

THE OMBUDSMAN IN THE 21st CENTURY

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INTRODUCTION

For this is not the liberty which we can hope, that no grievance should ever arise in the commonwealth, that let no man in this world expect; but when complaints are freely heard, deeply considered and speedily reformed, then is the utmost bound of civil liberty attained, that wise men look for.¹

Over three centuries ago, English poet John Milton penned words that could have been a mission statement for the first office of the Ombudsman established in Sweden in 1809. While this role in investigating and resolving complaints is still a central role of the institution of the Ombudsman, the Ombudsman in the 21st century has evolved to undertake a wide range of functions that have seen it become an increasingly important part of the justice and governance landscape of over 90 countries.

In this commentary, I explore the Ombudsman in the 21st century; particularly recent changes to the role of the Ombudsman in the context of the previous national and international practice.

Changes to the role of the Ombudsman

From Sweden, through Scandinavia, to now over 90 countries, in the last two hundred years there has been a widespread international adoption of the office of the Ombudsman. There is no doubt that the spread of the role of the Ombudsman has paralleled a desire in modern societies, particularly in the latter part of the 20th century, to improve access to justice. Similarly, as concerns about access to justice have grown, so too has enthusiasm for alternative dispute resolution. Ombudsmen have been able to offer various methodologies of dispute resolution

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1 John Milton, 'Areopagitica' in William Poole (ed), *Areopagitica and Other Writings*, Penguin Classics, 2014, 98.

that have delivered very timely, highly cost-effective justice. Indeed, the Productivity Commission, in its recent *Access to Justice Arrangements Inquiry*, found that “[i]n the context of the broader civil justice system, ombudsmen and other complaint bodies resolve a large volume of complaints at low cost.”²

While increased commitment to access to justice certainly provides a very sound reason why the office of the Ombudsman has been adopted by so many countries, this access to justice role is very much the classical parliamentary role known in Sweden two centuries ago - an independent, impartial and readily accessible way to resolve the concerns of citizens in terms of how the laws of Parliament are administered.

What is observable is that the Ombudsman has not just been adopted widely as an investigator and resolver of complaints, but the office itself has changed from its classical formulation to a very different institution today. There are many reasons that might explain this change. One certainly is the growth of the state and concomitant need for the oversight of this growth. Indeed, over the last few decades, despite considerable deregulation and privatisation, there has nonetheless been growth in government, including increasing complexity in government services. The Honourable Robert French AC, former Chief Justice of the High Court of Australia, has described a ‘galloping growth in regulation’³ including a ‘growth of less visible soft law’⁴ in the form of administrative guidelines. Indeed, even in those areas of deregulation and privatisation that may have removed jurisdiction from classical Parliamentary Ombudsmen, this jurisdiction has often been taken up by private sector Ombudsmen.

Another noteworthy component of this change in the scope of the role of government has been the response of the modern state to the changed socio-political environment in which it exists. This is particularly observable in the growth of the coercive powers of government and the desire by citizens to ensure that these powers are performed with integrity, transparency and accountability. For example, the Western Australian Ombudsman undertakes inspections of telecommunications intercepts, monitoring of terrorism legislation, whistleblowers’ complaints, monitoring of the control of criminal organisations and monitoring of criminal code infringement notices all of which were unknown to Ombudsman just a few decades before.

All of this leaves aside the extraordinary growth of the Ombudsmen concept in the private sector, often referred to as industry Ombudsmen. Ombudsmen are now also

2 Productivity Commission, *Access to Justice Arrangements*, Report No. 72, 5 September 2014 at 324.

3 Chief Justice Robert French, ‘Law – Complexity and Moral Clarity’, (Speech delivered at the North West Law Association and Murray Mallee Community Legal Service, Mildura, 19 May 2013), 7 <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj19may13.pdf>> (viewed 27 June 2017).

4 Ibid.

undertaking dual roles, combining their classical role with that of industry-based Ombudsman. For example, in Australia, a number of Ombudsmen, including the Commonwealth Ombudsman and the Western Australian Ombudsman, undertake industry-based Ombudsman roles (in the case of Western Australia, as Energy and Water Ombudsman).

A reason for the adoption of the Ombudsman to undertake these new functions required by governments and Parliaments is that, as an institution of modern governance, the Ombudsman has proved highly adaptive. The adaptive nature of the Ombudsman can be seen in the fact that a single office may undertake an advanced hybrid of merits and judicial review, exercise both recommendatory and determinative powers, perform inspectorate, monitoring and rapporteur functions, all at once across both the public and private domains. We could go further and note those offices that not only consider the sort of maladministration the subject traditionally of prerogative judicial review, but those who concurrently examine serious misconduct and corruption powers (for example, the Anti-Corruption and Civil Rights Commission of Korea).

Similarly, Ombudsmen have also proved adaptable to constitutional context. Ombudsmen fit exceptionally well into Parliamentary Westminster systems of government. But, of course, there are many variations of how to separate the accretion and exercise of the power of the state. For example, the traditional Chinese system of government had five branches, including an integrity or control branch. The Control Yuan of Taiwan is a modern embodiment of this branch. Although not all Ombudsmen have yet been endowed with constitutional dignity, as officers of the Parliament, or indeed their own branch of control, Ombudsmen continue to adapt successfully to the vast variation of systems of government around the world.

The Ombudsman and human rights

A key feature of the modern office of the Ombudsman is its role in human rights protection and promotion.

The Ombudsman is an officer of the Parliament. Increasingly Parliament is not only asking the Ombudsman to scrutinise particular new functions of the State, but in doing so, to ensure that scrutiny incorporates communities that may have particularly vulnerability in relation to the exercise of these new functions. In the case of the Western Australian Ombudsman, the Ombudsman was given an important function to keep under scrutiny the operation of Criminal Code infringement notices (sometimes referred to as ‘on the spot’ fines for certain criminal code offences). Under section 723 of *The Criminal Code* the Ombudsman must, for a period of 12 months, keep under scrutiny the operation of the relevant provisions of the Code. This scrutiny includes review of the impact of the operation of the provisions on Aboriginal and Torres Strait Islander communities.

The Ombudsman must, as soon as practicable after the expiration of that 12 month period, prepare a report on the Ombudsman's work and activities under the section and furnish a copy of the report to the Minister for Police and the Commissioner of Police. The Ombudsman may identify, and include recommendations in the report to be considered by the Minister about amendments that might appropriately be made to the Act with respect to the operation of the provisions of the Code and the Minister is to lay (or cause to be laid) a copy of the report furnished to the Minister before both Houses of Parliament as soon as practicable after the Minister receives the report.⁵

A further example would be the single most important function now undertaken by the office of the Western Australian Ombudsman - the review of certain child deaths, as well as fatalities arising from family and domestic violence. Here the focus of the Ombudsman is in reviewing these deaths and fatalities to determine the circumstances in which and why deaths and fatalities occur, identifying (and reporting upon) patterns and trends arising from these reviews and making recommendations about ways to prevent or reduce these deaths and fatalities. These functions are also undertaken in a broader context. Both of these functions first commenced in the last decade.

Most recently, the widespread adoption through Europe, New Zealand and now Australia of Ombudsmen undertaking a monitoring role under the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is further evidence of an expanded human rights role.⁶

Benefits of the growth of the Ombudsman

It is my view that the expansion of the role of the Ombudsman is largely a very positive one. There are, I think, numerous benefits. Here, I simply list a few of the more obvious ones, namely: creating high levels of community awareness of the office of the Ombudsman, a perennial challenge for our offices; an integration of non-classical functions into Ombudsman offices benefits the community through the efficiencies created and, in my experience, enables significantly higher quality work across all functions; the institutionalisation of the Ombudsman makes it much less vulnerable to political cycles; Ombudsman offices can collaborate with, learn from, and benchmark against, each other; and as government powers expand and personal and economic freedoms are variously restricted, monitored, licensed or otherwise regulated by government, an expanded right to complain about the administration of this regulation and to have it oversights is beneficial.

5 See section 723 of *The Criminal Code*.

6 Alexandra Beech, 'OPCAT: Australia Makes Long-Awaited Pledge to Ratify International Torture Treaty', ABC News (online), 9 February 2017 <<http://www.abc.net.au/news/2017-02-09/australia-pledges-to-ratify-opcat-torture-treaty/8255782>>.

Ombudsman-initiated investigations

Complaint investigation and resolution also reveals patterns and trends in public administration – systemic issues that may, and do, require further consideration. Ombudsmen have increasingly been empowered by parliaments to undertake investigations of their own initiation, rather than only initiated by citizens, often referred to as own-motion investigations. These proactive investigations are undertaken with all of the powers of a standing Royal Commission. The reports produced from these major investigations are tabled in Parliament and generally include significant analysis of either particular, or systemic issues in public administration, findings arising from this analysis and recommendations for change to law, policy and practice following these findings.

The Ombudsman and the Rule of Law

Next, I turn to the development of the relationship of the Ombudsman and the rule of law. In the shadows of the 800th anniversary of the Magna Carta, the resonance of the rule of law with the work of Ombudsmen in mediating the relationship of power to those governed has grown considerably over the last few decades as the scope and scale of the Ombudsman's work has increased.

The rule of law is not a rule of the law, but a rule about what the law should be. As many a law student would sadly attest, as a legal and political doctrine even in its most prosaic formulations, it can be like approaching a James Joyce novel - brilliant, important, but bordering on the impenetrable.

Although the classical formulation belongs to the great legal theorist A V Dicey, perhaps the most succinct formulation can be found in the writings of Austrian economist, Friedrich Hayek. Hayek considered that the rule of law:

[s]tripped of all its technicalities [it] means that government in all its actions is bound by fixed rules and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.⁷

Although most importantly, and quite properly, oversight of the administration of the rule of law is a role for our courts (and our courts are, unlike Ombudsmen, indispensable to the rule of law), wherever Ombudsmen exist, they have become, in my view, strong protectors and promoters of the rule of law.

The rule of law is also critical to the continuation of economic development and the opportunities for raising the living standards of citizens that development brings.

⁷ Friedrich Hayek, *The Road to Serfdom*, (Routledge Classics, 1994), 75-6.

Conclusion

The Ombudsman has evolved to become an inseparable, indeed increasingly a constitutionally-protected, part of the modern notions of good government, access to justice, the protection of human rights and the maintenance of the rule of law.

Ombudsmen are enormously privileged to undertake a task that seemingly increases in importance year after year – ensuring the relationship of citizens to power is one that is as free as possible, as fair as possible and, always, as dignified as possible.