by the Ombudsman Act s.2(4).

<sup>22</sup> Mills, *Hurler on the Ditch*, pp.147–50.

<sup>23</sup> Ombudsman Act 1980 s.2(2). Grounds for removal are stated misbehaviour, incapacity and bankruptcy—s.2(3)(b).

<sup>24</sup> Ombudsman Act (First Schedule) (Amendment) Order 1984 (SI 332/1984). The extension came into force in April 1, 1985.

over four hundred semi-state bodies,<sup>25</sup> and the OECD more recently criticised the resulting fragmentation of public service accountability and performance.<sup>26</sup> Only in late 2012 did the Government finally legislate to catch up to the creep of bodies outside the purview of Ombudsman review. The Ombudsman (Amendment) Act 2012 provided for the automatic inclusion of all public bodies, except those specifically excluded.<sup>27</sup>

To guard against duplication, the Act continues to *prima facie* exclude jurisdiction where there is a right to judicial review, statutory appeal or appeal to an independent body. In these instances, however, the Ombudsman may proceed with the investigation “where special circumstances make it proper to do so”.<sup>28</sup> Such circumstances arose in the 2001 *Passengers with Disabilities Report*, where the Ombudsman justified her examination because of the limited scope of the available independent appeal and the significant difficulties faced by the carers in the specific cases.<sup>29</sup> Thus the Office retains an ability to ameliorate faults with existing mechanisms.

Despite the recent jurisdictional reforms, it is significant that specific exclusions continue in areas long regarded as administratively sensitive. The Department of Justice has lobbied successfully to remain outside the Ombudsman’s purview in relation to the actions of An Garda Síochána, the administration of the law relating aliens and naturalisation procedures and the administration of prisons. In the latter two areas, alternative mechanisms have been proposed: a complaints system for prisoners is being developed<sup>30</sup> and a new statutory appeals system has been promised under the Immigration, Residence and Protection Bill 2010. Nevertheless, contrary to a large number of comparative jurisdictions, both remain insulated from the already effective Ombudsman system. The Ombudsman has warned that these processes “must be robust and truly independent if they are to provide a genuine alternative to Ombudsman oversight.”<sup>31</sup>

There is, finally, a Ministerial exclusion power contained in Ombudsman Act s.5(3). Deriving from earlier political anxieties, it allows a Minister to request that the Ombudsman not investigate a matter concerning their department or related functions. The request must include reasons as to why it is being made. On receiving the request, the Ombudsman is obliged to cease investigation.<sup>32</sup> Although this power has not yet been used, it embodies a latent mistrust of the Office which as we will show, has manifested itself in recent controversies.

<sup>25</sup> T. J. Barrington, *The Irish Administrative System* (Dublin: Institute of Public Administration), 1980.

<sup>26</sup> Organisation for Economic Co-operation and Development, *OECD Public Management Reviews: Ireland — Towards an Integrated Public Service*.

<sup>27</sup> Over 100 State Agencies were added, including two particularly controversial bodies, the National Roads Authority and FAS (the State employment training body). Ombudsman (Amendment) Act 2012 First Schedule.

<sup>28</sup> Ombudsman Act [s.5(1)(a)(i)–(ii)].

<sup>29</sup> Office of the Ombudsman, *Passengers with Disabilities (Special report)* (Dublin: Office of the Ombudsman, 2001), p.16. All Ombudsman reports referenced in this article are at <http://m.ombudsman.gov.ie/en/Publications/Investigation-Reports/> [Accessed May 2, 2014].

<sup>30</sup> See Justice.ie, <http://www.justice.ie/en/JELR/Pages/PR13000019> [Accessed May 2, 2014].

<sup>31</sup> *Ombudsman Address to the Oireachtas Public Services Oversight and Petitions Committee*, October 10, 2012 at <http://www.ombudsman.gov.ie/en/news/speeches-articles/2012/ombudsman-amendment-bill-and-2011-annual-report.html> [Accessed May 2, 2014].

<sup>32</sup> Ministerial requests must be included in the Ombudsman’s Annual Report to the Oireachtas. Ombudsman Act 1980 s.6(7).

## Ireland's "Ombudsman Dividend"<sup>33</sup>: enhancing administrative justice

The Ombudsman's Office, we argue, has proved successful in developing a conception of administrative justice, which offers a systematised corrective to Ireland's administrative flaws. Across a number of thematic areas, the Office offers a counterpoint to the more deferential, authority-focused and individualistic avenue of judicial review.

### *Evolving standards of good governance*

The Irish Ombudsman has supplemented traditional administrative law through active definition and application of the concept of maladministration. The yardstick the Ombudsman applies to complaints is defined in s.4(2) of the 1980 Ombudsman Act. This lists seven grounds for finding a "defect" in an administrative decision, namely where it is:

- Taken without proper authority;
- Taken on irrelevant grounds;
- The result of negligence or carelessness;
- Based on erroneous or irrelevant considerations;
- Improperly discriminatory (this was later linked with the Equal Status Act 2000);
- Based on undesirable administrative practice; and
- Otherwise Contrary to sound or fair administration.

The legislation makes no reference to maladministration, but its non-exhaustive definition of a defect clearly encompasses much of that wider category.<sup>34</sup>

The openness echoes the initial Ombudsman creating legislation in the United Kingdom—Parliamentary Commissioner Act 1967—which left the term maladministration<sup>35</sup> undefined. In parliamentary debate of that Bill, the Leader of the House of Commons, Richard Crossman, set out what was to become known as the "Crossman catalogue":

"A positive definition of maladministration is far more difficult to achieve. We might have made an attempt in this Clause to define ... all the qualities which make up maladministration ... It would be a wonderful exercise—bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on. It would be a long and interesting list."<sup>36</sup>

Crossman ultimately concluded that the meaning of maladministration would be filled out organically by case work. Thus, though these examples grew into conventional indicia, Sir William Reid, in his 1993 Annual Report of the Ombudsman, adopted a progressive interpretation of maladministration to include

<sup>33</sup> A. Abraham, "The Ombudsman as Part of the UK Constitution: A Contested Role" (2008) 61 *Parliamentary Affairs* 206–215, 212.

<sup>34</sup> G. Hogan and D. G. Morgan, *Administrative Law in Ireland*, 4th edn (Dublin: Round Hall, 2010), p.400.

<sup>35</sup> Parliamentary Commissioner Act 1967 s.5(1).

<sup>36</sup> *Hansard*, HC Debs, October 18, 1966, vol.734 col.51.



further elements such as “unwillingness to treat the complainant as a person with rights” or “offering no redress”.<sup>37</sup>

Maladministration therefore runs the spectrum from judicial review grounds to more open-textured concepts of good governance of administration. The yardstick applied by the Irish Office received its most sustained examination in the *Redress for Taxpayers Special Report*.<sup>38</sup> First, the Office noted that in interpreting “contrary to fair or sound administration” regard is had to the principles developed by the Irish courts as well as to the European Court of Justice and the European Court of Human Rights. Also relied upon are the principles of good administration developed by international bodies such as the Council of Europe “which the State has accepted”, which, though not enshrined in domestic statute, reflect “similar principles developed in the Irish Courts.”<sup>39</sup> Finally, subject to the avoidance of conflict with the courts, her Office may develop “incrementally ... rules of good practice the infringement of which ... would be “contrary to fair or sound administration.”<sup>40</sup>

The interplay between fair administration and human rights protections is also a significant development in Ombudsmanry generally. Whilst the Irish Office has been circumspect in employing rights language, human rights are part of its review process.<sup>41</sup> Thus the Annual Report of 2000 laid out the “background rights” that underlie the decision making powers of public bodies, identifying five “core values governing the state/citizen relationship”, namely “the need to uphold the autonomy, dignity, respect, status and security of individuals.”<sup>42</sup> The civil service’s internalising of such norms through its commitment to developing “a human rights approach to service provision”,<sup>43</sup> has deepened the Ombudsman’s mandate for their use as legitimate expectation of the citizen. In addition, the Office has made constructive use of soft law, for example in the tax context the Ombudsman has relied upon the Revenue Commissioners’ stated internal best practices to mitigate hardship.<sup>44</sup>

The shading of the Ombudsman Act standards from a legal through to an administrative fairness orientation has conflicted with more minimalist, legalistic mindsets within Government departments. In a 1997 Report on her investigation of three complaints involving late claims for contributory pensions, the Ombudsman noted that the Department of Finance’s response “at all stages has been to say that the impugned decisions are taken into accordance with the law.”<sup>45</sup> Underlying this was a civil service inference that “it is not open to the Ombudsman to be critical

<sup>37</sup> Parliamentary Commissioner for Administration, *Third Report 1993–94* (London: HMSO, 1994), para.7.

<sup>38</sup> Office of the Ombudsman, *Redress for Taxpayers (Special Report)* (Dublin: Office of the Ombudsman, 2002), p.8.

<sup>39</sup> Office of the Ombudsman, *Redress for Taxpayers (Special Report)* (Dublin: Office of the Ombudsman, 2002), p.8.

<sup>40</sup> Office of the Ombudsman, *Redress for Taxpayers (Special Report)* (Dublin: Office of the Ombudsman, 2002), p.8.

<sup>41</sup> Emily O’Reilly, as Ombudsman, reflected upon the relationship between maladministration and human rights law in a 2007 speech to the British and Irish Ombudsman Association at: <http://www.ombudsmanassociation.org/docs/HumanRightsOmbudsmanEmilyOReilly.pdf> [Accessed May 2, 2014].

<sup>42</sup> Office of the Ombudsman, *Annual Report of the Ombudsman 2000* (Dublin, Office of the Ombudsman, 2001), p.13, quoting Dawn Oliver in “The Underlying Values of Public and Private Law” in M. Taggart (ed.) *The Province of Administrative Law* (Oxford: Hart Publishing, 1997).

<sup>43</sup> Office of the Ombudsman, *Annual Report of the Ombudsman 2000* (2001), p.13.

<sup>44</sup> Office of the Ombudsman, *Redress for Taxpayers (Special Report)* (Dublin: Office of the Ombudsman, 2002), p.10.

<sup>45</sup> Office of the Ombudsman, *Investigatory Report on the non-payment of arrears of contributory pensions* (Dublin: Office of the Ombudsman, 1997), para.12.

of decisions taken in accordance with law".<sup>46</sup> The Ombudsman Act however, clearly permits "an action to be taken with "proper authority" to be found "contrary to fair and sound administration".<sup>47</sup> This position echoes that of the UK Parliamentary Ombudsman in her Special Report on Military Detainees, *a Debt of Honour: The ex gratia scheme for British groups interned by the Japanese during the Second World war*, where her critique of a rushed, poor quality decision-making process and the justifiable expectations raised by the Parliamentary announcement of the scheme was eventually accepted by the Ministry for Defence.<sup>48</sup>

### *Obtaining systemic redress*

Beyond the provision of specific remedies, the Ombudsman has displayed an ability to change administrative practice. Such a systemic approach is of distinctive value to common law systems, as Ann Abraham argues:

"It is the sort of function to which the common law mentality with its inherent individualism is a stranger, constrained from looking beyond the facts of the particular case, compelled invariably to resort to a simplistic 'rotten apple' theory of organisational malfunction instead of a more realistic analysis that makes room for systemic and institutional failure"<sup>49</sup>

Nevertheless, the engagement of the Irish Ombudsman with systemic reform has been the primary source of conflict between the Office and Government.

Generally, systemic redress has arisen where the Ombudsman has exercised her "own initiative" power of investigation under s.4(3)(b) of the Ombudsman Act which allows for an investigation where it appears "having regard to all the circumstances, that an investigation under this section into the action would be warranted." Such investigations are informed by individual complaints received and often result in a consolidation of numerous complaints into a more systemic investigation. The investigation of the right to nursing home care which resulted in the *Who Cares Report*<sup>50</sup> is such an example. The investigation was "prompted by a persistent stream of complaints to the Ombudsman"<sup>51</sup> and provided a broader analysis of the problems than could be undertaken in response to individual complaints.

The mandate to engage in systematic redress was contested in a case relating to late claims for contributory pensions by insured people.<sup>52</sup> The relevant Department argued that as Ministerial regulations prescribed the relevant time limit for making claims, it had no discretion, unless it was at fault for the delay. Nevertheless, the Ombudsman proceeded with the investigation, finding that s.4(2) of the Ombudsman Act 1980 referred to actions, "taken in the performance of

<sup>46</sup> Office of the Ombudsman, *Investigatory Report on the non-payment of arrears of contributory pensions* (1997), para. 12.

<sup>47</sup> Ombudsman Act 1980 s.4.

<sup>48</sup> *Fourth Report of the Parliamentary Commissioner for Administration* HC 324 (London: TSO, 2005) (2004–5), paras 132–133.

<sup>49</sup> Abraham, "The Ombudsman as Part of the UK Constitution: A Contested Role" (2008) 61 *Parliamentary Affairs* 206–215, 210.

<sup>50</sup> Office of the Ombudsman, *Who Cares? An investigation into the right to nursing home care in Ireland* (Dublin, Office of the Ombudsman, 2010).

<sup>51</sup> Office of the Ombudsman, *Who Cares? An investigation into the right to nursing home care in Ireland* (2010), p.5.

<sup>52</sup> Office of the Ombudsman, *Investigatory Report on the non-payment of arrears of contributory pensions* (1997).

administrative functions”, not inquiring into legislative actions. She defined a legislative action as “the making of a law; it is not the application of that law to individual cases or categories of cases”.<sup>53</sup> Consequently, she could criticise statutory regulations as ultra vires the primary legislation, as these would be “without proper authority.” The Ombudsman also found that she could criticise intra vires regulations that were producing an adverse, i.e. unfair and unreasonable, effect where the result was “contrary to fair or sound administration”.

Under Irish constitutional law regulations are called into existence only by the primary Act, and the Minister may not therefore be a law-maker as such, only possessing the power to put into effect the Oireachtas’ “principles and policies”.<sup>54</sup> The Minister is further bound by an obligation to act “with basic fairness, reasonableness and good faith”.<sup>55</sup> Removing the power of recommending amendment from the Ombudsman, which has not occurred in the United Kingdom,<sup>56</sup> would lessen the ability of the Office to challenge entrenched, regulation-facilitated unfairness. As part of the “integrity branch”, the Ombudsman, as an agent directly responsive to the people, can concentrate democratic oversight over technocratic instruments that are usually simply laid before the Dáil without any motion.

### *Mediating compliance and dialogue*

The resistance seen in the contributory pensions case moves us towards assessing the overall compliance by relevant public bodies with the Office. The Ombudsman exists to enhance flexibility and accessibility, and in the Irish context, both the necessary legislation and practical co-operation have had to be actively fought for. Legally, Ombudsman Act 1980 s.7(1)(a) allows the Office to:

“... for the purposes of a preliminary examination ... require any person who in the opinion of the Ombudsman, is in possession of information ... that is relevant to the examination ... to furnish that information ... and, where appropriate, may require the person to attend before him for that purpose and the person shall comply with the requirements.”

Those involved in an investigation “shall not ... obstruct or hinder the Ombudsman in the performance of his functions”.<sup>57</sup> The 2012 Amendment Act now allows the Ombudsman to enforce cooperation by making an application for a Circuit Court order directing a person to cooperate where they have failed to do so.<sup>58</sup>

<sup>53</sup> Office of the Ombudsman, *Investigatory Report on the non-payment of arrears of contributory pensions* (1997), para. 13.

<sup>54</sup> Article 15.2.1° of the Irish Constitution states:

“The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.”

Where principles and policies are not present to guide Minister discretion then the delegation of power by the Oireachtas is likely to be unconstitutional, as per the Irish Supreme Court in *Cityview Press Ltd v An Comhairle Oilúna* [1980] I.R. 381.

<sup>55</sup> *Burke v Minister for Labour* [1979] I.R. 354.

<sup>56</sup> In the UK, the Parliamentary Commissioner was encouraged by the Standing Committee in Parliament to regard the content and potential amendment of regulations as within jurisdiction.

<sup>57</sup> Ombudsman Act 1980 s.7(3).

<sup>58</sup> Ombudsman (Amendment) Act 2012 inserting s.7(1) (c) and (d).

The flexible Ombudsman procedure can offer unique benefits over court litigation, as seen in the 2003 *Beaumont Hospital Cancer Case*.<sup>59</sup> As a result of treatment failures, a patient admitted to the hospital was misdiagnosed, did not receive adequate follow-up consultations and died ten days after admission. Under internal complaint procedures, an independent review team produced a report in 2007. The family, however, considered the report to have misrepresented their experience and unsuccessfully requested its amendment. In her 2009 Annual Report, the Ombudsman noted that the complainant (the man's daughter) withdrew legal proceedings so as to pursue the Ombudsman investigation. This was motivated by a desire for "clear answers with regard to her late father's treatment, an apology for the shortcomings in his treatment and assurances that lessons had been learned within the hospital system."<sup>60</sup> It appears the complainant's view was that the adversarial and costly nature of litigation endangered these outcomes. The Office of the Ombudsman facilitated a number of meetings with senior hospital personnel; these were then followed up by a detailed written apology acknowledging communication and medical treatment failures. The complaint resulted in Beaumont Hospital establishing a new system that sought to ensure a clearer division of responsibilities between consultants on duty, which the Ombudsman described as representing "considerable progress" in providing "continuous and consistent care".<sup>61</sup>

### **Conflicts with Government and the Ombudsman's independence**

Despite the discussion thus far highlighting positive developments in relation to the powers and operation of the Ombudsman, there have been instances of tension and outright rejection of the Ombudsman's role and competence, extending even to the legislature. This is highly significant as an Ombudsman's ability to report to a receptive Parliament represents, as Kirkham argues "the cutting edge" of its power and "a gauge of the effectiveness of the office and its continuing ability to secure redress".<sup>62</sup>

The direct conflict with the Health Service Executive ("HSE") in 2008, when the Irish Ombudsman made findings of systematic maladministration in the delaying of payments under guardianship and foster parent schemes, is therefore troubling. The HSE contested the investigation report as beyond the powers of the Ombudsman and threatened legal action, including applying for an injunction to prevent the report being presented to the Oireachtas. Litigation was ultimately not pursued, however the Ombudsman incurred significant costs in requesting necessary legal opinions.<sup>63</sup> In its final response, the HSE rejected the report's recommendations. These had been that the relevant agencies should be paid outstanding fees plus interest and "time and trouble" payments, and that in future the HSE should "engage openly with guardian agencies to ensure that such disputes

<sup>59</sup> Office of the Ombudsman, *2009 Annual Report*, p.62.

<sup>60</sup> Office of the Ombudsman, *2009 Annual Report*, p.62.

<sup>61</sup> Office of the Ombudsman, *2009 Annual Report*, p.62.

<sup>62</sup> R. Kirkham, "Challenging the Authority of the Ombudsman: the Parliamentary Ombudsman's Special report on Wartime Detainees" (2006) 69(5) M.L.R. 792, 813.

<sup>63</sup> The Ombudsman Office costs were €52,000, while the total cost to all parties was estimated to be €150,000.

Office of the Ombudsman, *Gagging the Ombudsman? Aftermath of an Investigation by the Ombudsman of the Health Service Executive* (Dublin, Office of the Ombudsman, 2010).

would not arise again.” Significantly, despite the rejection and the related legal posturing, the HSE later gave effect to the recommendations.<sup>64</sup>

In a comparative context, Kirkham notes that no UK Government has attempted judicial review of the Ombudsman’s reports, though local councils disputing local authority Ombudsman findings have done so. Furthermore, rejection of Ombudsman’s reports is exceedingly rare and never unqualified.<sup>65</sup> As a former UK Ombudsman has noted rejections are highly significant:

“there would be no point in having an Ombudsman if the Government were to show disregard for his Office, his standing as an impartial referee, and for the thoroughness of this investigation.”<sup>66</sup>

In the Irish context, we find situations not only where a public body has rejected the Ombudsman’s jurisdiction or recommendations, but also where the Government has supported that rejection. This occurred in 2010/11, when the Department of Agriculture, Fisheries and the Marine was backed by the Government in refusing to accept the recommendations that a €200,000 payout be made to a family who had been refused assistance under the Lost at Sea Scheme. The Ombudsman found that the design and operation of the scheme were contrary to sound administration. The Fianna Fail/Green Party Government vetoed an Oireachtas debate on the Ombudsman’s Report and subsequently an Oireachtas committee voted to ignore it on instructions from the Government whip. By failing to facilitate debate, the Ombudsman argued that the:

“Government were knowingly disempowering the office, potentially robbing it of its ability to make public bodies accountable and to secure redress for people badly served by the State.”<sup>67</sup>

In a speech shortly after these events, the Ombudsman accepted the Government’s right to reject the Report, but argued that such a rejection required a fair hearing.<sup>68</sup> In the event, media reaction was such that an Oireachtas committee did debate the Report, although the government-controlled committee predictably rejected the findings and recommendations. The incident underlines the ability of party politics to overpower Irish legislative oversight. The former UK Parliamentary Ombudsman, Sir Cecil Clothier, in contrast, felt he could be confident in:

“[t]he Commissioner’s report had no party implications; the House tended to be united in demanding explanations from the department in a highly public manner.”<sup>69</sup>

Also in 2010, both the Health Services Executive and the Department of Health refused to co-operate with the Ombudsman’s Report on the right to nursing home care in Ireland, denying her access to relevant information to assist the investigation. Echoing previous claims, they submitted that the Ombudsman did not have the

<sup>64</sup> Office of the Ombudsman, *Gagging the Ombudsman? Aftermath of an Investigation by the Ombudsman of the Health Service Executive* (2010), p.9.

<sup>65</sup> Kirkham, “Challenging the Authority of the Ombudsman” (2006), 813.

<sup>66</sup> Select Committee on the Parliamentary Commissioner for Administration, *Sixth Report: The Channel Tunnel Rail Link and Exceptional Hardship*, HC 270 (1994–95).

<sup>67</sup> E. O’Reilly, “Watchdog needs State guarantee” *The Sunday Times*, June 5, 2011.

<sup>68</sup> O’Reilly, “Watchdog Needs State Guarantee” *The Sunday Times*, June 5, 2011.

<sup>69</sup> C. Clothier, ‘Fact-finding in Inquiries—the PCA’s perspective’ [1996] Public Law 384, 388–389.

power to make broad systemic findings and that she was prejudicing ongoing legal actions. While the Government expressly backed this position, no legal action challenging the publication of the report was taken. The Ombudsman Report, published at the end of 2010, stressed that the jurisdictional challenge was:

“... the most serious mounted against the Ombudsman's Office since its establishment in 1984. The extent and nature of this challenge, occurring both at the outset of the investigation and at the stage of representations on the draft report, does raise serious issues for the Ombudsman as she goes about discharging her independent role.”<sup>70</sup>

What is clear is that the relationship between the government and the Ombudsman Office in 2010/11 had reached a low level, akin to that which existed during the 1987 budget cuts outlined earlier.

Relations between the Ombudsman and Government have not necessarily improved even following a change of political leadership in 2011. The launch of an investigative report entitled “Too Old to Be Equal” occurred after the election of the new Fine Gael/Labour Party Government.<sup>71</sup> This found that the Mobility Allowance scheme run by the Department of Health to benefit those with a disability was in breach of the Equal Status Act 2000 because of a bright line age restriction of the benefit to those under 66 years old. Further, in an example of administrative inconsistency, the Report found that people who had been receiving Mobility Allowance before reaching the age of 66 did not have their allowance payments discontinued after they passed this age. The Ombudsman underlined that the Department of Health was aware of the illegality of the upper age limit, but that it had shown no “sense of urgency” to make the scheme compatible 11 years after the legislation had been passed, despite having received warnings from the Equality Authority. In advocating systemic change, the Ombudsman recommended that the Department review the scheme and revise it “so as to render it compliant with the Equal Status Act 2000”<sup>72</sup> by October 2011.

The Department initially accepted this recommendation but in a follow-up report in 2012, the Ombudsman found that the scheme continued to operate unchanged despite its illegality.<sup>73</sup> The Department then justified its lack of action by stating that compliance would be too expensive. The Ombudsman dismissed this reasoning in a follow-up report, refusing to accept that economic necessity required the state to “infringe ... the law. There are options to be considered on how best to use scarce resources. Breaking the law is not one of those options.”<sup>74</sup>

The Ombudsman's critique rested on accountability principles. First, the public should be able to trust the state to act with “integrity” in areas of complexity particularly against a background of scarce resources.<sup>75</sup> Secondly, State agencies should act in an open and honest way; if there is a danger that a benefit such as the Mobility Allowance Scheme could be abolished or altered people affected

<sup>70</sup> Office of the Ombudsman, *Who Cares? An investigation into the right to nursing home care in Ireland* (Dublin, Office of the Ombudsman, 2010), p.15.

<sup>71</sup> Office of the Ombudsman, *Too Old to be Equal—An Ombudsman investigation into the illegal refusal of Mobility Allowance to people over 66 years of age* (Dublin, Office of the Ombudsman, 2011).

<sup>72</sup> Office of the Ombudsman, *Too Old To Be Equal* (2011), p.3.

<sup>73</sup> Office of the Ombudsman, *Too Old to be Equal—A follow-up* (Dublin, Office of the Ombudsman, 2012), p.2.

<sup>74</sup> Office of the Ombudsman, *Too Old To Be Equal—A Follow Up* (2011), p.4.

<sup>75</sup> Office of the Ombudsman, *Too Old To Be Equal—A Follow Up* (2011), p.17.

should be given the necessary information. Finally, the Report questioned the State's commitment to fundamental human rights norms. The Department of Health's willingness to override the fundamental principle of equality because of cost concerns:

“suggests that it has a very weak sense of the importance of supporting human rights principles and, indeed, a very weak sense of the rule of law and of its obligation to act in accordance with the law.”<sup>76</sup>

The follow-up Report was published the day after the Government had announced the expansion of the jurisdiction of the Ombudsman.<sup>77</sup> Political endorsement of the Ombudsman as a champion of the people was therefore swiftly followed up with a high profile rebuke by that champion of a key State Department for resistance to her recommendations. This was a fine example of political leverage through what has been termed by one Ombudsman “the mobilisation of shame”.<sup>78</sup>

It appears, however, that the follow-up report, and a later appearance of Department staff before the Joint Oireachtas Committee on Oversight and Petitions in February 2013, prompted the Department to impetuously cancel the scheme rather than make a considered attempt to bring it in line with the rule of law and accountability principles. Twenty days after the Committee hearing the Mobility Allowance and the Motorised Transport Grant were closed to new applicants. The 5000 existing recipients would lose their benefits four months later. The Department restated that it had been unable to devise a lawful and effective mechanism within their €10.6 million budget. The unilateral decision was taken without notifying disability groups, the Ombudsman or the Joint Oireachtas Committee.

Unsurprisingly, disability groups were highly critical of this cut and as the four months came to an end the Department agreed payments to existing recipients should continue to “prevent hardship” and “alleviate stress, anxiety and uncertainty”.<sup>79</sup> It indicated an intention to establish a new statutory regime in the area, but more than a year after the announced abolition of the schemes no alternative proposal has yet been published. The unlawful Mobility Allowance and the Motorised Transport Grant continue to operate.

Resistance to findings has extended beyond the Office of the Ombudsman to a more extreme instance involving its separate sister body, the Children's Ombudsman in relation to a report it published in 2011 on the detention of children in St Patrick's Institution for Young Offenders in Dublin.<sup>80</sup> Based on years of investigation, and relying on concerns raised by the children detained there, the Report considered all areas of the operation of the institution and led the Children's Ombudsman to call for its early closure. In her introduction, she stressed the significance of hearing the voices of the children observing that “... there is little

<sup>76</sup> Office of the Ombudsman, *Too Old To Be Equal—A Follow Up* (2011), p.18.

<sup>77</sup> The report was issued on October 24, 2012.

<sup>78</sup> Marten Oosting, former Netherlands Ombudsman, quoted in R. Gregory and P. Giddings, *Righting Wrongs: The Ombudsman in Six Continents* (Amsterdam, IOS Press, 2000), p.464.

<sup>79</sup> Department of Health, “Interim Report of the Review Group in relation to the Mobility Allowance and Motorised Transport Grant Schemes”, June 11, 2013 at <http://www.dohc.ie/press/releases/2013/20130611.html> [Accessed May 2, 2014].

<sup>80</sup> Ombudsman for Children's Office, *Young People in St Patrick's Institution* (Dublin: Ombudsman for Children's Office, 2011).

achieved if we do not convince those who come into contact with these young people that their views are legitimate ...<sup>81</sup>

The calls for an early closure were met with little political enthusiasm, and media coverage of the report was muted. Eighteen months later, the publication of a damning report on the conditions in the institutions by the Inspector of Prisons, Michael Reilly, provided an alarming indication of the attitude of the Department of Justice and the Prison Service to the consultation carried out by the Children's Ombudsman.<sup>82</sup> The Children's Ombudsman recalled that:

“people were sneering at the outcome of that report ... I was patronised somewhat and made fun of ... and made to feel that I was a bit naive in thinking that what the young people were saying was true.”<sup>83</sup>

The view of officials was that a report by the Children's Ombudsman, based on the views of children in the criminal justice system, was not credible as an *authoritative analysis* of the prevailing situation. The result was a refusal by those responsible for St Patrick's Institution to take notice of a coherent account of fundamental problems and abuses in the detention of children.

The disruptive depth of this rejection cannot be underestimated. The experiences of the Children's Ombudsman extend into a lack of respect for the inquiry and fact-finding abilities of the Office. The episodic rejection of Ombudsmen findings challenging administrative practice underline the prevailing selective commitment to their functioning, despite government rhetoric surrounding the 2012 Amendment Act. It is worth contrasting the St Patrick's Report with the selection of the Children's Ombudsman to investigate the removal of Roma children from their families by Gardaí in October 2013. The Minister for Children identified the Children's Ombudsman as the preferred inquiry mechanism because she had “shown herself in the past to be well capable ... of doing this kind of independent report.”<sup>84</sup>

In the United Kingdom, the courts have sought to engender the necessary culture of respect, by accepting, firstly, that a rejection of an Ombudsman's recommendations can be assessed for their lawfulness on judicial review grounds, while secondly, in *Bradley*, demanding that public bodies provide “cogent reasons” for its decision.<sup>85</sup> Thus, as Kirkham states:

“... it is lawful for a public body to dispute the findings of an ombudsman but it must do this in a way that pays respect to the office. This includes directly responding to all the points in a report, rather than selectively choosing convenient aspects of the report.”<sup>86</sup>

<sup>81</sup> Ombudsman for Children, *Young People in St Patrick's Institution* (2011), p.8.

<sup>82</sup> Inspector of Prisons, *Report on an Inspection of St Patrick's Institution by the Inspector of Prisons Judge Michael Reilly*, 2012 at <http://www.justice.ie/en/JELR/Appendix%20A%2005.10.pdf/Files/Appendix%20A%2005.10.pdf> [Accessed May 2, 2014].

<sup>83</sup> C. Lally, “Concerns of children's Watchdog ‘sneered at’” *Irish Times*, October 18, 2012.

<sup>84</sup> “Children's Ombudsman has ‘trust of the public’ needed for Roma cases probe” October 26 2013, [thejournal.ie](http://www.thejournal.ie/emily-logan-trust-roma-garda-investigation-hse-1148755-Oct2013/) at <http://www.thejournal.ie/emily-logan-trust-roma-garda-investigation-hse-1148755-Oct2013/> [Accessed May 2, 2014].

<sup>85</sup> *R. (on the application of Bradley) v Secretary of State for Works and Pensions* [2008] EWCA Civ 36 at [36].

<sup>86</sup> R. Kirkham, “Implementing the recommendations of an ombudsman ... again” (2011) 33(1) *Journal of Social Welfare & Family Law* 71, 82.



Beyond such specific legal bulwarks, the courts have also expressed support for the rigour of the Office's methodology:

“Findings ... are either hard-edged findings of fact, established after thorough and independent investigation by the [Ombudsman], or represent an assessment by the [Ombudsman] of maladministration and injustice which, by reason of his expertise, accumulated experience of ... administration and panoramic view of the functioning (and malfunctioning) of ... government, he is peculiarly well-equipped to make.”<sup>87</sup>

Government intervention, in recent times has also been driven towards the financial and administrative consolidation of Ombudsmanry in Ireland. Such interests led to the office being designated as the *Information Commissioner* overseeing the otherwise separate Freedom of Information Act 1997. The more recent McCarthy Report,<sup>88</sup> advocated the amalgamation of bodies and claimed duplication of work was occurring. This would result in a rationalised “single Ombudsman Commission” incorporating the Office of the Ombudsman/Information Commissioner, the Children's Ombudsman, the Office of the Data Protection Commissioner and the Office of the Commission for Public Service Appointments.<sup>89</sup> Such a range of functions, alongside the Office's membership of the Standards in Public Office Commission, indicate a very burdensome workload. The current approach is largely to merge the back-office functions of the other Commissioners into the Ombudsman's Office. The selective emphasis upon reforming Ombudsmen is to be queried, when there has been little mention of other fragmented bodies such as the Office of the Appeal Commissioners for the purposes of the Tax Acts, the various Performance Verification Bodies, appeals tribunals, as well as the Garda and Defence Forces Ombudsmen, probably on account of a traditional valuing of their sectoral diversity.

## **Re-positioning the Ombudsman: from constitutional misfit to reform agent**

How significant a role can the Ombudsman play in reinvigorating parliamentary democracy and administrative accountability in Ireland? As noted at the outset, the Ombudsman is often regarded as a constitutional misfit, essential in practice but transgressive to traditional categories.<sup>90</sup> We have seen that the Oireachtas has failed at times to discharge its constitutional function to discourage selective compliance with Ombudsman investigations. This leads us to the question of constitutional recognition of the Ombudsman, which though not new, has since the onset of the banking crises has received renewed consideration.

The Report of the Constitutional Review Group 1996 strongly endorsed the constitutional recognition of the Office. The Review Group's foresight is to be praised, given the failure of the UK Government Green Paper on reform to provide

<sup>87</sup> *R. (on the application of Gallagher) v Basildon DC* [2010] EWHC 2824 at [27].

<sup>88</sup> *Report of the Special Group on Public Service Numbers and Expenditure Programmes* (Dublin, Government Publications Office, 2009).

<sup>89</sup> *Report of the Special Group on Public Service Numbers and Expenditure Programmes* (2009), p.51.

<sup>90</sup> See R. Snell, “Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma” in Chris Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (Canberra: AIAL, 2000), p.188.

much importance to the institution in 2007.<sup>91</sup> The Group found “a consensus” in the Oireachtas “about the desirability of strengthening and developing” the Office, extending to it the protections which exist for the Comptroller and Auditor General.<sup>92</sup> Constitutional recognition would, it felt:

“... reinforce freedom from conflict of interest, from deference to the executive, from influence by special interest groups, and it would support its ability to assemble facts and reach independent and impartial conclusions.”<sup>93</sup>

This recommendation has lain unimplemented. The First Progress Report of the All-Party Oireachtas Committee on the Constitution provided a specific text for inclusion in the Constitution but inertia set in. Meanwhile, within the United Kingdom's (admittedly unwritten) constitutional system, there have been similar endorsements of the role of the Ombudsman in fulfilling the promise of parliamentary democracy.<sup>94</sup> Following the banking crisis and the *Lost at Sea* report, Emily O'Reilly underlined that constitutional recognition was of renewed relevance.<sup>95</sup> The most recent Programme of Government of the Labour/Fine Gael Coalition did not contain an express commitment, and the terms of reference of the Constitutional Convention did not identify it as a priority.<sup>96</sup> Few institutions have received such glowing political rhetoric as the Ombudsman, but praise has not been underpinned at the constitutional, and even governmental, level. This underlines the political marginality of administrative reform and the institutionalised clientelism within which many Irish politicians are habituated or strictured.

In terms of *judicial* engagement with the Ombudsman mechanism, there would seem, at first glance, to be a conflict. The Irish Courts have often prioritised a heavily judicialised model of tribunals and other forms of error finding mechanisms. The courts and the Ombudsman adopt different methodologies to resolving disputes, and sensitivity to these differences is required within both institutions. The distinct *and essential* constitutional role of Ombudsmanry was endorsed by the Canadian Supreme Court in *Re British Columbia Development Corp v Friedmann*:

“[t]he powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve.”<sup>97</sup>

Such judicial valuing of the working methods of the Ombudsman, have in the absence of litigation, not appeared in Ireland.

In conceptualising the interactions of the office with the branches of Government, describing the Ombudsman as parliament's watchdog over an all-powerful executive, represents an oversimplification. The Ombudsman can also be seen as acting *for* the Executive in ensuring Departments implement its legislation.

<sup>91</sup> This is described by A. Abraham, “The Ombudsman as Part of the UK Constitution: A Contested Role?” 2008.

<sup>92</sup> All Party Oireachtas Committee on the Constitution, *First Progress Report* (Dublin: Stationery Office), 1997.

<sup>93</sup> All Party Committee, *First Progress Report* (1997), p.166.

<sup>94</sup> As stated by the UK Public Administration Select Committee in 2007:

“The time has come to recognise that the machinery of ethical regulation is now an integral and permanent part of the constitutional landscape.”

Public Administration Select Committee, *Ethics and Standards: The Regulation of Conduct in Public Life*, (London: The Stationery Office, 2007) HC 121-I, p.3.

<sup>95</sup> O'Reilly, “Watchdog needs State guarantee” *The Sunday Times*, June 5, 2011.

<sup>96</sup> 772 Dáil Deb. July 10, 2012. The Fine Gael election manifesto, did commit to constitutional recognition.

<sup>97</sup> *Re British Columbia Development Corp v Friedmann* (1984) 14 D.L.R. (4th) 129 at 139–40.

Nevertheless, as we have illustrated, the Oireachtas, and its underlying parliamentary culture, are the final bulwark for the Office when faced with opposition. Further, in an era of legislative hyperactivity, the Ombudsman represents a key node for ensuring that Parliament will not merely produce legislation, but see that it is faithfully implemented and engage with the institutional questions and practices it may well have itself produced.

In a speech entitled *Executive Accountability and Parliamentary Democracy* delivered in 2011, Emily O'Reilly stressed the need for a deeper reflection on the quality of parliament, not least:

“the dangers inherent in accepting that parliament is ... a charade, that parliamentarians have in many cases lost the sense of parliament as an independent entity acting in the public interest. While few will acknowledge this openly, senior civil servants working with Ministers and sitting in on Oireachtas debates must, in very many instances, become profoundly cynical; either that, or they too have lost the sense that a properly functioning parliament is fundamental to a properly functioning democracy.”<sup>98</sup>

In placing these issues within the context of Ireland's recession and the arrival of the Troika, it is appropriate to highlight a statement of the late Brian Lenihan TD, while Chair of the All-Party Oireachtas Committee on the Constitution. Accepting that constitutional reform of the relationship between the Oireachtas and the Executive was necessary, he stated:

“Clearly the Ombudsman is a graphic example of the pressing need for effective oversight of Government and public administration. For a small country like Ireland, the committee is well aware of the need to ensure the Government has the capacity to respond speedily to challenges in the external environment. *Too sensitive a balance could lead to an enfeebled Executive.*”<sup>99</sup>

At the time of the above statement, Mr Lenihan was a backbench TD, but as Minister for Finance, he was destined to oversee the most significant, and ultimately unsupervised, executive decisions ever taken by the Irish State.

Legislative engagement with the Ombudsman, has however, received new institutional fora with the establishment in 2012 of the Oireachtas Joint Sub-committee on the Ombudsman, under the wider remit of the Joint Committee on Public Service Oversight and Petitions.<sup>100</sup> The Committee has emphasised its role in enhancing the accountability functions of the Oireachtas and regards engagement with the Ombudsman as an essential part of this. Its terms of reference therefore include a requirement that it consider the Reports of the Ombudsman laid before the House.<sup>101</sup> Importantly, the Committee sees itself as a “formal channel

<sup>98</sup> E. O'Reilly, *Executive Accountability and Parliamentary Democracy*, speech given at NUIG, March 26, 2011 at <http://www.ombudsman.gov.ie/en/News/Speeches-Articles/2011/Executive-Accountability-and-Parliamentary-Democracy.html> [Accessed May 2, 2013].

<sup>99</sup> Emphasis added. 540 Dáil Deb. col.543 (February 13, 2001).

<sup>100</sup> There is a second sub-committee on Public Petitions at [http://www.oireachtas.ie/parliament/oireachtasbusiness/committees\\_list/psop-committee/](http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/psop-committee/) [Accessed May 2, 2014].

<sup>101</sup> Dáil Standing Orders 165A allow for the establishment of the committee and its sub-committees.

of consultation and collaboration between the Oireachtas and the Ombudsman ... and for ensuring that its criticisms are acted upon.”<sup>102</sup>

This is an opportunity to ensure that the problems experienced in the relationship in the past five years are not institutionalised. Some initial promise was evident in the wake of the abolition of the mobility schemes the Committee voiced its concern about the troubled relationship between the Ombudsman and the Department of Health and has continued to engage with both sides. It remains to be seen whether this greater engagement, can improve the treatment of the Office, particularly in times of conflict.

Finally, while this article has stressed the importance of understanding the Ombudsman's place in institutional theory and in political culture; there is no doubt that the personal profile and judgment of the Ombudsman are key variables in the institution's success. The recent election of Emily O'Reilly to the post of European Ombudsman by the European Parliament underlines the effectiveness of her response to the cultural resistance this article has analysed.<sup>103</sup>

## Conclusion

We began this article with the statement of former Taoiseach Charles J. Haughey justifying his opposition to the creation of an Irish Ombudsman. In describing the casework of the Office, we have shown that it represents a distinctive forum for complainants, often to those unable to afford litigation. Increasingly, it has supplied leadership in developing norms of proper administration and governance, directly communicating with decision-makers. Without constitutional recognition however, the Ombudsman sits unsteadily on the fickle tides of underlying political culture. An analysis of its strengths and weaknesses must ultimately move to a critique of the broader distortions within our parliamentary democracy and regulatory patterns within the administrative state. While the rhetorical support of many politicians continues to be loudly stated, their political and legislative actions have not borne out a deeper commitment to the Office and its underlying philosophies. While ultimately we must leave the causes of this to the political judgment of the reader, the words of another political figure, Minister Noel Dempsey, provide an appropriate bookend:

“The most important part of the job (of public representative) is ensuring, through our work, that the system works for every citizen, not just the ones who come to our clinics. Public representatives shouldn't be distracted from their national function by constant clientelism—by becoming a hero to one citizen through finding a way around a system when the real responsibility is to change the system to benefit all citizens ... Our state and semi-state organisations are not scrutinised nearly enough by our national politicians, particularly in relation to their service delivery to citizens. Because the whole basis of what we do politically is adversarial competition, there's little opportunity for a collective approach to solving problems.”<sup>104</sup>

<sup>102</sup> Taoiseach, *Programme for Government 2011* (2011), p.20.

<sup>103</sup> European Ombudsman press release, “Emily O'Reilly begins work as European Ombudsman” September 30, 2013 at <http://www.ombudsman.europa.eu/en/press/release.faces/en/51921/html.bookmark> [Accessed May 2, 2014].

<sup>104</sup> Quoted by Emily O'Reilly in her 2010 address “In the Public Interest: Lessons from the Ombudsman Experience” given to the Institute of Public Administration, Conference on Good Governance at <http://www.oic.gov.ie/en/news>

