



Presentation to the Conference marking the 40th Anniversary of the Victorian Ombudsman Office, Melbourne, November 2013

Introduction

Forgive me starting this presentation on your birthday by noting that New Zealand was the 4th Country in the world – and the 1st English speaking country to adopt the Ombudsman concept. Following that, there was a period which commentators have dubbed “ombudsmania” where many other countries and states quickly followed suit.

We can, on this particular occasion, be proud of the foresight of our legislators in Australasia, and parts of the Pacific, in being early adopters of the concept.

The role of the Ombudsman has stood the test of time as a mechanism for resolving citizens complaints – providing a fair and impartial assessment of grievances and their underlying causes and effecting changes in process and in practice which strengthen administrative justice, procedural fairness and trust in government, in industry organizations and in other facets of our lives where fair and equitable treatment is critical to harmony in the political, social and economic environment.

Ann Abraham – former Parliamentary and Health Ombudsman in the UK – described the role very aptly and in what she says lies the reason I think for the rapid spread of the Ombudsman idea around the world.

“The ombudsman shares an important judicial characteristic with the courts and tribunals. What distinguishes the ombudsman from the courts and tribunals is not the lack of an adjudicatory function, but rather the ability to adjudicate in a different way. As Bean J. noted in a recent judgment the ombudsman has “very

wide discretion”; “a public adversarial hearing is not the only fair way of finding facts”; and it is not the way Parliament requires of the Parliamentary Ombudsman.¹

In other words, although ombudsman schemes may have plenty in common with the courts and tribunals, they are far from perfect clones of them. Of more interest, in fact, are the differences. Where the law, has traditionally been characterised by formality, the observance of rigorous rules of evidence, adversarial process and the binding authority of precedent, ombudsman practice by contrast has always prized its relative informality, its common-sense approach to evidence, its inquisitorial process and its capacity to do justice in the individual case, unfettered by the burden of binding precedent. As one commentator put it, “If the law is cold and rigid in its adherence to universal principle, an ombudsman is warm and supple in his or her response to the particular”.²

It is of course precisely this sense of “otherness” that invests ombudsmen schemes with their attraction for potential litigants. Like other alternatives to the courts and tribunals, whether mediation, conciliation or arbitration, ombudsmen rightly take pride in the relative speed, simplicity and low cost of the “individual” and essential inquisitorial form of justice that they administer. They have relative freedom in deciding for themselves the best way to get to the real heart of a particular dispute, picking out the key issues and if necessary redressing any imbalance of power between the parties. For those whom the law’s cost, delay and inflexibility are active deterrents, the softer, gentler ombudsman way is naturally enticing. It is, perhaps, a bit like (but only a bit!) the difference between complementary and conventional medicine, between acupuncture and the surgical knife.

The Challenges that Lie Ahead

It is clear that the international ombudsman community is at something of a cross road.

Worldwide, there are major changes confronting Ombudsmen in the social, political, and economic environments within which we work. There are increasing challenges to our mandate or potential limitations on our powers or the breadth of our jurisdiction. There is the challenge of technology, specifically as we grapple with the need to balance the State's need to generate and hold records, increasingly in digital form about individual citizens, and the right of those individuals to challenge information that is held and used in decisions that relate to them, or impact on them. There is also challenge of maintaining confidentiality in the face of increasing demands for openness and transparency. And in most countries there is a growing demand for Ombudsman services and in many places the Ombudsman is increasingly required to take on additional jurisdictions especially in the field of human rights.

¹ R. (*on the application of Bradley*) v Secretary of State for Pensions [2007] EWHC 242 (Comm); [2007] Pens. L.R. 87.

² N, O’Brien, “Ombudsmen and the courts: time for dialogue”. *The Ombudsman*, December 2002.

The current global financial crisis demands austerity in public spending and as the pressures come on the State Sector to cut budgets and trim services, the Ombudsman is faced with a rising demand for redress of service delivery failures and little or no additional resources to meet this need.

Late last year the 10th World conference of the International Ombudsman Institute was held in Wellington. Founded in 1978, the IOI is the only independent global organisation for the co-operation of more than 150 Ombudsman institutions, in 75 countries, and its purpose is to contribute to:

- respect for human rights and fundamental freedoms,
- adherence to the rule of law;
- effective democracy,
- administrative justice and procedural fairness in public organisations,
- improving public services,
- open and accountable government, and
- access to justice for all.

Prior to the Conference in Wellington, participants identified a number of key challenges they were facing or believed were ahead of them.

Members identified the following specific drivers:

- Expectations are high amongst people in every country with an Ombudsman as to what amounts to fair treatment and a good decision by an agency and what is considered to be the reasonable delivery of public services.
- Technology and new social media mean that voices, opinions (and any dissatisfaction) are heard by many quickly; and
- Social movements, particularly in Europe and the Middle East are affecting change from within and not waiting for official processes to take their course. The most popular hash-tag for tweets in 2011, was "*hash-tag Egypt*". Our colleagues in Greece have seen the same.

We are still in the midst of a global financial crisis. Governments are being forced to implement austerity measures that place limits on service delivery options across the board. And, worryingly, this has meant the closure of Ombudsman offices in many places – in Italy, where some regional offices have been disestablished and in Spain – the latest 2 closures were just two weeks ago - and elsewhere in Europe.

Ombudsmen around the world also report that:

- Austerity measures are creating higher numbers of vulnerable people in our society. More people are being excluded from accessing services as they no longer qualify.
-

- Different types of vulnerable people with different needs are appearing at our doors. I am sure you will have seen this yourself. People with disabilities for example, can often have a difficult time simply accessing services they need.
- Ethnic minority groups, indigenous peoples and migrant workers have difficulties assimilating. One of our colleagues in Europe is dealing with issues arising from two national minorities and one ethnic group previously at war with each other, now trying to live and work together and be seen to be treated fairly and equitably by agencies.
- Protecting the rights of the elderly is a growing theme for IOI colleagues.

My colleagues and I are aware that the elderly are increasingly vulnerable to abuse and various forms of negative stereotyping and discrimination. They often have limited access to health care and face specific age-related restrictions in many fields, such as job discrimination in hiring, promotion and dismissal.

Furthermore, as many governments implement austerity measures which place limits and restrictions on access to social and economic policies for their older populations, there is an increased urgency for the Ombudsman to be alert to the issues, rights and roles of elderly persons in our world and the role Ombudsmen can play to ensure fair and reasonable decisions are made.

- Governments around the world are also shifting the delivery of public services to private providers in many cases.

Unfortunately, corrupt practices and dubious decisions become a possibility in this context, specifically where making a profit from the delivery of public services is the dominant motive. Indeed, let's be frank, corruption and misconduct within government is a universal issue – no matter the size of the state.

In some, it is more sophisticated and can be cleverly hidden. In others, it is almost unapologetically open and an accepted part of a society or culture.

The Ombudsman's oversight is seen as one means of countering officials' ability to fall to corrupt practices. But risk to life and limb for some of our colleagues can be the consequence. As President of the IOI I have had to deal with a number of cases in recent months where standover tactics have been used to intimidate the Ombudsman in some countries. This prompted the Wellington Declaration last year which, inter alia, noted that the IOI:

Stresses that it is an expression of democratic maturity and the rule of law that governments and parliamentary majorities shall allow criticism voiced by independent Ombudsman institutions. As a consequence, an Ombudsman diligently fulfilling his/her mandate, shall not be subject to any form of physical, mental or unjustified legal coercion."

The Council of Europe, in a plenary session on October 4 this year, passed a Resolution emphatically calling on states to explicitly support the work of Ombudsmen in light of the current economic crisis, and serious challenges to the defence and protection of rights.

Other challenges which are being experienced include the fact that:

- Some states have seen whole communities suddenly become displaced as a result of unexpected natural disasters.

Applying a standard formulaic cookie-cutter solution by agencies just doesn't work when:

- a tsunami takes away multiple villages, thousands of lives and leaves 4.4 million people without electricity and 1.5 million without water - or
- an earthquake destroys your 2nd largest city or, as you sadly know all too well here in Australia
- fires all but destroy 5 towns and affect nearly 80 other townships

New groups of vulnerable in our society are suddenly created that need urgent support and assistance at a local, regional and/or national level. Ombudsman oversight can be critical in ensuring this happens.

- The complaint burden for everyone is rising – in part it results from cut backs in government services and the service delivery failures that result, and new media making it easier to complain. Ombudsmen are having to prioritise, multi-task and do more with less.

People's expectations of this integrity institution remain high. Not only of making quality decisions but also in terms of what's a timely and efficient response from an Ombudsman.

- The new technologically savvy world is changing, and challenging, for Ombudsmen.

The power of the media, properly used, can pre-empt us:

For example, the Flemish Ombudsman told me of a 40 minute late night television show which pushed his government to a complete reform of *tele-gambling*. The Ombudsman had been doing an investigation for 6 months with a view to recommending the same reform – but hadn't quite got to that point yet.

While the result was a great relief for many of his country's citizens, he is of course concerned that his office just cannot make such a "*similar spectacular difference*" (as he described it) in a similar timeframe.

He expressed his concern to me that for Ombudsmen in this communications era, citizens might consider alternative channels as more appropriate to get answers to their complaints. He's asked me as IOI President this key question:

- *How can/should Ombudsman adapt to the changing world and ensure they remain a credible and relevant recourse for citizens without losing their essence and core values.*

I would add also:

- How to maintain the independence of the office in this climate of change.
- How to deal with the erosion of the Ombudsman role due to the proliferation of industry and other bodies claiming “ombudsman” status and perhaps, some would argue, “weakening the brand”.
- How to ensure that the Ombudsman institution remains a credible and relevant recourse for our respective citizens and one that can demonstrate its effectiveness.
- What are convincing/persuasive measures and indicators for evaluating the effectiveness of an Ombudsman office.
- How to effectively manage multiple jurisdictions?
- How to identify and manage risk better?
- What’s an effective recommendation when an agency has no money to implement it?

Drivers for change and strategic responses to these are well canvassed in a paper published in July this year by a research team at Queen Margaret University in Edinburgh.³

The report begins by noting that “the ombudsman landscape is both diverse and incoherent.” And the authors end their description of the UK environment by saying:

“The development of ombudsman schemes can be seen to have been pragmatic and to have resulted in a landscape which is cluttered and subject to excessive variation which is unguided by principle. The broader landscapes of dispute resolution within which ombudsman schemes sit are equally incoherent, muddled and confusing to consumers. This context presents a significant challenge for the future development of ombudsman schemes and, indeed, the general lack of direction and coordination of redress policy in the UK was identified by research participants as a key driver for change within ombudsman schemes.”

The key drivers in this environment are described as being:

“...grouped into three broad categories:

- Driver 1: changes in the number, profile and expectations of consumers using ombudsman schemes;

³ The Future of the Ombudsman Schemes: drivers for change and strategic responses” Queen Margaret University, Edinburgh. July 2013. Chris Gill, Jane Williams, Carol Brennan and Nick O’Brien.

- Driver 2: changes in the delivery of services provided by organisations subject to Ombudsman schemes; and
- Driver 3: changes resulting from the policy environment.”

The report expands on each of these and, in part, recognises some of the issues I’ve already mentioned. There are many more. It also canvasses a series of strategic responses to these drivers and concludes “... by providing a tentative description of what a successful ombudsman scheme will look like in future. The research identified 8 ways in which ombudsman schemes may need to shift their practices in order to respond to the many challenges, and capitalise on the many opportunities, they face. In summary, these involve ombudsman schemes becoming more:

- informal in terms of process;
- timely in the resolution of complaints;
- focused on oral/interactive communication with consumers;
- available to consumers online;
- visible and accessible to consumers;
- proactive and influential in the policy environment;
- strategic in influencing service provision; and
- integrated rather than sectoral.

Many of us are already engaged in actioning these or similar strategies and the International Ombudsman Institute, is working hard to ensure that its members are increasingly better equipped to deal with the challenges of a fast changing environment. But it has also has many members who need our support to operate effectively in less well developed environments where simply surviving puts the citizen under acute pressure and where the Ombudsman’s role is impacted by political or other pressures unknown to the majority of us.

The economic and social health of our countries depend on all our institutions functioning as well as they can and dealing in a principled way with their consumers. The Ombudsman’s role is to ensure that they do, and that role is more important in this changing climate than ever before.

But more of the same, in the way we approach that task, won’t do.

And that’s the biggest challenge of all.
