

# **Devolution as an Impetus for Reform? The Case of the Scottish Ombudsman**

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## **1 Introduction**

One popular saying in relation to ombudsmen is that their main objective is to drive themselves out of business. They wish to reach such an improvement in public administration performance that maladministration would become an unknown word, and even if any complaints are submitted, they are resolved quickly and fairly by the public authorities themselves. However, such a vision is probably not going to materialise in the foreseeable future, thus the ombudsmen will remain an integral part of the fight against improper behaviour of public servants.

The main objective of this article is to analyse the office of ombudsman in Scotland. Britain has a long history of ombudsmen, but at the same time the system shows certain anomalies in comparison to traditional continental models. However, at the end of 1990s a process of constitutional changes started in Britain that brought autonomy in selected matters to Scotland, Wales and Northern Ireland. One of the features of these shifts was the opportunity to establish new ombudsman's structures in the abovementioned countries; among them the position of Scotland was prominent. Along other issues, we would like to answer primarily the following questions on the case of the Scottish ombudsman: Did the drafters opt for a British or a continental model? On what grounds? How successful has the completely new office been? Is there any wider impact of the Scottish experience on other parts of Britain or even other states? These are important research questions that are worthy to be answered. It is true that the administrative system in Britain (including Scotland) is somewhat different from the central European model, but many aspects of the ombudsman's operations are transferable across any system or country.

This article is divided into five sections (including the conclusion): The first section briefly presents the British ombudsmen system and its special characteristics; the second introduces us to the process of devolution and its impact on ombudsmen in Scotland. Legislation required the Scottish Executive to pre-

pare a new body that would deal with complaints; the basic features of the body were widely discussed in a public consultation procedure, whose main points we analyse. The third part describes the form the new ombudsman received and the responsibilities and power s/he exercises. The next to last section explores the first five years of the Scottish ombudsman's work, not only through a statistical overview, but also by analysing the most problematic aspects that have come up during their actions. The conclusion attempts to complete the circle from section one, evaluates the Scottish reform and links it to the wider British environment.

The text is based predominantly on documents from the Scottish ombudsman, Scottish Executive and Parliament and their research bodies. All these sources are available on the Internet. The website of an organization called "Scottish Ombudsman Watch" was very helpful, which publishes alternative (read critical or concealed) information about the ombudsman's operation. Available scientific literature is limited, the only exception being short articles written by Mary Seneviratne, Mark Elliot and Richard Kirkham, who wrote specifically on the topic of devolved ombudsmen.<sup>1</sup> Other academic sources had mainly corroborative value.

## **2 The Ombudsman's System in the United Kingdom prior to Devolution**

It is a well-known fact that ombudsman is an institution originally coming from the Scandinavian countries, but since its inception in the 19<sup>th</sup> century, it has become an integral part of the constitutional set-up in many countries of the world. In each state the position and powers of ombudsman is slightly different as it reflects the cultural, political and mainly legal features of that country.<sup>2</sup> However, in almost all cases the primary goal remains the same--to investigate complaints and protect the complainants against wrongful behaviour of the public authorities.

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1 For the bibliographical information see the relevant citations.

2 Very brief review of ombudsmen's functions in selected countries of the world is given by Sládeček, Vladimír, 2002. Ombudsman a jeho role při ochraně práv. IN: *Postavení a role ombudsmána v demokratické společnosti*. Brno: Masarykovo univerzita, s. 9-15; for 24 country studies in more detail see relevant chapters in Gregory, Roy and Philip Giddins (eds), 2000. *Righting Wrongs: The Ombudsman in Six Continents*. Amsterdam: IOS Press.

The United Kingdom has had a long tradition of ombudsmen that goes back to 1960s. In their typical way, the British decided to use a modified version of ombudsman's structure and competences, some research even claims that the British approach forms one of the two basic models.<sup>3</sup> By the mid 1960s the British politicians began to realize that the citizens did not have sufficient powers against an expanding government. After a long preparatory phase, the Parliament opted for ombudsman as the possible remedy to the situation and in 1967 the Parliamentary Commissioner for Administration Act was adopted. The post of Parliamentary Commissioner for Administration (PCA) was established, but s/he had to face important limitations, as the Act's drafters feared that the institution might undermine the prominent role of Parliament in the British system. The main innovation was the introduction of the filter, which allows the complainants to submit their complaints only through a Member of Parliament. Also in other aspects the PCA had a very conservative and restrictive design, for example the remit of the PCA was defined positively by listing all bodies falling under his jurisdiction instead of the other way round approach. The PCA had to publish a report after each investigation, which lead to delays. On the other hand there was a certain in-built flexibility.<sup>4</sup>

The PCA and the ombudsmen's sector in Britain underwent various important changes since its establishment. The major development was the introduction of additional specialised ombudsmen for other public areas, namely health service and local government.<sup>5</sup> Three local ombudsmen operated in England, an additional two were responsible for local authorities in Scotland and Wales, and there was one health ombudsman for each country. Northern Ireland has had its own arrangements since 1969 with two separate ombudsmen.<sup>6</sup> In all of these speciali-

3 The second model is Scandinavian. See Sládeček 2000, p. 9.

4 For the detailed information on the development, functions and problems of PCA see Kirkham, Richard, 2007. *The Parliamentary Ombudsman: Withstanding the Test of Time. 4<sup>th</sup> Report Session 2006-2007. HC 421*, p. 5–14.

5 The posts were established by the National Health Service Reorganisation Act 1973 and the Local Government Act 1974; for recent discussion of the local ombudsmen see Skulová, Soňa, 1996. Několik poznámek k instituci ombudsmana pro místní správu ve Velké Británii. *Časopis pro právní vědu a praxi*, vol. 4, no. 2, p. 248–258.

6 See Kirkham, Richard, 2005. The Ombudsmen of Northern Ireland, Scotland and Wales. *Journal of Social Welfare and Family Law*, vol. 27, no. 1, p. 81-84.

zed cases the obligations that applied to the PCA (filter, compulsory reports) were not used.<sup>7</sup> Despite the fact that the ombudsmen were legally distinct bodies, some of them were personally integrated, namely one person always held the position of PCA and health ombudsmen in all parts of Britain together. The ombudsmen sector resembled a complicated web of mutually connected, but at the same time independent offices, which made it hard to use for citizens. The other noticeable aspect had been the growing scrutiny of the ombudsmen not only by the public, but also by the courts. By 1994 the courts decided they already had the jurisdiction to review the decisions of the PCA,<sup>8</sup> so far the judicial system has upheld one action against the PCA's action.<sup>9</sup>

### **3 Devolution and the Guarantee of Protection against Maladministration (Review of the Debate)**

General elections in 1997 brought an end to a long reign of the Conservative Party and resulted in enormous changes to the United Kingdom. One of the flagship goals of the new Labour government under Tony Blair was to provide autonomy to other countries of Britain: Scotland, Wales and Northern Ireland. This process is called devolution and means that selected competences are transferred from the central (British) level to the countries' level and are exercised through regional assemblies and governments. However, devolution is not a full federalization, because England, as one of the UK countries, does not have its own assembly or government and each of the three "autonomous" countries have different amounts of their own (devolved) competences.<sup>10</sup> The powers that remain at the central level are labelled as "reserved."

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7 The fourth branch (apart from PCA, health ombudsmen and local authorities ombudsmen) was housing ombudsmen.

8 *R v Parliamentary Commissioner for Administration, ex parte Dyer* [1994] 1 WLR 621; the decisions of local government ombudsman could be review already from 1979, see *R v Local Commissioner for Administration for the North and East Area of England, ex p Bradford City Council* [1979] QB 287.

9 *R v Parliamentary Commissioner for Administration, ex parte Balchin* [1997] JPL 917; for a commentary see Giddings, Philip, 2000. Ex p. Balchin: findings of maladministration and injustice. *Public Law*, vol. 44, no. 2, p. 201-207.

10 In light of this the whole process is often described as asymmetric devolution.

In Scotland the citizens voted in favour of devolution in a referendum in 1997 and the following year the British Parliament adopted the 1998 Scotland Act, which served as a framework for the devolution process in Scotland. In 1999 the first elections to the Scottish Parliament were held and the Scottish Executive was formed. From the three-abovementioned parts of Britain, Scotland is the one with the highest degree of autonomy. Local parliament even has a right to influence (although only by a small margin) the level of taxation. Since the start of devolution, three regional elections were already held in Scotland, the last ones in 2007. It might be said that generally speaking devolution, at least in Scotland, has been considered a success story.<sup>11</sup>

The process of devolution had to have an impact in the area of complaints against maladministration, because a new level of governance was created which could not fall under the auspices of either the PCA or the local authorities ombudsman in Scotland. Legislation required the Scottish Parliament to make a provision for investigation of complaints in the post-devolution environment.<sup>12</sup> But before that was done, transitional arrangements applied. Since the 1<sup>st</sup> of July 1999 the following system has operated in Scotland.<sup>13</sup> The New office of Scottish Parliamentary Commissioner for Administration was created that has the power to investigate the actions of devolved public authorities including the Scottish Executive, Administration and Parliament.<sup>14</sup> A complainant had to make his complaint through a Member of the Scottish Parliament. The person holding the office was appointed by Her Majesty the Queen with no interference of the Scottish Parliament and, in practice, the post was executed by the same individual as the PCA. Only 81 cases were put forward between 1999 and 2001.<sup>15</sup> The health service ombudsman and local authorities ombudsman continued to perform their functions similarly to the pre-devolution situation, only the former reported to

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11 It is not an aim of this article to evaluate devolution as such, for preliminary evaluation see Bromley, Catherine (ed), 2006. *Has Devolution Delivered?* Edinburgh: Edinburgh University Press.

12 See Section 91 of the Scotland Act 1998.

13 See Scotland Act Order 1999, Transitory and Transitional Provision- Complaints of Administration (S.I. 1999/1351).

14 The full list of bodies that could be investigated was given in Annex B of the Order.

15 Scottish Parliament, 2001. Scottish Public Sector Ombudsman Bill. *Research Paper no. 01-22*, p. 11.

the Scottish Parliament. The PCA was still responsible for complaints in reserved (non-devolved) matters.

The Scottish Executive soon started to actively work on a permanent solution requested in the 1998 Scotland Act and invited the relevant actors to participate in a wide consultation process. In October 2000 it published a document called “Modernizing the Complaints System: Consultation on Public Sector Ombudsmen in Scotland,”<sup>16</sup> which was engineered as the first step in identification of the key issues in the whole process. The paper was distributed to more than 800 organizations and individuals with special interest in the area. Based on the first report and received comments, a second consultation document was prepared and released in July 2001 by the Executive entitled “A Modern Complaints System,”<sup>17</sup> with more detailed proposals. It was again sent to the same entities as before and responses were analysed in order to issue the final proposal of the bill. During the open consultation process, various aspects of the nature of the ombudsmen’s operation in Scotland were discussed in detail.<sup>18</sup> In the remainder of this section we present the main points of the debate, because they could also have a wider impact on the situation in the United Kingdom and perhaps also in other parts of Europe.

By far the most interesting issue at that time was the integration of the existing specialized ombudsmen in Scotland into one system, the so-called ‘one-stop shop.’ This would mean an abandonment of one of the basic pillars of the British model and an approximation of the continental type of the ombudsman office. The main advantage of such a change is simplification of procedures, better accessibility for the complainants and streamlining in terms of effectiveness and efficiency. There were two options to structure the new office. The first one was the “college

16 Scottish Ministers, 2000. Modernizing the Complaints System: Consultation on Public Sector Ombudsmen in Scotland. *SE/2000/84*.

17 Scottish Ministers, 2001. A Modern Complaints System: Consultation on Proposals for Public Sector Ombudsmen in Scotland. *SE/2001/139*.

18 Apart from the two texts mentioned in footnotes no. 15 and no. 16, the debate is summarized in *Scottish Public Sector Ombudsman Bill: Report of consultation on the proposals*. Available from <http://www.scotland.gov.uk/Resource/Doc/159134/0043282.pdf> (visited on 1st November 2007); analysis is provided by Seneviratne, Mary, 2002. ‘Joining up’ the Scottish Ombudsmen. *Journal of Social Welfare and Family Law*, vol. 24, no. 1, p. 89–98.

system,” under which specialized ombudsmen would be retained, but they would operate under one common umbrella in terms of offices, staff and resources.<sup>19</sup> The second option was one ombudsman responsible for all sectors. The one-stop solution was widely supported in the consultation. Only some entities expressed the worries that this could result in a loss of specialist knowledge and expertise the ombudsmen had accumulated over time and also that the transformation of many existing offices into one could be problematic and painful. Still the prevalent view was that the advantages of one-stop prevailed over its disadvantages.

If the one-stop system was to be successful, it was essential that the new ombudsman keep all the powers and responsibilities of the individual ombudsmen. Not all of them concentrated only on investigations of maladministration, e.g., the health ombudsman was able to check the quality and appropriateness of the service. It was generally rejected that the ombudsman should have the powers to investigate discretionary decisions, as it does not comply with the division of powers if an appointed official could also question decisions of elected representatives. Several proposals suggested the ombudsman should have the opportunity to review manifestly unreasonable decisions or the process of staff appointments in local government.<sup>20</sup>

Even more controversial in the consultations was the attitude to the definition and scope of ombudsman’s remit. Numerous subjects argued that at that time the valid practice of listing positively the bodies within the jurisdiction of the ombudsmen is too restraining and should be replaced by the list of bodies excluded from jurisdiction and consequently automatic presumption of non-listed bodies as those within the remit. This could be combined with a general definition of the term “public authority.” Opponents argued that generality in this case is at the expense of clarity and the complainants would not be sure of what actually is within the remit of ombudsman.

The procedure for submitting complaints was another focal point in the consultation process. The obligation to submit complaints through the Members of

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19 The idea of college system was proposed also for England in the Collcutt Report (Collcutt, Philips and Mary Hourihan, 2000. Review of the Public Sector Ombudsman in England. *A Report by the Cabinet Office.*); see also section six of this article.

20 The ombudsman in Northern Ireland has the power to investigate the personnel matters. See Kirkham 2005, p. 81–82.

the Scottish Parliament was heavily criticized by the majority of participants. They argued that this British tradition did not serve its function of filtering useless complaints anymore and only created an unnecessary hurdle for complainants and leave them at mercy of their deputies.<sup>21</sup> It also has to be kept in mind that the filter was previously applied only to one of the specialist ombudsmen (SPCA), which was planned to be replaced by the one-stop system. Opponents claimed the filter contributes to reducing the workload of ombudsman or that the Members of Parliament could advise the complainant how to structure the complaint and if it was worthy to pursue it at all. Finally the filter was defended as the expression of the constitutional responsibility of Scottish Parliament to the citizens and cited as a factor that contributed to certain control of the ombudsman.

Serious considerations were dedicated to the thought that ombudsman might have the opportunity to initiate the investigation. This move could reduce the overall number of cases with manifest maladministration in the society in which there was no complaint from the affected individuals. There is even a chance that the public authorities would behave more responsibly if such power were enacted. The majority of participants however argued against such a right, because it might distract the ombudsman from its primary goal of solving individual complaints and s/he might prefer to look for medially popular cases.

Finally the questions of dissemination of information about the investigation and enforcement of its outcomes were discussed during the consultation. One supported option was to keep the traditional approach and rely only on publication of reports (and therefore moral value of ombudsman actions), the other one was to give the right of enforcement to the ombudsman, preferably the discretion to submit a court order. The latter would be a strong step forward in assuring compliance with the recommendation of the ombudsman, on the other hand, an ombudsman, as an unelected person, should not decide on issues that are reserved for the courts or fall under democratic political decision-making. The compromise might be the opportunity to prepare a special report to the Parliament and Executive if his/her recommendation was not followed; these organs have the powers to rectify the problem. It has to be noted that the 40 year experience of

21 For a discussion of the pros and cons of the filter in general see Elliot, Mark, 2006. Asymmetric devolution and ombudsman reform in England. *Public Law*, vol. 50, no. 1, p. 91–92.



the PCA in Britain has confirmed the viability of such a system as only once has the recommendation not been remedied by the House of Commons.<sup>22</sup>

Although only a limited number of subjects invited by the Scottish Executive actually participated in the consultation process, its outcome was successful and many comments were implemented into the final proposal.<sup>23</sup> In November 2001, a text of a proposal entitled “Scottish Public Sector Ombudsman Bill” was introduced to the Scottish Parliament with accompanying Explanatory Notes and Policy Memorandum.<sup>24</sup> After that it was discussed in committees of the Parliament, but its content had not been amended profoundly from the original proposal, only the name of it changed to “Scottish Public Services Ombudsman Bill.” On the 21<sup>st</sup> of March 2002 the SPSO Bill was adopted by the Parliament and the following month it received Royal Assent.

#### **4 Institutional Framework of the Scottish Public Services Ombudsman<sup>25</sup>**

The SPSO Act established the Scottish Public Services Ombudsman (SPSO) to deal with complaints that had been dealt with before by the Scottish Parliamentary Commissioner for Administration, Scottish health service ombudsman, Scottish local authorities ombudsman and Scottish housing sector ombudsman. These posts were abolished.

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22 The only case was the recent decision of the PCA in *Wartime Detainees Pensions*, for detailed analysis of the outcome and the subsequent process and their consequences see Kirkham, Richard, 2006. *Challenging the Authority of the Ombudsman: The Parliamentary Ombudsman’s Special Report on Wartime Detainees*. *Modern Law Review*, vol. 69, no. 5, p. 792–818.

23 The analysis of two consultation documents confirms that the only view supported by the majority and actually not implemented in the final proposal was the negative definition of the ombudsman remit.

24 The text of the proposal is available at <http://www.scottish.parliament.uk/business/bills/billsPassed/b43s1.pdf> (visited on 7th November 2007).

25 Apart from the text of the SPSO Act, this section is based on *Scottish Public Services Ombudsman Act 2002 (asp 11): Explanatory Notes*. Available at [http://www.England-legislation.hmso.gov.uk/legislation/scotland/en2002/aspen\\_20020011\\_en.pdf](http://www.England-legislation.hmso.gov.uk/legislation/scotland/en2002/aspen_20020011_en.pdf) (visited on 15th November 2007).

The SPSO is nominated by the Scottish Parliament and appointed by Her Majesty the Queen. The office is held for a maximum period of five years and no more than for two consecutive terms, unless the public interest demands a third term. At the age of 65 the SPSO has to retire. There is a maximum of three deputies in the office, who are responsible for certain parts of the business; it is up to the SPSO to distribute the responsibilities among them.<sup>26</sup> The independent position of the SPSO is clearly determined including the provisions about his/her pay and pension. The office is financed by the Scottish Parliament and the execution of the budget is audited every year, the management structure of the office is not set out in the Act and is therefore within discretion of the SPSO.

The new office brings together the functions of the four specialized ombudsmen. Investigation of maladministration is at the core of her competences (see also below), but in selected areas (mainly health sector, but not limited to) s/he could also investigate the failure to provide service or failure in a service. In the end the drafters opted for a solution that only the complaints related to the bodies specified in the list are permissible (Section 3 and schedule 2 of the Act), at the same time there is a list of bodies excluded from investigation (Section 7 of the Act).<sup>27</sup> In comparison to other parts of Britain, the SPSO received broader jurisdiction, for example complaints related to Mental Welfare Commission or public development agencies. Since the adoption of the Act, the remit has already been extended further (see below). Of course, the authorities exercising only the reserved matters fall outside the jurisdiction of the SPSO.

The objective of the Act is to make the submission of the complaint as easy as possible. The filter was removed so all complaints are addressed directly to the SPSO, while the members of the Scottish Parliament may still submit the complaint on behalf of their constituents, but only with their consent. In special circumstances it is possible to make complaint orally or electronically, but these are only exceptions and have to be followed later in written form. Only the complaints submitted within one year after the complainant became aware of the grievance are eligible. An interesting compromise was adopted on the power to

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26 It was expected that the deputies would retain the specialist knowledge in the areas previously controlled by the ombudsmen (health, public affairs, local matters) and make up for the college system.

27 In order to facilitate flexibility, these lists could be amended by subordinate legislation.

initiate an investigation. The core of ombudsman's work remains the investigation of individual complaints, but there is a provision in the Act that allows public authorities to submit a complaint on behalf of the aggrieved individual even if s/he did not complain him/herself. Before this step, the authorities have to use all other means to solve the problem. A concrete example where the provision could be used would be a situation where there is strong criticism in the society about maladministration in a certain case, but there is either no affected individual or an individual with no desire or capability to submit a complaint. Another possibility to rectify maladministration found by ombudsman during the course of another investigation is to share information with other subjects (e.g. auditors) that could solve the problem.

The investigation process itself is not described in the Act and it is up to the SPSO to establish the necessary guidelines and procedures. The SPSO has very strong powers regarding the collection of information and all subjects have to provide full cooperation in his/her investigation. The investigation will usually be closed by publication of a report that is also to be available to the public, but the report is not obligatory and therefore the cases could also be resolved informally. The SPSO does not have any enforcement powers, the only tool is submission of a special report to the Scottish Parliament if any injustice caused by maladministration is not remedied by the public bodies. It is then up to the Parliament or the Scottish Ministers to take the action. There is no provision guaranteeing the appeal against the outcome of the investigation, only courts could decide if the SPSO acts against the law (see below).

## **5 The Scottish Ombudsman Five Years After**

The Act began to be implemented into practice relatively quickly and already in September 2002 the Scottish Parliament nominated former professor from Edinburgh University, Alice Brown, as the SPSO and also agreed on her three deputies. The office started its operations in October 2002. The first months were dedicated mainly to the organizational building of the system and transformation of personnel, resources and complaints from the previous ombudsmen. From the beginning the SPSO's main goal was to advertise its services to the citizens, as the knowledge of her role or even existence was very low according to opinion

polls.<sup>28</sup> The SPSO therefore emphasized the importance of outreach, for example all authorities falling under her remit had to inform citizens about the possibility of complaints against their actions and advertising campaigns were taking place. Yet it was not until 2004 that the office was able to really provide one-stop shop service as only then it moved into one address and hired additional staff. Since then the SPSO has developed into a full capacity body with 38 staff members, a budget of almost three million pounds in 2007 and planned to expand to 45 in 2008.<sup>29</sup> During the winter of 2007 the process of renomination of Alice Brown was initiated and the Scottish Parliament decided almost unanimously to confirm her in office for additional four years.<sup>30</sup> Consequently Alice Brown asked the Scottish Parliament to reconsider the structure of her office, she wanted to have only two deputies with changed roles, in this the Parliament complied, but at the same time it expressed its concerns about how these posts were filled by Brown and the salaries offered for deputies.<sup>31</sup> The impact of this affair on the reputation of the institution remains to be seen. That the position of the SPSO is not yet fully settled supports the debate in the Scottish Parliament in October 2007, when the deputies discussed the conclusions of the Crerar report whose aim was to review audit, inspection and complaints handling in Scotland. The Members of Parliament stated numerous arguments about the position, usefulness and effectiveness of the SPSO.<sup>32</sup>

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28 In 2001 only 42 percent of Scottish inhabitants heard about any ombudsmen and meagre 8 percent of them would consider complaining through him. See SPSO, 2003. *Annual Report 2002/2003*. Edinburgh: SPSO, p. 15.

29 Scottish Parliament, 2007. *Report to Parliament: The Scottish Public Services Ombudsman*, points 7, 10.

30 113 deputies voted for, one against, three abstained. Results and debate available at <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0328-02.htm> (visited on 16th November 2007). It means the second term of Alice Brown will expire on 29 September 2011. The shortening of the term from five to four years was recommended by the Procedures Committee.

31 The Scottish Parliament “the process bad practice, particularly given the nature of the office and determined that the ombudsman be advised accordingly”. MacMahon, Peter, 2007. Ombudsman has knuckles rapped over appointments of her deputies. *The Scotsman*, 8<sup>th</sup> November 2007.

32 For the report, which deals also with role of the SPSO, see Crerar, Lorne, 2007. *The*

Since 2003-2004 the SPSO office has been using a unified methodology, although it nonetheless has slightly changed over time that allows the comparison of its workload. The detailed statistics are presented below, an ombudsman also records enquires that are represented mainly by informal requests for information by phone or email, people are asking about the areas of responsibility of the SPSO or preliminary review of their complaints. The majority of enquires is resolved instantly, some of them are transformed into complaints, in many cases the staff of the SPSO recommends other action if the problem is out of its remit. The total number of enquires has more than quadrupled since the establishment of the office. Still, at the centre of the work is the investigation of complaints. Also here we can notice significant growth in the received complaints, one reason could be the improved knowledge about the existence of the ombudsman and a raising awareness of the people about usefulness of her services, the second explanation is the expansion of SPSO's competences that took place in 2005 (see further). It is yet to be seen if the rising workload does affect the effectiveness of ombudsman's actions.

Table 1: Workload of the SPSO

Year	Enquiries	Complaints	Total
2006-2007	2386	1842	4228
2005-2006	1974	1724	3698
2004-2005	990	1387	2377
2003-2004	498	1293	1791

Source: *SPSO Statistics*. Available from <http://www.spsa.org.uk/includes/download.php?id=631> (visited on 22<sup>nd</sup> November 2007).

Table 2 breaks down the complaints according sectors. Clearly the cases related to health services and local authorities dominate, the third pillar- devolved public authorities, ranked at a distant third place. One-stop shop therefore has not contri-

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*Report of the Independent Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland*. Edinburgh: The Scottish Government, especially p. 86-95; the debate in Parliament is available at <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1003-02.htm> (visited on 15th November 2007).

buted to significant changes in the composition of complaints, as before 2002 the local authorities ombudsman in Scotland had the highest workload followed by the health service ombudsman. On the other hand, the number of complaints to the SPSO in 2006-2007 was higher than the total combined number of complaints investigated by all individual ombudsmen before the adoption 2002 Act.

Table 2: Complaints Received by Sector (2006-2007)

Sector	Complaints
Health	497
Housing Associations (Registered Social Landlords)	129
Local Authorities	1017
Scottish Executive and Devolved Administration	139
Scottish Further and Higher Education	50
Not defined	10
Total	1842

Source: *SPSO Statistics*. Available from <http://www.spsos.org.uk/includes/download.php?id=631> (visited on 22<sup>nd</sup> November 2007).

Finally from the statistical corner, Table 3 presents how the complaints were resolved. Many complaints do not reach the stage of full investigation and are labelled either as premature or out of jurisdiction. In these cases the only way to improvement is better information about the powers and work of the SPSO, it would be also useful if the complainants firstly use the tool of enquiries before submitting complaints. About 20 percent of complaints undergo full investigation, of these in the last period (2006-2007) approximately one half of them were found to be at least partly justified. Relative to the amount of complaints, the health sector is the one most often affected by maladministration or failures in service. There has been almost an exponential growth of upheld complaints (see Table 4), but the SPSO's official documents so far have not explained the trend, we could only estimate that the main reason is a wider knowledge of the opportunities the office provides and that more informed people are complaining.

Table 3: Outcome of the Closed Complaints (2006-2007)

	Sector						Total
	Health	Housing	LA	SEDA	SFHE	Other	
Withdrawn / failed to provide info before investigation	58	5	88	10	3	1	165
Discontinued before investigation	78	12	99	21	1	0	211
Out of jurisdiction	72	29	191	48	8	9	357
Premature	81	96	509	55	17	0	758
Withdrawn / failed to provide during before investigation	4	1	1	0	0	0	6
Discontinued during investigation	8	1	5	0	0	0	14
Not upheld	71	10	70	12	6	0	169
Partially upheld	47	6	45	6	1	0	105
Fully upheld	16	2	21	2	0	0	41

Source: SPSO Statistics. Available from <http://www.spsso.org.uk/includes/download.php?id=628> (visited on 22<sup>nd</sup> November 2007).

Note: For sector abbreviations see Table 2.

Table 4: Complaints Upheld in Full or Part

Year	Number of complaints
2006-2007	146
2005-2006	54
2004-2005	8
2003-2004	15

Source: SPSO Statistics (various years). Available from <http://www.spsso.org.uk/statistics/index.php> (index page) (visited on 22<sup>nd</sup> November 2007).

In the rest of this section we will discuss issues that have formed the first years of the SPSO's operations. As in every newly founded institution the SPSO has also had to undergo the process of settling its competences and remit, mainly in terms of broadening them. In 2005 higher education and universities fell under the jurisdiction of the SPSO,<sup>33</sup> in the same year the complaint procedure in the National Health Service was simplified (in one instance was removed) and therefore the complainants could complain to the SPSO sooner than before. Mainly the second change has contributed to a certain increase of workload (see the statistics above). On the other hand, the office of ombudsman criticized the objective of the Scottish Executive to establish new bodies of Independent Police Complaints Commissioner for Scotland and Scottish Commissioner for Human Rights, fearing they would overlap with the functions of the SPSO and undermine the basic idea of the one-stop shop.<sup>34</sup> In view of many Members of Scottish Parliament, the remit of SPSO should be broadened or defined differently (negatively).<sup>35</sup>

One of the most controversial points is the definition of the term maladministration, which is, of course, crucial for the areas of responsibility and actions of each ombudsman. For some it is too narrow a term, which precludes the ombudsman from acting against decisions that are, for example, unjust or unreasonable; for some others it is sufficiently broad, as testing maladministration could involve almost everything.<sup>36</sup> But generally this means, as we already noted, that ombudsmen in Britain concentrate only on the administrative process of reaching a decision, not

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33 Further and Higher Education (Scotland) Act 2005. It is noticeable that in England and Wales the some competence was given to the Office of the Independent Adjudicator.

34 SPSO, 2006. *Annual Report 2005/2006*. Edinburgh: SPSO, p. 9; it has to be noted that the SPSO did not succeed in this area, by the adoption of "Scottish Commission for Human Rights Act" and "Police, Public Order and Criminal Justice (Scotland) Act" in 2006 the Scottish Parliament decided to establish both posts. However the actual overlap with the SPSO could not be evaluated as the new offices have not started their work yet.

35 See the debate during the renomination of Alice Brown in the Scottish Parliament. Available at <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0328-02.htm> (visited on 12th November 2007).

36 See in detail Kirkham 2007, p. 7-8; the term maladministration is very close but not direct negative to the term "good administration" (dobrá správa) used in the Czech Republic.



on the merit of the decision itself.<sup>37</sup> The term maladministration was not defined by the 1967 Act, but during the discussion of the bill in the Parliament in the same year the Leader of the House of Commons described maladministration as “bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and arbitrariness and so on”,<sup>38</sup> the list has been used informally ever since, in 1993 the PCA annual report proposed a more detailed catalogue. The 2002 Act also purposely refrained from inclusion of the definition in its text and consequently the SPSO closely followed the methodology used by the PCA. The other description available at the moment for the SPSO is the definition in its glossary of terms, which explains maladministration as “bad, inefficient or dishonest administration. This can cover things like unreasonable delay, rudeness, failure to apply the law or rules properly.”<sup>39</sup> Although we accept that the legal definition of the term would be problematic and particularly limiting to the flexibility of the ombudsman, the mix could be confusing for the complainants who do not know what the term maladministration stands for.<sup>40</sup> In order to mitigate this problem, the PHSO (see below) published in 2007 a long-awaited document with a detailed explanation of what is meant by maladministration,<sup>41</sup> it is quite likely that the SPSO will also try to implement these principles and the thus far unclear situation would be improved.

The process of complaints’ examination is of the utmost importance for each ombudsman. As we already indicated, the 2002 Act allowed the SPSO to solve the matters informally, it was not necessary to prepare a full report on each case. A general five-step outline was proposed to deal with complaints in practice, from

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37 But the 2002 Act (Section 7/1) says „The Ombudsman is not entitled to question the merits of a decision taken without maladministration“, which means if decision included maladministration, the merits could be reviewed too.

38 This is called „Crossman catalogue“.

39 *Maladministration and Service Failure*. Available at <http://www.spsos.org.uk/about/article.php?id=221> (visited on 14th November 2007).

40 That it is possible to enact the maladministration definition is proved for example in the 1974 Ombudsman Act in New South Wales (section 26), the text available at [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/oa1974114/s26.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/oa1974114/s26.html) (visited 16th November 2007).

41 PHSO, 2007. *Principles of Good Administration*. Available at <http://www.ombudsman.org.uk/pdfs/pgs.pdf> (visited 16th November 2007); it has to be noted that in view of author of this article these guidelines do not belong to the category of easily understandable.

first contact, assessment, examination and investigation to special report to Scottish Parliament.<sup>42</sup> The preference was given for swift remedy and informal solutions, only very few cases proceeded to full investigation (step 4) and presenting reports.<sup>43</sup> However despite some clear advantages of the system, it started to be considered problematic by the SPSO, because she was unable to perform her other important function--sharing the results of her work and improving the quality of public administration, simply because there were not enough reports published by the office through which the best-practice could be disseminated. Therefore in autumn 2005 a new system was introduced, under which each case formally undergoes full investigation with the subsequent report, even if it is solved informally.<sup>44</sup> The result is somewhat paradoxical--while one of the main drawbacks of the PCA was traditionally considered her obligation to prepare reports for each of her cases, the SPSO decided for it voluntarily.<sup>45</sup>

The final step of each ombudsman is to recommend action to the public authority in order to provide redress to the complainant if his/her complaint is well founded. According to the SPSO, the ideal redress is represented by return of the pre-administration state of affairs for the complainant. Logically this is not always possible, then the alternative remedy is to be provided such as apology, explanation of behaviour, reimbursement of actual loss, action to mitigate injustice or symbolic payment for troubles. The second area of redress concentrates on the general improvements in processes and procedures of public authorities through proposing relevant changes in them or providing guidance for the staff.

Satisfaction of complainants with the services of ombudsman is an aspect of the office that must be checked in order to evaluate its usefulness. Here we must distinguish between the satisfaction with the outcome of the decision and with the process. The second one is probably fairer and is connected to the timely, appropriate and efficient solution of his/her complaint. In this case, the SPSO performs quite well as only a very few complaints have been made against her services, about 50

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42 SPSO, 2004. *Annual Report 2003-2004*. Edinburgh: SPSO, p. 14.

43 The annual report from 2003-2004 broke down the cases according to steps, from 1828 cases only 18 reached the full investigation stage (step 4). See *Ibid*, p. 22-23.

44 SPSO, 2005. *Annual Report 2004-2005*. Edinburgh: SPSO, p. 6.

45 The contradiction between guiding best standards and lack of full investigation is noted also by Elliot 2006, p. 88.

percent of them are upheld (on time see the following paragraph).<sup>46</sup> Much more difficult is to evaluate the satisfaction related to the outcome of decisions. The opinion poll ordered by the SPSO in the area of health care brought heavy critique of the SPSO's services by the participants.<sup>47</sup> But such a result is hardly unexpected. The complainant whose complaint is rejected obviously feels aggrieved, but usually the reason is that the ombudsman is not able to review the merit of the public organ's decision. The only way to mitigate this is to be inform better about the nature of the ombudsman's service and about the competences he/she has. The SPSO has been doing a lot in this regard, but some of her steps go in the other direction. For example, in the annual report for 2005/2006, the SPSO speaks of her office as "an alternative to the courts,"<sup>48</sup> which is of course nonsense with possible unforeseen consequences for those seeking redress.

As we have already noted, the redress is helpful only if it is timely. While for example the PCA set certain deadlines on her work,<sup>49</sup> the SPSO decided to apply only a very loose framework, the eligibility of a complaint should be decided within 20 working days and then within another 20 working days the decision should be made. If this goal is not achieved, an explanation must be provided and then the complainant must be informed about the ongoing investigation in intervals of at least every 20 working days.<sup>50</sup> It is noticeable that no statistics concerning how long the complaint takes on average have been published by the SPSO, from the

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46 In 2006/2007 there were 42 complaints, of which 20 were justified. Statistics since 2003/2004 available at [http://www.scottishombudsmanwatch.org/files/SQM\\_stats\\_1\\_.pdf](http://www.scottishombudsmanwatch.org/files/SQM_stats_1_.pdf) (visited 19th November 2007), it is surprising that these numbers are not made public in the annual reports.

47 Only 15 percent was very or fairly satisfied with the decision of the SPSO, 59 percent fairly or very dissatisfied. Also in other aspects of the investigation the SPSO did not receive positive evaluation. See SPSO and Scottish Health Council, 2006. *Experience and Attitudes in relation to NHS Complaints since the Introduction of the New Procedure* (Craigforth report), p. 77–91.

48 SPSO, 2006. *Annual Report 2005-2006*. Edinburgh: SPSO, p. 5.

49 Eligibility of a complaint should be decided within 10 days, 80 percent of complaints within 3 months and 95 percent within 12 months, only the second target was not met in 2005-2006. See PHSO, 2006. *Annual Report 2005-2006: Making a Difference*. London: The Stationery Office, p. 52.

50 SPSO, 2004. *Annual Report 2003-2004*. Edinburgh: SPSO, p. 15.

accessible sources it seems that the excessive length of the procedures is one of the main problems of the office. The difficulties were noted by the members of Scottish Parliament during the reappointment of Alice Brown,<sup>51</sup> in March 2007 there were 919 outstanding complaints at the SPSO office, with number of them submitted before 2005.<sup>52</sup>

One of the newest developments in the life of the SPSO is that she already had the “honour” to have her decision reviewed by courts. In 2007 one of the local authorities (Argyll and Bute Council) applied to the Scottish Court of Session that the outcome of the SPSO’s investigation was wrong and should be repealed. The Court, discussing the decisions related to the PCA cited above and applying them to the provisions of the SPSO Act, concluded that the Scottish situation is different from the British (English) one. The judge consequently refrained from making any final judgment whether the SPSO is subject to judicial review or not as it would be premature at this early stage of the office’s development. On the other hand the judge considered the decision of the SPSO to be incorrect but declined to cancel it as it would have no practical impact given the factual circumstances of the case.<sup>53</sup>

As we have mentioned above, the auxiliary goal of every ombudsman is to improve public administrative procedures. The SPSO identified insufficient communication as a reason for the majority of complaints. Many times the complainants would be happy just to obtain an apology, but the affected authorities are worried that to issue an apology would be used as the admission of liability in possible litigation. The SPSO discussed this issue widely in her annual reports and contrary to the hypothesis just expressed accepted the view that it is indeed a failure to apologize, which contributes to further escalation of the dispute and consequent legal actions. In this area the SPSO is trying to provide guidance and solution to the abo-

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51 See footnote no. 35.

52 See the statistics available at [http://www.scottishombudsmanwatch.org/files/23.05.07\\_SPSO\\_outstanding\\_complaints\\_at\\_March\\_2007.pdf](http://www.scottishombudsmanwatch.org/files/23.05.07_SPSO_outstanding_complaints_at_March_2007.pdf) (visited on 15 November 2007); for example one of the most notable cases was resolved only after four years of investigation. See BBC News, 2005. *Ministers issue motorway apology*. Available at [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/4419736.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/4419736.stm) (visited 12 November 2007).

53 See *Argyll and Bute Council against Judicial Review of a Decision of the Scottish Public Services Ombudsman* [2007] CSOH 168. Available at <http://www.scotcourts.gov.uk/opinions/2007csoh168.html> (visited 22nd November 2007).

vementioned dilemma. She mentions the recent legislation in Australia that limits the scope of liability, including the provision that an apology is not an admission of liability. The experience from Australia has led to improvements in relations between public authorities and complainants.<sup>54</sup> The objective of the SPSO is to introduce similar legislation in Scotland and she has raised the issue already several times in discussion with Scottish ministers and Members of Scottish Parliament. Whether her two-year long efforts will succeed is as yet unknown.

## **6 Conclusion: Real One-Stop Service for the United Kingdom?**

The current landscape of ombudsmanry is painstakingly complex in Britain and Scotland is not exception. Despite the proclaimed “one-stop shop,” there is still the responsibility of the PCA (PHSO) over reserved matters, in England the intermingling of the health ombudsman with the PCA (who has jurisdiction over all of Britain in certain cases) is another example of problems that the asymmetric devolution brings. Understandingly there has to be an impact on both efficiency and effectiveness of ombudsmen operations in the United Kingdom.

As early as 1998 the PCA asked the Government to conduct a review of the public sector ombudsmen in England, because he felt the traditional British approach was somewhat outdated and did not conform to the needs of modern government and its control. The request was accepted and in April 2000 a comprehensive report was published which proposed to simplify the system (mainly in England) and adapt it into the process of devolution.<sup>55</sup> Academic circles, which had been criticizing the situation in Britain for a long time, welcomed the Collcutt report as a step forwards, but also expressed concerns that the proposed changes were not sufficient.<sup>56</sup> Still, the Government indicated its willingness to implement recommendations of the report into legislation, unfortunately, the House of Common has not been able to find time to adopt amendments to the PCA Act. Despite this, the system in England had to adapt to the changing situation within the limits

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54 See in more detail SPSO, 2005. *Annual Report 2004-2005*. Edinburgh: SPSO, p. 7.

55 Collcutt and Hourihan 2000.

56 Among the reactions compare for example Giddins, Philips, 2001. Whither the Ombudsman? *Public Policy and Administration*, vol. 16, no. 2, p. 1–16; Thomson, Brian, 2001. Integrated Ombudsmanry: Joined-up to a Point. *Modern Law Review*, vol. 63, no. 3, p. 459–467.

of current legislation, for example, offices of the PCA and English health service ombudsman that were represented by one person from the beginning were recently formally renamed into the Parliamentary and Health Service Ombudsman (PHSO), this body currently remedies many issues by informal solutions. In order to accommodate at least these developments, the Government reacted with publishing another consultation paper<sup>57</sup> and based on this prepared a regulatory reform order, which is secondary legislation that allows minor amendments to primary legislation. The order was adopted by the British Parliament in 2007, but it brought only cosmetic modifications to the system that should contribute to better cooperation between specialist ombudsmen in England, but their legal unification (one-stop shop) or college system proposed by the Collcutt report were not reached. Also the filter for certain complaints of the PHSO was not removed, as the reform order could not amend the cornerstones of the primary legislation.<sup>58</sup>

It is obvious that the mentioned attempts are only temporary and wider reform is needed in the United Kingdom. The ultimate aim must be the simplification of the system, so that the people are not confused when submitting complaints. Probably the only solution is the integration of ombudsmen into one office, as the success of SPSO confirmed. But what option to take in order to best reconcile the current complicated web of asymmetrically devolved Britain?<sup>59</sup>

The first option is to retain the current situation, in which some countries (e.g. Scotland) have one-stop shop, England has more ombudsmen and there is one central ombudsman who has jurisdiction over reserved matters in the whole state (and responsibility for certain issues in England as well). Although in Scotland such an arrangement has proved viable, it has caused difficulties in England. There is a well-founded fear of waste of resources as in many cases the ombudsmen

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57 Cabinet Office, 2005. *Reform of Public Sector Ombudsmen in England*. London: Cabinet Office Publications:.

58 The text of the Regulatory Reform (Collaboration etc between Ombudsmen) Order 2007 is available at <http://www.opsi.gov.uk/si/si2007/20071889.htm> (visited on 15th November 2007); for analysis see PHSO, 2007. *Factsheet: Regulatory Reform Order 2007 No. 1889*. Available at [http://www.ombudsman.org.uk/pdfs/Regulatory\\_Reform\\_Order\\_factsheet.pdf](http://www.ombudsman.org.uk/pdfs/Regulatory_Reform_Order_factsheet.pdf) (visited on 17th November 2007).

59 For comprehensive discussion see also Elliot 2006, p. 93–105.

have to operate as information centres that send the complainants into competent instances instead of concentrating on investigation within their jurisdiction.

The easiest way would be to create one ombudsman's office for the whole of the United Kingdom that would have remit over all bodies (central, devolved, local) and investigate all complaints, therefore one real one-stop shop would be established. The advantages are obvious, however it would also mean an infringement on the autonomy of devolved administrations and imposition of an unconstitutional hierarchy, as the super-ombudsman will have to be nominated by the British House of Commons, although s/he will exercise jurisdiction also over devolved authorities. Similar difficulties arise from the proposal made by the Collcutt report- to have a one-stop shop (although only through a college system) in all countries with the English ombudsman also responsible for reserved competences.

When the easy avenues out are closed thornier ones have to be used. They start with the hypothesis that devolution precludes establishment of any real one-stop shop and the two-level architecture is to be maintained. Scotland serves as a blueprint for the new system: each country (including Scotland) will have a one-stop shop with similar competences as the SPSO; further, there would be one British ombudsman with jurisdiction in reserved issues. Unfortunately, this solution faces difficulties with the position of England, to which the devolution does not apply. Here we have the abovementioned three ombudsmen with remit covering local authorities, one ombudsman responsible for health (integrated with the PCA into PHSO), there is no division between reserved and devolved matters.<sup>60</sup> So what should the English one-stop shop ombudsman be investigating? The only answer is an artificial division of competences in England based on a pattern valid in other parts of Britain, namely in Wales as the least devolved country. This division would, of course, be used only for division of jurisdiction between British and English ombudsmen and would not have any meaning anywhere else. The other difficulty emerging is what body will nominate the English ombudsman.<sup>61</sup> Any selected option will have its pros and cons and will not be implemented easily, we can only conclude that while the reform in Scotland had also been painful,

60 Obviously the best option would be to extend the devolution also to England, but such plans go much beyond the ombudsmen's situation and are not viable in the foreseeable future.

61 Could it be British House of Commons with deputies from other parts of Britain?

it brought positive results and hopefully these experiences could be replicated in England as well.

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