

Presentation to the Australian and New Zealand Ombudsman Association Biennial Conference 2010

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Independence – A key principle

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1. Introduction

It is a considerable pleasure to attend the second biennial Australian and New Zealand Ombudsman Association Conference. I had the pleasure of speaking at the inaugural ANZOA conference held in Melbourne and I think it is particularly pleasing that we are able to come together on this occasion in Wellington.

The topic we are considering in this session is independence and, more particularly, independence as a key principle of the Ombudsman institution.

In this session, on the basis that Liz will be outlining the New Zealand experience with industry-based dispute resolution, I will largely focus on independence as a key principle for parliamentary or “classical” Ombudsmen¹, but I will, throughout the paper where relevant, reference independence as a key principle for industry-based Ombudsmen.

To do so, I will largely follow the points that the conference organisers have identified for discussion in this session. Accordingly, I will begin with a brief examination of the question what do we mean by the term independence?, before turning to explore the importance of independence, then considering how independence is applied in practice, before finishing with consideration of the responsibility that comes with independence.

Given the expertise and experience of those in attendance today, I will speak for no more than 30 minutes as I understand will Liz, which hopefully will allow ample time for discussion.

2. What is independence?

So let me begin with what we mean when we say that Ombudsmen are independent. Independence, at least in terms of the Ombudsman, can be conceived of as being free from the control of others in what you do. More particularly in the case of Ombudsmen, independence is usually defined as being independent of government. To use my office as an example, my legislation is the *Parliamentary Commissioner Act 1971* and the formal title of my role is the Parliamentary Commissioner for Administrative Investigations. In short, Ombudsmen are officers of the Parliament,

¹ In this paper, I use Ombudsmen as the plural form of Ombudsman. Given their Swedish derivation, it is generally accepted that the words Ombudsman and Ombudsmen should be considered gender neutral.

responsible to it and it alone and not responsible to a Minister, nor to the Government of the day. The Queensland Ombudsman suggests that independence means that:

no person or body can direct:

- how investigations should be conducted
- whether particular complaints should or should not be investigated
- the level of priority given to investigations.²

Of course, Ombudsman must also be independent of complainants, but this is much less frequently mentioned, if for no other reason than complainants have significantly less capacity to influence or attempt to control Ombudsman decision making.

The emphasis that Ombudsman place on their independence is often focussed on their powers in relation to the resolution of complaints and undertaking of administrative investigations. Independence for Ombudsman, however, also refers to the capacity to administer their budget without direction, to make employment decisions without direction and also to not undertake those whole of government policies that may give rise to the Ombudsman being perceived to be, or actually being, not independent of Government. Expanding this last point a little further, it is true to say that, when it comes to most aspects of the operation of Ombudsmen, it is both what is actually the case as well as what could reasonably be perceived to be the case that is equally important. This is absolutely true for the principle of independence: Ombudsman must actually be independent and also be perceived to be independent.

The concept of independence is also critically important to industry-based dispute resolution schemes (including industry-based Ombudsmen). The well-known, at least to ANZOA members, *Benchmarks for industry-based customer dispute resolution schemes*³, defines independence as being that the “decision-making process and administration of the scheme are independent of scheme members”. Once again, of course, independence for industry-based Ombudsman also means being independent of complainants.

None of what I have said so far is to suggest that the concept of independence is completely straightforward – there are many interesting questions that arise when we consider independence in practice. I will return to these questions in the third section of this paper.

3. How important is independence?

The second issue I want to address is how important is independence. If this was a very short speaking session, I would give this answer: very. Since we have a little bit more time today I will elaborate on this somewhat. The importance you place on the independence of the Ombudsman in part probably turns on your view as to whether you believe Ombudsman themselves are important. After all if the Ombudsman is not an important institution it will presumably be of less significance whether or not the office is independent.

² <http://www.ombudsman.qld.gov.au/AboutUs/OurOffice/OurRole/tabid/60/Default.aspx>

³ *Benchmarks for industry-based customer dispute resolution scheme*, referred to in the remainder of the paper as the Benchmarks.

The Ombudsman began, some two hundred years ago, as a relatively minor part of the governmental framework of one Scandinavian country. Since that time the Ombudsman's office has evolved and extraordinarily so. It is now represented in over one hundred and thirty countries.⁴ This includes office of the Ombudsman at the federal level in Australia as well as every state and territory as well as in New Zealand. The Ombudsman's expansion has not just been one of scale, but also scope. Ombudsmen now undertake a much wider range of activities than was the case traditionally. To use my office as an example, in addition to the "classical" Ombudsman functions, we undertake inspections of telecommunications intercepts, investigation of public interest disclosures (more popularly referred to as whistleblowers' complaints), investigation of complaints from overseas students, reviews of certain child deaths and we are currently discussing a possible three new jurisdictions.

Moreover, perhaps the most striking expansion of the office of the Ombudsman is not parliamentary Ombudsmen but industry-based Ombudsmen. These Ombudsmen have grown at a rapid rate in the last two decades and, in Australia, now provide a major pathway to access to dispute resolution in many of the major sectors of the economy, including telecommunications, financial services, energy and water supply and public transport.

In my view the Ombudsman is now properly considered to be an integral part of modern notions of government accountability and, indeed, I and others argue, has become fundamental to the one non-negotiable element of all government responsibilities – the creation and maintenance of the rule of law. In Western Australia, we identify four key integrity agencies that collectively meet as the Integrity Co-ordinating Group, the Corruption and Crime Commission, the Auditor-General, the Public Sector Standards Commission and the Ombudsman. In turn, industry-based Ombudsmen are both a major pathway to the resolution of disputes in a timely and efficient manner, but also play an important role in capturing an evidence-base (in the complaints they handle) that can be given to regulators and policy-makers to inform and improve the work that they undertake.

If we do accept that the Ombudsman is a fundamental part of the majority of modern democratic governments then it is still important to understand whether the independence of the Ombudsman is a critical principle for a body to be known as an Ombudsman.

The importance of independence can it part be demonstrated by the extent to which so many bodies identify independence as an essential characteristic of the Ombudsman institution. Almost all Ombudsmen cite independence as a cornerstone upon which their work is built and without which its work would not be credible. For our website and other communication materials, my office chooses three words to describe itself: fair, independent and accountable. The Victorian Ombudsman uses independent, impartial and free and the Tasmanian Ombudsman emphasises free and independent. ANZOA chooses the words free, fair and independent and in its recent policy statement on the essential criteria for describing a body as an Ombudsman, independence features as one of six criteria.

⁴ John McMillan, 'Key features and strengths of the Ombudsman model – National Ombudsman Commission of Indonesia', Seminar and Training on Local Ombudsman, 22 and 25 June 2004, available at www.ombudsman.gov.au

Of the twelve essential characteristics of Ombudsman identified in 1969 by the American Bar Association, eight of the twelve criteria either directly use the word independence or clearly suggest independence.

A little earlier, I discussed the expansion of the office of the Ombudsman. While there are many explanations for this appropriation of the term Ombudsman, for today's purposes one of those explanations stands out for particular attention – the term Ombudsman has become increasingly popular because it is a unique and trusted brand name, a name that connotes impartiality, fairness, integrity and independence.

It is the essentialness of these characteristics, none more so than the Ombudsman's perceived independence from those who it keeps to account, that has made the public trust and confidence in the term so high and, of course, therefore so appealing to use as a suggested solution to a public policy problem that is likely to gain confidence.

Indeed, the success of the Ombudsman brand name is starting to also become somewhat of a curse – it seems that barely a week now goes by without the call for the establishment of a new Ombudsman, many of which bear very little resemblance to what we would think of as Ombudsman. In almost all cases those bodies that are proposed as Ombudsman that, quite frankly, should not be called Ombudsman, almost always fail because they are not, in fact, independent.

Why is independence so important for Ombudsmen? – because without independence there can be no confidence that our investigations, either their choice, conduct or conclusions, have not been tainted by influence. This confidence must extend to the Ombudsman being both actually independent and seen to be independent. A lack of confidence in those who exist to keep government to account ultimately results in a weakening of the rule of law and the very system of government that serves us so well.

We should never forget that we are, both in this country and in my country, extraordinarily fortunate to enjoy the prosperity and freedom that we have. In every international index that is published our two countries rank near the very top for living standards, health outcomes and care for those less able. It is no coincidence that every international index also sees our countries rank near the very top for respect for transparency of government processes, our respect for individual freedom, the robustness of our democracies and the institutionalisation of the rule of law characterised in part by the creation of, and respect for, independent accountability institutions such as the Ombudsman.

4. How is independence applied in practice?

I now want to turn to how independence is applied in practice. At the outset, I need to be clear that there is no one accepted approach to the application of independence for parliamentary Ombudsmen, nor for industry-based Ombudsmen and between these two different types of Ombudsmen there are also many differences of approach. What I have decided to do in this section is set out what I think are typical ways that independence is applied, whilst still noting obvious departures from the norm. I have identified ten ways that independence is applied in practice, namely: (1) the appointment process of the Ombudsman; (2) the term of appointment of the Ombudsman; (3) the removal of the Ombudsman; (4) the legislative guarantee of the independence of the Ombudsman; (5) the relationship of the Ombudsman with the Government of the day; (6) the Ombudsman should be outside of the public service

(7) the relationship of the Ombudsman with the Parliament; (8) the budget of the Ombudsman; (9) the location of the Ombudsman within the structure of government; and (10) the physical location of the Ombudsman. In compiling this list I have principally had in mind parliamentary Ombudsmen, but where appropriate I have also made reference to industry-based Ombudsmen. I will now deal with each in turn.

4.1 The appointment process of the Ombudsman

First, the appointment process for the Ombudsman, to preserve independence, is generally an appointment of the Governor chosen through an independent selection process. Some appointment processes specify that a Parliamentary Committee undertakes the appointment process or that both Houses of Parliament must agree to the appointment of an Ombudsman.

In the case of industry-based Ombudsmen, appointment is typically undertaken by the Board (or Council where they are separate) of the Ombudsman, or a committee of the Ombudsman that has equal number of consumer and industry representatives.

4.2 The term of appointment of the Ombudsman

Second, the term of the appointment of the Ombudsman is widely recognised as a key component of protecting independence. The general view is that the term of appointment should be at least longer than one full term of government. In Australia, the norm is that appointment terms are between five and seven years, but at least in one case the Ombudsman is appointed until the age of 65.

In the case of the industry Ombudsmen, appointment terms are usually set out in contracts, but not necessarily for extended fixed terms. Having said that, the experience of Australian industry-based Ombudsmen is that they generally serve terms of five years or more.

4.3 The removal of the Ombudsman

Third, the removal of the Ombudsman is also a critical factor in preserving the independence of the Ombudsman. The Ombudsman should, of course, be removed from office for proven incapacity or misconduct, but generally speaking this can only be undertaken with the agreement of both Houses of Parliament.

The removal of industry-based Ombudsmen is usually by the decision of the governing body of the Ombudsman, namely the Board.

4.4 The legislative guarantee of the independence of the Ombudsman

Fourth, the independence of the Ombudsman (including many of the matters that I have included in this list) should be enshrined in the legislation that creates the office of the Ombudsman.

Some additional matters that are regularly captured in legislation that pertain to independence are the salary of the Ombudsman, the post-employment activities of the Ombudsman and also immunity from civil suit for the performance of their functions.

The independence of industry Ombudsmen is usually enshrined in their establishing documents, including Charters and Constitutions, but may also have a regulatory underpinning, often in legislation that regulates the particular industry that the Ombudsman oversees. Of course, both the Benchmarks and ANZOA's policy on independence of Ombudsmen provide critical reference points for the independence of industry-based Ombudsmen.

4.5 Ombudsman should be outside of the public service

Fifth, the Ombudsman should not be a member of the public service and should have freedom in relation to employment of staff.

4.6 The relationship of the Ombudsman with the Government of the day

Sixth, the Ombudsman must be free of Ministerial direction or direction from the Government of the day. Similarly, industry-Ombudsmen must not only be free of control of industry, but also the Ombudsman should be free from direction about how to handle and resolve complaints from the Board of the Ombudsman.

4.7 The relationship with the Parliament

Seventh, the Ombudsman must have a direct relationship with parliament and be subject to their authority and their authority only.

4.8 The budget of the Ombudsman

Eighth, the Ombudsman must have a sufficient budget to undertake their tasks independently. This certainly does not mean that the Ombudsman, to be independent, can simply name a number that he or she believes is appropriate and be given that amount. Ombudsmen, like other agencies, must seek their appropriation directly from the Parliament and be held to account by Parliament for its expenditure. The method by which Ombudsman obtain their Parliamentary appropriation will differ slightly from jurisdiction to jurisdiction, but will sometimes be approved by a parliamentary committee and on other occasions, a government department, most typically, Treasury.

In the case of industry-based Ombudsmen, their budgets are generally set by their Boards and approved at an Annual General Meeting of Members.

4.9 The location of the Ombudsman within the structure of government

Ninth, the structural location of the Ombudsman is important in practice to its independence. The location of an accountability agency as a line responsibility in a large departmental structure can potentially have negative impacts on the independence of the Ombudsman. In my view this is very different from having a Minister charged with the administration of the governing legislation of the Ombudsman – a quite proper arrangement that in no way impacts upon the independence of the Ombudsman.

4.10 The physical location of the Ombudsman

Tenth, care must also be exercised about the physical location of the Ombudsmen – my office, for example, is in a building with no other government tenants, save for a number of accountability and integrity agencies with whom we very sensibly have a resource sharing arrangement. Similarly, we would generally expect industry-based Ombudsmen to not be located in the same building as their industry.

5. The responsibility that comes with independence

The last matter I want to deal with today is the responsibility that comes with independence.

It is important to be clear that being independent, does not mean being unaccountable. First and foremost Ombudsmen are accountable to Parliament. In many cases, this is in the form of a standing or select committee that includes in its terms of reference oversight of the Ombudsman. Even where there is no such Committee in most cases Ombudsmen will have some relationship with a public administration committee or similar type of committee and can always be the subject of inquiries by standing and select committees, parliamentary questions and appearing before appropriations hearings. In the case of industry-Ombudsmen they are accountable to Boards and/or Councils.

We are also accountable to taxpayers – they are after all the people paying for our operations (or in the case of industry-Ombudsman schemes the consumers of the industries services). To take the Western Australian Ombudsman's office as an example, we are subject to a range of accountability mechanisms. For example, compliance with a range of whole of government regulation and policies in relation to matters such as procurement, employment, financial accounting, annual reporting and record keeping. We are subject to oversight from a range of accountability agencies including the Corruption and Crime Commission, Public Sector Standards Commission and Auditor-General.

Independence is also not a licence for recklessness in our activities. Indeed, I think quite the opposite is true. Because we enjoy such a high level of independence, and in the case of parliamentary Ombudsman, such a significant level of investigatory powers, including generally the powers of a standing royal commission, we have a great duty of responsibility.

Once again to take my office as an example, we have a strong set of internally-driven principles to ensure that we are exercising our independent powers responsibly. This includes:

1. That we have a clear evidence base for the work that we undertake;
2. Ensuring that our policies and procedures are highly transparent and operating on a "no surprises" basis;
3. No matter how well-intentioned, thoroughly researched or grounded in evidence they may be, we undertake cost and benefit analysis of any administrative improvement we recommend as well as considering the unintended consequences of our recommendations; and
4. We also only undertake matters of material public importance and then ensure our resource allocation to the issue, and the decisions we make, are proportionate to the problem under consideration.

Our independence is also, in my view, not a licence to be involved in matters of public policy. In my view, the development of policy is for governments who are

elected to do so, and are held to account in democracies for their success or failure in so doing. The role of the Ombudsman is to ensure that those policies, once they become law, are properly administered. I see similar constraints on industry-Ombudsmen - they are neither regulators nor policy-makers (although they will quite properly have engagement with both). Industry-Ombudsmen essentially exist to resolve consumer disputes. This is not to say that they do not have very valuable insights to provide to regulators about the nature of the complaints they receive, including serious or systemic issues (indeed, they are often required by their own or external regulatory instruments to inform regulators about these issues). Nor does it mean that they may not have input into policy matters that impact upon their core business of complaint handling.

Ultimately, if Ombudsman trespass inappropriately in the area of policy they risk undermining their independence and impartiality and, of course, credibility.

6. Conclusion

Let me conclude with these thoughts. Is independence an important principle to which Ombudsmen must adhere? It unquestionably is. Do parliamentary Ombudsmen and industry-based Ombudsmen demonstrate independence in practice? In my view, they do. This is not to say that they all do so in exactly the same way, nor that it may be observed that some Ombudsmen, both parliamentary and industry-based, may not have incorporated some practices that possibly give them a firmer footing in terms of their independence. But are these Ombudsmen generally characterised with a strong commitment, in principle and practice, to independence? I think they are. This is also not to say that there are disturbing developments in the undermining of the essentialness of the principle of independence of Ombudsmen. The call for the development of dispute resolution and accountability mechanisms with the name Ombudsman that are not in fact independent in their decision-making and operation both undermines those mechanisms, but more importantly threatens to undermine the very strong confidence that governments and citizens have developed in the term Ombudsman and the fact that it is hallmarked by true independence.

Is the independence of the Ombudsman institution respected by governments, scheme members and complainants? From my conversations with Ombudsmen in this country and in mine I observe that the level of respect for the independence of the Ombudsmen is extremely high. I can speak authoritatively about the Western Australian experience – I have never in my three years as either the Western Australian Ombudsman or Western Australian Energy Ombudsman had any interaction of any kind whatsoever with government or a scheme member that has compromised my strong and strict view about the independence of the office. Indeed, the respect for the Ombudsman institution generally, and its independence specifically, is extraordinarily strong and something in which, as a citizen, I take great comfort.

In conclusion, Governments hallmarked by integrity agencies such as the Ombudsman retain the confidence of the public and contribute significantly to stable and successful societies. Conversely, governments hallmarked by a lack of integrity, a lack of an ethical underpinning, corruption, conflict, secrecy, undue favours and unaccountable to its citizens, risk losing their confidence and threatening those societies. Further still, there is clear correlative evidence linking economically underperforming nations with lack of integrity and corruption in government. In short, integrity in the public sector is essential for our ongoing economic prosperity, to protect individuals from overbearing governmental activity and to optimise the way

they exercise their powers. Essential to this integrity is actual and perceived independence from government.

Moreover, the Ombudsman in its more recent incarnations, and particularly as industry-based Ombudsmen, is now a significant pathway to access to justice in Australia and to improving the practices of those industries. Here to, the independence of industry-based Ombudsmen is integral to the confidence that consumers, industry and government have in them.