THE OMBUDSMAN AND THE RULE OF LAW

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Today I am keen to explore the role of the ombudsman in upholding the rule of law, and principles of fairness and ethics, in the context of some significant contemporary changes to and the evolving role of ombudsmen. These changes are happening across a number of jurisdictions in Australia—but I thought I would specifically draw on the evolution of the New South Wales Ombudsman over the last thirty years.

I don't believe these changes have so far been fully understood or appreciated—common notions of an ombudsman today seem to still be largely entrenched in our foundational concepts. But an examination of the functions that ombudsmen are carrying out today must, I think, bring these concepts into question. I believe they also raise a number of challenges to our capacity to play an effective role in upholding the rule of law in the future and some interesting questions as to the future direction of the ombudsman.

Early Perceptions and Functions of Ombudsmen in Australia

As most of you are probably aware, the history of ombudsmen in Australia go back to the 1970s and the rise at that time of the "new administrative law". They were born out of a social and political context—a time when public administration was growing and the powers of public authorities to affect private rights had increased. With this came a political will to make public officials more accountable, to make government more open, and to provide accessible remedies for defective administration—which the courts had so far failed to effectively do. The public was demanding simple, cheap and quick procedures for those affected by official action.

Within this context, Australian jurisdictions propounded their own versions of the original Swedish concept of an ombudsman. For example, in 1973 the Bland Committee, established by the Commonwealth Parliament to report on administrative discretion, reported its vision of an ombudsman to be a body "oriented towards the resolution of individual complaints and generally better at swatting flies than hunting lions".[1] The Commonwealth Ombudsman was subsequently given powers to investigate and resolve individual grievances about public authorities and to make recommendations to departments and agencies.

In the same year as the Bland Committee's report, the New South Wales Law Reform Commission published a report on appeals in administration. The Commission had been requested to report on rights of appeal from administrative tribunals and officers and whether an ombudsman should be appointed. It considered an ombudsman to be a reference to "an impartial person who deals with specific complaints about official actions of public authorities and investigates, assesses and reports upon, but does not reverse or modify those actions."[2] The Commission recommended the appointment of an ombudsman in New South Wales which would be more concerned with giving "redress to a person whose rights have been unjustifiably encroached upon by an official

* New South Wales Ombudsman. Paper presented at the Annual Public Law Weekend, November 5-6, 2004.

action of a public authority"[3] and "to intervene in disputes between government and citizen."[4]

The first New South Wales Ombudsman was subsequently appointed in 1975 to carry out functions that were largely in line with the concept put forward by the Law Reform Commission. In its early days the key functions of the office were narrowly focused on resolving grievances about public authorities and administration:

- It was given the capacity to investigate administrative conduct of *public authorities*. Initially this jurisdiction was over *state* authorities only—the capacity to examine the conduct of local government employees was not obtained until 1986;

- Police officers acting as constables were also initially excluded from jurisdiction—only administrative conduct of police officers could be investigated; and

- The capacity to undertake complaint and own motion investigations and to publicly report were the key means of carrying out this role.

At the end of the first year, the first Ombudsman, Mr. Smithers, reported that he had fourteen staff members. In the first year the office received under 2,000 complaints.

In short, I think it would be fair to say that, while there have always been differences across jurisdictions in Australia, our early, foundational, ideas of the role of a public ombudsman were primarily of keeping *public agencies accountable through the handling of individual complaints about administrative actions.*

Commentary on the Ombudsman Today

In the thirty year history of ombudsmen in Australia there has been much discussion about the contemporary issues facing ombudsmen and their future direction—both by ombudsmen themselves and legal scholars. These issues have ranged from concerns about threats to the capacity of ombudsmen due to under funding [5] through to the ombudsman's role in systemic improvements through its complaint and own motion investigative functions.

Perhaps most of all, in the last ten to fifteen years there has been discussion of the impact on ombudsmen of changes to the way in which government is providing its services—and in particular the trend toward the privatization and corporatization of government. Some commentators have indicated a certain apprehension about the loss of jurisdiction as a result of government privatization and the outsourcing of the delivery of services—resulting in calls for the ombudsman to be given jurisdiction over core government services provided by third parties.[6] Others have seen this trend and a simultaneous rise in other, industry-based, ombudsmen as a threat to our continued relevance and existence.[7]

But underpinning these discussions is a continued concept that the role of public ombudsmen is primarily to keep *public authorities accountable by dealing with or investigating complaints about*

administrative action—and at most to deal with complaints about third parties who provide core services of the government.

I find it surprising that, despite the significant changes in what public ombudsmen are doing today, common perceptions and thinking about them have not substantially shifted. We need to start challenging this and "modernizing" our concepts of public ombudsmen. To demonstrate why, I'd like to provide you with a snapshot of the work that my office—after thirty years of operation—is doing.

Evolution of the New South Wales Ombudsman

Since we began in 1975 our role has been transformed in a number of ways.

One illustration of this, as with a number of other ombudsmen in Australia,[8] is our expanded jurisdiction over police. As I mentioned earlier—our jurisdiction over police was initially limited to administrative conduct of police officers. Over several years our powers in relation to police have gradually increased. For example:

- In 1983 we were first given the power to investigate the conduct of police officers. It's hard to imagine now, but this allowed *seconded police officers* only to *reinvestigate* a complaint once it had already been investigated by police; then

- In 1993 we finally obtained full investigation powers which were not reliant on police investigating the complaint first. This was in addition to our role in reviewing investigations of complaints by police as well as a new power to monitor these investigations, for example, by observing interviews.

At this time, our expanding role in the policing area also resulted in an internal move toward specialization. In 1993 the office created two teams—one to focus specifically on our police jurisdiction, and the other to deal with our role in relation to public authorities generally.

Since 1993, our functions in relation to police have continued to evolve. Today our jurisdiction in this area involves a number of new and some unique functions. For example:

- We have functions in relation to reviewing legislation that gives police new and, usually controversial, police powers such as recent laws that allow police to use drug dogs in public places. These functions are carried out using a number of research strategies, for example, by observing police on the ground using the legislation and conducting surveys and focus groups about their effect;

- We have a specific function that requires us to "keep under scrutiny" the systems established within police for dealing with complaints;

- We have a number of inspection and auditing functions, such as:

- Inspecting the records of police to determine whether they are complying with requirements in relation to telephone intercepts; and

- Inspecting records relating to and monitoring "controlled operations" in New South Wales. "Controlled operations" are police operations to investigate crime that might otherwise involve police participating in unlawful activities, for example, purchasing drugs from suspected drug suppliers. Our functions include examining the substantive decisions that permit controlled operations; and

- We have also initiated significant project work in the policing area to improve systems. For example, we have audited a number of commands with significant Aboriginal populations to see how well they are implementing the police Aboriginal Strategic Direction.

Aside from policing, we have had two other significant changes to our jurisdiction. The first of these was in 1998 when we were given jurisdiction in relation to allegations of conduct by employees of a range of government and non-government agencies that could be abusive to children. This jurisdiction covers employees of, for example, schools, child care centers, and residential care and juvenile justice centers. The relevant agencies are required to notify us of allegations of child abuse against their employees—including allegations of sexual offences and misconduct, assault, ill-treatment, neglect, and psychological harm. We can either closely monitor the agencies' investigations or directly investigate the allegations. This role is a significant change in two respects —it involves overseeing government and *non-government* bodies and it is concerned with the handling of child abuse allegations—not strictly "administrative conduct".

The second significant change in jurisdiction was in 2002. At this time my office obtained functions in relation to a range of community services—both government providers such as DoCS and DADHC as well as a range of non-government providers. Within this jurisdiction we carry out a range of functions including:

- Reviewing the deaths of certain children and people with disabilities;

- Reviewing the situation of certain people in care;

- Dealing with complaints about the provision of community services;

- Reviewing the complaint handling systems of service providers;

- The oversight and coordination of official community visitors to accommodation services and residential centers; and

- Broad functions in relation to the monitoring and reviewing of the delivery of community services.

In addition to these new jurisdictions— the way we do business in our traditional jurisdiction of public administration has evolved. Rather than focusing solely on resolving and investigating complaints and individual grievances, we have developed more sophisticated and proactive means of ensuring that public authorities administer services effectively and fairly. For example, we provide government agencies with training in investigations and complaint management and conduct "mystery shopper" programs, where we conduct customer service audits of state and local government agencies by posing as members of the public.

Recently we have also sought amendments to our *Ombudsman Act* to specifically require us to keep under scrutiny the systems that public authorities have in place for dealing with complaints. This would bring the functions we have in relation to public authorities "up to date" with the functions we have in our other jurisdictions.

In summary, our work has evolved and developed over the last thirty years in a number of ways:

- The nature of *what* we look at has changed—we've moved from a narrow examination of "administrative" action to a range of conduct, including:
    - Any action of police, whether on or off duty;
    - The handling of allegations of child abuse; and
    - The operation of particular legislation.
- *Who* we oversee has changed—we are no longer confined to "public authorities", or even agencies that deliver services that were once provided by government. Our jurisdiction covers a range of government and non-government agencies as well as private individuals.
- *How* we do our work has also changed. We use a range of strategies to carry out our functions and no longer solely focus on the investigation of complaints. For example, we:
    - Audit systems and inspect records; Review investigations by agencies;
    - Undertake research and project work;
    - Provide training; and
    - Prepare a range of publications and brochures.

In the meantime my office's staff has grown from fourteen, in its first year, to nearly 200 people. We now have four specialist teams for our police, community services, general, and child protection jurisdictions. In the last financial year we received over 9,000 formal complaints and notifications and over 26,000 informal complaints.

It is interesting to note that the changes that the New South Wales and some other ombudsmen in Australia have undergone are not necessarily occurring worldwide. For example, the Swedish Ombudsman's work is still quite narrowly focused on dealing with complaints

about public officials —although for Sweden this has always included courts of law.

Discussion About Changes in Context

On one hand the vastly different areas in which the New South Wales Ombudsman now operates may be considered to have taken us outside the bounds of what a public ombudsman was initially established to do.

On the other hand, I don't think these changes are at all surprising—perhaps they are even inevitable. As we gain experience and develop corporate skills and knowledge we are bound to rethink the way we do business.

While complaint handling will always be an important part of what we do, after thirty years we are aware if its limitations. It is essentially a reactive, and to some degree *ad hoc* approach (given that it relies on people bringing grievances to our attention), to delivering outcomes for the public. We now know that in order to gain maximum benefits in the delivery of services we need to employ more proactive methods that achieve systems improvements, such as auditing and ensuring that agencies themselves implement effective complaint handling mechanisms. This is perhaps all the more important when many government welfare services, such as public housing, are now being provided to only the most needy in society—who are less likely to complain.

The sorts of changes experienced by the New South Wales Ombudsman are also to be expected because we are positioned within a social and political context where priorities are shifting and government policy and service delivery is continuously being remodeled. In this context, it is *critical* that we adapt our work if we are to remain relevant and effective. In turn, we should be informing and contributing to our social and political worlds with the results of our work. We would be critical of the agencies we oversee if they failed to be responsive to social changes going on around them.

I think the New South Wales experience provides a good example of how ombudsmen are capable of successfully rising to these challenges and maintaining our relevance and importance in society.

The increase in police powers is a good example of this. In recent years police in New South Wales have been provided with a range of new and more intrusive powers—for example, the ability to intercept telecommunications, to undertake otherwise criminal activities in "controlled operations", to use dogs to search people publicly for drugs, and to take DNA samples from suspects and some convicted offenders. We have played an important role in providing a counterbalance to these powers—by ensuring greater accountability, not just through complaints, but through a range of other mechanisms such as the legislative review functions and the inspection of relevant records I mentioned earlier.

Our role in overseeing certain allegations of child abuse also reflects a greater social consciousness in recent times about this issue. Ten to fifteen years ago child abuse was not on the radar of public debate in the way that it is today. An increased awareness of the problem has

led to a number of changes in public policy. In 1997, the New South Wales government held a Royal Commission into police corruption, which raised a number of concerns about police responses to child abuse allegations. This led to broader concerns and a further inquiry into how the government as a whole responds to prevent and handle cases of child abuse. As a result of this inquiry, the government implemented a range of strategies, including a requirement that certain public and non-government agencies report to the ombudsman allegations against their employees of child abuse.

Our jurisdiction in this area and in relation to community services also reflects the dynamic nature of our evolution. The issue of government privatization and its implications for Ombudsman have been on the agenda for some time. But the experience of New South Wales demonstrates our capacity, and I think our need, to respond more generally to issues of significant public interest that cut across a range of agencies—not just government (or agencies that now provide services that were once provided by government), but agencies that are licensed or funded by and in some way regulated by government.

The Consistencies?

With all this change, and the likelihood of more in the future, the question arises as to what, if anything, is the consistent theme in our work?

In 2001 I spoke at the Australian Institute of Administrative Law conference in Canberra about what the essential features of bodies that call themselves an ombudsman are. At that time I suggested that a fundamental role of the ombudsman is to ensure that the powers of whatever agencies specified to be within jurisdiction are exercised in a way that produces responsible, fair, and reasonable outcomes.

I also discussed some of the essential features of the ombudsman in carrying out this role. These include characteristics such as:

- Independence,
- Impartiality,
- Fairness,
- Accessibility, and
- Rationality.

These are characteristics which the rule of law is premised upon.

While my office has been through a number of changes in our thirty years of operation—I can safely say that these principles have remained a constant. They continue to provide our guiding principles in carrying out our range of functions. It is these characteristics that the public has come to expect from us and, I think, have been the key to our success and continued relevance.

Changing Ombudsman and the Rule of Law

So far I have spoken about the changes to the New South Wales Ombudsman as though they have been a natural evolution without hiccups or difficulties.

While I am confident that we have thus far successfully managed these changes and have been able to effect improved outcomes for the community by examining the service delivery and conduct of a broad range of agencies, there have been and will continue to be challenges. I think that these challenges raise a number of issues in relation to our continued capacity to effectively uphold the rule of law.

Non-Government Agencies and the Rule of Law

For one, our growing jurisdiction over non-government bodies raises a number of issues in relation to how we apply the principles of the rule of law.

Traditionally these principles have been applied to government agencies only. We are now in a position of holding a range of non-government bodies to these standards—for example private schools and private prisons. These non-government agencies are unfamiliar with the work we do, the principles we advocate and the standards we and the community expect of them. This brings with it a number of challenges in educating and developing working relationships with these bodies to successfully achieve outcomes.

Maintaining Consistency

Another difficulty flowing from our expansion into new jurisdictions and a consequent growth in our physical size is maintaining coherence and consistency in our approach to our work.

As I mentioned earlier, my office's staff has increased from fourteen in our first year of operation to nearly 200. Our success has largely been due to our capacity to consistently work within the essential characteristics of an ombudsman—such as our independence, impartiality, and accessibility. However, I think it is always more difficult to maintain consistency and quality in a large organization and to some extent we run the risk of falling prey to our own success if we don't ensure that we manage our business effectively.

Practically speaking, I think there is an optimal size we can reach before we start running this risk. These practical considerations are going to mean that ombudsman offices in different states and federal jurisdictions are going to develop differently. For example, in New South Wales we have an Energy and Water Ombudsman (EWON) which is separate from our public ombudsman, to independently deal with complaints about electricity, gas, and water services. In other states, ombudsmen carry out dual roles in relation to industry and public administration. For example, in Tasmania the state ombudsman holds the position of the Tasmanian Electricity Ombudsman. In Western Australia the state ombudsman also holds the position of Gas Industry Ombudsman. I don't believe there is any inherent conflict with ombudsmen carrying out these dual functions. However, in New South Wales, given that the EWON currently deals with over

6,000 complaints a year, I doubt that it would be a workable option.

Aside from the practical issues of size—there are limits on the functions ombudsmen *should* have within jurisdiction. Ultimately, our responsibilities need to fit with the essential characteristics of ombudsmen I discussed earlier. I don't think that we should just uncritically accept government proposals to expand our jurisdiction. It's important that we challenge governments of the day if what they are proposing is not appropriate or they require us to carry out functions that don't fit with our philosophy. I believe there is a positive responsibility on incumbent ombudsmen to maintain the integrity of the office for its future occupants and the public interest they serve.

Greater Accountability

Another by-product of our expansion into different areas is an increasing pressure for greater accountability of our offices and scrutiny of our work.[9]

The accountability mechanisms in place for ombudsmen in Australia vary in different jurisdictions. For example, in New South Wales, my office is accountable to the Independent Commission Against Corruption and the Audit Office. A Joint Parliamentary Committee has a general responsibility to monitor and review the exercise of our functions and a right to veto a proposed appointment to the office. We also report publicly and in detail on our work each year in our annual reports. But we are immune from a number of the requirements that are placed on public agencies generally. For example, we are exempt from freedom of information requirements in respect of our complaint handling functions and significant limitations have been placed on the capacity to obtain judicial review of our decisions. We are not criminally or civilly liable unless bad faith can be proved and leave of the Supreme Court must be obtained before any proceedings can be commenced against us.

Other jurisdictions do not have the same level of parliamentary oversight as we do. New South Wales and Queensland are the only two jurisdictions to confer on a parliamentary committee mandatory functions of monitoring and reviewing the ombudsman's exercise of functions. Most ombudsmen are immune from liability for their actions unless they are done in bad faith—a number of jurisdictions also have privative clauses that oust the jurisdiction of courts to review ombudsmen decisions. An exception to this is Queensland, which in 2001 enacted a new *Ombudsman Act*. This Act protects officers from liability for acts done "honestly and without negligence"—leaving them open to criminal and civil proceedings, including judicial review for administrative error.

In principle, we shouldn't be concerned about the prospect of being held more accountable. But greater accountability—for example by applying freedom of information requirements or exposing ombudsmen to judicial review—does run the risk of reducing our effectiveness in achieving outcomes for the public. From my experience, one of our strengths and our most effective strategies in achieving outcomes for the community is dealing with problems informally and creatively. For example, in my office, we deal with most complaints in the general area through informal "preliminary" enquiries—rather than using our formal, coercive powers of investigation. We also actively seek to resolve conflicts between members

of the public and agencies or within agencies through alternative dispute mechanisms. It is also this informality that enables us to respond and achieve outcomes quickly and efficiently.

I think we therefore need to be careful about imposing greater accountability mechanisms on ombudsmen. While it is crucial that we demonstrate to the public our achievements and our worth, I don't think it would be in the public interest to create more formal and bureaucratic ombudsmen.

Concluding Remarks

I started this discussion by reference to the ombudsman's role in upholding the rule of law— both in a legal technical sense and more broadly in ensuring that public agencies provide services ethically and fairly.

What I have attempted to highlight today is that ombudsmen have and are undergoing a number of changes to the way in which they do business—the additional jurisdictions and functions that the New South Wales Ombudsman has gained over the last thirty years is just one example of this.

These changes are a reflection of and a necessary part of our success in ensuring our work remains relevant to the communities for whom we work. They also challenge our traditional notions of what a public ombudsman is or does—we are no longer confined to the oversight of public administrative acts through complaint handling.

While I think we have to embrace these changes, they do raise a number of challenges to our continued capacity to effectively uphold the rule of law:

- Our jurisdiction is no longer limited to government agencies—we are now required to keep to account non-government agencies who are unfamiliar with administrative law concepts;

- Our expansion into new areas and our growth in size and staff brings with it greater difficulties in maintaining a consistent and cohesive approach to our work; and

- We are and I think will continue to be under greater pressure to be subject to greater accountability mechanisms. This runs the risk of inhibiting one of our great strengths—to deal with problems informally and creatively.

These changes and challenges also raise interesting questions as to the direction in which ombudsmen in Australia are heading and what we will look like, say, in ten to fifteen years time.

As the New South Wales Ombudsman has expanded into new jurisdictions, we have tended to move away from directly conducting investigations towards a greater emphasis on scrutinizing the systems of agencies we oversee.

In the future—while we will continue to investigate matters of significant public interest or that raise systems issues—I think our role will continue to be more focused on auditing and inspecting, and ensuring that agencies have in place strong internal complaint handling systems. As this trend in the way we go about the business of accountability continues, so, I think, will the strength of ombudsmen and the important contribution we make to the community and the rule of law.

Endnotes

1. Austl., Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman* (Canberra: Australian Government Publishing Service, 1991) at 14.

2. Austl., New South Wales Law Reform Commission, *Report of the Law Reform Commission on Appeals in Administration* (New South Wales: VCN Blight Government Printer, 1973) at 8 and 33.

3. *Supra* note 2 at 72.

4. *Ibid*.

5. For example, Anita Stuhmcke, "Privatization and Corporatization: What Now for the Commonwealth Ombudsman?" (2004) 11 *Australian Journal of Administrative Law* 101.

6. Philippa Smith, "Red Tape and the Ombudsman" (May 1998) 88 *Canberra Bulletin of Public Administration* 19.

7. For example, comments by Sir John Robertson, the Chief Ombudsman of New Zealand in 1993, cited in Anita Stuhmcke, "The Commonwealth Ombudsman: Twenty Five Years On and No Longer Alone" No. 36 *Australian Institute of Administrative Law Forum* 54.

8. For example, the Commonwealth Ombudsman has also been provided with the task of monitoring and reviewing compliance with "controlled operations" legislation.

9. For example, Katrine Del Villar, "Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsmen" No. 36 *Australian Institute of Administrative Law Forum* 25, rep. in (2002) 6 *International Ombudsman Yearbook* 3.