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Published in:

Retfærd: Nordisk juridisk tidsskrift

2013

Document Version:

Publisher's PDF, also known as Version of record

[Link to publication](#)

Citation for published version (APA):

Mattsson, T. (2013). National Ombudsman for the Elderly: A solution for a more responsive welfare state? *Retfærd: Nordisk juridisk tidsskrift*, 36(3), 9-24.

Total number of authors:

1

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National Ombudsman for the Elderly: A solution for a more responsive welfare state?

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Abstract: The aim of the article is to discuss the role of the national Ombudsman institution, using the Ombudsman for Children (BO) in Sweden as the example of an existing institution and the Ombudsman for the Elderly as an example of a possible future Ombudsman. Taking the human condition of vulnerability as a point of departure, in accordance with Martha Albertson Fineman's vulnerability approach, the issue is whether the Ombudsman can be a useful tool for the state to provide resilience towards the inevitable age-related and situation-based dependencies in later life. In the article it is discussed whether it is reasonable to argue for an expansion of the Ombudsman office to elderly persons. The article also raises the issue of whether the duties of such an office should be at a general level to promote the rights of the elderly according to law, or focus on individual cases.

Keywords: elderly, ageing, vulnerability, dependency, ombudsman, ombudsperson

1 Introduction

For over 200 years, the Ombudsman institution in Sweden has been a way to supervise the discretionary powers of administrative authorities in situations where the courts cannot provide legal remedies.¹ The Swedish Parliamentary Ombudsmen still follow these basic principles, which have been applied since the institution's origin in 1809.² In addition, the concept of the Ombudsman as an institution has broadened,

- 1 This article is part of the research project *Active Aging for All?*, a project within the research program Elder Law at the Faculty of Law at Lund University 2012-2015. The program aims to initiate a new interdisciplinary research environment on active ageing, social integration and the legal status of the elderly. It is financed by the Marianne and Marcus Wallenberg Foundation and the Ragnar Söderbergs Foundation.
- 2 The Office of the Parliamentary Ombudsmen was established in Sweden in 1809. The legislators introduced this supervisory system into the constitution that would allow the parliament some control over the exercise of executive power. See the Parliamentary Ombudsman, 2012-06-12a.

Jurist- og Økonomforbundets Forlag

and other kinds of ombudsman offices have developed.³ Whereas the Swedish Parliamentary Ombudsmen by tradition deal mostly with issues having to do with alleged maladministration, other Ombudsman offices have the role of promoting and protecting human rights for a particular age-related or situation-based dependency. The aim of this article is to describe and analyse the role of the national Ombudsman office, using the Ombudsman for Children (BO) in Sweden as the example of an existing institution, and an Ombudsman for the Elderly as an example of a possible future Ombudsman. My questions are as follows: is it reasonable to argue for an expansion of the target group of the Ombudsman office to include older persons? And is it in line with the aim to create a just and responsive state for the vulnerable subject? If so, should the duties of such an office be at a general level, in order to promote the rights of the elderly according to law? Or should it focus on individual cases? In the article, I first describe the basic idea of the institution and its development. Then I focus on the Ombudsman for Children as one kind of Ombudsman office and briefly describe the duties and work involved. Lastly, I discuss the idea of expanding the office to an Ombudsman for elderly people. The point of departure is Martha Albertson Fineman's vulnerability approach, which emphasises state obligations to provide institutions that may provide resilience towards the inevitable dependencies that define human life.

2 A short background

The Swedish translation of the word *ombud* is representative, i.e. someone who is authorised to act for someone else or for a group and to represent their interests.⁴ In practice, the Ombudsman is often understood to be an official who has the role of representing the interests of the public by investigating and addressing complaints reported by individuals. The persons are usually appointed by the government or by the parliament according to a specific legislative act that gives them quite a degree of independence. The word Ombudsman also includes the offices for these officials.⁵

The Ombudsman Committee of the International Bar Association proposed the following definition some years ago:

- 3 I use the proper word Ombudsman throughout the article, although it would be more neutral to talk about the Ombudsperson. All the Swedish authorities within this office use the word Ombudsman. There is an Office of the Ombudsperson, however it is a United Nations agency appointed by the UN Secretary General, see <http://www.un.org/en/sc/ombudsperson/>.
- 4 Nationalencyklopedin, undated.
- 5 In the article, I do not refer to any single institution, but on the phenomenon that the state appoints Ombudsmen for supervisory functions.

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An office provided for by the Constitution or by action of the Legislature or Parliament and headed by an independent, high-level public official who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employees, or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.⁶

This definition reflects the independency of the office and its duties to represent individuals or groups of individuals within its field of responsibility. It also reflects the different roles and responsibilities that such an office may have. For example, in Sweden the Parliamentary Ombudsmen is governed by the Parliament and the Equality Ombudsman by the government. The Ombudsman for Children is different from both of them, through the direct link between the duties and the United Nations Convention on the Rights of the Child (CRC). Thus, it is not possible to give a description of the Ombudsman office as only one type of supervisory office. However, one common characteristic reflected by the definition is the contact with the group of individuals being represented. For example, in Sweden, access to the Parliamentary Ombudsmen is easy for the individual. Lodging a complaint with the Ombudsman is free of charge and has few formalities.⁷ Anyone can make a complaint; the person must not have reached a certain age, be a Swedish citizen or be located in Sweden. It is not necessary to be personally involved in the case of the complaint.⁸ The office also includes the power to initiate investigations on the public official's own initiative. Ombudsmen sometimes also take their own "cases" to identify problems with the public welfare system, such as investigations to determine whether people are getting poor service, or if people's rights are being breached when receiving youth or elderly care. Furthermore, the Ombudsmen may inform the Parliament (and the Ministry concerned) if they find existing laws and administrative regulations inadequate, and may propose measures to be taken to improve public service. There is also a possibility to report

6 The Ombudsman Committee of the International Bar Association, citation from Eilschou Holm, 1995, p. 13.

7 The Parliamentary Ombudsmen are regulated as follows: First, the Instrument of Government (Regeringsformen) states that Parliament appoints Ombudsmen and lays down rules concerning the authority of the Parliamentary Ombudsmen (chapter 13, section 6). Secondly, the Riksdag Act (Riksdagsordningen) regulates the authority of the Parliamentary Ombudsmen, their number, how they are appointed and for how long (chapter 8 section 11). Thirdly, the Act with Instructions for the Parliamentary Ombudsmen (Lag [1986:765] med instruktion för Riksdagens ombudsmän – "JO-instruktionen") contains descriptions of the task and how the work should be organised and reported. Fourthly, Administrative Directives for the Parliamentary Ombudsmen (Arbetsordning för Riksdagens ombudsmän) has rules concerning rights and responsibilities for various civil servants in the organisation and how the work should be divided by area of responsibility. These Directives are made by the Chief Parliamentary Ombudsman.

8 Eilschou Holm, 1995, p 13.

criminal behaviour to the prosecuting office. Opinions deemed to have general interests are published in Annual Reports.⁹

The last decades of the 20th century gave rise to several specialised anti-discrimination Ombudsman offices in Sweden, in addition to that of the Parliamentary Ombudsmen: the Equal Opportunities Ombudsman (*Jämställhetsombudsmannen*, JämO), monitoring issues relating to gender equality; the Disability Ombudsman (*Handikappombudsmannen*) who was concerned with the rights and interests of persons with disabilities; the Ombudsman against Discrimination on Grounds of Sexual Orientation (*Ombudsmannen mot diskriminering på grund av sexuell läggning*, HomO); and the Ombudsman against Ethnic Discrimination (*Ombudsmannen mot etnisk diskriminering*). In 2009 all these offices were merged into the Equality Ombudsman, named *Diskrimineringsombudsmannen*, DO.¹⁰ According to the Act concerning the Equality Ombudsman (2008:568), this office, since its start in January 2009, has a responsibility to supervise compliance with equality issues in accordance with the Discrimination Act (2008:567). According to Section 2 in the Act concerning the Equality Ombudsman, the DO shall also provide advice and other support to help anyone who has been subjected to discrimination to claim his or her rights. As a consequence, the DO receives and investigates complaints in areas relevant to the Discrimination Act. In short, the office can take cases to the Court, free of cost for the individual. In such cases, economic compensation is possible; this compensation for discrimination is regulated in Chapter 5 of the Discrimination Act. This restitution for discrimination aims to compensate for the violation represented by the infringement and also to act as a deterrent against discrimination in the future.¹¹

During the 20th century, the Ombudsman office was adopted in many countries in the world, and by some intergovernmental organisations such as the European Union.¹² For example, in Denmark the introduction of an Ombudsman dates back to the year after the end of Second World War, as a response to the need for improved protection of individuals against acts of the national administrative authorities.¹³ The Scandinavian model has often been directly applied to the existing national governance structure in the countries where it is used.¹⁴ In addition to general Ombudsman

9 See the Parliamentary Ombudsman, 2012-06-12b.

10 Yet another office is the Ombudsman for Children, which is concerned with matters affecting the rights and interests of children. This office will be described later in the article.

11 See further the Equality Ombudsman, 2013-05-05.

12 Some scholars have even called the institution of the Ombudsman “a gift from Scandinavia to the world”, see Eilschou Holm, 1995, p 13.

13 Eilschou Holm, 1995, p 14.

14 There is cooperation between the national Ombudsman offices through international associations, such as the European Ombudsman of the European Union, the European Network of Ombudsmen, the International Ombudsperson Association (IOA) and the Association of Mediterranean Ombudsmen (AMO).

offices, many countries have created special Ombudsman offices for certain groups of individuals or for particular issues. For example, in Finland there are ombudsmen for gender equality, rights of ethnic minorities, child welfare, data protection, consumer protection and patients' rights.

3 The Swedish Ombudsman for Children

The Ombudsman for Children has a tradition in the Scandinavian countries.¹⁵ In general, child welfare issues have been central policy issues for many years in Scandinavia.¹⁶ These countries were among the first countries to ratify the United Nations Convention on the Rights of the Child (CRC). By doing so, the nations declared that children have specific rights, and each country has a commitment to realise those rights. Today the office plays a role in promoting the rights in the Convention and reminding governments, municipalities and the people working with children about the importance of respecting and promoting these rights.

The Ombudsman for Children in Sweden dates back to the beginning of the 1990's.¹⁷ In 1990, the Government decided to appoint a Commission of Inquiry to examine the issue of a government-appointed Ombudsman for Children. In September 1991 the Commission submitted its report.¹⁸ The Commission recommended that Sweden appoint an Ombudsman for Children, and the government proposed that such an office should be established.¹⁹ The Swedish Parliament approved the appointment of an Ombudsman for Children (BO) and The Ombudsman for Children's Act (1993:335) came into effect in 1993.

Under the provisions of the Act, the work is to be general in nature, and include information and opinion-forming activities. According to Section 1, BO has the task of representing the rights and interests of children and young people in the light of Sweden's undertakings under the CRC. This is done by promoting the implementation and monitoring of compliance with the CRC, giving particular attention to whether laws and regulations and their application are consistent with the CRC (Sec-

15 Norway was the first country in the world to create an Ombudsman for Children.

16 Pitchal, 2010.

17 The first Ombudsman for Children in Sweden was Louise Sylwander. Her successor, Lena Nyberg, was appointed in 2001. The office has been led by Fredrik Malmberg since 2008. Various voluntary organisations also actively promoted the appointment of an Ombudsman for Children in Sweden. Several bills put before Parliament during the 1980's and the early 1990's called attention to the fact that children had no representative of their own who could invoke the law to safeguard their interests.

18 SOU 1991:70.

19 Prop. 1992/93:173. See also prop 2001/2002:96 En förstärkt barnombudsman.

tion 2). Each year, the Ombudsman submits a report to the government. This includes analyses and recommendations for improvements for children and young people.

BO has no regulatory powers.²⁰ Thus, the office may not interfere in individual cases.²¹ Instead, the main work is of a policy-making character, such as providing information and building opinion on issues relevant to children's rights and interests. According to Section 3, the BO shall:

1. Propose to the Government the amendments to laws or other measures needed to accommodate the rights and interests of children and young people;
2. Disseminate information, mould opinion and take initiatives for other suitable measures;
3. Represent the rights and interests of children and young people in the public debate;
4. Assemble knowledge and compile statistics on the living conditions of children and young people; and
5. Follow international developments regarding interpretation of the CRC and its application.

In order to gain information, national administrative authorities, regional municipalities and the local county councils shall report to the BO regarding the measures taken in their own operations to implement the rights of children and young people in accordance with the CRC. These authorities are also obligated to attend discussions with the Ombudsman at the latter's request (Section 6). The BO regularly holds dialogues with children, particularly those in dependent situations, to obtain knowledge of their conditions and their opinions on relevant issues. According to Section 6, the BO is free to determine its own organisation and decide on the focus of the work. The staff comprises around 25 employees.²² In addition, panels with scientific expertise and panels with children are connected to the BO.²³ The office receives state funding for accomplishing its tasks.²⁴ The funding may vary according to special assignments taken on the initiative of the BO or the government

20 The Norwegian Ombudsman for Children has some slightly different tasks, because children may complain to the Ombudsman and the office can assess individual cases.

21 However, it does have a duty of notification according to Section 7. The BO shall immediately submit a report to the Social Welfare Board if it becomes aware that a child is abused at home or is otherwise aware that the Board needs to intervene to protect a child. If there are special circumstances, the notification to the social services committee can be made also in other cases.

22 See the Ombudsman for Children, undated.

23 I am a member of the scientific experts' panel since 2008.

24 For 2013, the budget is 23 250 million SEK (Ekonomistyrningsverket 2013-01-02).

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The BO's work illuminates vulnerability issues that otherwise may not have reached the government or other authorities. For example, during 2012 the BO worked on issues such as the welfare of unaccompanied minors during the asylum process; the development of comprehensive national statistics on the situation of children²⁵; and the need to find ways to prevent increased housing eviction problems for families with children.²⁶ In addition to the regular supervision of child issues relating to the CRC, the BO gives special attention to one or several themes each year. In 2012 the focus was on domestic violence. The aim was to gain insight into how children perceive their situation and the support they receive from society.²⁷ In 2010 and 2011 the themes dealt with the situation for children in compulsory care. In 2013, the theme has been about children's mental illness. Some issues have a direct impact for practitioners and legislators. For example, in the area of the social care system, the Government decided to appoint a Commission of Inquiry to examine the law that regulates compulsory care for children in 2012, and it describes the BO as one advocate for this.²⁸

4 An ombudsman for elderly

4.1 The problem with the description of different generations as distinct groups

During the last two decades, the idea of developing a national Ombudsman for Elderly in Sweden has been put forth several times.²⁹ Similar offices exist in some countries. For example, in the United States, the Long-Term Care Ombudsman Program was developed by the federal government as early as the 1970's, to provide local representation by ombudsmen for senior citizens making individual complaints about the quality of later life in nursing homes.³⁰ Although this program is federally mandated, the funding and staffing of the offices are regulated by the states; thus, the roles and responsibilities vary across the country.³¹ The work of the ombudsmen is often limited to mediating or problem-solving in nursing facilities and long-term care, and the per-

25 Another part of Max18 is aimed directly at children and young people, to increase their awareness of how children live in different areas of and situations in Sweden. The child can make her or his own comparisons between gender, age, country or municipality et cetera. Max18 is based on six areas that are linked to the CRC; these areas are divided into 40 indicators.

26 www.barnombudsmannen.se.

27 In March 2013, the Annual Report "Från Insidan" was published, which deals with this issue.

28 Dir. 2012:79.

29 For Sweden, see Dahl, 1997, and Gauthier Reberg, 2002.

30 Herrington, 1997, p 323.

31 Herrington, 1997, p 323.

sons who work as ombudsmen are volunteers.³² In Sweden, local Ombudsmen for elderly with similar, limited duties exist in some municipalities, such as in Stockholm, Uppsala, Linköping and Nybro.³³ They deal with questions and complaints related to the obligation of the municipality to provide care and housing for the elderly.

The political and media discussions about *the need* for public remedies for representation of older people seem to be based on the idea that these citizens are particularly dependent and vulnerable to poor decision-making and unfair treatment, and therefore need more societal supervision than others.³⁴ Persons suffering from dementia, diminished capacity or mental illness, or other severely dependent individuals, are often put forth as examples. Another “vulnerable group” in the older population brought up in the discussion is that of maltreated persons. In Sweden as well as in other countries, alarming reports of severely maltreated older people in public or private welfare care have been high-lighted in media during recent years, calling attention to the need for increased supervision of accommodation offering care and nursing for the elderly. Lastly, because of growth in the ageing population worldwide, intensive discussion is building about the urgency of addressing the rights and roles of elderly persons. The idea seems to be that a rising number of elderly means increasing dependency on the social welfare system. For example, the EU 2012 Ageing Report³⁵ analyses the economic and budgetary impact of an ageing population over the long-term, and presents a forecast for increasing expenditure, covering pensions, unemployment, health care, long-term care, and education transfers for the Member States.

Of course it is important to pay more attention to demographic changes and the need for policy-making attention to these changes, as well as the negligence found in some of the care provided for this part of the population. However, the discussions give rise to the question of the subject of these discussions: who are the elderly? Unfortunately, the debate tends to reflect certain stereotyped portraits of who older people are and what they need. Fineman highlights similar difficulties in the political discussions of the older population in the United States.³⁶ The elderly often seem to be portrayed as *either* constantly dependent – in need of state protection because of illness, weakness, loneliness and sometimes lack of money – *or* not dependent at all, being in good health and with a financial and private situation which enables them to

32 Herrington, 1997, p 335. See further Kahana, 1994.

33 See <http://www.stockholm.se/FamiljOmsorg/Aldreomsorg/Aldreombudsmannen/>, <http://www.uppsala.se/Omsorgstod/Aldreomsorg--senior/Ratt-till-var-domsorg/Aldreombudsmannen/>, <http://www.linkoping.se/Stod-omsorg/Aldreomsorg/Aldreombudsman/>, <http://www.nybro.se/templates/page11524.aspx>.

34 Two problems seem recurrent in the U.S. elder law discussions, i.e. the poor quality care in the nursing facilities and the abuse at home for elderly. See for example Barber, 2008; Herrington, 1997 & Kaluzny, 2009.

35 European Commission, 2012.

36 Fineman, 2012, p 101.

handle their daily life by themselves. This portrayal does not take into account that like any other age group, the elderly comprise a complex and varied group of individuals, with major differences and variations of dependency and vulnerability during their life span. It seems unlikely that the majority of people who are “older” or “elderly” fit either of these “standard” views. It is likely that many of these persons have very varying degrees of dependency and in very different ways, just like the rest of the population.³⁷

Thus, one reason for arguing *against* an Ombudsman for Elderly is the problem with the description of different generations as distinct groups in society, with separate needs and interests due to vulnerability. This is a problem put forth in the vulnerability theory. Fineman makes the point that such a group approach ignores the universal vulnerability we all experience throughout life and creates unnecessary distances and differences between individuals and groups in society.³⁸ The designation of the elderly as a vulnerable population reinforces the inferior position of individuals in this group in relation to the ideal, autonomous, independent and self-sufficient liberal subject.³⁹ It also creates the risk of unnecessary competition among different groups in society, such as benefits to children versus benefits to the elderly. This risk increases because most societies today have problems in prioritising distribution of their scarce economic, social and other resources. Instead, a more general approach to dependency among the whole population and its effects on society avoids conflicts that arise on the grounds of belonging – or not belonging – to a prioritised group.

These problems of grouping people are reflected in the fact that there seems to be very little group identity between older persons. Compared to women, ethnic minorities and other groups which have created various civil rights movements around the world, elderly people seldom act in groups in the societal context. It has been put forth that one reason for this is that older adults do not have a cohesive group identity, because their age-based identity often is secondary to other identities based on family, religion, occupation, political affiliation or other factors.⁴⁰ In addition, according to the vulnerability approach, elderly persons are a complex and varied group, and just as for anybody else, with large differences and variations of dependency during their lives. Putting this together, it seems relevant to observe the complexity of the elderly as a concept. As a consequence for research on elderly people, and as Numhauser-Henning points out, the field Elder Law seems to lack an absolute definition of the subject of study. Age in the sense of “length of life to date” is a continuous phenomenon, and ‘old’ is most clearly defined in a contextualised setting. The “group of people” being studied is thus best determined by taking into consideration the area and

37 Fineman, 2008, p 1.

38 Fineman, 2012, p 115.

39 Fineman, 2012, p 116 with further reference to Fineman, 2008.

40 Kohn, 2012.

problems concerned in the specific study.⁴¹ The question is how this can be done with the vulnerability theory in mind, as this theory focuses on universal problems and concerns not necessarily issues connected to a person's age. My approach will be to use some universal concerns, such as participation, influence and dignity, in my examination of whether it is reasonable to argue for an expansion of the Ombudsman role to include representation for the elderly.

4.2 The problem of participation and influence for all

Many human rights are to be fulfilled, irrespective of the person's age. One basic principle in international documents on human rights is that the right to dignity and integrity is the same regardless of age. In the first chapter of the EU Charter on Fundamental Rights 2000, made a part of primary law after the Lisbon Treaty, it is stated that the dignity and integrity of all persons must be respected and protected by the States.⁴² In terms of the recognition and respect of the rights of the elderly to lead a later life of dignity and independence, this is further emphasised in Article 25. Another related fundamental principle is the right to self-determination. For example, the first article of the United Nations International Covenant on Economic, Social and Cultural Rights from 1966 covers the right to self-determination. This includes public care and service by the States. In Sweden, as in the rest of Europe, social services and health care are based on the person's consent. In addition, personal choices about and individual influences on the care and service to receive increasingly dominate the agenda on how to increase quality of life in relation to public service.⁴³

The emphasis on influence and self-determination creates demands on participation and activity on the part of the individual. However, due to age-related or situation-based changes, some elderly people may have difficulties in expressing their opinion about important matters concerning their own person when these persons are in contact with the authorities. At the same time, increasing age gives some people a number of difficult decisions to relate to, such as choice of housing, care and assistance. In addition, Sweden and the rest of Europe have become increasingly computerised; the older part of the population can suffer from significant exclusion in this regard.⁴⁴ The legal design seldom accounts for the large group of people who lack the ability to actively shape their lives or agree to receive support or service from various vendors.⁴⁵ Thus, there are some potential problems with participation rights versus the public responsibility to provide social care and service, and the interrelation of this balance with rights to dignity and integrity. Yet, so far, few political and legislative discus-

41 Numhauser-Henning, 2013.

42 Articles 1 and 3.

43 Mattsson, 2013a.

44 Mattsson, 2010; Mattsson, 2014.

45 Brodin, 2005.

sions have taken place regarding how to realise participation for elderly in matters of daily life and personal relations, personal integrity issues, capabilities and legal security issues.⁴⁶ The voices of older people are needed in public discussions and debates, to make credible both problems and solutions relating to the society's responsibility for living conditions and the quality of later life.

At some point, many elderly persons become dependent on extensive and continuous help from national welfare systems. Sweden and the other Scandinavian countries have extensive public care services for elderly people. Through home-help services, mobility service, daytime activities and other social services, some people who want to remain in their homes can live independently for a long period of time. For the elderly who are not able to stay in their homes anymore, municipalities are responsible for arranging special forms of accommodation including care and nursing.⁴⁷ As with all other services under the Social Services Act (2001:453), the care must be given only with the person's consent. At times the support of other reliable persons may be of great importance for control, dignity and well-being for the person.⁴⁸ The ways of participating in and influencing the daily life may vary for different persons and may also be very difficult to realise for some individuals. Taking into account the dependency and vulnerability of these elderly, who lack the ability and means to vindicate their rights, there are reasons to argue for having someone else to do so. This can very well involve arguing for the establishment of an independent Ombudsman office with duties of a policy-making character, such as building opinion and proposing amendments on laws on issues relevant to elderly people's rights and interests, and to represent the rights and interests of older people in the public debate.

Due to the steady trend of decentralisation and privatisation in elderly care that will continue through the 2010s, there is a need to define the policies required to ensure an appropriate quality of life for persons in need of such care. At worst this trend may undermine the traditional, Scandinavian, ideologically-based premise that society bears equal responsibility for resilience during dependency for all its citizens, and may gradually create a more individual approach to the needs of the population, based on individual contracts and means-tested help and assistance. As mentioned already, the prognosis of many experts is that future financing of the health and medical care system may cause severe difficulties. This alarming projected cost will most probably make the government and parliament continue their search for ways to become more cost-effective, by allowing the free market to provide an increasing part of health care and social services and by emphasising local and regional authorities' responsibility for

46 One exception is measures according to the Act (1993:387) concerning Support and Service for Persons with Certain Functional Impairments, LSS, which deal with services to people with disabilities.

47 Social Services Act Ch. 5 Sec. 4-6.

48 Jönsson & Harnett, 2012; Melin Emilsson, 2013.

the practical implementation and financing of these services. A decentralised and heavily privatised welfare system, with high costs and low budget, opens up for risks of (increased) inequality of distribution of services and lack of attention to all different individual degrees and forms of dependency among the elderly. An Ombudsman for Elderly may be a way of safeguarding the interests of older people and responding to different kinds of dependency among persons in a group needing societal activity, in a similar way as the Ombudsman for Children works for children and young people today. Such an office for elderly persons would be able to participate in – and at best influence – the development and the situation of older persons in need of public support and protection.

4.3 The need for a complementary state resilience

What functions, then, would an Ombudsman for Elderly have? Is there a need to expand the complaint system? Or should it work as a complementary provider of resilience, doing policy-making work on vulnerability issues that may concern many of the individuals? The same question was discussed during the legislative process of the Ombudsman for Children. One argument against the BO's involvement in individual cases was the risk that the tasks might conflict with the work of the Parliamentary Ombudsmen or other government agencies. As the BO was not involved in individual cases, no changes had to be made in regard to other public welfare duties. The government agency, local municipal authorities and voluntary agencies could continue their work as before. The outcome of the discussion was that the Ombudsman for Children was thus to be a complementary task to the existing order. Another argument was that taking individual cases would be very time-consuming and limit work on policy levels.⁴⁹ These arguments seem also to be valid for the discussion of an Ombudsman for Elderly. Another important argument is the need for a general complementary system for state resilience, unlike the individually-based complaint system. Without question, a complaint system is crucial for a legal system. The Swedish system is insufficient at times. Some administrative decisions, such as decisions about social assistance according to the Social Services Act, can be appealed to the Administrative Court, whereas other decisions cannot. The complaint mechanisms for health care are general, and based on the one hand on complaints to a health care authority, and on the other hand, complaints to the DO.⁵⁰ Lastly, the Parliamentary Ombudsmen

49 Prop. 1992/93:173, prop. 2001/2002:96.

50 Health and social care services provided by the county councils and municipalities comes under the Ministry of Health and Social Affairs, and are supervised by the Health and Social Care Inspectorate (IVO), before June 2013 by the National Board of Health and Welfare (*Socialstyrelsen*). The agency exercises supervision to ensure that the regulations and guidelines in the counties and municipalities are observed. An inquiry may also begin with a report from a patient or a care provider. In addition, according to a special statute (Act 1998:1656) the

office is a complaint measure for health care and social services. Although this complaint system is in need of discussion and improvements, the main focus in this article is how best to fulfil the aim to create a just and responsive state for the vulnerable subject. The individual compensation that the complaint mechanisms result in and the ad hoc outcomes for the legal system as a whole are arguments for finding tasks for an Ombudsman on a more general level to promote the rights and needs of elderly. In this discussion of the function of yet another Ombudsman, it also seems relevant to explore what a vulnerability approach to the challenges facing the elderly contains. Fineman emphasises the need for a comprehensive and encompassing approach to end-of-life issues.

“This would mean not positioning old age as a separate designation or category of human existence but recognising it as one end of the continuum that represents the life-course of the vulnerable subject. The elderly, like everyone else, are situated beings who live with the ever-present possibility of changing needs and circumstances in their individual and collective lives. We all are also accumulative and consuming beings and will have different qualities and quantities of resources with which to meet the challenges and opportunities in life. When society considers how to confront the problems associated with the end of life, we cannot focus only on the situation of individuals who are already among the elderly, but must also take into account those younger individuals who will age into the category eventually, as well as those who may experience dependency and need care even though they are young.”⁵¹

Fineman’s concern is to approach all social responsibility issues by including individual’s whole life span. The focus is not on an individual’s claims in a particular case. Instead, the focus is on a more general level, encompassing policy issues relevant for both today’s elderly and the elderly of the future. One illustrative example where Swedish social welfare legislation has recently changed to a more inclusive approach is the housing policy for elderly partners. For some years, heavy criticism was put forth because elderly partners often had to live apart from their mates during their last years; the individually need-based assessment for housing assistance allowed only persons needing such housing to live there, irrespective of whether the person had previously lived with a partner. The government finally submitted a proposal to the Legislative Council to amend the Social Services Act to allow elderly couples to live together in nursing homes.⁵² In November 2012 the law was amended. This legislative change is an example of how an integrated life-span approach can guide political and

public authorities responsible for the health and medical care in the counties must have one or several Patient Advisory Committees. There is also a right to compensation for damages in health and medical care according to the Patient Injury Act (SFS 1996:799). This act is based on a no-fault principle, and accordingly the right to compensation is not conditional to negligence on the part of medical personnel.

51 Fineman, 2012, p. 20.

52 Prop. 2011/12:147.

institutional practices, taking societal responsibility for the individual's dependency and vulnerability during life.

5 Conclusion

In this article, I have discussed whether there are reasons to develop a future Ombudsman for Elderly in Sweden. One difficulty lies already in defining the persons who will be the receivers of such an office. According to my vulnerability approach, being elderly is more a way of life than a distinct group of persons. The elderly, like everyone else, are persons who live with present and future changing needs and circumstances on a daily basis. This makes their needs as complex and varying as the individuals themselves. With this in mind, arguing for an Ombudsman for a particular age group seems, at first, somewhat problematic. To overcome this problem, in my examination of the issue I have approached the question by highlighting some universal concerns for every human being, such as participation, influence and dignity. These principles, I have argued, are central to all persons, in particular at a time when the emphasis on influence and self-determination creates demands on participation and activity on the part of each individual. Public means for upholding these principles therefore seem central for state resilience. Many older people are in need of help at some point, to be listened to and assisted by someone else. Thus, an argument in favour of creating the Ombudsman for Elderly office is the need for both individual and collective actions to uphold the national social welfare system for everyone who is and will be in need of it. A national Ombudsman with the duty of looking for and promoting solutions for different kinds of dependency situations for elderly may therefore be a solution for a more responsive state in today's society – at least in these times when general political aims do not seem far-reaching enough.

References

- Albertson Fineman, M. (2008) The Vulnerable Subject: Anchoring Equality in the Human Condition. *Yale Journal of Law & Feminism*, Vol. 20, No. 1, pp 1-24.
- Albertson Fineman, M. (2012) "Elderly" as vulnerable: Rethinking the nature of individual and societal responsibility. *Elder Law Journal*, Vol 20, No 1, pp 71-111.
- Barber, J. W. (2008) The Kids Aren't All Right: The Failure of Child Abuse Statutes as a Model for Elder Abuse Statutes. *The Elder Law Journal*. Vol, 16, No 1, pp 107-134.
- Brodin, H. (2005) *Does anybody care? Public and private responsibilities in Swedish eldercare 1940-2000*, Umeå, Print & Media, Umeå University.
- Dahl, A. (1997) Ge dementa personer en "ombudsman". *Äldre i centrum*, No 2, pp. 17-19.
- Dir. 2012:79: Översyn av lagen med särskilda bestämmelser om vård av unga, m.m.
- Eilschou Holm, N. (1995) The Ombudsman – A gift from Scandinavia to the World. In: H. Gammeltoft-Hansen & F. Axmark, *The Danish Ombudsman*, Copenhagen, DJØF Publishing.

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- Ekonomistyrningsverket (2013-01-02). Socialdepartementet: Regleringsbrev för budgetåret 2013 avseende Barnombudsmannen, regeringsbeslut 2012-12-20. Available from: <http://esv.se/sv/Verktyg--stod/Statsliggaren/Regleringsbrev/?RBID=14774> [Accessed 2013-04-24].
- European Commission (2012) The 2012 Ageing Report: Economic and budgetary projections for the EU 27 Member States (2010-2060). Available from: http://ec.europa.eu/economyfinance/publications/european_economy/2012/2012-ageing-report_en.htm [Accessed 2013-04-12].
- Gauthier Reberg, K. (2002) Äldrevård kan få egen ombudsman. *Riksdag & departement*, No 7, pp. 6-7.
- Herrington, E. B. (1997) Strengthening the Older Americans Act's Long-Term Care Protection Provisions: A Call for Further Improvement of the State Ombudsman Programs, *Elder Law Journal*, Vol. 5, No. 2, pp 321-358.
- Jönsson, H. & Harnett, T. (2012) Anhörigas roll som ställföreträdare i äldreomsorgen. In: Broström, L. & Johansson, M. (Eds.) *Ställföreträdarskap i vård och omsorg*, Malmö, Gleerups förlag.
- Kahana, J. S. (1994) Reevaluating the Nursing Home Ombudsman's Role with a View Toward Expanding the Concept of Dispute Resolution. *Journal of Dispute Resolution*, No 2, pp. 217-233.
- Kaluzny, A. (2009) The Patient Care Ombudsman: Who should it be? *Elder Law Journal*, Vol. 17, No. 2, pp 343-373.
- Kohn, N. A. (2012) A Civil Rights Approach to Elder Law. In: Doron, I. & Soden, A. M. (Eds.) *Beyond Elder Law*, Springer Berlin Heidelberg, pp 19-34.
- Mattsson, T. (2010) Socialtjänst och e-förvaltning. E-tjänster för äldre och personer med funktionshinder. *Förvaltningsrättslig tidskrift*, No 3, pp 255-270.
- Mattsson, T. (2013a) A Right to Active Aging for all? On the Status of the Elderly in Social Services and Health Care. In: A. Numhauser-Henning (Ed.) Introduction to the Norma Elder Law Research Environment. Lund University, pp 91-98. Different Approaches to Elder Law
- Mattsson, T. (2014) E-government for the distribution of social welfare services in Sweden: A vulnerability approach (forthcoming).
- Melin Emilsson U. (2013). The Role of Social Work in Cross-Professional Teamwork: Examples from Older People's Team in England. *British Journal of Social Work*, Vol. 43, No1, pp. 116-134.
- Nationalencyklopedin (undated) Available from: http://www.ne.se/sve/ombud?i_h_word=ombud [Accessed 2013-04-22].
- Numhauser-Henning, A. (2013) An Introduction to Elder Law and the Norma Elder Law Research Environment. In: A. Numhauser-Henning (Ed.) Introduction to the Norma Elder Law Research Environment. Lund University, pp 21-38.
- Pitchal, E. (2010) The Swedish Approach to Children and the Law. *Guardian*, Vol. 443 No 43, pp 24-25.
- Prop. 1992/93:173: Om en Barnombudsman, m.m.
- Prop. 2001/2002:96 En förstärkt barnombudsman.
- Prop. 2011/12:147: Rätten att få åldras tillsammans – en fråga om skälighet, värdighet och välbefinnande i äldreomsorgen.
- SOU 1991:70: Ombudsman för barn och ungdom.
- The Equality Ombudsman (2010-05-05). *About the Equality Ombudsman*. Available from: <http://www.do.se/en/About-the-Equality-Ombudsman/> [Accessed 2012-04-21].
- The Ombudsman Committee of the International Bar Association (undated). *Occasional Papers Archives*. Available from: <http://www.theioi.org/publications/occasional-papers-archives> [Accessed 2013-03-05].
- The Ombudsman for Children (undated). *Medarbetare*. Available from: <http://www.barnombudsmannen.se/om-oss/medarbetare/> [Accessed 2013-04-23].

- The Parliamentary Ombudsmen (2012-06-12a) *The Office was established in 1809*. Available from: <http://www.jo.se/en/About-JO/History/> [Accessed 2013-04-28].
- The Parliamentary Ombudsmen (2012-06-12b) *Decisions*. Available from: <http://www.jo.se/en/Decisions/> [Accessed 2013-04-23].
- The Parliamentary Ombudsmen (undated) *Index page*. Available from: <http://www.jo.se/en/> [Accessed 2013-04-22].
- www.barnombudsmannen.se [accessed 2013-04-02].
- www.un.org/en/sc/ombudsperson/ [accessed 2013-08-25].
- <http://www.stockholm.se/FamiljOmsorg/Aldreomsorg/Aldreombudsmannen/> [accessed 2013-09-05]
- <http://www.uppsala.se/Omsorgstod/Aldreomsorg--senior/Ratt-till-vard--omsorg/Aldreombudsmannen/> [accessed 2013-09-05]
- <http://www.linkoping.se/Stodomsorg/Aldreomsorg/Aldreombudsman/> [accessed 2013-09-05].
- http://www.nybro.se/templates/page_11524.aspx [accessed 2013-09-05].

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