PRESENTATION TO AORC ON RECALCITRANT RESPONDENTS

Deborah Glass

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Good morning, afternoon or evening – I'm delighted to be greeting you from Australia to participate in your seminar.

I know African Ombudsman have a strong and proud history, and much as I am fed up with online meetings – there have been far too many of them with my own office in the last 15 months – they are a wonderful opportunity to interact with colleagues from afar.

'Recalcitrant respondents' is a great topic – such an important issue for Ombudsman offices everywhere – and I am happy to provide an Australian perspective.

In my presentation today I will give a brief outline of my office and its powers – followed by some practical examples of how we deal with the subject matter of this seminar.

Let me start with some context. I doubt I need to tell this audience how old the institution of the Ombudsman is, but I'm so proud of our history I like to repeat it.

The concept of the Ombudsman goes back at least to Ancient Rome, if not earlier, although as we know, the first Ombudsman by that name originated in Sweden in 1809. Since then, Ombudsman offices have multiplied around the world, especially from the second half of the twentieth century.

The International Ombudsman Institute, of which I am proud to be a Director, has 226 members in 123 countries. It is the main subject of each board meeting to consider new applications, so it is wonderful to see the growth of such an important institution, reaching to almost all parts of the globe.

I understand Tanzania created the first Ombudsman institution in the African region, back in 1966, so my congratulations to Africa for beating Australia, not to mention most of the rest of the world, in being such an early adopter.

The first Australian Ombudsman appeared in 1971, and my office – the Victorian Ombudsman - in 1973, so it has been keeping governments on their toes for nearly 50 years.

While around the world our names may be different, we may or may not actually be called Ombudsman and our jurisdictions will vary, we have some core things in common – we exist because of the imbalance of power between the individual and the State. The Ombudsman is an independent authority providing the ordinary citizen with a safeguard against abuses of State power, whether deliberate, negligent or simply uncaring.

So if we are to be effective in redressing that imbalance of power, we need some powers ourselves, or governments will not bother to take any notice of us.

Outline of VO history and powers

I can't give you a full comparative study of Ombudsman powers around the world, but I understand Australian Ombudsman are regarded as having a reasonably good set. We all operate as being the equivalent of a standing Royal Commission – for those not familiar with Royal Commission powers, that means the power to:

- Summons witnesses and documents
- Require people to answer questions

Unlike Royal Commissions (and some of our anti-corruption bodies) we carry out our work in private, though we have the power to table reports in Parliament – which in my view is the most impactful power we hold. We table directly to Parliament, not through a Minister, when we choose, and of course our reports are then immediately available to the media.

So turning to the question of this seminar, how do we deal with recalcitrant respondents, the key point is that we can issue a summons requiring them to attend for interview.

This means there are real consequences if someone is very recalcitrant and fails to attend. It is an offence, punishable by a prison sentence.

So how does it actually work in practice?

First, let me reassure you Australia's prisons are not full of people who failed to comply with an Ombudsman summons. I have been in my role over 7 years and have never needed to enforce a summons, and I am not aware of it being done in the 40 years before that.

First, we seek people's co-operation. Usually we will tell them (at an appropriate time) what we are investigating and invite them in for an interview. They usually say yes because they know we have the power to summons them. Sometimes people ask to be summonsed – for example, in certain situations people don't want to be seen to be co-operating with an Ombudsman investigation. It's better for them to be able to tell their boss, I had to talk to them, they issued a summons.

And while people are required to answer questions, they also have rights and privileges.

- Right to seek legal advice and representation;
- Can request an independent support person be present;
- Can request an interpreter;
- Persons aged between 16 and 18 must be accompanied by a parent, guardian or independent person; it is a reasonable excuse not to comply with Ombudsman summons if under 16 years of age;
- Right to the video recording/transcript of their interview.

We issued 55 summonses last year, that's about once a week, so as you can see it's not uncommon, though many would be to banks, who require a summons to produce financial records.

But some of these were to deal with the problem of recalcitrant witnesses.

To illustrate this point, let me give you an example from probably my most politically sensitive investigation to date.

Example of 'Red Shirts' case

This case started with newspaper headlines about a political scandal, alleging the Government of the day – the Labour Party – only got into power because it was paying its political campaigners out of the public purse, by claiming they were electoral officers. These campaigners were mostly a group of enthusiastic young people known as the Red Shirts because that's what they wore to campaign.

The case came to me as a referral from Parliament, which triggered furious debate about the Ombudsman's jurisdiction to investigate Members of Parliament. Elected officials are not usually within the Ombudsman's jurisdiction, but there is a special provision in my Act that allows Parliament to refer 'any matter' to the Ombudsman, and the Ombudsman **must** investigate.

Does 'any matter' override the Ombudsman's jurisdictional limits? The Upper House of Parliament – which the Government did not control - thought it did, and the Government thought it didn't.

I didn't really care one way or another, but I didn't like the idea of either side of politics telling me what I could or couldn't do. The important thing for me here was not my jurisdiction, but my independence.

I was also very mindful of recalcitrant witnesses. The Government did not want me to investigate and was arguing I had no jurisdiction. That would mean no witness would cooperate voluntarily, and as soon as I issued a summons it would be resisted – and the whole matter would likely end up in court.

So I decided to take the question of my jurisdiction to court myself. I applied to my Supreme Court for a determination and invited the Parliament and the Government to join the proceedings if they wished, making it clear I would remain neutral. As I said, it did not matter to me whether or not I could investigate MPs, but I wanted the court to tell me.

The Supreme Court of Victoria said I could – and the Government appealed this all the way to the High Court of Australia and lost.

I waited for the outcome of the first appeal before starting the investigation, and then decided to get on with it.

The investigation involved 23 Members of Parliament and their electoral officers, and most of them were extremely reluctant witnesses. Our approach was to identify

those we really needed to speak to and invite them for interview. In the end, every single one came to an interview voluntarily, although in quite a few cases agreeing at the last minute before we issued a summons.

Our second approach, with the non-essential witnesses, was to invite them to comment on a draft narrative. From the witnesses we interviewed, we were able to compile a detailed account of the way the campaign and payments worked. We sent this to our other witnesses and invited them to tell us if we were wrong. We also said if they would prefer to give us their account in an interview, we'd be happy to accommodate that. If we did not hear from them, we would assume we were correct.

Finally, we prepared a draft report, which was critical of a number of the MPs and sent it to each of them as part of the adverse comments process. I am sure you are all familiar with the principles of procedural fairness. This process is not only necessary as a matter of fairness, it can also be a useful way of dealing with recalcitrant respondents if you don't have powers to compel. As long as you have the power of publication.

So overall, we managed to complete a very thorough investigation, despite the obstacles – and I think enhanced the reputation of my office for independence and courage.

Let me end with a few thoughts. I said this to my staff on my first day in the role over 7 years ago:

The Ombudsman's most impactful powers are the ones we don't need to use because everyone knows we have them.

And ultimately, while we can compel, we are most effective when we persuade. Like most Ombudsman offices I cannot enforce my recommendations, but my reports must be very persuasive, as about 95% of them are accepted.

And that is where we really make a difference.