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Plenary Session: Evolution of Ombudsmanship

'The evolution of the Ombudsman'

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Intro

Sawasdee Krap.

Can I commence by expressing my sincerest condolences on the tragic passing of His Majesty, the King of Thailand - this is a time of deep mourning for the people of Thailand.

In my conversations over the past few days with both the Chief Ombudsman and the staff of the office of the Ombudsman Thailand, I have come to understand that His Majesty was the Father of Thailand – a father of infinite wisdom, tireless work and boundless love for the people of Thailand.

To my friends from the office of the Ombudsman Thailand, at this most difficult of times for you, I thank you for the simply outstanding work you have done in organising and hosting our 11th World Conference.

I am privileged to be here, with so many of my colleagues and friends from around the world, to share our reflections on, and aspirations for, the institution of the Ombudsman. In particular, this opening session explores our conference theme of evolutions of Ombudsmanship.

In my presentation, I want to consider larger, conceptual shifts in the work of the Ombudsman, in particular, how the Ombudsman has both responded, and provided leadership, to the socio-legal environment in which it exists.

To do so, I will begin by discussing the growth of the Ombudsman, before exploring reasons for this growth and its benefits. I will then turn to consider the evolution of the Ombudsman in terms of both the protection and promotion of human rights and the rule of law, before making concluding observations.

The Growth of the Ombudsman

First, I want to consider the growth of the institution of the Ombudsman. From Sweden, through Scandinavia, to over 100 countries – so many of them represented

in this room today – the widespread international adoption the Ombudsman institution is, in the modern history of government accountability and justice, nothing less than astonishing.

At the same time that the Ombudsman has spread throughout the world, the expansion of the Ombudsman institution has not been one of just 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 child deaths and fatalities arising from family and domestic violence, monitoring of the control of criminal organisations, monitoring of criminal code infringement notices and the role of Energy and Water Ombudsman. Indeed, over the past decade the budget of the office of the Western Australian Ombudsman has increased from 3 million dollars to 11 million dollars. This rapid expansion, through the addition of a diverse range of functions, can be observed in Ombudsman offices around the world. This leaves aside the extraordinary growth of the Ombudsman concept in the private sector, often referred to as industry Ombudsman, Ombudsmen are now also undertaking dual roles, combining their classical role with that of industry-based Ombudsman. For example, in Australia, a number of Ombudsmen, including our colleague Commonwealth Ombudsman, Colin Neave and I, undertake industry-based Ombudsman roles which will be the subject of discussion in a breakout session this afternoon.

The highly adaptive nature of the institution of the Ombudsman can be seen in the fact that a single office may undertake an advanced hybrid of merits and judicial review, exercise both recommendatory and determinative powers, perform inspectorate, monitoring and rapporteur functions, all at once across both the public and private domains, and all with the powers of a standing Royal Commission. We could go further and note those offices that not only consider the sort of maladministration the subject traditionally of prerogative judicial review, but those who concurrently examine serious misconduct and corruption powers.

The Ombudsman has also proved adaptable to its constitutional context. Ombudsmen fit exceptionally well into Parliamentary Westminster systems of government. But, of course, there are many variations of how to separate the accretion and exercise of the power of the state. For example, the traditional Chinese system of government had five branches, including an integrity or control branch. The Control Yuan of Taiwan is a modern embodiment of this branch. Although not all Ombudsman have yet been endowed with constitutional dignity, as officers of the Parliament, or indeed their own branch of control, Ombudsman continue to adapt successfully to the vast variation of systems of government around the world.

The reasons for this growth

It is particularly interesting to ask why this is the case. There is no doubt that there are a range of reasons why the institution of the Ombudsman has evolved so dramatically. Today, I want to proffer four.

First, over the last few decades, despite considerable deregulation and privatisation, there has nonetheless been growth in government, including increasing complexity in government services. His Honour Robert French, Chief Justice of the High Court of Australia, has described a ‘galloping growth in regulation’ including a ‘growth of less visible soft law’ in the form of administrative guidelines. 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 private sector Ombudsmen.

With this rise in government activity there has been, for the most part, a concomitant rise in the number (and scope) of accountability agencies. The Ombudsman has become recognised as a central pillar in this integrity structure. As an example, since the creation of the office of the Western Australian Ombudsman over forty years ago, successive Western Australian governments have created a range of offices including the Public Sector Commission, the Corruption and Crime Commission, an office of Inspector of Custodial Services and an office of the Information Commissioner. The importance of so doing cannot be underestimated. History has decisively demonstrated that societies that enshrine integrity in their public institutions are the ones that are the most stable and successful. They are the societies where, among other things, prosperity is the greatest, living standards the highest, opportunities for advancement their strongest, health and education outcomes the best and safety-nets the most generous.

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. 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 have delivered very timely, highly cost-effective justice. Indeed, Ombudsmen in Australia, for example, resolve a similar number of complaints to courts and tribunals and do so in a way that is highly accessible and efficient.

Third, the institution of the Ombudsman has become trusted to deliver accountability of government power. While it has been my experience that this non-partisan, independent, and fair-minded approach, is valued by governments, it can be these very characteristics that place Ombudsmen under threat – a matter of the utmost importance that will be the subject of a session later in this conference.

Fourth, the office of the Ombudsman has expanded because Ombudsmen themselves have been prepared to accept new functions that governments propose. Ombudsmen do so for many reasons, the confidence in the importance of such functions being undertaken by an independent, impartial office being one obvious one. Certainly though, in times of economic uncertainty, with government budgets contracting and productivity-boosting micro-economic reform challenging, new functions for Ombudsman offices provide the capacity for scale and scope efficiencies, delivering resilience and stability.

Benefits of the evolution of 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. Here, I simply list a few of the more obvious ones, namely: creating high levels of community awareness of the office of the Ombudsmen, a perennial challenge for our offices; an integration of non-classical functions into Ombudsmen offices benefits the community through the efficiencies created and, in my experience, enables significantly higher quality work across all functions; the institutionalisation of the Ombudsman makes it much less vulnerable to political cycles; Ombudsman offices can collaborate with, learn from, and benchmark against, each other; and 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 oversights is beneficial.

The expansion of the office of the Ombudsman, and particularly of the use of the term Ombudsman, is not without problems. 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. Somewhat related to the first problem, there is the possibility of confusion that is created with so many different Ombudsmen 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. Ombudsmen themselves must ensure that they protect the name they have established. Although the desire of government to create Ombudsmen or give Ombudsmen new powers is understandable and mostly welcome, as is the desire of Ombudsmen 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.

The Ombudsman and Human Rights

Next I want to consider briefly the Ombudsman and human rights. Three centuries ago, English poet John Milton wrote:

For this is not the liberty which we can hope, that no grievance should ever arise in the Commonwealth, that let no man in this world expect; but when complaints are freely heard, deeply considered and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for.

In my view, at its very core, the Ombudsman is a protector of civil liberties – a human rights institution.

The Ombudsman's principal role is to receive, investigate and resolve complaints. Acting New South Wales Ombudsman, and one of Australia's leading administrative law scholars, 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”.

Beyond our complaint resolution work - essentially a reactive role, our offices have evolved to have an increasingly proactive mandate, particularly the undertaking of inspections of the exercise of coercive powers or of places where those detained by the state are held, and the ability, of our own motion, to undertake investigations into matters that involve human rights issues.

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.

The Ombudsman and the Rule of Law

Finally, I want to turn to the relationship of the Ombudsman and the rule of law. Most conference delegates will be very familiar with the concept of the rule of law – in the shadows of the 800th anniversary of the Magna Carta, its resonance with our work in mediating the relationship of power to those governed has only grown over the centuries.

It is not a rule of the law, but a rule about what the law should be. As many a law student would sadly attest, as a legal and political doctrine even in its most prosaic formulations, it can be like approaching a James Joyce novel - brilliant, important, but bordering on the impenetrable.

Although the classical formulation belongs to the great legal theorist Dicey, perhaps the most succinct formulation can be found in the writings of Austrian economist, Friedrich Hayek. Hayek considered that the rule of law:

[s]tripped of all its technicalities [it] 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.

A central component of the rule of law is to ‘reduce the complexity, arbitrariness and uncertainty of the administrative application of law.’ In my view, this very clearly describes the day to day work performed by the Ombudsman.

Although most importantly, and quite properly, oversight of the administration of the rule of law is a role for our courts, wherever Ombudsmen exist, they have become, in my view, strong protectors and promoters of the rule of law.

The rule of law is also critical to the continuation of economic development and the opportunities for raising the living standards of citizens that development brings. The evolution of the institution of the Ombudsman as part of the rule of law is a matter of which we ought to celebrate unashamedly.

Conclusion

The story of the evolution of the Ombudsman is a narrative breathtaking in its sweep. Ombudsmen are now woven into the governance fabric of hundreds of countries around the world. If the essence of evolution is change and adaptation to environment, then the Ombudsman has evolved to meet changes to the socio-political environment in which exists, particularly the growth of the coercive powers of government and the desire by citizens to ensure that these powers are performed with integrity, transparency and accountability.

The Ombudsman has evolved to become an inseparable, indeed increasingly a constitutionally-protected, part of the modern notions of good government, access to justice, the protection of human rights and, indeed, I and others argue, to the one non-negotiable element of all government responsibilities – the maintenance of the rule of law.

To every conference delegate here today, the evolution of Ombudsmanship is a matter as profound as it is a source of pride. We are enormously privileged to undertake a task that seemingly increases in importance year after year – ensuring the relationship of citizens to power is one that is as free as possible, as fair as possible and, always, as dignified as possible.

I look forward to exploring over the course of this week the breadth and depth of that task and thank you for the opportunity to contribute to that discussion.