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Recent evolutions in Australian Ombudsmen¹

Chris Field
Western Australian Ombudsman

1. Introduction

It is a considerable pleasure to attend my first Australian Institute of Administrative Law National Forum and to have the opportunity to present a paper to you. While Ombudsmen² are involved in a wide range of activities, and most purposely take a multi-disciplinary approach to their work, there is no one discipline, at least from my point of view, that has more obvious relevance to the work of Ombudsmen than administrative law.

I am grateful that for this year's National Forum, as indeed has occurred a number of times previously, organisers have dedicated a session to the discussion of Ombudsmen. I was of the view prior to taking my current role, a view that has only fortified since, that the office of the Ombudsman is not only a permanent fixture on the administrative law landscape, but a fundamentally important part of the network of accountability agencies that play a vital role in maintaining and promoting the integrity of Australian public service.

The title of this session is 'Recent evolutions in Australian Ombudsmen'. In this session I will largely focus on recent developments for parliamentary or "classical" Ombudsmen and Simon on recent developments for industry-based Ombudsmen - a hopefully sensible demarcation for our presentations on the basis of our respective roles.

The challenge I have set myself, which hopefully will be more difficult for me and more interesting for you, is not simply to set out recent organisational developments in the office of the Western Australian Ombudsman, but rather to look at larger, conceptual shifts in the work of the Ombudsman, and in particular, how the Ombudsman has changed and adapted to the socio-political environment in which it exists. To do so, I will begin with a brief examination of the history and modern role of the Ombudsman, before examining two developments in the work of the Ombudsman. The first development I will discuss is the expansion of the Ombudsman. The second development is the regulatory role of the office of the Ombudsman.

I will speak for no more than 30 minutes, as will Simon, which will allow 15 minutes for any questions you may have.

¹ I express my thanks to Dr. Peter Wilkins, Deputy Western Australian Ombudsman, for his helpful comments on the first draft of this paper. Any errors in this article are, however, mine alone.

² 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.

2. The history and modern role of the Ombudsman

Before considering evolutions in the role of the Ombudsman, it seems sensible to consider what the office could be said to be evolving from. As many of you may know, the Ombudsman began two hundred years ago in Sweden in 1809 as a parliamentary inspector of the bureaucracy, and like IKEA, has spread around the world. When I refer to the office of the Ombudsman in this paper, it is this parliamentary, or classical, Ombudsman that I have in mind.³ I do not propose to spend time this morning examining the basic history and role of Australian Ombudsmen as I will assume it is something about which almost all Forum participants are familiar. I think it is sufficient to note that Ombudsman offices first appeared in the early 1970s and there is now an Ombudsman at both the Commonwealth level and in every State and Territory. Each of these Ombudsmen is appointed for a fixed term (generally five years) and is independent of the Government of the day. The Ombudsman's principal role is to investigate and resolve complaints about public administration. Ombudsman can also investigate complaints of their own motion. The Ombudsman's powers of investigation are significant, and generally that of a Royal Commissioner. In finalising investigations, the Ombudsman has recommendatory, as opposed to determinative powers.

3. The growth of the Ombudsman

The first evolution in the office of the Ombudsman that I want to discuss today is the expansion of the office of the Ombudsman. The expansion of Ombudsmen can largely be said to fall into three categories. The first is the migration of the Ombudsman beyond its birthplace in Sweden to other countries.

3.1 Migration from Sweden to other countries

Ombudsmen of some description can now be found in most European countries, throughout Africa and Asia, in a number of American states, the South Pacific and, of course, Australia. The office of the Ombudsman has migrated from parliamentary democracies to other forms of government, from countries with very significant public services to those with less, from the very prosperous to the very poor, from the very large to the very small. All in all, the Ombudsman has proved a particularly portable concept.⁴

³ See Gabrielle Kucsko-Stadlmayer, 'The further spread of the Ombudsman idea in Europe' for an interesting discussion about typologies of Ombudsmen, particularly at pp 5-6. This paper was delivered to the International Ombudsman Institute conference in Sweden in June 2009 and is available from the author.

⁴ For further discussion of the migration of the Ombudsman, see, for example, Gabrielle Kucsko-Stadlmayer, note 3 above, Brian Elwood, and 'The Ombudsman travels to the Anglo-Saxon world', Alice Tai, 'Diversity of Ombudsman in Asia'. Each of these papers was delivered to the International Ombudsman Institute conference in Sweden in June 2009 and are available from the author.

3.2 Appropriation of the term Ombudsman

The second expansion of the office of the Ombudsman has been the widespread appropriation of the term Ombudsman.⁵ As a title with understood dimensions - a provider of fair, independent dispute resolution - the Ombudsman has been appropriated from its beginnings as a parliamentary officer into many aspects of public and private administration. A reference to the office of the Ombudsman these days is just as likely to be to one of the large number of industry-based Ombudsmen (for example, the Telecommunications Industry Ombudsman), internal Ombudsmen in public sector organisations (for example, local governments) or internal Ombudsmen in private companies (for example, insurance companies and banks). Suggestions for the creation of new Ombudsmen are now commonplace⁶, for example last week, Senator Nick Xenophon called for the creation of an Overseas Student Ombudsman.⁷ In fact, there is now a veritable cradle to grave offering of Ombudsman – from Children’s Ombudsman to Aged Services Ombudsman to everything in between. A personal favourite of mine is the Florida Sinkhole Ombudsman – although I’m sure if you lived in Florida, and so happened to be proximate to a sinkhole, and your house collapsed into a suddenly appearing, rather large hole in the ground, you would be exceptionally grateful for the existence of the Sinkhole Ombudsman. Indeed, the Ombudsman has so successfully infiltrated modern culture that a US Fox News television program that uses a comedian to provide an impartial, balanced summing up of the show’s commentators is called the Ombudsman.

3.3 Increase in the scope of Ombudsmen

While the Ombudsman has spread throughout the world, the expansion of the Ombudsman institution has not been one of just scale, but also scope. This third category of expansion has been the evolution in the scope of functions undertaken by Ombudsmen. 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 and, most recently, reviews of certain child deaths. Indeed, over the past two years, the size and budget for my office has increased by fifty percent.

Ombudsmen are now also undertaking dual roles, combining their classical role with that of industry-based Ombudsman. For example the Tasmanian Ombudsman and I both undertake the industry-based Ombudsman role of Energy Ombudsman. Having performed this dual role over the past two years, I am pleased to say that I think it can be made to work successfully. It is also interesting to observe, in terms of how adaptive the Ombudsman model can be, that while in my general jurisdiction I am exercising recommendatory powers in the energy jurisdiction I am exercising determinative powers.

⁵ See, generally, John McMillan, ‘What’s in a name? Use of the term Ombudsman’, Presentation to the Australian and New Zealand Ombudsman Association Conference, Melbourne 22 April 2008 available at www.ombudsman.gov.au

⁶ John McMillan states that ‘almost every month in the media the government is called on to create a new specialized Ombudsman office. Over the last few years I have counted at least thirty such proposals’, in John McMillan, note 5 above at 2.

⁷ See www.abc.net.au/news/stories/2009/07/28/2638119.htm (viewed as at 2 August 2009).

Finally, at a time when we are in a process of a national debate regarding the potential development of new regulatory mechanisms to recognise, protect and promote human rights, it is important to acknowledge the evolution of the role of Ombudsmen as human rights protectors.⁸ One of the reasons (among a range of others) why I personally do not support a human rights charter is the existence of so many institutions in our society (such as the Ombudsman) who serve, within the existing regulatory framework, to protect and promote human rights with very great success.⁹

In my view, at its very core, the Ombudsman is a human rights institution. Commonwealth Ombudsman, Professor John McMillan, has observed that “the right to complain, when securely embedded in a legal system, is surely one of the most significant human rights achievements that we can strive for”.¹⁰ As I have said earlier the Ombudsman’s principal role is to receive and resolve complaints. It is sometimes said that the Ombudsman is essentially a reactive institution and that human rights agencies must have a clear proactive mandate. Whilst it is true that the complaint-handling function is largely reactive, this position is otherwise, in my view, misconceived.¹¹ The Ombudsman has always possessed, and I think is increasingly exercising, a very significant proactive jurisdiction - particularly the undertaking of inspections regarding the exercise of coercive powers and the ability, of its own motion, to undertake investigations into matters that involve human rights issues.¹² Ombudsmen offices, on a daily basis, investigate how the state, through its instrumentalities, affects the rights that inherently reside in individuals to exercise their economic and personal freedoms. As one of many case examples I could give, my office is currently undertaking an own-motion investigation into the collection, protection and use of personal information by government agencies – a clearly proactive investigation into a now well accepted individual right to privacy of personal information.

⁸ See, generally, Ritta-Leena Paunio, ‘The Ombudsman as human rights defender’. This paper was delivered to the International Ombudsman Institute conference in Sweden in June 2009 and is available from the author.

⁹ My view about the undesirability of a human rights charter/bill of rights is strictly mine personally and does not necessarily reflect the view of the office of the Western Australian Ombudsman or the Western Australian Government.

¹⁰ John McMillan, ‘The role of Ombudsman in protecting human rights’ at 3 available at www.ombudsman.gov.au.

¹¹ Professor John McMillan notes that “A great advantage that Ombudsman offices have ... is that we can follow-up complaints and report findings: we can be proactive, not reactive”, John McMillan, note 9 above at 6. The development of new United Nations human rights conventions also highlights how the traditional proactive human rights role of the Ombudsman suits developing human rights applications: “As long ago as 1987, the European and the UN Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment came into being. The UN Convention’s Optional Protocol (OPCAT) established a system of regular visits to all places of detention in order to prevent torture and other cruel, inhuman or degrading treatment. Visits are carried out by a new international body and by one or several of the National Preventive Mechanisms that states set up, designate or maintain. In many countries, it is the Ombudsman who has been designated as the National Preventive Mechanism that the Optional Protocol provides for. The reason for this choice is probably the fact that Ombudsman meet the requirements with respect to independence, *but an additional fact is that they have long been overseeing and inspecting those places mentioned in the Convention* [emphasis added]” in Ritta-Leena Paunio, note 8 above at 13. On this same point see Gabriele Kucsko-Stadlmayer, note 3 above at 7-8.

¹² Moreover, there is a demonstrable link between, on one hand, the strength of a country’s rule of law, accountable democratic institutions and economic freedoms and, on the other, genuine respect for human rights. In this way also, as a key accountability agency, the Ombudsman protects and promotes human rights.

3.4 Why has the office of the Ombudsman expanded?

There are undoubtedly many reasons that explain the expansion of the role of the Ombudsman. Here, I have identified five.

First, over the last few decades, despite considerable deregulation and privatisation, there has nonetheless been growth in government, including increasing complexity in government services. Indeed, even in those areas of deregulation and privatisation that may have removed jurisdiction from classical Ombudsmen, this jurisdiction has often been taken up by industry-based Ombudsmen.¹³ University of Chicago academic, Professor Richard Epstein, has noted that "...each new extension of government power should be examined under a presumption of error".¹⁴ While this view is unlikely to be shared completely, a growing recognition of the likelihood of error occurring with new government powers has no doubt supported the development of oversight agencies. Indeed, with this rise in government activity there has been, for the most part, a concomitant rise in the number (and scope) of accountability agencies, so much so that commentators even talk of a fourth branch of government, the integrity branch, to sit alongside of the executive, legislature and judiciary.¹⁵ It is suggested that this integrity branch of government has been vested with the responsibility to oversight, investigate and educate the public sector in relation to corruption, misconduct, good decision making, avoiding conflicts of interest and the like. The Ombudsman has become recognised as a central pillar in this integrity structure. In Western Australia, for example, the Integrity Co-ordinating Group consists of the Auditor-General, Ombudsman, Crime and Corruption Commission and the Office of Public Sector Standards.

Second, much of the growth of the Ombudsman concept has paralleled growth in concerns regarding access to justice and the need for fast, low-cost resolution of disputes.¹⁶ Ombudsmen of all types have been well-placed to provide an alternative pathway for the resolution of disputes. Similarly, as concern about access to justice has grown, so too has enthusiasm for alternative dispute resolution. Once again, Ombudsmen of all types have been able to offer various methodologies of dispute resolution that has delivered very timely, highly cost-effective justice. Complaints dealt with by industry-based Ombudsmen schemes now number in the hundreds of thousands. To use the Western Australian Energy Ombudsman as an example, 96% of complaints are resolved in 10 business days or less.

¹³ Micro-economic reform throughout the 1980s and 1990s, greater emphasis of self-regulation and market models and the rise of the organised consumer movement (who were active protagonists for these schemes) all partly explain the growth of industry-based Ombudsmen.

¹⁴ Richard Epstein, 'Why the Obama stimulus plan must fail', *Forbes*, 21 July 2009, viewed as at 2 August 2009 on the Cato Institute website at http://www.cato.org/pub_display.php?pub_id=10372

¹⁵ John McMillan, 'The Ombudsman and the rule of law' (2005) 44 *AIAL Forum* 1 at 4 and John McMillan, 'Chaos or coherence? Strengths, opportunities and challenges for Australia's integrity systems', available at www.ombudsman.gov.au

¹⁶ See, generally, Chris Field, *Alternative Dispute Resolution in Victoria: Supply-side research project*, February 2007 available at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/\\$file/cav_report_adr_supply_side_research_2007.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/cav_report_adr_supply_side_research_2007.pdf) (viewed on 2 August 2009).

Third, the term Ombudsman has become a unique and trusted brand name. The term Ombudsman connotes impartiality, independence and fairness in dispute resolution and scrutiny. Importantly too the Ombudsman is not seen as some passing fad or recent invention and is respected as politically bipartisan.

Fourth, the office of the Ombudsman has expanded because Ombudsmen themselves have been prepared to accept new functions that government propose.

Fifth, the Ombudsman has become an important contributor to the maintenance of the rule of law.¹⁷ This gives greater permanency to the office of the Ombudsman in those countries that already observe the rule of law, but also makes it more likely that those countries who are moving towards this observance will establish an office of the Ombudsman. I think it also makes the Ombudsman more durable in terms of political philosophy. An Ombudsman model can easily fit with a more protective, interventionist welfare state approach (indeed, much of the growth of the Ombudsman institution this century parallels the growth of the welfare state).¹⁸ But at the same time the Ombudsman can fit successfully with a political approach that favours more limited government, but places a central focus on the role of the state to maintain the rule of law. One of the greatest of all economists, Friedrich Hayek¹⁹ has said of the rule of law:

Nothing distinguishes more clearly conditions in a free country than those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all its technicalities this 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.²⁰

The Ombudsman is a contributor to the rule of law because we help to ensure that those who administer government's laws play by the rules.

3.5 Benefits and problems with the expansion 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 of which I will simply list a few that occur to me:²¹

1. Creating high levels of community awareness of the office of the Ombudsman is both an ongoing aspiration for Ombudsmen and a perennial challenge. The expansion of the use of the term Ombudsman significantly enhances awareness of the Ombudsman in the community and its core functions;

¹⁷ See, generally, John McMillan, note 14 above.

¹⁸ Roger Douglas, *Administrative Law*, 2nd Edition, Butterworths, 2004 at 279.

¹⁹ I personally share P J O'Rourke's view that *The Road to Serfdom* is the second most important book on economics ever written (although perhaps the most courageous). The first is Adam Smith's *The Wealth of Nations*. See P J O'Rourke, *On the Wealth of Nations*, 2007, Allen and Unwin at 76.

²⁰ Friedrich Hayek, *The Road to Serfdom*, Routledge Classics, 1944 at 75-76.

²¹ John McMillan, 'The expanding Ombudsman role: What fits? What doesn't?' available at www.ombudsman.gov.au The author notes three gains from the expansion of the use of the term Ombudsman, namely, a "stimulus to good practice in complaint handling and oversight", "public awareness of the right to complain" and "guidance in our own work" at 4.

2. An integration of non-traditional functions into Ombudsmen offices benefits the community through the synergies created between components and allows Ombudsmen offices to achieve much greater scale and scope economies and, in my experience, achieve significantly higher quality work across all functions;
3. The 'institutionalisation' of the Ombudsman makes them much less vulnerable to political cycles;
4. Ombudsman offices can collaborate with, learn from, and benchmark against, each other; and
5. 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 oversighted is beneficial.

The expansion of the office of the Ombudsman, and particularly of the use of the term Ombudsman, is not without problems. Once again, I simply list a few of the more obvious ones:²²

1. There are dangers around the misappropriation of the word Ombudsman. In effect, this is a caution against allowing the word Ombudsman to be used as a confidence-inducing façade for an otherwise partial, non-independent body. Use of the word Ombudsman in this way not only risks misleading the public about the particular service they are using, but also has the potential to undermine the credibility of the Ombudsman institution generally;
2. Somewhat related to the first problem, there is the possibility of confusion that is created with so many different Ombudsman with different jurisdictions and different methodologies. Also, as the term Ombudsman is increasingly appropriated across sectors we must continue to be vigilant that the term does not become so generic that it becomes effectively meaningless. Ombudsman themselves must ensure that they protect the brand name they have established; and
3. Although the desire of government to create Ombudsman, or give Ombudsman new powers, is understandable, and mostly welcome, as is the desire of Ombudsman to expand their functions to create greater wherewithal to undertake their functions, some functions suggested for Ombudsman offices are simply not a good fit and, as independent officers, should be refused accordingly.²³

4. Ombudsman as regulator

In the second section of my paper, I want to discuss the concept of the Ombudsman as a regulator.

4.1 Does the Ombudsman make regulation?

As I have already discussed, modern Ombudsmen perform many functions. They are, first and foremost, complaint resolvers. They are increasingly proactive inspectors of specific powers exercised by government institutions, they are educators about good

²² Professor John McMillan has observed that the expansion of Ombudsman can lead to "public confusion", public deception" and "ill considered change" in John McMillan, note 19 above at 4.

²³ See, generally, John McMillan, *The expanding role of the Ombudsman: What fits? What doesn't?* available at www.ombudsman.gov.au for examples.

administration, and they are investigators of potentially systemic and/or serious maladministration, conflicts of interests and abuses of power. In this way, Ombudsmen are properly characterised as watchdogs. They are also, in my opinion, regulators. Ombudsmen, in identifying mistakes in administration, and proposing new ways to administer laws (or indeed, as they case may be, suggesting the removal, variance or creation of laws) are institutions that are regulatory in their nature. In short, Ombudsmen have a role in regulating public administration, and by implication, in regulating the public.²⁴

This is not to suggest that this is wrong - just as regulation is a very valuable, indeed clearly an indispensable, part of modern economies, so too the regulatory role of Ombudsmen should, in my view, clearly be seen as important and valuable.

The issue here is what we have learned about the limits of regulation, including regulatory burden and how accountability agencies, including Ombudsmen, can continue to incorporate this thinking into their work.²⁵

4.2 An evolving understanding of the limits of regulation

Over the past few decades in Australia and elsewhere, we have seen growing emphasis on ensuring that all aspects of our economy, including public administration, are provided as efficiently and productively as possible, including strong interest in reducing so-called red-tape and unnecessary regulatory burden on the community. Using Australia as an example, this has been a period of the creation of new government institutions such as the Productivity Commission, and various offices of regulatory review at jurisdictional level, significant micro-economic reform, including privatisation and deregulation, numerous reports and one-off references, notably the Commonwealth Red-Tape Taskforce and a variety of jurisdictional variations of this concept as well as new processes such as regulatory impact statements prior to the passage of new regulation and recurring expectations of efficiency dividends by government agencies.

The global financial crisis, and ensuing recession, only serves to remind us of the need for good quality regulation without excessive cost.

Accountability agencies, as regulators, should be confident that there is very significant public value to be created from their administrative improvements. Similarly though, they need to be aware of the regulatory burdens that they can create. A very large amount of regulatory activity occurs for the right reasons – it is conceived, considered and implemented with unquestionably good intentions. Unfortunately, not all of that

²⁴ In regulating the administration of regulations the work of the Ombudsman might be described as a form of meta-regulation: see *Rethinking regulation: Ideas for better governance*, ANU Regulatory Institutions Network, 2004, available at http://regnet.anu.edu.au/program/review/reports/Rethinking_Regulation.pdf (viewed at 2 August 2009). See also Administrative Review Council, *Administrative accountability in business areas subject to complex and specific regulation*, November 2008, available at [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)-d_ARC+Report+No.+49+Complex+Regulation.DOC/\\$file/d_ARC+Report+No.+49+Complex+Regulation.DOC](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)-d_ARC+Report+No.+49+Complex+Regulation.DOC/$file/d_ARC+Report+No.+49+Complex+Regulation.DOC)

²⁵ Among the many disciplines that inform the practice of administrative oversight my view is that economic analysis brings useful insights. Law and economics has had a very considerable influence on a range of legal disciplines, most notably contract and tort, but has had considerably less influence on administrative law: see, for example, Susan Rose-Ackerman, 'Progressive law and economics – and the new administrative law', 98 *Yale Law Journal* 341 at 342. An understanding of the work of the Ombudsman from this perspective I think is a fruitful area of endeavour.

which is designed with good intentions actually achieves good outcomes. An oft referenced regulatory failure is American prohibition.²⁶ Prohibition was a perfectly well-intentioned regulation with, unfortunately, spectacularly bad results. Among the bad results was the corruption of public administration – costly in financial terms and corrosive in terms of confidence in the state and the rule of law.²⁷ As famous American economist Milton Friedman stated:

Prohibition was imposed for our own good. Alcohol *is* a dangerous substance. More lives are lost each year from alcohol than from all the dangerous substances the FDA controls put together. But where did Prohibition lead? New prisons and jails had to be built to house the criminals spawned by converting the drinking of spirits into a crime against the state. Al Capone, Bugs Moran became notorious for their exploits – murder, extortion, hijacking, bootlegging. Who were their customers? Who bought the liquor they purveyed illegally? Respectable citizens who would never themselves have approved, or engaged in, the activities that Al Capone and his fellow gangsters made infamous. They simply wanted a drink. Prohibition didn't stop drinking. It did convert a lot of otherwise law-obedient citizens into law breakers. It did confer an aura of glamour and excitement to drinking that attracted many young persons. It did suppress many of the disciplinary forces of the market that ordinarily protect the customer from shoddy, adulterated and dangerous products. It did corrupt the minions of the law and create a decadent moral climate. It did *not* stop the consumption of alcohol.²⁸

But we don't need to go back nearly this far in history to consider examples where a regulatory intervention has at least been suggested to have unexpected consequences.

4.3 Principles for good regulation

I think accountability agencies, including Ombudsman, need to be aware that no matter how well-intentioned are our recommendations for administrative change, these changes may:

1. not necessarily always achieve their desired outcome;
2. have unintended consequences; and
3. result in costs that outweigh the benefits of the improvement.

In short, the Ombudsman as an institution exists to identify and suggest the remediation of mistakes in public administration – what administrative lawyers refer to as maladministration. But Ombudsman themselves can make mistakes, including mistakes in the suggestions we make to improve public administration. The trick here is not that we will never make a mistake, but to be cognisant of the fact that mistaken judgments will occur and to have a series of principles in place to reduce our regulatory error.

The principles that I suggest utilising are as follows:

1. That there is always an evidence base that establishes the need for administrative improvement. For most Ombudsmen a ready base of evidence exists in the complaints made to their offices;

²⁶ Milton Friedman and Rose Friedman, *Free to Choose*, Harcourt 1980 at 226-7.

²⁷ The response to this corruption included significant anti-corruption policing. The corruption itself, and the response to it, both avoidable by government not seeking to control the activity in the first place.

²⁸ Milton Friedman and Rose Friedman, note 25 above at 226-7 (original emphasis).

2. That these improvements will actually remedy the problem identified. This may seem redundant to say, but regulators do need to be able to demonstrate that their proposed remedy will actually address the problem at hand;
3. That the improvement is proportionate to the problem identified. Some problems are wide-ranging, whole of government problems with serious implications and deserve similarly wide-ranging solutions. But other problems may be limited or not so serious and the remedy similarly limited;
4. That we have considered the benefits and the costs of the recommendation we are making. It is surprising how often in public policy generally, when we consider improvements to a currently less than optimal system, that we give great emphasis to the benefits, but less so to the costs. These costs might be one-off implementation costs or ongoing compliance costs. Similarly, in considering cost, we do need to consider the value that the community places on the various choices that can be made with limited resources. It might be not particularly costly to fix a problem but inasmuch as expenditure of money in this area will be an opportunity cost to expenditure in an area more valued by the community, it still may not be desirable; and
5. That we have considered the unintended consequences of the recommendations we make. Many proposed improvements can in fact lead to not just undesirable consequences, but sometimes completely perverse consequences where the exact opposite of the improvement sought is actually achieved. While some unintended consequences are unforeseeable, most, with research, wide-ranging consultation, an eye to history and a good dose of humility, are avoidable.

It is also important to remember that accountability agencies do not just investigate, report on, and make recommendations about, problems in public administration, they also undertake a range of activities from education, standard-setting, and creating new regulatory mechanisms designed to limit the likelihood of these problems occurring in the first place. These types of measures will mostly be highly desirable. We do need to be mindful, though, that such approaches can become overly prescriptive or complex, adding unnecessary burdensome costs to public processes – costs, of course, borne by the taxpayer. Such processes may also create undesirable inertia in government administration and dampen positive innovation through excessive risk aversion. Considered risk-taking (including considering that you are taking a risk with other people's money) that leads to beneficial outcomes for the public is, I think, something to be promoted, not avoided, by public sector leaders.

It is important to note that in setting out these principles, I am not suggesting that they are not observed regularly by Ombudsmen. Even a cursory scan of published Ombudsmen investigations reveals that they have long given consideration to the need for regulatory recommendations as well as their costs and benefits and potential consequences (as well as listening to these arguments when they are made by public sector agencies).

In making the case for Ombudsmen to consider carefully the imposts of their proposed administrative improvements, I think it is also important to point out that the Ombudsman's powers are recommendatory only. The Ombudsman cannot compel an agency to accept its idea of an administrative improvement no matter how strongly it believes it to be correct. Having said that, I personally find the argument that because the Ombudsman only has recommendatory powers it might pay less attention to the

effects of its recommendations to be a particularly unsatisfactory one. It should also be kept in mind that although the Ombudsman's findings are recommendatory only they generally are considered very persuasive. Indeed, during my term as Western Australian Ombudsman one hundred percent of our recommendations for administrative improvement have been accepted by agencies. It should also be said that it not the role of the Ombudsman alone to take responsibility for any administrative imposts created by its recommendations for improvement. Clearly the agencies the subject of the Ombudsman's recommendations need themselves to consider the need, alternatives, costs and benefits and unintended consequences of any improvement recommended to them.

5. Conclusion

The *Ombudsman Evolution*, as much as it may sound like a hitherto undiscovered Robert Ludlum novel, does describe a very real, and equally very interesting and important, development in the modern history of justice and accountability. In the words of one commentator:

All over the world, the very word "ombudsman" evokes feelings of security, protection and freedom. The constitutional Ombudsman concept is today intrinsically tied to the ideas of democracy, rule of law and human rights.²⁹

The Ombudsman, at first a relatively minor part of the governmental framework of one Scandinavian country, has evolved, and extraordinarily so. It is now represented in over one hundred and thirty countries,³⁰ 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. Moreover, the Ombudsman in its more recent incarnations, and particularly as industry-based Ombudsman, is now a significant pathway to access to justice in Australia.

If the essence of evolution is change and adaption to the environment, then the Ombudsman has evolved to meet changes in its environment, from the expansion of government power, the growth in interest in protecting human rights, the desire to promote integrity in public administration and the rise of access to justice as a major area of policy attention. There is much to celebrate in this evolution, some matters that require ongoing vigilance and a few matters that are of concern. Overall, however, perhaps the greatest strength of the Ombudsman is simply its capacity to evolve so successfully. If history is any guide, a topic at a future AIAL Forum dedicated to further evolutions in the office of the Ombudsman is unlikely to be misplaced.

²⁹ Gabriele Kucsko-Stadlmayer, note 3 above at 7.

³⁰ 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