

Topic : Ombudsmen under threat - Reaction and response to inappropriate and misplaced criticism from Government officials

Speaker : Victoria R. Pearman  
(Office of the Ombudsman, Bermuda)

1. The Ombudsman is an ally and a resource in the cause of good governance. Watchfulness, vigilance and attentiveness are necessary. Understanding the Ombudsman's role requires an appreciation that she is not an advocate for any side, but an advocate for what is fair. The Ombudsman cannot permit any concerns over the relationship with Government, any entity or any individual to compromise the independence, integrity or authority of her work. Natural justice and scope for disagreement and objection are built into the Ombudsman's processes. Public confidence and trust are what encourage people to bring forward their matters. Statements that diminish the Ombudsman's authority undermine the public's right, willingness and confidence to complain. They also undermine the department's responsiveness to and respect for the Ombudsman's work and process.
2. Ombudsmen are assisted in their work as efficient complaint handlers when they build appropriate professional relationships with Government officials and public servants. This is an ongoing process. Good working relationships should be established and maintained. It envisions good communication and mutual respect and balance. *[Insert balanced Sumo slide here]* This may not always lead to agreement, but it may reduce misunderstanding and hostility. Even when the Ombudsman is the bearer of bad news, they bring useful information which allows for correction and improvement before issues become more costly and more difficult to correct.
3. I wish I could impress you with how well prepared I was, having fully considered all of these things, when I and my Office and its work came under attack by a Government Minister following one Special Report I made to Parliament in June 2015. *[Insert Sign Post slide here]* The truth is I did not know what an appropriate response should be in these circumstances. I was off-island when the comments were made. This may have been a blessing in disguise. An Ombudsman gone wild in the international news could have required its own break-out session at this conference. I am not sure if the Ombudsman can be publicly angry. *[Insert alert Sumo slide here]* Some members of the

public confronted me when they saw me. They wanted explanations. They said they knew I was not afraid to fight. I had battled in the courts for 20 years. Why didn't I defend myself now? Admittedly, restraint was difficult. For a new Ombudsman only a year old these were thorny issues.

4. Other options open to the Ombudsman were: to do nothing further; attempt to affect a discreet political solution by pursuing these matters further with the leader of the Government, the Premier; try to improve public perception of the office by drafting and issuing an appropriately worded press release, in her own defence or; try to affect a legal solution by making some form of application to the Supreme Court of Bermuda seeking such remedies as may be available or appropriate. *[Insert Prickly Pear slide here]* Given the Government's hostile and entrenched position, a political solution was unlikely to be accepted or agreed. It was difficult to predict what the response to a press release might be given the political climate at the time. I was uncomfortable and uncertain whether it was befitting of this constitutional office to respond to these comments. By analogy, a member of the Judiciary would never publicly respond to criticisms. A public fight with a politician did not seem a suitable way to defend and uphold the dignity of the Office, especially if it were prolonged. I also had to avoid the appearance of being caught in the middle, or even worse be thought to be taking sides, when the issue escalated into a fight between politicians from either side of the aisle.
5. Redress through the courts through litigation may be an available remedy for the Ombudsman. Our legislation provides for the offences of contempt and the making of false or misleading statements to be certified by the Court. (*Ombudsman Act 2004 ss.25-26.*) These provisions are designed to empower the Ombudsman to conduct investigations where persons may seek to impede or resist the investigation process. It is unclear the extent to which these provisions would be interpreted by the court to address inappropriate remarks by Government officials. The task of proving contempt has been committed is a challenging one in all but the most extreme and obvious of circumstances. The only thing worse than fighting in Court is losing in Court. Courts have uncertain outcomes and are costly, taking money, time and attention away from our work. Sometimes legal determinations are required. Still, Ombudsman should be careful not to rush to combative forms of dispute resolution, in favour of alternative dispute resolution which we encourage others to explore. Litigation can sometimes also affect relationships. Ombudsmen battle unfairness, injustice, and indifference. Should they be in the practice of routinely fighting people?
6. The attack on me and the integrity of my Office came in response to a consolidated Annual and Special Reports to Parliament in June 2015. Time will not permit me to go into great detail on these two matters. Those who are interested in learning more can read

about them in our consolidated Special and 2014 Annual Report available on our website [www.ombudsman.bm](http://www.ombudsman.bm) *[Insert Annual Report 2014 slide here]* The Special Reports referred to recommendations which had not been followed by two Government Departments, both under the responsibility of the Minister of Home Affairs. The first Special Report concerned a complaint by a Bermudian, against the Department of Immigration. She learned that a job for which she held qualifications was filled by a non-Bermudian for whom a work permit had been issued by the Department. On a small island with limited resources it is a requirement that qualified Bermudians and their spouses are given first consideration in employment. It is also generally required that positions be advertised before a work permit can be issued.

7. The Department did not accept our criticism of it as fair because the Minister, as was his right, declined to follow the Department's recommendation to revoke the work permit following its internal investigation. We acknowledged that the Department was not responsible for the Minister's decision. However, it was responsible for failing the Complainant by not giving sufficient regard to the information she provided, not adequately addressing her complaint in a timely manner and not ensuring compliance with its own policies. We drew the public's attention to the Ministry's and the Department's failure to implement the Ombudsman's recommendations, purposely crafted to address the unfairness to the Complainant. The Ombudsman had no power to compel a Department to implement our recommendations. This does not mean the Department, the Ministry and other Authorities were free to dismiss recommendations they do not like. Accepted principles and legal authority dictate that Ombudsman recommendations are expected to be implemented. This is an integral part of the constitutional oversight of the Department that an independent Ombudsman was established by the Legislature to carry out. We explained why, when an authority failed to adequately implement our recommendations, we were empowered to reveal this failure to the Legislature and to the public, and further why we included it in our Annual Report.
8. The second Special Report was issued in response to a failure to implement recommendations made pursuant to an 'own motion investigation' by my predecessor, Arlene Brock, of a failure to adequately protect a historical graveyard, parts of which were demolished. As stated by Dr. Arduin earlier, cultural and historical contexts are important considerations in our work. This historical site is located on land where a world famous golf course was designed after the Bermuda Government passed legislation in 1920 to repossess land that for many generations had been the home and community to the descendants of freed African slaves. Some families fought to stay and were forcibly removed. This was during the period of segregation in Bermuda. Families were dispersed and a well-established church was closed. This graveyard is the only remaining physical proof of the original community. In October 2013 the tombstones were demolished. The former Ombudsman Arlene Brock investigated the actions that lead to

the demolition. The Special Report which followed was entitled “A Grave Error”. My report provided an update on developments since the publication of that January 2014 Report.

9. When the consolidated Special Report and Annual Report became public, the Minister held a press conference to denounce it, calling it a farce. *[Insert Inappropriate Responses slide here]* The disregard for the Reports reinforced from an Ombudsman perspective why it was necessary to bring this matter to the attention of the people of Bermuda and to their representatives in Parliament in the form of Special Reports. A reasonable interpretation of the Minister’s comments is as follows:
  - i. The Ombudsman and her office are unprofessional or have acted in an unprofessional manner, with respect to the specific investigations involving the two Departments and with respect to the Special Reports and their contents;
  - ii. The Ombudsman and her office have acted beyond their constitutional and statutory powers in breach of the provisions of the Ombudsman Act 2004; and
  - iii. The Ombudsman has also been acting to some unspecified extent, in bad faith, with ulterior motives, although it is unclear whether the Minister is suggesting that the motives are personal, political or something else altogether.

*[Insert alert Sumo slide again]*

10. As I stated earlier, political voices exchanged words over the comments with members of the public also getting involved. Politicians of the Opposition party had denounced the Minister’s remarks, with at least one Member of Parliament calling for the Minister to resign for showing such disregard for a constitutional officer. In the Senate, a Government colleague of the Minister questioned our jurisdiction and suggested that I resign. In Parliament the Premier informed Parliament that he was consulted by the Minister before he made the statement and agreed with the Minister’s approach. A few short years earlier, a Government Minister (now Opposition Leader) had made inappropriate, disparaging remarks about the former Ombudsman’s Report. The Government members reminded the Opposition that they now seemed to be singing a different tune. The political war of words made it more difficult, I felt, to make a statement. Reiterating the basis for my findings as contained in my Reports seemed redundant. Perhaps that would have been appropriate and informative.
11. There had also been significant legal actions in respect of the former Ombudsman’s investigations into governance affairs of the Corporation of Hamilton municipality and recommendations relating to that investigation. (“4x6=262”: *Ombudsman’s Own Motion Investigation into Governance at the Corporation of Hamilton, December 2013*). The

former Ombudsman had successfully commenced Court proceedings for the Court to certify contempt against the former Mayor and former Deputy Mayor in failing to appear in the course of her investigation when summonsed to do so. The Corporation of Hamilton also commenced legal proceedings against the former Ombudsman and a second set of legal proceedings against me, relating to that investigation and its recommendations. Both of which were successfully defended.

12. This all took place on a tiny island nation in the mid-Atlantic where some distant leaders in larger lands, mistakenly believe we have no real worries save for golfing, sailing, attending beach parties and deciding what colour Bermuda shorts to wear. On local news reports, newspapers, talk shows blogs and tweets it seemed everyone in Bermuda, except Victoria Pearman, was sure what my next step should be. I was contacted by Dr. Arduin on behalf of the Caribbean Ombudsman Association (CAROA). I received messages of encouragement from several colleagues for which I am very appreciative. The Secretary of the Ombudsman Association, (OA) Donal Galligan reached out to me and offered support. I took this opportunity to seek guidance on my main question which was whether as a constitutional officer it was appropriate to make a public response to the Minister's comments.
13. With Secretary Galligan's assistance, I was able to seek the views of the Ombudsman Association's Executive Committee which included Peter Tyndale, Ombudsman for Ireland, and Second Vice-President on the IOI Executive Committee. I learned the OA and the IOI had intervened on other occasions where there had been disputes between Ombudsmen and Governments. It was agreed that there was merit in letters of support from both the OA and the IOI being written. I should add that CAROA also offered to write letters in support and were included in various correspondence. Dr. Arduin also commenced work on drafting a guidance protocol, including amongst other things, the intervention of CAROA on behalf of a member institution.
14. Letters of support were written by OA and IOI addressed to both Houses of Parliament and were publicised in the media. *[Insert Keep Calm slide here.]* This approach allowed me to refrain from getting into a battle of words with the Minister yet publicly addressed the inappropriateness of his response. The educational aspects of the letters were beneficial in informing the public discussion. The letter from the OA also helpfully referred to UK jurisprudence of which Bermuda is a dependency. It clarified, contrary to the Minister's assertion that it is entirely within a Minister's prerogative as to whether the Ombudsman's recommendations are accepted Government Ministers must have 'cogent reasons' for not implementing the Ombudsman's recommendations. This supported the position included in our Report.

15. Following the letters by the IOI and the OA expressing concern in relation to the Minister's comments about the Report, the Premier publicly confirmed Government's support and cooperation and respect for the role of the Office. I was invited to meet with the Premier. We had a frank conversation. Time will tell if the relationship with the Minister is capable of repair. The Ministry of Home Affairs made a public statement it would continue to support the work of the Ombudsman but in this particular case she had 'overreached'. The Minister also stated that notwithstanding the concerns raised by the international organisations, these remarks came from one source and are representative of one view. The Minister said he stands by his view notwithstanding the apparent pressure by outside organisations of which the Ombudsman is a member.
  
16. The Ombudsman must do what is required to uphold her office from attack and defend its ability to perform its essential functions of independent complaint handling and advocating for best administrative practice. We should be alert to attacks which may present themselves in nuanced ways. Not all threats will be direct threats on independence. Some threats arise in our less public dealings with departments such as: threats which delegitimise the Office and threats on the integrity of the Ombudsman's process against the manner in which investigations are carried out and the efficacy and soundness of its findings and conclusions. The Ombudsman while jealously guarding the integrity of her office cannot afford to lose sight of her purpose to be an effective complaint handler. This requires balance. Ombudsmen speak truth to power and are change agents. This involves education of ourselves and others.
  
17. Promoting greater understanding of the office and its importance to the community is a proactive rather than a reactive means of strengthening the Ombudsman office from threat and unfair official attacks. Individuals who we educate on our role in promoting fair, accessible, independent complaint-handling provide important information which public authorities and Ombudsman would not otherwise receive. When the public know departments will be held accountable by the Ombudsman for their decision-making, they will be supporters and defenders against attacks on the office. Likewise public authorities want to be assured only reasonable and sustainable complaints will be upheld. When it is clear they are being treated with respect and we take a collaborative approach to our important role as a resource for benefit and reform of administrative procedures for their department, they will be more supportive of us. If they see us as an institution of value to their work, they will want to advance and defend it. It is for us to help Government officials see the office as a means to address the complaints of those they represent as well as a resource alerting Government to systemic issues and trends requiring their attention. It is hoped they will see this institution not as an adversary but an ally in the cause of good governance to be valued and protected. As we navigate the thorny issues of protecting ourselves and relationship building, it may be helpful if we

remember that after all is said and done, we are people working with other people, whether their title is Minister, Department Head, Complainant or Ombudsman.

18. I realise I have not presented an answer to the question how to react and respond to the threat of inappropriate Government criticism. In my case, the appropriate response to inappropriate and misplaced criticism from Government officials was for me to make no response. The appropriate reaction was to have support from our institutional organisations. I have shared some reflections on what I have learned. Some of these thoughts were stimulated by my conversations with experienced teachers like Dr. Victor Ayeni, Director of Governance and Management Services International and leading international authority on ombudsman, human rights and related oversight institutions. The Office of the Ombudsman for Bermuda had the pleasure of welcoming Dr. Ayeni to the island once again at the beginning of this year to conduct training and to give a public presentation on the observance of our 10<sup>th</sup> anniversary.

19. And of course I am no longer a one-year old Ombudsman. I am almost three now. It is good that we are able to discuss these matters in a grand conference such as this with so much collective wisdom and experience from so many different countries and viewpoints. I look forward to further learning and discussing these matters with you. It is also gratifying to know we are accessible to assist each other to grow as Ombudsmen as our institution evolves. The collegial nature we share is invaluable and greatly strengthens our institution. As an African proverb teaches us, "If you want to go fast, go alone. If you want to go far, go together."