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OMBUDSMAN, TRIBUNALS AND ADMINISTRATIVE JUSTICE SECTION

Understanding how and when change occurs in the administrative justice system: The ombudsman/ tribunal partnership as a catalyst for reform?

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ABSTRACT

This article explores the ongoing condition of the ombudsman sector through models of change adopted from the social science literature. Debates about change are fleshed out through an analysis of the ombudsman/tribunal's partnership initiative currently underway. As well as providing an explanation for the slow process of reform, the article highlights the need for further research into the partnership initiative to detail the strengths, weaknesses and sustainability of such bottom-up reform agendas in the administrative justice system. We conclude that the impact of each individual initiative is likely to be minor but as a process they represent important moments of institutional learning which, in the context of current crisis, could operate as catalysts for major administrative justice reform.

KEYWORDS

Ombudsman; tribunals; partnership; change; reform; administrative justice

Introduction

With a particular focus on the public services ombudsman[1] sector in England, this article explores two questions about change agendas within the administrative justice system. First why is major reform so difficult to implement? Second, what are the most likely conditions for facilitating major reform?

These are long-standing concerns in the ombudsman sector where, for over twenty years, major reform efforts have regularly stalled despite widespread acceptance of the need for legislative overhaul (e.g. PASC 2014, Kirkham and Gill 2020). The relevance of these questions was further highlighted by the events that took place as this article was finalised. As the full seriousness and impact of the coronavirus pandemic begun to emerge, historic

economic measures were announced to transfer responsibility of large chunks of the private sector to the public realm (HM Treasury 2020), and extraordinary civil liberty infringing powers were granted to the Executive (Coronavirus Act 2020). Even before the final toll on the UK and elsewhere became known, this looked like a moment of profound change which, amongst its other impacts, would alter for generations the way that we think about the role of the state.

Although reform of the administrative justice system will not be the immediate focus of attention when public administration eventually re-establishes itself around a new normal, it is inevitable that the nature of the product that public service providers will be delivering will alter beyond recognition. In turn, perceptions of administrative justice are likely to change and those administrative justice institutions (AJIs) charged with delivering redress will be expected to adjust their operations in response.

In exploring the practical challenges for administrative justice reform that these dynamics will create, this article draws upon the wider academic literature to provide a framework for understanding how and when change occurs. Some of this literature has previously been applied to the administrative justice system by Le Sueur (2012). Where this article takes this work further is in modelling the likely reactions of stakeholders to the perceived need for major reform, including reasons for resistance. This approach also assists in anticipating the circumstances in which radical initiatives might eventually be successful.

This article identifies three key factors which influence the dynamics of change agendas. The first is the collection of inherent pressures that discourage reforms that too radically disrupt the existing structure (Gersick 1991, p. 18). These pressures create a bias towards bottom-up incremental reform measures, whereby local actors respond to new circumstances by identifying ‘better’ solutions within existing policy and legal frames. The second is the habit of key stakeholders to possess what has sometimes been referred to as a ‘conservative disposition’ (Gee and Webber 2019). This disposition entails a pragmatic acceptance of incremental methods of change over radical reform and a preference for local control over the process of reform. The third feature is the periodical tendency of human systems towards moments of radical change (Gersick 1991). Even though institutions and individuals benefit from and prefer stability, occasional disruptive and formative moments intermittently occur (Rothstein 1992). These formative moments force a realignment of the dominant policy paradigms and institutional forms through which business is ordinarily conducted (Hall 1993).

After outlining this explanatory theory of change, the article works through these three features of reform in turn, as they apply to the ombudsman sector. To illustrate the tendency of the sector to evolve through organic and bottom-up reform, one current endeavour, the ombudsman/tribunals partnership familiarisation initiative (the OT partnership), is analysed. This initiative has been developed by local actors and relies upon improving communication and shared learning between individual ombuds and tribunals. This partnership aspires to improve capacity and performance through a more integrated complaints service where jurisdictions overlap. Senior figures in the administrative justice system though have proposed that more powerful reform measures should be built into this partnership initiative.

We suggest that the impact of the OT partnership is likely to be minor, and use this example to highlight the limitations of incremental reform. Nevertheless, even before the coronavirus outbreak, the partnership represented an important stepping stone in creating the conditions for major administrative justice reform. This is because its strength lies not so much in the measures being introduced, but its signalling of a growing agreement amongst a wide constituency both of the need for more radical reform and the forms of shift in policy that are required to redesign the system. We conclude by asking whether the final set of barriers against reform in the sector have now been removed by the coronavirus outbreak, thereby creating the necessary conditions for a radical new shift in the administrative justice system.

Theories of change

Natural barriers to major reform

To model how and why change occurs, this article deploys concepts of ‘social learning’ and ‘organisational change’, as used widely in the social sciences including political science (Rothstein 1992), organisational theory (Gersick 1991), economics (Oliver and Pemberton 2004), public administration (Hay 2001) and energy policy (Kern et al 2014). Of most relevance for this paper, Le Sueur (2012) has used these ideas to map different forms of redress design in the administrative justice system.

Theories of social learning describe how during ordinary ‘periods of equilibrium’ institutions and decision-making processes operate within an overarching ‘deep structure’ (Gersick 1991, pp. 13-16) or ‘policy paradigm’ (Hall 1993, pp. 278–9). This structure frames the ways in which problems are perceived and addressed. Change to policy, processes and methods can occur within periods of equilibrium, but the forms that change takes is shaped and

restricted by the dominant policy paradigm, existing legal instruments and ongoing relationships between different established decision-makers (Kern et al 2014, p. 416). The strength of this heavily structured operational framework is such that in most human systems it is hard to introduce major reform, which in turn creates a bias towards incremental reform. At least four main reasons for this behavioural pattern can be identified (Gersick 1991).[2]

The first is that major change does not occur because of a lack of *cognition*, or awareness, of the alternatives to the present structure, or if alternatives are available they are poorly thought-through or 'construed on the basis of assumptions about human nature that are too optimistic' (Beckstein 2019, p. 627). Even where candidate reform packages exist, they look unviable or carry costs of transition that outweigh any reasonably foreseeable benefits.

Second, there are strong *motivations* on the part of key stakeholders to avoid the uncertainties and fears of failure that would accompany the introduction of radical change (Gersick 1991, p. 18). This reticence to adapt too fast may be strong, even when imperfection in current systems and institutions is widely acknowledged (Beckstein 2019, pp. 625-7). Further, there are considerable sunk costs invested in stable and long-standing processes and institutions, and the actors and office-holders involved in those systems will be incentivised to protect this investment and their position if there is a risk of them losing control over their situation (Gersick 1991, p. 18). Change also brings with it risks of undermining the store of accumulated practical knowledge and interdependent relationships built up in existing arrangements (Gee and Webber 2019, pp. 539-40).

A third explanation for the rarity of major reform and the dominance of patterns of equilibrium 'is that systems benefit from this kind of *persistence*' (Gersick 1991, p. 19: emphasis added). Stability in any human organisation or process allows it to 'become skilled at what it does' (ibid) and means that participants can detail, improve and even experiment with their roles with the confidence that success will be rewarded and failure dealt with through prospectively understood processes. There may also be powerful symbolic and existence value in the institution that might be damaged if it were to be materially altered (Beckstein 2019, p. 626).

Finally, decision-makers within systems are under a series of overriding *obligations* to operate within a particular set of relationships and processes, the most powerful of which are established by the democratic process (Cortell and Peterson 1999, 184). As a result, even if the other barriers to change can be overcome, the practical power of those obligations will prevent change (Gersick 1991, p. 19).

A preference for incremental change

Adopting a stance that radical change is not needed does not entail that change does not occur, instead it captures a belief that incremental and cautious reform is more likely to secure better results. Modelling these different approaches, Hall distinguishes three 'orders' of change which vary in the magnitude of their impact on the way that institutions and processes operate (Hall 1993). Of the three, 'first order' change best describes this preference for incremental evolution over radicalism. First order changes are those measures that 'fine-[tune] existing procedures or changes in practices' (ibid, p. 281). Their purpose is to improve the system, to make it work better given the context and policy paradigm that it currently operates within. First order changes do not rely upon obtaining fresh legal powers and work organically through local institutions and/or existing consensus in the sector. Such changes are common and will generally be driven and implemented from the bottom up and will not require high level policy input. The OT partnership looked at below is a typical example of first order change.

In the context of administrative justice, here we suggest three positive reasons why this approach may appear an attractive solution, particularly to local decision-makers.

The first reason is that first order change usually relies on those most closely involved in operating the system, such as AJIs, collating their 'coal-face' experience of pressure points to operate as early 'fire-alarms' systems that highlight the need for adaptation (McCubbins and Schwartz 1984). This form of monitoring is considered beneficial because local decision-makers are in a better position to identify problems than more distant layers of authority. Indeed, often there is no other viable choice.

A second advantage is that first order change relies on local decision-makers who are more likely to care about the inherent values of the system they are designed to promote and deliver. This attachment of local decision-makers to the values of the system comes both through their training and reputational needs (Black 2008). Thus, in order to maintain the faith of their clientele, they are directly motivated to seek out solutions and be innovative and experimental if necessary.

A third and linked advantage of first order change is that operating on the ground local decision-makers are more readily in–tune with the epistemic knowledge required to solve problems (Lipsky 1980). This includes being better equipped to integrate new information into the design of processes, and to respond quickly and fine-tune systems if things do not work as well as anticipated. They are also better aware, not just of the problems but of the parallel dynamics in which they operate. This makes them well situated to identify opportunities for

improvements and the availability of possible partnerships, as for instance with the OT partnership.

A faith in the power of bottom-up solutions, therefore, is driven by a belief that being more connected to actual practice, and arguably more motivated to deliver underlying goals of the system, local decision-makers are in a strong position to identify gaps in provision when they occur, and develop new workable solutions at an appropriate pace. This approach also allows local decision-makers to assess what has value in the existing model, and hence needs preservation, and what might be deemed redundant and disposable. Local decision-makers may be attracted to this approach because it grants them more control. Additionally, given the potential for unwanted, ill-informed and poorer solutions to be imposed on the sector which may have unforeseeable side-effects, they are incentivised to avoid higher level intervention, such as from government or the legislature (Gee and Webber 2019, pp. 535-6).

The periodic underlying demand for more radical change

As we detail below, when applied to the ombudsman sector, the theory of change outlined up to this point provides multiple forms of explanation as to why radical change has not occurred and arguments in favour of incrementalism. Nevertheless, although incrementalism, as predicted in Hall's model of first order change, may be the dominant pattern, more powerful forms of change do occasionally occur.

To begin with, not all incremental change is controlled by local decision-makers. Thus Hall anticipates the need for 'second order' changes (Hall 1993, p. 282), which 'are more significant than first order changes in that they establish novel techniques, new procedures or institutions for carrying out redress' (Le Sueur 2012, p. 21). These forms of change often require legislative amendment and new budgets, and hence necessarily involve a wider range of actors, especially the Executive and Parliament. Examples include the multiple new complaint-handling schemes that have been introduced in recent years (Kirkham *forthcoming*) and amendments to existing ombudsman legislation. This form of change, however, is similar in intent to first order change, insofar as the aim is to make the existing policy paradigm work given the context, not to restructure significantly the way that the system operates. To achieve the latter outcome, what are needed are 'third order' changes.

Although 'third order' changes may involve new legislation, more important are the broader cultural shifts in policy-making that they facilitate. Through third order changes an attempt is made to push a range of actors towards the adoption of different ways of thinking

about problems and the pursuit of entirely new approaches and solutions (Hall 1993, p. 282). The impact is to break down or fundamentally alter existing policy paradigms and the deep structure of the system. The original Parliamentary Commissioner Act 1967 can be seen in this light. Although the 1967 Act was ultimately a watered-down version of the reform that was originally proposed (Whyatt 1961), it came about as part of a wider sea-change in attitudes towards administrative justice. This formative moment encouraged new dispute resolution mechanisms to be introduced which have ever since been regularly turned to by governments and other policy-makers (Blake *et al* 2010).

Such radicalism occurs infrequently.

> First and second order change can be seen as cases of 'normal policymaking,' namely of a process that adjusts policy without challenging the overall terms of a given policy paradigm ... . Third order change, by contrast, is likely to reflect a very different process, marked by the radical changes in the overarching terms of policy discourse associated with a 'paradigm shift.' If first and second order changes preserve the broad continuities usually found in patterns of policy, third order change is often a more disjunctive process associated with periodic discontinuities in policy (Hall 1993, p. 279).

The normal pattern of policy-making, therefore, is one of 'iterative evolutionary cycles' (Hay, 2001, pp. 200–202) in which various strategies of reform are attempted to improve, patch-up and make do the existing policy paradigm. The social learning theory of change, however, postulates that there will be limits within the existing policy paradigm as to what can be achieved through such techniques. To break the pattern, what is needed are periodic transformations.

Such breaks to settled equilibrium are rare, unpredictable and by no means inevitable. Research across multiple subject fields shows that even when prolonged periods of experimentation with an old policy paradigm continually lead to struggles and failings (Walsh, 2000, pp. 486-7), significant change often does not happen (Beckstein 2019, pp. 625-7). Within the literature opinion differs on the conditions that are most likely to facilitate policy paradigm change, but Cortell and Peterson highlight three factors as being necessary - triggers, institutional opportunity and change-oriented preferences (1999).

'Triggers' are ordinarily thought of as unanticipated events which create large-scale public dissatisfaction, sometimes fear. However, electoral landslides, sustained demographic shifts or international movements might also act as triggers for domestic change. The key is

the extent such moments call into question the established institutional structures and discredit the adequacy of current policy (ibid, pp. 184-5).

The importance of triggers is that they create 'windows of opportunity' for deep structural change (Kingdon 1984). The likelihood of the opportunity being acted upon depends on the strength of societal demands for change and the scope for autonomous political action (Cortell and Peterson 1999, pp. 185-7). The window for change is larger when the trigger event creates significant costs for political elites that are not seen to respond. Even so, new ideas are unlikely to be implemented unless they coalesce with, or at least do not conflict with, prevailing political opinion (Walsh 2000, pp. 487-8). Change, therefore, becomes more likely when cross-society agreement on the need for change can be observed, which thereby frees up the political space for decisive action.

Even if a window of opportunity has been created, there will be challenges in bringing about change if new ideas conflict with existing institutional missions and priorities, and if multiple agencies are impacted. These challenges will be more easily overcome if the 'change-oriented preferences' of key stakeholders are aligned and relevant interest groups are willing to act as policy entrepreneurs for new ideas (Cortell and Peterson 1999, pp. 187-191, Walsh 2000, p. 487, Oliver and Pemberton 2004). Building the support of stakeholders heavily invested in the current structure may require prolonged periods of institutional learning, but if such a process can convert the viewpoint of inherently establishment voices then the demand for change becomes ever more compelling and likely to occur. On this point, and contrary to the analysis offered above, the naturally conservative disposition of pre-established institutions can carry the seeds of a powerful argument for change. Change can become understood as renovative in nature, if the environment within which existing institutions and processes operate has altered so significantly that they struggle to deliver the core function that they have long been designed to deliver (Beckstein 2019, pp. 627-32). In such circumstances, in order to preserve the most important elements of the established system and to counter-balance developments outside of their control, key stakeholders may be persuaded that it is 'necessary to acquiesce in change on secondary issues' (Huntington 1957, p. 455).

On the process by which radical change occurs, there is disagreement in the literature (eg Hay 2001). Plausibly, there may be definitive time limited 'revolutionary' moments that mark the shift in policy paradigm, as in response to a single event or crisis (Gersick 1991, Greener 2001, p. 134). It is equally likely, however, that change is more evolutionary and messier in nature, occurring through a series of smaller but significant 'sub-set' adjustments being injected into the old paradigm in response to several crises, until eventually the old is

more or less completely replaced (Cortell and Peterson 1999, Oliver and Pemberton 2004, pp. 434-36; Kern et al 2014, pp. 524-5).

Lessons for the administrative justice system

The theory of change outlined above offers an explanatory frame only and has limited predictive value (e.g. Blyth 1997, Gee and Webber 2019, p. 549). Nevertheless, in this article it is argued that three embedded features of the administrative justice system are accurately captured by this framework, each of which heavily impacts on how individual AJIs strategize their reform efforts.

First, radical reform is discouraged by the way that the system of British public administration is devised. The effect is that AJIs are incentivised not to rely upon government intervention and to explore incremental and bottom-up opportunities for change.

Second, AJIs value the advantages that come with pursuing change through the organic development of small-scale measures. This form of change allows for institutional autonomy, making it easier to foster experimentation, develop bottom-up ideas and protect the underlying values and strengths of existing institutions.

Third, the space for more radical solutions, although entirely unpredictable in occurrence, does sometimes become available. Such changes may occur in response to bottom-up demand but it is more likely that AJIs have to be opportunistic in pursuing their change agendas, attaching themselves to broader governmental objectives and changes in political thinking. Crisis may also be a major contributor to radical reform in generating new ideas and forcing governments to ditch old ways of thinking.

In the following section, the manner in which these themes have played out in the ombudsman sector are explored, with a particular focus on the OT partnership.

The dominance of incremental approaches to change in the ombudsman sector

The long history of blocked reform

In the ombudsman sector, of the standard barriers to major change identified above, a *cognitive* lack of awareness of the possibilities is a minor factor. Reform was formally touted by the (then) three ombudsman offices in England as long ago as 1998 in a joint letter to the Cabinet Office. This letter prompted a review which led to proposals for major reform (Cabinet Office 2000). A later report by the Law Commission in 2011 made further recommendations for

reform (Law Commission 2011), as did another government commissioned report in 2014 (Gordon 2014), and the Public Administration Select Committee (PASC) in 2014 (PASC 2014). In 2016 the government even went as far as to publish draft legislation (Cabinet Office 2016) and successful alternative models exist in each of the devolved nations (eg Scottish Public Services Ombudsman Act 2002, Public Services Ombudsman Act (Northern Ireland) 2016, Public Services Ombudsman (Wales) Act 2019) and multiple other common law systems. Academics have also developed a manifesto for new legislation (Kirkham and Gill 2020).

The key blocks on radical reform, therefore, are not lack of cognition but the *motivations* of various stakeholders to accept the need for such change, the perceived benefits of *persisting* with the old ombudsman model and the strength of existing *obligations*. In examining these factors, the constraining force of the external environment on the ombudsman sector will be considered in this section, before looking at the internal motivations of local decision-makers to favour organic reform.

External barriers to reform

Above all, the ombudsman sector has to operate within the confines of statute and budgets sanctioned by the Executive. These obligations make government support for reform essential, as most proposals require the introduction of techniques and powers that are not currently provided for.

A key challenge here is that the motivation for governments to focus on ombudsman reform is low. Administrative justice reform rarely has high political salience and it is more in the interest of governments to herald progress in public service delivery than render transparent maladministration. Further, providing for oversight and redress is costly, and operates to restrict the freedom of public service providers. There may even be incentives for abolishing AJIs, or reducing their influence, if they are perceived as getting in the way of delivering public service solutions or providing ineffective forms of oversight (Schillemans 2010). This is not to say that promoting administrative justice does not occasionally become a powerful political issue,[3] only that there are natural public administration incentives to prevent it from becoming one.

On the positive, ombuds help steer disputes away from the courts and hence offer a solution for politicians looking to provide a relatively low-cost and time-friendly answer for electorate concerns in the justice arena (Creutzfeldt 2018). This attribute means that second

order change has occurred regularly in the ombudsman sector, through the creation of multiple new schemes over the last fifty years (Kirkham *forthcoming*). However, although creating an ombudsman to address a new problem is politically marketable, selling reform of an existing office does not carry the same political attraction, particularly if the proposal comes with the potential for an increase in budgetary expectations and scrutiny. Thus the English demand for reform remains unresolved after a debate of over twenty years. A similar, albeit more optimistic, story of slow progress towards legislative reform can be seen in the devolved nations. In the case of Northern Ireland, it took 12 years to secure reform (COFM 2015, p. 4), with Wales six years (CLAC 2018, p.7), whilst in Scotland proposals to reform remain ongoing.

One explanation for these long gestation periods is that, in England at least, there is a coordination problem in the administrative justice system. Even small and localised change can involve multiple actors, making the process of organising reform difficult. Where reform offers an ambitious agenda, involved actors may include ministers, legislators, civil servants, redress agents, service providers and other stakeholders, such as users. Here the attempts to garner the collective acquiescence of multiple actors to reform is made tougher still by the absence of any clear organising frame to conduct reform. Responsibility for administrative justice is dissipated across a range of government departments and select committees, and there is no formal advisory body to oversee the system (The Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013).

Without a powerful and enthusiastic political sponsor, there are practical limits in what can be achieved in adjusting the legal constraints on AJIs. Ultimately an ombudsman is reliant upon their associated government department to process legislative reform, and larger scale reform measures require the input of the Cabinet Office, the agenda of which is closely attuned to high-level political priorities. Getting around this logjam, in Northern Ireland (COFM 2015) and Wales (e.g. CLAC 2018) legislative reform was delegated to select committees, but at Westminster equivalent support is unlikely to be sufficient to shift the government's control of the legislative agenda.

Internalised first order responses to external restrictions

The above reasons provide practical explanations for why public services ombuds in England remain unreformed, with only a few minor legislative amendments having been passed in recent decades (The Regulatory Reform (Collaboration etc between Ombudsmen) Order 2007).

Thus, whilst ombuds often argue and lobby for legislative change, such calls become dissipated across a range of actors with limited power or incentive or take forward change agendas. This leaves the sector's focus invariably drawn instead towards maximising local opportunities to upgrade existing internal processes.

An additional challenge is that, like all AJIs, ombuds are obliged to operate reactively to broader political developments in the delivery of public services and the wider political economy. Such developments might trigger opportunities for change, but the foundations of such work may not be ideal and the relevant actors may not be able to prioritise their redress design role when implementing change (Le Seuer 2012, 18). As a result, what change that does occur may be more managerial and budget-driven than service-enhancing in focus. By way of example, austerity policies cut budgets at the Local Government Ombudsman office dramatically, resulting in multiple organisational changes being made to achieve efficiencies, including a reduction in its advisory function to citizens (Thomas et al 2013).

First order change, however, does not necessarily have to be reactive to top down pressure or events, nor does it have to be an insular process. Like most human systems, ombuds possess a reputation-protecting need to address problems within their sphere of responsibility (Black 2008) and can often be highly entrepreneurial in identifying solutions. To illustrate this dynamic potential, the example that is explored further in the next section is an ongoing partnership initiative between the ombuds and tribunals.

The strengths and limits of incremental evolution: the ombudsman/ tribunal partnership

Motivations to control and persist

The OT partnership illustrates the natural motivations of local decision-makers to pursue incremental reform, as well as its advantages. It also, however, highlights the limitations of this approach to reform. The partnership is an entirely non-governmental initiative and is driven by local actors. It started out as an idea scribbled on the back of a napkin by the then leaders of the First-Tier Tribunal and the Independent Complaints Reviewer (ICR). This led to a memorandum of understanding (MoU), which created an information sharing arrangement (ICR 2010, p. 6). The MoU arguably allowed the two bodies to become more robust and provide a better service, until the ICR's remit was later dissolved. The spirit of this initiative has since been resurrected elsewhere. In order to promote exchange, engagement and best-practice, from 2019 the First Tier Special Educational Needs and Disability (SEND) Tribunal

and the Local Government and Social Care Ombudsman have been working together, developing their own MoU and identifying areas where cooperation would be mutually beneficial. This project is currently underway 'behind closed doors' with the hope that, once a pilot is set up, it is monitored, evaluated and will serve as a learning example for other initiatives.[4] The next pair of bodies that is having initial conversations to set up a pilot is the Housing Ombudsman and the property chamber, and the PHSO are currently exploring opportunities for partnerships with the tribunals sector (AJC 2020).

In practice, the OT partnership is in its very early stages but larger goals have been identified as plausible through the arrangement. Perhaps the most ambitious claim that could be made for its potential can be found in a lecture by Lord Justice Ryder, the then Senior President for Tribunals (2019). Mirroring observations made by his predecessor (Sullivan 2015), Ryder diagnosed many of the problems facing the administrative justice system and mooted a series of proposals to address those failings. In doing so, Ryder identified the partnership between ombuds and tribunals as a key vehicle for realising administrative justice goals. Importantly, in advancing these proposals he made no mention of legislative reform as an aspiration for the partnership.

Identifying problems

As identified earlier, a potential benefit of a bottom-up approach to administrative justice reform is that AJIs are in a better position to identify problems in the sector than government. AJIs possess this capacity, as through their role they cannot avoid the challenges of dealing with the problems experienced by users of public services (Ryder 2019, p. 3). Indeed, the identification of problems in the over-stretched nature of the system is a theme that can regularly be seen in the output of leading ombuds (e.g. Behrens 2018) and the judiciary (Ryder 2019).

The ground level concern that the OT partnership addresses is the overlap in administrative justice responsibility between different AJIs and the problems this causes. In several fields of public service provision, grievances on much the same subject-matter can be pursued through a tribunal or an ombudsman, albeit the formal grounds may be different. Occasionally, individuals will pursue grievances in one forum unaware that it is not the best option available to them. This is a classic example of the silo approach to administrative justice. With no single-entry point to advise the citizen or manage the overlap in responsibilities between the two institutions, the potential is created for confusion and frustration for the

individual citizen pursuing redress (e.g. AJTC 2011). Moreover, with different institutions operating mostly in isolation within their own areas of expertise information known in one branch of the system is not shared with other partner bodies, so reducing opportunities for efficiencies, joint problem-solving or institutional learning (Thomas and Tomlinson 2017, p. 393).

As the work of the Law Commission and academics in this field illustrate, other actors have also raised the alarm about this set of problems. Where local decision-makers have an advantage, however, is that given their direct and daily interaction with the system and users, they are better equipped to provide early warnings and to assess their urgency. In this respect, given that it is the most traditional and well-protected branch of the administrative justice system, expressions of support from the judiciary for radical reform, such as enhanced use of online dispute resolution and alternative dispute resolution methods, is a powerful development (e.g. Briggs 2016, Ryder 2019). Even here, cumulatively, the pressures on the old system are causing it to creak.

Guardians of the values in a system are more motivated to respond to flaws

A complementary claim in favour of organic change is that local actors are by way of training and reputation strongly incentivised to defend the values of the system and seek out solutions. Other stakeholders, such as government or external observers, are either less driven or have no power to secure reform.

Evidence of the in-built reform-minded dynamic of human systems can be seen in the ombudsman sector. Ombuds have long looked to maximise the flexibility inherent in their autonomous position to facilitate change, either individually or through the Ombudsman Association (OA). The OA is a professional association which provides a support structure through which to share best practice, develop professional norms and even promote self-regulation (e.g. Ombudsman Association 2017).

The OT partnership provides another example of the reform-minded energy contained in bottom-up action. Notably, all the innovations referred to here, plus others, are occurring without direct government support. The motivation to pursue this agenda can be seen in Lord Justice Ryder's speech, where he urged a 'conversation .... about joint working, mutual co-operation and the creation of an administrative justice sector that our users value' (Ryder 2019, p. 5). He has also argued for '[a] strong and single voice for change rooted in what our users want. They can and should be asked what do they want their justice space to be like' (ibid, p.

3). This aspiration taps into a theme that has been very closely pursued in the ombudsman sector in recent times, and which has yet to be secured despite being long promoted by legislators (PASC 2014). The logic is that the users' voice needs to be engaged and systems designed around what users want and expect, for instance in terms of a fair process and service provided (Creutzfeldt 2018).

Local decision-makers as better problem-solvers

Another claim in favour of incremental change is that local decision-makers, in touch with live information streams and incentivised by the immediateness of the needs of the system, can produce better solutions and keep them updated according to the needs of the external environment. Again the OT partnership could potentially evidence some of these advantages.

Whilst the evaluation of the OT partnership has to be a topic for future work, a clear gain could be an enhanced quality of service and better integration of the user experience. Confusion caused by the duplication of redress routes is one of the long-identified deficits in the user experience in the administrative justice system (Dunleavey *et al* 2010). Charging two of the institutions which cause this deficit with responsibility to establish and operate communication channels to manage this confusion could yield demonstrable gains. Communication with citizens could be improved, better information provided and the processing of grievances could be conducted more efficiently and appropriately.

Additionally, local decision-makers are likely to be better aware, not just of the problems but of the parallel dynamics in which they operate. For instance, the tribunal system is currently managing massive changes in the way of modernising and digitalizing the justice system. These changes are being piloted and tested in several different contexts (Tomlinson 2019), and there is potential through the OT partnership to cross-fertilise the lessons learned into the ombudsman sector.

The limits of incremental change

There may be numerous benefits in pursuing change through bottom-up endeavours such as the OT partnership, but there are also real limits to this approach towards reform which the Ryders's statement of ambition illustrates (2019). First order change works best where the objectives desired are not restricted by legal or other operational realities, and there is sufficient autonomy to adapt policies and processes. By contrast, where a change agenda challenges the

existing parameters of the legal powers of relevant bodies, then reform stalls without higher level input. Several of the Ryder's proposals reveal this dilemma.

One option for local decision-makers pursuing change is to push the boundaries of their existing powers to introduce new ways of operating. Ryder encourages this approach within the OT partnership by calling for the referral of cases 'that are prima facie maladministration' from 'administrative courts and tribunals ... to an ombudsman' (2019, p. 3). The difficulty for case-handlers charged with implementing this aspiration, however, is that there is little formal detail on the processes for actioning the referral of cases from courts and tribunals onto ombuds. Case handlers could be encouraged to use their discretion generously to take advantage of whatever informal channels there are available to AJIs to cajole claimants to transfer their grievance from one AJI to another to find the most suitable forum. This though is an approach that carries significant risks if a claimant is later denied the opportunity to pursue a remedy as a result of such a transfer. Further, it places an onus on AJIs to provide a fully informative 'triage' service, which supplies the claimant with the appropriate information in which to make such a choice. The Law Commission ten years ago proposed that the civil procedure rules be amended to allow courts and tribunals to stay proceedings to facilitate such transfers, but received a lukewarm reception from the legal community (2011, p. 25) Current law is also unclear on the circumstances when a complainant can pursue a grievance both by way of a legal remedy *and* through the ombudsman (*R v Local Commissioner For Local Government Ex p Liverpool* [2000] EWCA Civ 54). Arguably, such double claiming is unlawful.

Similarly, Ryder proposes that when they become aware of public bodies making administrative errors on a systematic basis, tribunals should invite ombuds to investigate (2019, p. 3). This idea has a long heritage (Gill 2020), with the implicit suggestion being that organisationally, and in terms of powers, ombuds are better equipped to undertake broader systemic inquiries than the case-focused tribunals sector. But in England and Scotland public services ombuds do not possess the power to launch an investigation, other than through a direct complaint. There is some flexibility in legislation which may facilitate ombuds taking on Ryder's invitation by expanding individual investigations into systemic ones, although the court has placed some limits on how far a complaint can be expanded once it has been received (*R (Cavanagh) v Health Service Commissioner* [2005] EWCA Civ 1578). Building-up individual complaints to facilitate larger inquiries would require caseworkers to use their discretion more actively to find representative cases to build systemic investigations around. The fact that such discretionary power is not being widely used at present by ombuds, however, is one good reason to suggest that this is not an easy solution to apply.

Other proposals for change face an even stronger practical barrier, namely the lack of any legal power to take them forward. For instance, Ryder recommended:

> A ... power in an ombudsman to refer to the Administrative Appeals Chamber of the Upper Tribunal – which is a United Kingdom Superior Court of Record – any issues they believe require guidance by judicial review determination or individual redress beyond their powers (2019, p. 3).

By this proposal, ombuds might identify contentious interpretations of the law being applied by administrators on a systemic basis, and provide an important public service by highlighting these uncertainties and referring them to court.

This proposal has precedence[5] but the power of reference is there for only two schemes in the sector currently[6] and would need statutory amendment to enable. Further, there are some practical question marks about how such a power would be best constructed (Law Commission 2011, pp. 43-47), such as to do with funding and process, and legitimate concerns that such a power would create a pressure on ombuds to refer points of law to the courts, and even change the behaviour of complainants. The proposal, therefore, is one worthy of further consideration but amounts to at least a second order change.

Finally, however ambitious local decision-makers might be, there are some measures that they are highly unlikely to be able to implement without a broader cultural resetting of the wider system. For instance, Ryder argued for:

> A programme of interoperability – and what do I mean by that – judges able to work as ombuds and vice-versa – not just collaboration and co-operation but career paths and that includes for our case workers and case officers. One of our case officers has become a judge and others will follow. They have materially identical skills and abilities frameworks in both our services (2019, p. 3).

At its most radical this proposal sounds like a *third order change* which would involve not just developing stronger partnership arrangements, but in some respects allowing for a merger of functions and delivery in both the tribunal and ombudsman sectors.

To bolster the legal competence of ombuds, interoperability could mean that a new form of career route is established. In Germany this dualist form of career route is common – and arguably has very beneficial effects within German legal culture (Creutzfeldt 2018). The typical set up in Germany is that there is only one ombudsman who leads the organisation. This position is usually filled by a retired judge and their decision-making staff are all lawyers. This way the system acquires acceptance and credibility from the German public. While decisions

are not binding, they take on a legal character and supplies 'the German ombudsman model [with] a level of legal formality that is absent in the UK ombudsman schemes' (Creutzfeldt 2016, p. 14). By contrast, in the UK neither the office holder nor staff are required to follow a fixed route of professional training, and legal training is applied ad hoc to applicable legal contexts.

There may be merits in considering this option, but both the tribunal and the ombudsman sector have distinct and jealously guarded characteristics and attributes that they might fear would be watered down if tribunal staff started working for ombuds, or vice versa. The ombudsman sector, in particular, would be nervous of any formalisation and dilution of the more 'equitable' form of justice currently delivered in the sector, especially if the judicial sector were given any further supervisory role over ombuds (e.g. Committee on Justice in Wales 2019, para. 6.50).

Up to a point, in decision-making there is some interoperability already. Ombuds can make a finding of maladministration on the basis that the authority had breached the law (Kirkham 2006), albeit neither an enforceable or binding one. The degree to which this form of work is undertaken presently is unclear, although ombuds will naturally favour making findings on the basis of other factors. For tribunals to make ombudsman-like judgments in a tribunal case, however, raises altogether more complicated issues. For this proposal to work, a tribunal judge might need new legislative powers in order to be able to unpick information through an inquisitorial capacity, and to decide cases differently the evolution of a new ground of law equivalent to maladministration would be necessary.

A new dawn? Searching for a third order paradigm change

To sum up, the OT partnership is the latest example of local decision-makers in the ombudsman sector operating autonomously to improve its capacity to respond to the demands placed upon it. However, although this initiative may do much to improve the quality of the user experience, without alterations to the legal remit of the AJIs involved more ambitious goals, as for instance expressed in the former Senior President's lecture, are unlikely to be delivered, or sustained. Given this analysis, and the long track record of resistance to major reform in the ombudsman sector, in this concluding section we refer back to the earlier discussion of institutional theories of change and examine the prospects for the future. We predict three plausible scenarios.

Continued weak incrementalism

The first scenario we label 'continued weak incrementalism'. By this pattern, the existing structure within which ombuds operate will endure, leaving ombuds to address the demands placed upon them through outdated legislation and limited powers (Kirkham and Gill 2020). All ombuds will individually and collectively continue to experiment and tinker to make the best of the existing system, notwithstanding its acknowledged weaknesses. For instance, the OA is currently working on projects to build-up best practice in complaint-handling and promote peer review between different ombuds to nudge schemes towards higher standards of performance (Tyndall et al 2018). These initiatives, as with the OT partnership, have limits but offer some potential, and retain energy because they will be driven by a regular turnover of ambitious office-holders.

This pattern of minor reform remains the most likely outcome, at least in the short term. However, the inevitability of this pattern is less certain than previously. Without the coronavirus pandemic, strategically advocates of major reform may have concluded that now is not the right time to push for legislative reform. The Conservative government's known aversion to strong institutional oversight (Conservative Party 2019, p. 48), reduces confidence in it or Parliament being persuaded to support major reform. There are also risks that pushing for reform now might lead to adverse policy solutions being put forward which could worsen the sector's position compared to the status quo (Beckstein 2019, p. 627). Much though has now changed to make major reform, at least in the medium term, more likely.

Are the conditions for third order change present?

In line with the theory of social learning outlined in this article, there are several reasons for believing that the conditions for the democratic acceptance of major reform in the administrative justice system have rarely been so favourable.

To begin with, multiple overlapping trigger events have occurred which have thrown considerable doubt over the long-term stability of the dominant neo-liberal policy paradigm of the last few decades. Even before the coronavirus pandemic, austerity (e.g. UN Human Rights Council 2019) and Brexit had created the conditions for crisis and major third order change in public administration. Additionally, although smaller in impact, the ongoing process of digitalization has also shaken up the way that we think about the delivery of public services and administrative justice (Tomlinson 2019). On top of these events, the coronavirus pandemic is bound to create long-term shock waves through society. The direction of travel of public

administration is difficult to predict, but the prospects for triggering a renewed faith in the capacity of the state and professionalism appear strong.

Notwithstanding the power of these developments, under ordinary conditions it would remain likely that radical reform elsewhere in the administrative justice system would take priority over a niche issue such as ombudsman reform. The window of opportunity for major reform created by most triggers would be simply too small to retain the bandwidth of interest and attention necessary to encapsulate the renewal of AJIs. According to the literature on social learning, a key determinant of how long windows of opportunity stay open is the cost to established elites of failing to react to demands for reform (Cortell and Peterson 1999, pp. 186-188), with a key cost the potential for a breakdown in authority and trust in the relevant human system (Hall 1993, p. 289). Trust is a difficult concept to measure, but along these lines the demand for administrative justice, and its acceptance by public authority, can be understood as primarily a vehicle through which trust in public administration is maintained (Vitale 2018). Further, the importance of maintaining a robust network of AJIs to deliver redress and trust in the system can be seen as highly relevant at certain key moments in the past, such as during the fifties and sixties (e.g. Franks 1957, Whyatt 1961). Through such periods, concerns that public and stakeholder trust in public administration had gone missing led to institutional responses of lasting significance that were specifically designed to maintain a viable balance in the relationship between the state and citizen. Thus the radical redesign of systems or the establishment of new institutions can be viewed as a necessary reactionary '*just-in-time-organisational* [response] to social crisis' (Jones 1992, p. 55).

Plausibly, we may be arriving at a similar moment in time. Already the Government has been forced to establish a new Health Service Safety Investigation Body (HSSIB), a body with specialised knowledge to investigate and understand local incidents and improve standards (Department of Health 2017). This solution was devised as a direct trust-enhancing response to crisis in the health sector following a series of major incidents in the NHS that raised serious safety concerns (e.g. Francis 2013). A similar set of concerns can be seen to exist in other areas of public administration that will need addressing, most noticeably around the Home Office mishandling of the Windrush affair (Williams 2020). Other high profile administrative errors are bound to emerge from the management of the coronavirus pandemic.

Even there is a sufficient breakdown in trust to create a window of opportunity for major reform, institutional theories of change predict that it will not lead to significant results if the 'change-oriented preferences' of key stakeholders are unaligned or resistant to the possibilities. Here too though there are grounds for optimism that the motivations of relevant stakeholders

have shifted, and that some will be willing to act as policy entrepreneurs. Retaining trust and functionality, as well pursuing improvements, has been a common theme of recent pronouncements in the sector.

On the prospect of this development, the OT Partnership is important as it signifies a coalescing amongst important interest groups in their understanding of the dominant problems in the current administrative justice system. Workshops organized by the AJC's ombuds and tribunals familiarisation working group (e.g. see the minutes of October 2019 and February 2020 (AJC 2020)) have assisted in bringing together ombuds and tribunal judges to identify and build awareness around existing problems. Such a partnership approach, therefore, is embedding a collective institutional learning (Thomas 2015, Jamiesson 1993) and shifting practice away from rigid processes towards more flexible interchanges. The OA is performing a similar service, as could broader umbrella organisations such as the Administrative Justice Council. Increasingly, both in terms of goals and solutions, a radical renewed vision for the administrative justice system is being voiced by key establishment figures, and expressed in similar terms. For instance, the sentiment of the Senior President's speech (Ryder 2019) sits closely to the messages delivered by the current Parliamentary Ombudsman in a lecture three years previously (Behrens 2017). A familiar theme has been a recognition that the traditional structural approach to administrative justice is rooted in conservatism and is outdated, and that retaining trust in the system of justice is paramount. This need to move towards an enhanced focus on user access and participation, and a reduction in the silo approach to justice, is one that has been previously accepted by legislators and the judiciary (PASC 2014, Ministry of Justice 2016).

What we also see in this growing interest in change from a range of established institutions is the development of a small-c conservative argument for change to match the more common egalitarian arguments for powerful administrative justice institutions (Doyle and O'Brien 2020). One of the reasons why the input of the tribunal sector is important on the debate about reform is that the sector has many reasons to be sceptical of the potential for new ideas to transform the landscape. The judiciary, in particular, might be expected to be inherently resistant to any grand reform measure that impacts negatively on the long-understood model of justice that it oversees. But the argument that more radical change has become necessary in order to maintain the underlying goal of administrative justice for all is becoming overpowering. The result is a weakening desire to persist with current solutions, so long as through reform the core values of the current system can be retained and strengthened and the

potential for negative unforeseen consequences offset. An example here is the retention of a close relationship between the Parliamentary Ombudsman and Parliament.

This combining of progressive and conservative arguments for change provides some hope that a broad cross-section of political and establishment thinking can be persuaded of the merits of reform. Certainly, there will be costs of transition, including for a range of impacted institutions, but equally it is well-charted that the potential benefits are multiple (e.g. Gill 2020) and include possible financial savings (Gordon 2014). Further, knowledge and implementation of the alternatives is growing. For instance, the Independent Office for Police Conduct has had its powers expanded to allow it to launch investigations without the need for referral or direct complaint (Policing and Crime Act 2017, s.17) and potentially to receive 'super-complaints' from designated bodies (Policing and Crime Act 2017, ss.25-27), again signalling a willingness to expand the opportunities for an ombudsman-like body to intervene. In this environment, it is plausible that the arguments against major reform in the ombudsman sector will dissipate.

Revolutionary moment or managed restructuring?

It is not possible to predict future events, but this article has identified the main barriers to radical change in the sector and offered the hypothesis that the conditions have rarely been better set for such change. We conclude by identifying two scenarios for its implementation.

In the first of these scenarios, change might occur through a 'revolutionary moment', triggered perhaps by a new government keen to set a fresh agenda. Radical experiments in government, however, are often too difficult to anticipate, or implement correctly, in one step (Considine *et al* 2009). The relatively secondary nature of the ombudsman's work to the administrative justice system, also works against it becoming the focus of reform endeavours. Hence, an alternative hypothesis is that radical shifts in thinking are often staggered through a series of smaller-scale interventions, led by both government and relevant policy-makers, which in combination significantly alter the environment within which ombuds operate (Cortell and Peterson 1999). This implies a 'managed restructuring' within the ombudsman sector rather than a one-off formative moment. But it also implies that, given the nature of the ongoing changes to public administration that are likely to occur and the knowledge of stronger ombudsman models elsewhere, mere 'managerial' reforms (Kirkham and Thompson 2017) along the lines of the stalled Public Services Ombudsman Bill (Cabinet Office 2016) will be insufficient by themselves to deliver a sustainable solution.

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[1] A note on terminology: In this piece we use the term ombudsman and ombuds as the plural.

[2] Across multiple papers, different factors can be identified (eg Beckstein (2019, pp. 625-7) details six) but these four are common in most accounts.

[3] For instance, consider the profile of a film like *I, Daniel Blake* (see generally O'Brien 2018) or the reaction to the Windrush affair (Home Affairs Committee 2018).

[4] The Administrative Justice Council (AJC), an advisory body that largely relies upon the voluntary input of administrative justice providers, has set up a working group to monitor the OT partnership and future research is planned examine its output.

[5] Under the Charities Act 2011, ss. 325 and 326 the Charities Commission can refer points of law to the Charity Tribunal. For a discussion, see Joint Committee on Draft Charities Bill 2003-04, para 241, Law Commission 2017-19: ch. 15.

[6] See the Pensions Ombudsman (Pension Schemes Act 1993, s. 150(7)) and the Financial Ombudsman Service (FCA Handbook, DISP 3.4.2). Interestingly, with both the ombudsman sector and the Charities Commission the power has been used sparingly (Law Commission 2017-19: ch.15).