



# Ombudsman and human rights: working with vulnerable communities

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This is not a paper in the strictest sense – but rather a collection of my thoughts about the developing concept – of Ombudsman offices and human rights.

Before I begin, I would like to clarify I will not be speaking about those Ombudsman offices that have been established with a specific human rights charter, or that have through legislation or constitution been established as dedicated human rights bodies. Clearly they will all have a strong and well defined human rights focus and identity.

I will instead be focussing on what we often call “traditional” or classical Ombudsman offices, like the majority of those in our region, that do not have a specific human rights mandate. What we do and whether and to what extent we are involved or should consider ourselves to support human rights. My office is one such office.

As we know, the modern Ombudsman has been around for more than 200 years. What we have come to consider as human rights, on the other hand, is far younger. As Justice Abella of the Canadian Supreme Court observed, the concept of human rights came out of the second world war: *We had, in short, come to see the brutal role of discrimination, a word we had never and could never use in a concept like civil rights that permitted no differences, and invented the term “human rights” to confront it.*

I have always been a little nervous when the talk around classical Ombudsman offices turns to human rights. There are a couple of reasons for this.

Firstly it is a relatively new association. When I first became Ombudsman, there was little, if any, talk within Australia and our Region about classical Ombudsman as human rights bodies. We saw ourselves as focussed on administrative conduct. Human rights and Ombudsman were rarely mentioned in the same sentence. I think this was because we tended to view human rights, in Australia at least, as national and international issues relevant only to places of conflict and dictatorial rule, and separate dedicated human rights bodies existed alongside us.

But clearly the broader public and political thinking and discussion about human rights and what that encompasses has developed and changed over time – it is clear there are links both direct and indirect between our work as classical Ombudsman and the preservation and enhancement of human rights.

One of the traits of being a good and successful Ombudsman is the ability to be open to change, being flexible and able to do things differently. To recognise that the way we do business and the issues on which we will focus are not static and will continually change. Thinking about Ombudsman and human rights is no different. It is undoubtedly an area where you can argue a number of different perspectives, particularly given the very different ways we all do our work. Even among our relatively small APOR group there are very different jurisdictions and very different local challenges and problems to face.

A focus on human rights helps to shape the views of government, particularly around issues, such as responding to terrorism, police powers, Aboriginal affairs, the protection and welfare of children and so on. They are a consideration in any discussion relating to policy impacting on individuals and groups within our communities. And as such many of these areas are now core parts of our Ombudsman work.

But I do think we need to exercise some caution because we come to consider ourselves human rights bodies, because human rights can be such a loaded term. Talk of international human rights is invariably accompanied by talk of grand, lofty, often amorphous ideals. A couple of years ago, Irish Ombudsman Emily O’Reilly described the language of human rights as ‘a case study in constructive ambiguity’. She then went on to observe that:

*Far from always representing a broader and more expansive statement of rights, international human rights norms are sometimes the irreducible and nebulously articulated minimum arrived at by far from consensual processes of international political bargaining.*

This is why I sometimes worry when the term human rights is used in conjunction with classical Ombudsman. It brings a lot of other issues, complexities and agendas to the table, and everybody's understanding and definition of it is different. Perhaps one way around this is to approach human rights more pragmatically and flexibly. They are after all not just about declarations and international treaties. These are important and clearly of value to our offices, but human rights are really about the simple, everyday things that affect us all, matters that go to and affect the quality of our lives. Eleanor Roosevelt's answer to the question of where human rights begin is often quoted, because it is so relevant. She replied that they are found:

*In small places, close to home – so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning here, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.*

I think this is where the classical or traditional Ombudsman role comes in. Ombudsman touch on these everyday areas, and should always be working to get results, quickly, easily and informally. We work to achieve the best possible outcome in the public interest.

And it is this aim, achieving the best possible outcome in the public interest, which raises my second human rights concern. For me, human rights tends to lead to thoughts of advocacy. Advocates bravely pushing the case of an individual or a group, concerned with achieving the best possible outcome and righting wrongs to those directly involved.

While our work often results in good and important outcomes, we work in the broader public interest. Ombudsman should, in my view be very cautious about intentionally serving as an individual's advocate. Much of the credibility of our offices, and our strong reputations stem from our firm impartiality.

Having said this it is, of course as with most things, not that simple. In certain areas, such as my office's work with Aboriginal communities and our work relating to children, we take up a role that could easily be interpreted or seen as that of an advocate. We often deal with agencies and service providers on behalf of those who are unwilling or unable to make their case.

We recently investigated the Department of Community Service's decision to remove a young child from her mother. The mother had come to Australia with her children and had no support systems, and little understanding of what was happening. After a long and complex investigation, we found the Department's conduct and actions were built on a flawed process, and an incorrect assumption. The Department has since apologised, returned the child to her mother and will be compensating her for many years apart from her child.

While I am reluctant to describe traditional Ombudsman as human rights offices, these sorts of cases and the breadth and increasing diversity of our work show that what we do sits at the very least in the small, local, Eleanor Roosevelt-type category of human rights.

We make sure people receive essential services, we ensure those provided with additional powers act lawfully, we make sure those working with children, both in the public and private sectors, are acting appropriately. In many cases, we are ensuring those who are the most vulnerable within our society are treated lawfully and fairly.

But I believe our work does take us even further. For example, my office's work in child protection, our work with prisons, our policing functions are all much broader.

We all have vulnerable communities, and we can and must all do more to ensure they have the access to services and support that they are entitled to and need. I believe it is our work with vulnerable communities that perhaps gives us the clearest examples of a human rights focus in our work.

Arguably one of the most vulnerable groups within any society are those we decide to imprison. They are often forgotten, and when remembered, receive little to no community sympathy.

My office has a longstanding role in relation to prisons. We regularly visit each correction centre across the state, speaking with inmates and staff. There are currently over 10,000 adults in our prison population.

We work to achieve good, quick, practical outcomes. It is often the day to day issues that really matter. We ensure those held in our prisons are treated fairly, according to the law (if the law is fair), and have the essential services they need. We have worked to improve prisoner's access to essential medication. We have ensured those with a mental illness receive the medical care and support they need, and we have made sure prisons cease using wall mounted restraints to restrain prisoners.

This sort of work is very similar to the requirements under the Optional Protocol to the Convention Against Torture (OPCAT), and I expect we will soon have a role in relation to OPCAT, perhaps similar to that of the New Zealand Ombudsman as a national preventative mechanism.

Let me briefly discuss a couple of other examples from my office's work that speak to the link to human rights.

## **ACSA**

The situation of our Aboriginal communities, not just in NSW but across Australia, is a pressing issue for all levels of government. Aboriginal Australians experience unacceptably high levels of disadvantage, poverty, disease and death. These conditions mean that Aboriginal children are an especially vulnerable group. They are more susceptible to abuse and die at higher rates and at younger ages than the non-Indigenous population.

Following a recent review of child protection in NSW, my office has been tasked with a three year examination of the success of the interagency plan across government for dealing with child sexual assault in Aboriginal communities. Our work will help ensure that what is promised is actually delivered.

This is a very challenging task. There are 88 actions listed in the plan, with 19 government agencies providing services to these communities, all tasked with varying responsibilities. There is also a diverse range of other organisations involved as service delivery 'partners'.

## ***Bourke and Brewarrina***

But our work with Aboriginal communities extends further, to working with individual local communities. Two such communities are Bourke and Brewarrina.

For a number of years, we made it a priority to work closely with Aboriginal communities in regional NSW.

NSW accounts for over one third of Australia's national population of 22 million, and covers an area of over 800,000 square kilometres. This is 20 times the size of our host nation. Providing services to an area this vast presents a great many challenges, just one of which is protecting children from harm.

The problems faced are collective problems that cut across both of these remote regional communities and many others. They involve the quality of work, response and engagement by government through police, health, education and community services.

The scale of the problem is demonstrated by looking at just one family.

Both parents have longstanding drug and alcohol issues, and a history of domestic violence. They have six kids, aged between three and twelve. In one year, their twelve year old had 70 involvements with police, including for sexual assault, malicious damage and theft. Their nine year old had 31, and their eleven year old was also known to police.

The kids have a long history with the community services department, and have been assessed on 71 separate occasions. The kids have been removed from their parents a number of times. One of these times they were placed with the father's family, who also have a history of drug and alcohol abuse, domestic violence, homelessness, inadequate supervision and risk of physical harm. The kids were removed and returned to their parents after their grandmother assaulted one of the kids, who was five. There are ongoing concerns around their school attendance and their safety. This is just one family in one community and sadly it is not atypical – it is the type of scenario repeated from family to family, community to community.

Our work has focussed on the relevant government departments working better together and planning more effectively for the future. A big part of this is involving the community in the decision making process.

One of the biggest failings of government when dealing with indigenous communities has been lack of genuine consultation. Planning programs and support in cities like Sydney and Canberra to be delivered in communities thousands of miles away just doesn't work.

We have also recommended that service delivery be far more flexible. Traditional models of service delivery have not worked in the past. Government needs to work smarter, work effectively, and work creatively.

Relevantly the recommendations we made are consistent with those made by a group of Aboriginal legal services and community advocates to the UN working group preparing Australia's human rights "report card" for the year.

The difference is that a recommendation to the UN takes a fair while to trickle down the line. From Geneva, to Canberra, to a Minister, into a Department, out of a Department, into a working group, followed by a draft plan, followed by consultation with the States, then, and only then, will there be a policy developed or delivered. One of the advantages of our work, the work of Ombudsman, is that we can achieve something more quickly for these communities, because frankly they don't have the time to wait.

## **Tasers**

*Law and order is another issue that impacts directly on all of us and is often at the heart of any discussion about human rights. Police are provided with a great deal of power and discretion, and it is important these are exercised appropriately. They are able to use force, including weapons, restrain us and deprive us of our liberty.*

*One area where there has been an increased international human rights focus on the use of force by police across the world in recent years is the use of new weapons. Amnesty international, for example, have completed a great deal of work around the use of Taser weapons by police. There are similar concerns in Australia.*

*Tasers are a type of less lethal weapon that administer an electric shock – up to 50,000 volts – on contact to cause incapacitation and/or submission of a person.*

*In 2008, my office reviewed the use of these weapons. At that time they were 30 Tasers restricted to specialist units accessed by a small number of senior police and used infrequently. While we found their use to have largely been appropriate, we did identify failings in the systems surrounding the use of the weapons.*

*Reflecting these and experiences overseas where they were in wider use, I recommended a two year moratorium on a further roll out of Tasers to allow these problems to be carefully considered. Government ignored this recommendation, and moved forward, providing Tasers to all first response police.*

*There are now almost 1,200 Tasers in the field, with plans for the weapons to be provided to all general duties police. All officers are or will be trained in their use. This is an area of great community interest, but there is very little information about their use. This is why I decided at the end of last year to re-visit police and Tasers. Over the next year, we will conduct a major review looking closely at the 1600 uses of Tasers since our last report, as well as the supporting procedures and the review systems currently in place. We will update our research, looking at what is happening internationally and seek involvement from the community and interested parties.*

## **Conclusion**

So even after sharing these few examples of our work, and considering the issue, the conundrum for me remains. What is the relationship between established, traditional Ombudsman offices and human rights? Should we consider ourselves part of the human rights framework when we have no specific mandate? Is it a comfortable fit and does such a view create expectations that we may not be well placed to meet? If we do work that supports human rights does that mean we are a human rights body? Perhaps these questions do not need to be answered – because what is clear that much of our work can be viewed from a human rights perspective.

Our work promotes adherence to human rights obligations and norms. It shines a light in and helps to change the conduct of governments where they are not meeting their obligations to properly support and protect their citizens and perhaps most importantly, at least in the context of my office, our work ensures that those who are the most vulnerable in our community are given a voice, do not fall under the radar and are treated with the respect and priority they deserve.

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