



---

# The Ombudsman and Civil Liberties: working together to make things right

NSW Council for Civil Liberties lunch address  
NSW Parliament House

12 March 2010

Bruce Barbour  
NSW Ombudsman

I appreciate being given the opportunity to speak today. I acknowledge the traditional owners of the land on which we meet and pay my respects to elders past and present.

I'd like to speak briefly about two things. Firstly the distinction between civil rights and the work of the Ombudsman. I would also like to comment on some of the parallels and complementary nature of the work of our two organisations.

There is certainly a lot of grand language around both civil liberties and their protection. Without this topic, generations of US Presidents would have been left without a rich vein of material. I do not want to downplay their importance; but I don't think we need grand language and rhetoric. Sometimes a simple framework and straightforward language is the best way to deal with very important issues.

Civil liberties are to me the everyday rights and freedoms that the majority of us just take for granted and rarely even think about. Things like our freedom of speech, freedom of association, our right to vote, our right to feel safe, to have our privacy respected. In our community most of us have always enjoyed these rights; and most of us have never been in a situation where they have been threatened.

We have always spoken our minds, we have always voted, we have always been able to call upon the police and the courts to right an injustice committed against us.

This level of comfort however, can be particularly dangerous. Most people are not vigilant about monitoring the threats to such rights and do not consider the risks that can arise from reducing or even removing them. In the world we know, a contraction or reduction of civil liberties usually only happens to counter some form of imminent threat or danger. In the last ten years, threats from terrorist attacks, riots, gang violence and paedophilia have resulted in tougher laws and stricter punishments. Too often any opposition to these changes is met with the mantra: "If you have done nothing wrong, you have nothing to fear." But there are things to fear.

There will of course be times when individual liberties and freedoms need to be curbed. If we commit a sufficiently serious crime, we will most likely be sent to prison. But the need for these restrictions is usually transitory, and prisoners for example are still entitled to some, if not all, of our core rights and liberties.

But if we do not ensure the rights and freedoms many of us take for granted are not only available to everyone – but also protected, we will lose them. And as we have seen throughout history, it can be very difficult to claw them back.

So where does my office fit in, what do Ombudsmen have to do with civil liberties? Is it our role to protect and champion them?

Typically Ombudsmen and Civil Liberties organisations are lumped together, considered to be two parts of a whole. It is true that we often cover similar ground, with our work underpinned by similar principles and values. But I think it is important to recognise and explain the distinction.

While we will often focus our attention on similar areas; police powers, access to information, the rights and welfare of those with a disability, or those who are incarcerated, and so on, we do have in my view different roles and different aims.

I am reluctant to class my office as a human rights Ombudsman, mainly because I want to avoid the baggage that accompanies what I call “big H” human rights. International conventions and judgements of the International Courts, while essential, tend to complicate things. We need only look at the slow-boiling debate in NSW over the need for a Bill of Rights. No topic is guaranteed to bring out more passionate, and verbose, supporters and critics. However, respect and regard for human rights and civil liberties has always been at the core of traditional Ombudsman notions of fairness, justice and reasonable decision making.

The history of Parliamentary Ombudsman and the way they are conceptualised does often differ, sometimes dramatically, from jurisdiction to jurisdiction. There are some countries where a human rights role for an Ombudsman is both central and essential. In Latin America for example, Ombudsmen were a product of new, fragile democracies, following on from Military dictatorships. These bodies formed part of a system where the Courts could not always be relied upon to be fair and impartial and civil rights had long been trampled or non-existent. The important role of these offices is reflected in their titles. Almost all are known as Defensor del Pueblo, or the People’s Defender.

Closer to home, many of the Ombudsmen working in Pacific nations are tasked with roles and responsibilities not traditionally provided to Ombudsmen. In Papua New Guinea and Vanuatu, for example, the Ombudsman is also responsible for monitoring and enforcing the Leadership Code. This can involve investigating and occasionally making particularly damning findings against Parliamentarians, Members of the Cabinet, Attorneys General and even Prime Ministers. This is a challenging and occasionally dangerous position for an Ombudsman to be in. Those challenges are very real - before Christmas, the Chief Ombudsman of Papua New Guinea Chronox Manek was shot outside his home in an apparent assassination attempt.

Australian Ombudsmen were not born of that level of urgent need to fight for and protect life and liberty. We were instead part of a largely well received and bloodless Administrative revolution in the 1970s and ‘80s, which saw the creation of Ombudsmen, Administrative Tribunals, and the passage of legislation such as Privacy and Freedom of Information Acts.

Despite having been around for over 35 years – the role of Ombudsman in Australia is still, unfortunately, sometimes misunderstood. Earlier this month, I was bemused to read that Tony Abbott had described Alan Jones as ‘the great Ombudsman for the Australian people.’ The less said about this comment from such an experienced politician the better. But it does go to the heart of my point. Despite what many of our complainants, stakeholders and even members of Parliament think, we are not an advocacy body. Unlike Councils for Civil Liberties we do not have a role to agitate and to push a particular agenda.

While our work may lead to legislative or policy changes, this is not our primary aim or goal. Our role is to act in the public interest, to ensure the lawful exercise of powers, good administrative practice and fair and transparent decision making.

Our success is rooted in and utterly dependant on our impartiality – it is the very fact that we are not an advocate and that we stand neither with the complainant or the agency that allows us to achieve the results we do. We look at a vast number of issues but key to each is that we try to achieve the right, fair and proper outcome.

Civil liberties groups, on the other hand, must act as vocal, and sometimes controversial advocates for the rights of individuals and the community. They push, prod and occasionally whack the government of the day in what they feel to be the right direction, trying to bring about changes in policy or to provoke attention and debate. This involves being very vocal, strategic and targeted.

Having said this, there are however, significant parallels between us. The everyday work of my office often goes to the heart of those essential services everyone needs to survive – and this will always link into what are essentially rights-based issues.

We help tenants to ensure they are not left without water for them and their children because of their landlord's failure to pay their water bill.

We make sure prisoners have access to those normal, everyday things we take for granted, like toilet paper and food, education and medical attention, as well as communication with people outside the prison walls.

We monitor the payment of victim's compensation to children who have lived through far too much already and deserve the community's support.

We work with remote Aboriginal communities and government departments to help ensure kids are safe and receive the best possible support and protection.

We assess the ability of those with a mental illness to access public housing, and help to improve systems designed to support their needs.

It is important to emphasise, we are not just a complaint based organisation. We have significant functions – to keep important systems that protect citizen's rights under scrutiny to make sure they are working properly. For example we oversight the police complaints system, the systems for preventing child abuse by employees of designated government and non-government agencies, handling and responding to allegations involving those employees. We also monitor and review the delivery of community services and related programs. We review the situations of children and disabled people in care, and also the deaths of those in care. We are even the appeal body for the police witness protection program.

Much of this work boils down to making sure what is provided by both government and non-government organisations measures up to what is promised. This sounds very simple, and sometimes it is, but often it is extremely complicated and involves a lot of fact finding and careful evaluation of competing interests and priorities – sometimes through investigations and the use of significant powers. But it is critical work, and it goes to the heart of meaningful and adequate support and access to essential services.

There are a great many areas where the work of my office and the Council will intersect. Perhaps the most obvious of these in recent times has been our work in reviewing the implementation of new legislation.

Former US Supreme Court Justice Louis Brandis' views on openness in government are often rolled out when discussing open government and oversight. He observed that:

*Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.*

I agree, and I believe this comment is just as relevant now as it was eighty years ago. But it is another of Justice Brandis' comments I would like to reflect on today:

*The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.*

I am not saying that we are necessarily dealing with politicians without understanding, but we do have to be wary and inquisitive of well meaning, swift, reactive legislative changes and policy shifts, because they have the potential to cause harm.

What is a good idea this week or this month may well remain on the books and be disastrous in five, ten or fifteen year's time. We have to make sure good intentions do not result in bad law.

In the last ten years, my office has been tasked with reviewing the implementation of a number of particularly contentious pieces of legislation. All had their origins in extraordinary events. I have been pleased that the Council and many other organisations and individuals have provided detailed, careful submissions to these and other reviews.

Fortunately Parliament has seen fit to include a review role for the Ombudsman when passing some legislation giving controversial powers to police and others, with the potential to infringe on civil liberties. This has sadly only come about at times through pressure from a few – but nonetheless it shows us that politicians are at least aware of civil liberties concerns when passing contentious legislation. I would be particularly worried if Parliament moved away from providing for such reviews in the future.

Following the terrorist attacks in 2001, governments around Australia and across the world provided their police and security forces with additional, extraordinary and often highly restrictive powers. Our then Federal Attorney General Philip Ruddock believed that:

*In enacting such laws we do not only preserve traditional notions of civil liberties and the rule of law but we are recognising that these operate in a difference paradigm. If we are to preserve human rights then we must preserve the most fundamental right of all – the right to human security.*

This was a sentiment shared by a great many in the community, and a great many politicians. We have reported our findings in relation to covert search warrants, and will report on preventative detention orders at the end of this year.

During our review of uses of covert search warrants, we believe the appropriate balance was achieved between the needs of law enforcement and the privacy of occupiers. However, I am worried what will happen once there is no external scrutiny of how the warrants are executed.

The Cronulla riots in 2006 were followed by a great deal of political comment, with the introduction of legislation providing police with new and extraordinary powers to prevent or control public disorder. The then Police Minister Carl Scully told Parliament:

*They are emergency measures in emergency times. We do not lightly empower the police with significant powers of search, seizure and confiscation in the absence of very difficult circumstances.*

During our 2 year review, I am pleased to report that the powers were only used twice, and each time the incidents did not escalate. But the powers are still there and one cannot help but ask the question: do they continue to be needed and will they in the future be used reasonably. It is positive that Parliament has given us an ongoing role to monitor the use of these powers and to report annually on this.

More recently, a violent incident at Sydney airport saw the government pass legislation to target outlaw motorcycle gangs. The *Crimes (Criminal Organisations Control) Act 2009* was passed quickly, and was accompanied by a great deal of tough talk.

A number of people and groups, including the Director of Public Prosecutions, have expressed some concern about this legislation. While its intended targets are motorcycle gangs, this legislation has the potential to have a far broader catchment. This is one of those Acts with an uncertain future. We will conclude and report on our review next year.

Not all of our reviews though, relate to police powers used only in one off, extraordinary situations. Several years ago now we completed a review of legislation providing for the use of drug detection dogs. When the Act was introduced, the then Police Minister Michael Costa told Parliament the legislation was '*aimed primarily at detecting and prosecuting persons committing offences relating to the supply of prohibited drugs and plants.*' He went on to state that it would allow police to '*target well-known drug dealing areas and break up the trade in prohibited drugs.*'

We were not far into our review when we realised this was simply not what was happening. The vast majority of those found with drugs had relatively small amounts for personal use. During the two years of our review, only 19 convictions for supply resulted from drug dog indications. So the Act was not assisting police to target those who were supplying drugs.

A two day operation in 2004 focussed on the Big Day Out in Sydney. Over the 2 days, a total of 323 police officers were deployed into teams with drug detection dogs – across the city rail network and at the Olympic Park venue. Just the drug detection dogs part of the operation cost in excess of \$41,000. The cost of the entire operation is unknown.

A total of 86 people were charged with drug related offences, 18 with supply. Of these, 12 charges were withdrawn, and five plead guilty. None of these people had prior criminal records. A young girl told us of her experience after they had passed through the ticket gates:

*It was too late for anyone to do anything but be caught up in this. People all around me were panicking ... My friend encouraged me to relax and walk through, which I did. But there were others who decided to take their drugs there on the spot – and I'm sure some people took whatever they had on them. It was very scary – wondering what would happen to me and worried about others who might seriously have gotten really sick.*

Traditionally our reviews have concentrated on the practical implementation of new legislative powers. Looking at operational issues such as efficacy and cost effectiveness was a new direction for us. But it was impossible to review the implementation of this legislation without looking at these issues. They were the very large elephants in the room.

We made a number of recommendations aimed at increasing the effectiveness of the Act. We also questioned if, in light of the failings outlined in the report, the Act should be retained at all.

Interestingly, at the end of 2006 soon after the release of the report, the NSW Police Association, as part of a "special investigation" into my office, suggested:

*It would be naïve to suggest that the legislation was enacted to catch drug suppliers – these people do not usually carry commercial quantities around in the street waiting to be caught. But the real debate is whether we should be doing more to prevent our young people believing that it is acceptable or safe to be using even small quantities of substances that can kill.*

It may well be that we should be debating how best to target drug use by young people, but discouraging individuals from carrying small quantities of drugs was not the stated intention when the legislation was enacted. That is why I commented on the efficacy of the legislation. We have to ensure legislation providing police with additional powers is doing what it says on the box and does not indirectly contribute to serious health and safety concerns.

Our review of the implementation of another Act – the *Police Powers (Drug Detection Trials) Act* led to the law being repealed. This Act gave police the power to set up road side check points to screen vehicles using sniffer dogs. The aim was to detect and frustrate people involved in trafficking drugs by road.

We found the powers were utterly ineffective in assisting police to apprehend drug couriers on a sustained basis. Police located drugs in only 2% of vehicles stopped and the majority of these were small quantities of cannabis for personal use.

Given the cost and resources required for so little gain and the considerable inconvenience to innocent people being put through the stop and search process – we questioned the merit of the powers and legislation continuing. The government agreed.

This is a good example of where new controversial laws and powers acutely affecting the public, can be overturned following review. Most new laws don't have these inbuilt feedback loops or processes – and they are especially important when the laws impinge on our civil liberties.

The Police Association has also not been happy about my publicly raising concerns about tasers and their use. The Association even went as far as to state that I would have the blood of officers killed or injured in the line of duty on my hands. I recognise press releases have to be strongly worded to catch attention, but even to me this one seemed unnecessarily personal and misleading.

Pressing for Tasers to be provided to all frontline Police is a political law and order home run. Both sides of Parliament have pushed hard for a roll out. Our findings and recommendations have been misreported by both sides of this debate. We did not recommend Tasers should not be used but rather – there be a cautious and limited roll out. They are clearly a worthwhile tool for law enforcement officers, and our review of their use by specialist units showed their operational benefit. Put very simply, if they result in less fatal shootings, they are a good development.

But it is important to remember that Tasers are not a non-lethal response; they are a less lethal response. The limited independent research and anecdotal evidence that exists suggests that there are real risks, and those at greatest risk of injury or death from Taser usage are the young, those under the influence of drugs and alcohol and those with a mental illness. The very people with whom police will have significant contact, and who are likely to be unstable or unpredictable.

We received some criticism because our review drew attention to the risk of Taser related deaths. However, that is a highly relevant and important issue. Our concern was vindicated by the fact there have been at least 40 Taser associated deaths reported internationally in just the 12 months since tabling our report.

Taser International has consistently discounted any risk from the use of Tasers. They have, however, recently issued new guidance advising those using Tasers to aim away from the chest and back. This would suggest that they may not believe their own press.

But the potential health risks are only one of several reasons why we recommended caution around a roll out to all operational police.

At the time of our review, we felt the training and guidance in place were inconsistent and insufficient. Some of the units using Tasers did not have specific Standard Operating Procedures relating to their use. Others did, but they were conflicting. Much of the training was being provided by the Australian representative and distributor of Taser International and heavily influenced by the manufacturer's views of the low risk associated with their use. This is starting to change, but the situation is still far from ideal.

We also had, and continue to have, concerns around Tasers being used in situations where an officer is not at risk of harm. This is known as "mission creep", and we see examples of it in other jurisdictions where Tasers are more established law enforcement tools. Only recently, a US Circuit Court of Appeal found that a Taser use on an agitated, but unarmed young man at a routine traffic stop, dressed only in boxer shorts and shoes, was an unjustified use of force. A quick YouTube search provides further disturbing examples. Tasers are not a weapon of convenience to be used against uncompliant members of the public. They are an alternative to firearms, and should be used as such. Not surprisingly, we have received complaints about Tasers and their use, and have already seen a number of troubling uses in NSW.

In our work, we make recommendations, and do what we can with the threat of public debate or embarrassment to make sure they are implemented. This is where organisations such as the Council come in and can play an important role. You can take the information in our reports and use it as you wish. I notice the results of the drug dogs report still pop up regularly in your press releases. It is encouraging when our reports generate public discussion and debate, as these are sometimes the only things that stir politicians into action.

The American Council for Civil Liberties founder Roger Baldwin once commented that: *'so long as we have enough people in this country willing to fight for their rights, we'll be called a democracy.'*

This Council and others bodies like it around the world fight for our rights – and without them I think that many restrictions on our rights would pass unnoticed and without public debate.

When I first came to work at the Ombudsman Office as an investigation officer twenty six years ago. I had completed University and some post graduate studies abroad and was very happy to have a job. I learned quickly that this was work which enabled me to make a difference; to help people. When I came back as Ombudsman almost ten years ago, my desire was the same, and that has become the focus of the directions I have set for my office.

I genuinely believe that we can really make a difference in people's everyday lives. We can ensure what is provided to the community measures up to what is promised, and we can provide guidance and apply pressure when necessary, to ensure government agencies improve the service they provide.

But the very nature of an Ombudsman's work means we can only go so far. We can be fearless in pursuing issues, but the greatest risk to our effectiveness is a loss of objectivity or to be seen to be partial. We can do our work without headlines or with them. But I think our work is made all the better by the involvement and contribution of organisations like the Council and others who are passionate about protecting our rights. As well as being fearless, you can be partial. In fact, this is what is expected of you. Both as Ombudsman and as a member of the community, I thank the Council and its members and ask that you keep on agitating, raising issues for debate, asking questions that should be answered, helping to protect what we so often take for granted, for it is surely in all of our interests that you do.

NSW Government Publication  
© NSW Ombudsman, March 2010

This work is copyright, however material from this publication may be copied and published by State or Federal Government Agencies without permission of the Ombudsman on the condition that the meaning of the material is not altered and the NSW Ombudsman is acknowledged as the source of the material. Any other persons or bodies wishing to use material must seek permission.