

ADDRESS TO THE NSW OMBUDSMAN'S OFFICE

29 JUNE 2022

Mark Speakman, Attorney General

1. I thank Nathan Moran for his Welcome to Country.
2. I too acknowledge traditional custodians of the various lands on which we gather, at the Calyx¹ the Gadigal of the Eora Nation, and here in Cronulla the Gweagal of the Dharawal Nation, and pay my respects to their respective Elders past, present and emerging.
3. Thank you to the Ombudsman, Paul Miller PSM, for inviting me here to speak to you at the Calyx, which I opened in June 2016 in my previous life as the Environment Minister. The word 'Calyx' refers to the sepals of a flower collectively, forming the outer floral envelope that protects the developing flower bud. I'm sure there's some kind of metaphor there for the work you do, although I'm not sure whether you've ever considered your office as an outer floral envelope protecting public administration as a developing flower bud.
4. I'm delighted to join you virtually all to today's event (COVID-19 precautions precluding me joining you onsite), and to acknowledge the many achievements of the Ombudsman's Office after the difficult circumstances of the last two and a half years.
5. I'd like to make some brief introductory remarks about the role of the Ombudsman's Office in strengthening democracy, upholding the rule of law, and improving public administration.
6. I'll first consider the origins of this important office.

¹ At the Royal Botanic Garden Sydney < <https://www.rbgsyd.nsw.gov.au/thecalyx> >

Origins of the Ombudsman

7. Sweden has given the world three brilliant things: IKEA, ABBA and the Ombudsman.
8. As you may be aware, the first modern Ombudsman was established in Sweden in 1809.²
9. Earlier, between 1718 and 1772, Sweden enjoyed what is called the Age of Liberty, over half a century of Parliamentary governance with increasing civil liberties, culminating in the first piece of legislation recognising freedom of the press.³
10. Sweden had known a fledgling democracy, and seen it crushed. Autocratic rule by an absolute monarch returned in 1772 following a coup by King Gustav III, which lasted 37 years until the deposition and exile of his son, King Gustav IV Adolph.
11. In 1809, a constitution, the Instrument of Government, was enacted, establishing a separation of powers between the new King, the Parliament and the Judiciary, and preventing authoritarian rule.
12. Significantly, the new constitution required the Parliament to appoint a man "known for his knowledge of the law and exemplary probity" as the Ombudsman, a Swedish word loosely translated as the 'people's representative'. The office was unique, because it sought not to protect the King, Parliament, or nation, but was tasked with safeguarding the rights of individual citizens, independent of the executive, and prosecuting public officials for failing to perform their duties.
13. That first Swedish model has now been assembled, with some variation here and there, all around the world, not unlike

²'About the Parliamentary Ombudsman' (webpage, undated) <<https://www.jo.se/en/About-JO/History/>>.

³'Freedom of the Press Act of 1766: Swedish Legislation' *Encyclopedia Britannica* (article, 25 November 2021) <<https://www.britannica.com/topic/Freedom-of-the-Press-Act-of-1766>>.

an IKEA flat pack.⁴ Over the last 200 years, over 140 statutory Ombudsmen with oversight of public authorities have been established worldwide.⁵

14. New Zealand was quick off the block, and in 1962 became the first country outside Scandinavia to establish an Ombudsman.⁶
15. The Ombudsman model reached Australia in the 1970s. It started with Western Australia in 1971, and spread like wildfire, with all States and the Commonwealth having established an Ombudsman office by 1978.⁷
16. The first NSW Ombudsman, Mr Smithers (*no, not The Simpsons' character*) was appointed in 1975. He had 14 staff members and received under 2,000 complaints.⁸ By comparison, in 1920-21 the Ombudsman's office received nearly 25,000 contacts in and finalised almost 13,000, complaints⁹ demonstrating the increasing scope and breadth of your office.
17. The establishment of the Ombudsman implemented recommendations of the 1972 report of the NSW Law Reform Commission entitled *Appeals in administration*. It's interesting to reflect on the Law Reform Commission's vision for the new statutory officer:

⁴ This is a variation of a common joke in papers about the Ombudsman originating in Sweden and spreading around the world. See, for example, an article by Western Australian Ombudsman Chris Field, 'Recent Evolutions in Australian Ombudsmen' (7 August 2009)

<<http://classic.austlii.edu.au/au/journals/AIAdminLawF/2010/16.pdf>>.

⁵ Commonwealth Ombudsman, *Annual Report 2008-09* (Report, October 2019)

<https://www.ombudsman.gov.au/publications/reports/annual/all-reports/docs/2008-09/chapter_8_01>.

⁶ Ibid.

⁷ Ibid.

⁸ Bruce Barbour, *The Ombudsman and the Rule of Law* (AIAL Forum no.44, 2005) 18 <

<http://www5.austlii.edu.au/au/journals/AIAdminLawF/2005/2.pdf>>.

⁹ NSW Ombudsman, *Annual Report 2020-21* (Report, 26 October 2021) <

https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0010/136387/NSW-Ombudsman-Annual-Report-2020-21.pdf> 20.

An Ombudsman is a man in high public office who has the functions of receiving the complaints of citizens about the conduct of public authorities, investigating the conduct complained of and, if he thinks that the conduct was wrong, recommending that correction be made... He will (subject to stringent obligations of secrecy) have full access to information and records in the possession of public authorities. In some cases his investigation will show that a complaint is ill-founded: his explanations to the complainant, and his report, will help to remove a sense of grievance, and to vindicate the public authority. In other cases he will find that a complaint is well founded. He cannot, however, direct that redress be given: his function is to persuade. His most useful work, in cases where he finds that something has gone wrong, will be by persuasion behind the scenes. He is given means whereby he can fortify his persuasion: he may issue for publication reports of miscarriages in administration. His published reports will attract political sanctions where, his recommendation being disregarded, wrong conduct of a public authority goes unredressed.¹⁰

18. The Commission had a very specific vision of its 'grievance man', and emphasised that:

The right man must be chosen. The office of Ombudsman calls for a man of unusually high calibre...

He must be respected by public authorities. He must deserve and receive the support of Parliament and of Ministers of the Crown. He must be sensitive to the problems of the administration. He must be compassionate and patient with the problems of the citizen. He must use his powers of public criticism with restraint. When occasion demands, he must be explicit and firm in criticism.¹¹

19. Aside from embarrassing Paul, my purpose in reading these passages is to demonstrate that the role of the Ombudsman in NSW has always been inherently linked with great

¹⁰ New South Wales Law Reform Commission, *Appeals in administration* (Report No 16, 28 February 1973) 9.

¹¹ *Ibid* 11.

principles of our liberal democracy. These include respect for the rights of individuals; scrutiny, and accountability, of Government and decision makers to act in the public interest; and adherence to the rule of law.

Strengthening democracy and the rule of law

20. At the International Ombudsman Institute World Conference in 2009, the then Chief Parliamentary Ombudsman of Sweden described the establishment of the office of the Swedish Ombudsman two centuries before as contributing:
 - “...to the democratic ideal
 - by strengthening the role of Parliament...
 - by advocating the rule of law
 - and by making it possible to hold those who have been entrusted with the power to exercise public authority responsible for their actions and omissions.”¹²
21. The former Commonwealth Ombudsman and Acting NSW Ombudsman, Professor John McMillan AO, has described the office of the Ombudsman as “an institution that embodies the spirit of democracy”.
22. He explains that a democratic government serves the community, and the Ombudsman’s office performs what he describes as both a symbolic and ‘intensely practical’ role to strengthen democracy by holding government to account, ensuring government plays by its own rules, and protecting citizens from victimisation.¹³
23. Inherent in a democracy governed by the rule of law is the ability of citizens to criticise the Government without fear of

¹² Commonwealth Ombudsman, *Annual Report 2020-21* (n 4).

¹³ Prof. John McMillian, *Key Features and Strengths of the Ombudsman Model – National Ombudsman Commission of Indonesia* (June 2004) 2 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0015/31641/22-and-25-June-2004-ey-Features-and-Strengths-of-the-Ombudsman-Model.pdf>.

retribution. Clearly, the Ombudsman's Office facilitates this important tradition by accepting the complaints of citizens about matters of government administration.

Public interest disclosure reforms

24. The Ombudsman's Office also oversees the whistleblower scheme for the disclosure of serious wrongdoing in the NSW public sector.
25. Public officials who make Public Interest Disclosures (or PIDs) are protected from detrimental action and generally cannot be subject to any liability for making the disclosure.
26. Earlier this year, the NSW Parliament passed reforms, the *Public Interest Disclosures Act 2022*:
 - (a) repealing the existing *Public Interest Disclosures Act 1994* and establishes a new principal Act protecting disclosures by public officials about serious wrongdoing; and
 - (b) increasing protections for people disclosing misconduct or wrongdoing to the Independent Commission Against Corruption, the NSW Ombudsman, and the Law Enforcement Conduct Commission.
27. The Public Interest Disclosures Steering Committee, chaired by the NSW Ombudsman, advised the Government on the development of the new reforms, ultimately confirming that the Steering Committee:

unanimously welcomes the PID Bill, and believes it will represent a significant enhancement to whistle-blower protections in NSW, helping to ensure that reports of wrong-doing are acted upon, and that reporters are encouraged to come forward and are protected when they do. The Bill addresses many of the weaknesses in the existing PID Act.

28. I wish to formally thank the Ombudsman, Paul, and your office for your leadership in the development of those significant reforms. I wish you all the best in implementing them.

New integrity agency funding arrangements

29. The independence of the Ombudsman's Office from the executive government is critical to the performance of these functions.
30. Following advocacy from the Ombudsman, the Government has introduced new funding arrangements for NSW integrity agencies to safeguard their independence, to enhance transparency, and to improve the recognition of the important role of integrity agencies.
31. The NSW Budget 2022-23 delivered last week was the first budget to include the new arrangements. It included a significant uplift in funding for the Ombudsman's Office, including \$12.4 million recurrent expenses and \$1.3 million capital expenditure over four years to support the Ombudsman's Office preparing and delivering new responsibilities, including implementing the new public interest disclosure reforms.
32. This funding represents an investment to improve public administration, and ultimately the lives of citizens.

Improving public administration

33. The Ombudsman's Office has a clear mandate to investigate maladministration by public authorities.
34. But your role goes further than that.
A critical function of the Ombudsman is to foster good governance in the public interest.

35. Complaints are undoubtedly critical to the function of your office. You're the agency our citizens look to when they have a grievance. However, it's clear the role of Ombudsman's Office has moved beyond merely resolving individual, particular grievances. A perusal of the many reports and submissions published on your website makes clear that your office investigates systemic problems and advocates for holistic reform to improve public administration and contribute to public sector performance.
36. I'm delighted to confirm that the Government proposes to further expand this important educative role in improving public administration.
37. When preparing for this speech, my attention was drawn to a 2005 paper by the then NSW Ombudsman indicating that he had recently "sought amendments to [the] Ombudsman Act to specifically require [the Ombudsman] to keep under scrutiny the systems that public authorities have in place for dealing with complaints".¹⁴
38. Well, 17 years later, the Government last week introduced the Ombudsman Legislation Amendment Bill 2022 to the NSW Parliament. The Bill proposes a number of amendments to legislation governing the functions of the Ombudsman's Office to clarify and enhance the Ombudsman's powers, to resolve inconsistencies, and to update legislation.
39. In particular, the Bill proposes an amendment to the Ombudsman Act to enable the Ombudsman to review the systems of public authorities for handling complaints. Currently, the Ombudsman has audit and monitoring powers over agencies performing functions under particular Acts, for example, a power to review the complaint handling systems

¹⁴ Bruce Barbour (n 7).

of service providers, and has broad powers to conduct investigations about the conduct of a public authority, but does not have a general power to review the complaint handling systems of public authorities.

40. The proposed oversight function was most recently recommended by an August 2018 special report to Parliament by the former Ombudsman, Mr Michael Barnes, following the review of the complaint handling practices of 44 agencies.
41. The proposed power will enable the Ombudsman to assist agencies, in a collaborative manner, to improve their own complaint-handling systems. The function will add further value to public sector complaint handling and service delivery without the expense of the Ombudsman conducting formal investigations.

Conclusion

42. I thank you all for performing your extraordinarily important work.
43. I encourage you to reflect on all you've achieved in the previous years by protecting citizens and upholding the rule of law throughout the rolling cycles of crises that NSW has endured: drought, bushfires, floods, pandemic.
44. I hope that today offers you the opportunity to look to the future of the Ombudsman's Office.
45. Thank you and congratulations.