

## ABSTRACT

### DISCRETION, DIRECTION AND THE OMBUDSMAN: TO STEER THE SHIP OR TO CHOOSE THE SHIP?

In the context of the ombudsman institution discretion has a number of functions. Firstly, its use is investigated by ombudsman with respect to how government administrators have exercised discretion in the making of administrative decisions. Secondly, discretion is usually conferred upon the ombudsman by the governing statute, to determine whether a complaint will be investigated and how this will be done. Thirdly, ombudsman generally hold discretion to investigate systemic issues with freedom to determine how such investigations will be conducted. Finally, Ombudsman are given wide discretion with respect to the strategic focus of their own office.

This paper examines discretion with particular focus on discussing the role that discretion plays in shaping the direction of an ombudsman office. This paper examines how the discretion of an ombudsman is used to determine strategic direction and considers whether limits on its use are desirable and/or necessary.

**Professor Anita Stuhmcke**  
**Faculty of Law, University of Technology Sydney**  
[Anita.Stuhmcke@uts.edu.au](mailto:Anita.Stuhmcke@uts.edu.au)  
**02 9514 9658**

## **1. Introduction**

Thank you for asking me to speak here today. It is a pleasure to participate in this distinguished international gathering of ombudsmen and I look forward to any comments and suggestions you may have at the end of the session.

As a law academic I have a longstanding interest in the ability or inability of the law and legal institutions to accommodate technological, social, economic and political change. Given the rapid and substantial changes faced by many of your offices the issue I will address here today is how far may an ombudsman deviate from the traditional norms of ombudsmanship before they become something other than an ombudsman?

## **2. The evolving nature of ombudsman is a pressing issue**

This question as to the true role of an ombudsman is a vexing one. It is however increasingly important as many of your offices are subject to increasingly differentiated functions. Functions which relate to but are essentially different from the traditional ombudsman function of individual complaint handling.

As we know the New Zealand Ombudsman office is celebrating its 50<sup>th</sup> anniversary this year and has a unique claim to fame as the first English common law ombudsman in the world and therefore an office to which many ombudsmen owe their genesis. It may therefore be a watershed moment to see in the most recent New Zealand Ombudsman integrity statement (PPT 1) the statement that:

The Ombudsmen are increasingly seen as an appropriate “home” for overseeing key democratic measures and initiatives aimed at safeguarding the rights of individuals and increasing government transparency. In an environment where it is recognised that savings can be made using existing institutions to deliver new measures and

initiatives, we are aware that the Ombudsmen may be asked to perform additional functions.<sup>1</sup>

The underlying issue for my paper today is how diverse may these functions appropriated by Ombudsman be? How do we know when and whether the addition of new functions and the implementation of new directions undermine and undervalue the quintessential value of an Ombudsman? To what extent should new functions reduce or limit the original core function of individual complaint handling? Is it a question of scale and or, one of scope?

In this talk I will address this issue in three stages: by firstly giving an operational example of how an individual office may use inclusion, exclusion and discretion, to adjust its own direction; by next identifying the range of evolving styles of ombudsman; and then finally through drawing out six principles which may be applied to circumscribe the use of discretion by an ombudsman office. While my examples are Australian centric the thrust of my discussion applies to ombudsmen generally.

My conclusion is to propose that an ombudsman'ship' may be reorientated and even have its functions fundamentally altered (and in that respect seen as venturing off course) and yet nevertheless remain within the circumference of the norms of good ombudsmanship.

### **3. An example adjusting direction: the operational application of 'inclusion, exclusion and discretion'**

Established in 1975, the Australian Commonwealth Ombudsman is approaching 40 years of operation. All nine Australian classical ombudsmen,<sup>2</sup> were established with

---

<sup>1</sup> New Zealand, Office of the Ombudsmen, Statement of Intent for period 1 July 2011 to 30 June 2014, p 9

<sup>2</sup> The Commonwealth Ombudsman was established in 1976 by the *Ombudsman Act 1976* (Cth) and all of the State Ombudsmen were also established in the 1970s: Western Australia in 1971 by the *Parliamentary Commissioner Act 1971* (WA) ; South Australia in 1972 by the *Ombudsman Act 1972* (SA); Victoria in 1973 by the *Ombudsman Act 1973* (Vic); Queensland in 1974 by the *Ombudsman Act 2001* (Qld); New South Wales in 1974 by the *Ombudsman Act 1974* (NSW); Tasmania in 1978 by the *Ombudsman Act 1978* (Tas); Northern Territory in 1977 by the *Ombudsman (Northern Territory) Act 1977* (NT); and the Australian Capital Territory in 1983 by the *Ombudsman Act 1989* (ACT).

the primary function of receiving and investigating complaints from members of the public against government agencies – essentially being introduced as free individual complaint handlers aiming to improve the citizen experience and government service delivery.

Since its introduction the Commonwealth Ombudsman has however evolved into an office that describes itself as having 5 broad functions:<sup>3</sup>

Complaint handling

Own motion inquiries

Statutory audit activity

Promoting good administration

Other specialist functions

I would like to just focus on one of these functions to demonstrate how significant change may occur in the operation of an office through an incremental application of inclusion, exclusion and discretion. The function I will focus on is that of own motion inquiries.

The use of own motion inquiries has significantly increased over the lifetime of the Commonwealth Ombudsman.<sup>4</sup> This is an intriguing development as the choice to do so is discretionary in the sense that there has been no external mandate by way of government legislation or other explicit imperative to do so.

Own motion or systemic investigations can address issues which potentially concern many complainants rather than an individual complainant. Their increased use by the Commonwealth Ombudsman reveals two important aspects for the diversification of functions faced by Ombudsman:

1. Ombudsman functions need not be linked to the traditional core function of complaint handling. For example own motion investigations are triggered by a

---

<sup>3</sup> McMillan 2010

<sup>4</sup> Stuhmcke 2008

number of events which are not limited to an individual handling. (PPT 2) In effect these functions are essentially different It is also the case that systemic investigations which often end in a formal report to the agency concerned are more often undertaken in areas where there is a smaller volume of individual complaint (PPT 3).

2. The discretion of the Commonwealth Ombudsman as to what to include and exclude from its functions extends also to modifying its approach to handling individual complaints. Research conducted over the history of the Ombudsman reveals an increased use of discretion to refer complainants to the 'first resort' of the agency complained about rather than to the Ombudsman. This has resulted in a decreasing number of individual complaints being handled by the office (PPT 4).

The data thus evidences a movement that many have identified as occurring - that the emphasis of the roles of Commonwealth Ombudsman is shifting. This change is incremental and may be seen as an application of the offices own use of inclusion, exclusion and discretion.

#### **4. Evolving styles of Ombudsman**

The Commonwealth Ombudsman is not alone in this movement – across Australia Ombudsman are changing. While this change is occurring on a continuum it is nuanced. It is the outcome of both external legislative mandate and internal discretion. A description of this evolution may be most easily captured by three forms of Ombudsmanship:<sup>5</sup>

*The first is 'The Reactive Ombudsman or RO'.*

Many international ombudsman offices are reactive ombudsman as the institution has the core role of individual complaint-handling which is the traditional role of most classical ombudsmen.<sup>6</sup> The title 'reactive ombudsman' is not intended to imply that this model has no proactive functions – rather it is used to expose the emphasis

---

<sup>5</sup> Stuhmcke (2012)

<sup>6</sup> Hill 1976; Seneviratne 2002

placed by such ombudsmen upon resolving disputes between government administration and the individual complainant.

*The second is 'The Variegated Ombudsman or VO'*

Today in Australia many of the nine classical Ombudsmen may less easily be categorised as *RO* and may instead be *VOs*. While the emphasis of the institutions in this model remains upon the essential core features of an ombudsman what distinguishes this group of ombudsmen is growth in the number *and* variety of functions they perform. Such as new functions of inspecting, auditing and monitoring functions to ensure agencies comply with legislative requirements.

*The third is 'The Proactive Ombudsman or PO'*

The New South Wales Ombudsman is *PO*. As Mr Bruce Barbour, the current NSW Ombudsman in a recent speech to the International Ombudsman Institute World Conference in Stockholm states :<sup>7</sup>

We need to accept that change will happen, and we need to be the driver of this change, to look for better and more effective ways to operate, to re-shape the Ombudsman model to keep pace with community needs and expectations, to explore and question – to see as possible what we have previously thought was not. This will be essential if we are to remain relevant. Thinking this way has taken my office into very different decision making practices, thinking carefully about where we place our focus and the way we prioritise and undertake our work. We have evolved from a reactive complaint handling body into a forward-thinking, strategic, community focussed and proactive office. Using the core principles of our Swedish heritage, building on them, developing them to meet the needs and circumstances of our own community. Placing them in today's context and planning for tomorrow.

Apart from the scope of a *PO* including a wide diversity of offices across a vast range of government departments and a diverse range of functions such as individual

---

<sup>7</sup> Barbour (2009)

complaint handler; human rights protector; own motion investigator (proactive systemic change agent or system fixer); auditor; protector of whistleblowers; reviewer of witness protection; reviewing child abuse and reportable deaths; educator; community change agent etc., it is the scale of the work is also significant.

For example, with respect to community engagement and education one distinguishing feature of the NSW Ombudsman is the size of the operations of the Office. In 2009-2010 the NSW Ombudsman (PPT):

- Undertook more than 271 information, community education and training activities reaching over 10,237 people, including providing 144 training workshops.<sup>8</sup>
- Hosted three community forums (one of which was attended by 300 people) on domestic violence, probity and the devolution of large institutions;<sup>9</sup>
- Initiated a roundtable forum of government agencies to examine the various screening processes that funded services use when checking for information about the probity of prospective employees, board or management committee members and other volunteers involved in the planning or delivery of community services - the roundtable resulted in a report containing recommendations for reform submitted to government under section 31 of the *Ombudsman Act 1974*.<sup>10</sup>

These forms of ombudsman need not be planned nor strategically created – indeed As Chris Wheeler, the Deputy NSW Ombudsman, in a recent address<sup>11</sup> on the development of the NSW Ombudsman notes many of the changes that ombudsman offices will make will be ad hoc and incremental. Indeed such ad hoc and incremental change by ombudsman follows the public sector’s changing attitude to whistleblowers, complaints and customer service which has altered dramatically in the last 30 years.

---

<sup>8</sup> Ibid 41.

<sup>9</sup> Ibid 28.

<sup>10</sup> Full report available at:

[http://www.ombo.nsw.gov.au/publication/PDF/specialreport/SR\\_ImprovingProbityStandards\\_Dec10.pdf](http://www.ombo.nsw.gov.au/publication/PDF/specialreport/SR_ImprovingProbityStandards_Dec10.pdf)

<sup>11</sup> Wheeler (2012)

## 5. Six principles of Ombudsman ship and the use of discretion

Professor Pearce, a former Commonwealth Ombudsman has posed the question as to whether '[T]here is a danger in Australia that the original purpose for the establishment of the office is being lost'.<sup>12</sup> This is the question that is of particular interest given the changes and challenges facing many international Ombudsman today.

How then to ensure an ombudsman office maintains its integrity in light of changing functions and challenging resourcing? Or to return to the use of seaside analogies - how does an ombudsman know when to batten down the hatches or when to tide over or to cut and run or to perhaps be three sheets to the wind? In short what degree of flexibility or deviation from the original model of an ombudsman is appropriate?

The answer to this question is, as I mentioned at the beginning of this talk, a vexing and difficult one. Vexing as for Ombudsman offices the dilemma of inclusion and exclusion of functions involves the use of discretion. Ombudsman will have the power to make a choice between alternative courses of action. The difficulty is that while there may be no such thing as a uniquely correct discretionary decision it is possible that there may be clearly incorrect applications of discretion such as those which are unauthorized or arbitrary or, of most interest to this paper, where functions are added which militate against the principles of the institution.

To pose a possible solution – or at least a framework for discretionary decision making - I would like to turn from the context of the ship and think instead about doughnuts. Against this backdrop the discretion of an Ombudsman and the addition of functions is, as Ronald Dworkin once famously put it, “like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.”<sup>13</sup>

In other words the belt of restriction which binds your use of discretion and the allocation of additional functions may be seen as almost a meta theory of ombudsmanship. This belt of restriction is your doughnut and it is formed through

---

<sup>12</sup> Pearce (2005)

<sup>13</sup> Dworkin 1977 p 52



principles, or ombudsman norms. We may capture this concept in any way we wish but in essence the restrictions exist outside legal rules and external requirements.

So to return to the question – to what extent may an Office differentiate and proliferate its functions from that of the traditional RO?

Very broadly six ‘principles’ of ombudsmanship may assist (although noting that these are not universally identified):

**Principle 1: Integrity - independent, fair and impartial**

**Principle 2: Responsiveness and flexibility<sup>14</sup>**

**Principle 3: Accountability and transparency**

**Principle 4: Aspiration to create and improve standards of public administration**

**Principle 5: Accessibility**

**Principle 6: Catalyst of change – ‘they say that sunlight is the best disinfectant’<sup>15</sup>**

The suggestion here is not that we search for the existence of each of these principles to prove the existence of an ombudsman but rather that the expectation is that these exist and that any use of discretion must operate to protect and ensure such principles.

In other words the suggestion is to have a “unified field theory” of Ombudsman discretion. The end result of this concept being that the various Ombudsman used as examples here today need not be grouped by their perceived differences from each other in terms of function but rather by their similarity in terms of ombudsman norms and principles – as operating within a unified concept of ombudsmanship . The benefit of this is it allows the development of an office to justify its operations

---

<sup>14</sup> Barbour (2011) stating ‘One of the traits of being a good and successful Ombudsman is the ability to be open to change, being flexible and able to do things differently. To recognise the way we do business and the issues on which we will focus are not static and will continually change.’

<sup>15</sup> Barbour (2010)

from an inclusive rather than an exclusive perspective. An office will not need to query whether new powers are exceptions to the general parameters of ombudsman but rather ascertain that any such powers are within this belt of restriction. (Yes, the same concept, just a different way of perceiving the question.)

## **Conclusion**

Ombudsmanship is a term which encompasses significant differences in terms of powers, status, duties, appointment and working procedures. In one country an ombudsman may be a human rights protector and in another a mediator. Inclusion and exclusion of functions and choice over roles is legitimate when performed within the meta theory of ombudsmanship. The institution of the ombudsman is after all a universal concept within which discretion must be used for adjustments in line with national, local or individual peculiarities.

## Reference List

### Conference papers/Addresses

Barbour, B. (2009) Actions speak louder than words: An Ombudsman's office and children. *IOI World Conference Stockholm*.

Barbour B (2010) Living up to standards. Corruption Prevention Network Conference

Barbour B (2011) Ombudsman and human rights: working with vulnerable communities. APOR Conference Taipei

McMillan J (2010) How Ombudsmen review and Influence Public Administration. International Intelligence Review Agencies Conference Sydney

Wheeler C (2012) Review of Administrative Conduct and decisions in NSW since 1974 – an ad hoc and incremental approach to radical change. AIAL Conference

### Journal Articles

Stuhmcke A (2008) Changing Relations between Government and Citizen: Administrative Law and the Work of the Australian Commonwealth Ombudsman. *The Australian Journal of Public Administration* 67(3): 321-339

Stuhmcke (2012) The evolution of the classical ombudsman: a view from the antipodes. *International Journal of Public Law and Policy*. 2(1): 83-95

### Books

Dworkin RM (1977) *The Philosophy of Law*. Oxford University Press

Hill LB (1976) *The Model Ombudsman: Institutionalizing New Zealand's Democratic Experiment*. Princeton, Princeton University Press

Seneviratne M (2002) *Ombudsman: Public Services and Administrative Justice*. Butterworths

### Book Chapter

Pearce D (2005) The jurisdiction of Australian Government Ombudsmen' In: Groves M (ed), *Law and Government in Australia*' Federation Press, pp110-138



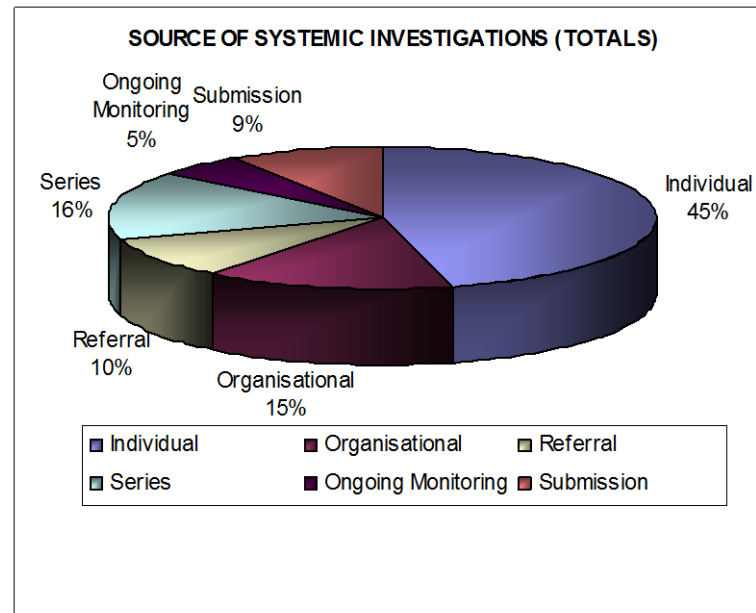
# **OMBUDSMANSHIP...**

**DISCRETION, DIRECTION AND THE  
OMBUDSMAN: TO STEER THE SHIP OR TO  
CHOOSE THE SHIP?**



## **New Zealand, Office of the Ombudsmen, Statement of Intent for period 1 July 2011 to 30 June 2014, p 9**

‘The Ombudsmen are increasingly seen as an appropriate “home” for overseeing key democratic measures and initiatives aimed at safeguarding the rights of individuals and increasing government transparency. In an environment where it is recognised that savings can be made using existing institutions to deliver new measures and initiatives, we are aware that the Ombudsmen may be asked to perform additional functions.’





## Number and percentage of individual finalised complaints and systemic investigations by portfolio

		Social Security	Taxation	Telecommunication	Immigration	Australian Federal Police	Defence	ACT	All	Other
Total systemic investigations	231	21	14	12	16	51	28	24	8	57
	%	9%	6%	5%	7%	22%	12%	10%	3%	25%
Total individual complaints finalised	390,735	182,221	43,628	49,614	21,264	13,255	23,749	9,711	0	47,292
	%	47%	11%	13%	5%	3%	6%	2%	0%	12%



## Percentage discretion not to investigate (Commonwealth Ombudsman)

YEAR	% DISCRETION NOT TO INVESTIGATE
2008/2009	73%
2007/2008	75%
2006/2007	78%
2005/2006	75%
2004/2005	73%
2003/2004	73%
2002/2003	70%
2001/2002	79%
2000/2001	79%
1999/2000	79%
1998/1999	67%
1997/1998	63%
1996/1997	55%
1995/1996	46%
1994/1995	47%
1993/1994	49%





## Bruce Barbour

We need to accept that change will happen, and we need to be the driver of this change, to look for better and more effective ways to operate, to re-shape the Ombudsman model to keep pace with community needs and expectations, to explore and question – to see as possible what we have previously thought was not. This will be essential if we are to remain relevant. Thinking this way has taken my office into very different decision making practices, thinking carefully about where we place our focus and the way we prioritise and undertake our work. We have evolved from a reactive complaint handling body into a forward-thinking, strategic, community focussed and proactive office. Using the core principles of our Swedish heritage, building on them, developing them to meet the needs and circumstances of our own community. Placing them in today's context and planning for tomorrow.



## In 2009-2010 the NSW Ombudsman:

- > Undertook more than 271 information, community education and training activities reaching over 10,237 people, including providing 144 training workshops.
- > Hosted three community forums (one of which was attended by 300 people) on domestic violence, probity and the devolution of large institutions;
- > Initiated a roundtable forum of government agencies - the roundtable resulted in a report containing recommendations for reform submitted to government under section 31 of the *Ombudsman Act 1974* Ibid 41.



# All Ombudsman and out of jurisdiction referrals

## OUTSIDE JURISDICTION

Jurisdiction / Agency	No. of approaches to office	No. considered outside jurisdiction	%
Cth	45,719	26,307	58%
ACT	2,656		0%
NT	2,454	818	33%
NSW	32,994	7,027	21%
Qld	17,771	9,725	55%
SA	12,000		0%
Tas	2,991	1,738	58%
Vic	19,452	7,763	40%
WA	5,500	1,707	31%

# One question may be whether..

‘[T]here is a danger in Australia that the original purpose for the establishment of the office is being lost’.

Dennis Pearce, ‘The Jurisdiction of Australian Government Ombudsmen’ in Matthew Groves (ed), *Law and Government in Australia* (2005) at 138.



- > **Principle 1: Integrity - independent, fair and impartial**
- > **Principle 2: Responsive and flexible**
- > **Principle 3: Accountability and transparency**
- > **Principle 4: Aspire to standards**
- > **Principle 5: Be accessible**
- > **Principle 6: Catalyst of change – ‘they say that sunlight is the best disinfectant’**



UNIVERSITY OF  
TECHNOLOGY SYDNEY