

7 April 2000

The Director  
Standing Committee on Law and Justice  
Legislative Council  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Blunt

**Re: NSW Bill of Rights Inquiry**

Thank you for the opportunity to make a submission to your current inquiry into a statutory Bill of Rights for NSW, and for the extension of time in which to submit it.

There are many documented arguments both for and against the introduction of a Bill of Rights. It is beyond the remit of this Office to canvass the majority of these arguments in any detail or to comment on their merits.

The focus of the work of the NSW Ombudsman is the administrative conduct of public authorities and public officials. It has been argued that in the absence of a Bill of Rights, government agencies are inclined to take action as they judge best, rather than by reference to human rights principles, and that a Bill of Rights would refer administrators to principles that should apply in the particular case.<sup>1</sup>

In principle, the Ombudsman supports the notion that public sector agencies should have regard to human rights in their conduct.

Without adopting any position in relation to a Bill of Rights, our primary concern is how best to promote the practical protections that would be afforded by a Bill of Rights. This submission draws the Committee's attention to some of the important considerations that need to be addressed if the proposal to introduce a Bill of Rights is pursued, the role of the Ombudsman in the protection of human rights and the potential implications of a Bill of Rights on this role.

Form and content of a Bill of Rights for NSW

Before any proposal for a Bill of Rights can be advanced, a number of critical preliminary issues must be determined. For example:

- What are the rights proposed to be enshrined by the Bill of Rights?
- Does the Bill of Rights purport to codify existing rights or create new rights?
- How prescriptive is the Bill of Rights is intended to be?

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<sup>1</sup> Bailey P, "Why Australia Needs a Bill of Rights" in *An Australian Bill of Rights: Pro and Contra* (Institute of Public Affairs, 1986).

In order to arrive at an informed response to these threshold questions, it would be useful to catalogue all of the existing rights currently protected by both legislation and the common law, and use this exercise to determine what rights are missing.

Considerable thought would need to be given to how the rights appearing in a Bill of Rights are to be conceptualised. The degree of specificity and detail required will positively correlate with the prescriptiveness of the Bill of Rights. Articulating all derivations of express rights is a complex undertaking.

A cost/benefit analysis should be undertaken to determine whether a sufficiently meaningful document can be produced and justified by the amount of work involved in reaching a consensus on a Bill of Rights.

To avoid uncertainty, confusion and legal challenges following the introduction of a Bill of Rights, a comprehensive review of legislation in force would need to be carried out to determine areas of actual or potential conflict with the proposed Bill of Rights. A similar audit would ultimately also be necessary for policies/procedures employed by key government departments likely to be impacted by a Bill of Rights.

If the decision is made to proceed with a Bill of Rights, we recommend that the impact of such a Bill of Rights on the existing legislation and practices in a number of discrete areas be examined in advance to assist decision making. Police powers is an area that would be particularly suitable for this task. There is nothing new in the expectation that the police be required to enforce the law without infringing human rights, but practically speaking, how would our existing legislation and police practices measure up to a Bill of Rights?

In our view, one way of dealing with all these potential complexities is to adopt an aspirational document, of universal application, that promotes principles rather than sets enforceable boundaries.

#### Monitoring compliance with a Bill of Rights

Another issue raised by the proposal to create a Bill of Rights for NSW is who should have primary responsibility for overseeing compliance with the Bill of Rights?

It is self-evident that if a Bill of Rights were to be introduced, individuals with grievances (legitimate or otherwise) would use it to seek redress.

At present in NSW responsibility for protection of human rights and adjudicating on complaints of human rights infringements is divided amongst a number of different agencies. There is no single central body charged with all human rights issues.

The Bill of Rights proposal raises general questions as to whether a specific body should be given special responsibility for promoting/protecting human rights under the Bill of Rights.

#### Existing role of the Ombudsman in the protection of human rights

In NSW, human rights have traditionally been protected by the common law, the Parliament (through the enactment of specific legislation) and the independent judiciary. More recently, a range of administrative institutions have been established

whose roles involve protection of various “rights”, such as the Anti-Discrimination Board and Privacy NSW (formerly the Privacy Committee).

The Ombudsman’s Office supplements these institutions, and helps uphold the rights of citizens in their relations with government authorities through investigation of conduct that may be unreasonable, unjust, oppressive, improperly discriminatory or contrary to law.

As Melinda Jones points out,<sup>2</sup> there is substantial common ground between administrative law and human rights. Both human rights instruments and the institution of the Ombudsman share a common goal of protecting citizens against unjust governmental action, and ensuring that citizens are treated with equal concern and respect.

The Ombudsman

*acts as a deterrent against the misuse and abuse of public power to deny basic human rights by upholding the dignity of the individual and giving people the opportunity to question the legality and fairness of public laws and directions and to challenge official behaviour and actions.*<sup>3</sup>

Internationally, over the past decade there has been a growth in the number of Ombudsmen whose primary function is the protection of the human rights. The charter of these Ombudsmen expressly confers jurisdiction to investigate violations of human rights by government authorities. This development has occurred principally amongst newly emerging democracies, where the recent history of the country has been of human rights abuses committed by government authorities and there is no separate institutional machinery for human rights protection.

The *Ombudsman Act 1974* (NSW) does not contain explicit power to investigate complaints concerning human rights infringements. The NSW Ombudsman acts on the precepts of administrative law and good administrative practice rather than on the basis of international human rights law.

Nevertheless, by promoting fairness and efficiency in public administration, and by identifying unreasonable, arbitrary, oppressive or discriminatory conduct on the part of public authorities, the role of the NSW Ombudsman does reflect the aims and provisions of human rights law. And human rights norms are relevant, both directly and indirectly, to the work of the NSW Ombudsman.

As a matter of general principle, complaints against government agencies can, and often do, involve human rights infringements. This is particularly true in relation to complaints against police, prisons and other correctional facilities and their staff, and complaints in our child protection jurisdiction.

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<sup>2</sup> Jones M, *Human Rights and the Administration of Law*

<sup>3</sup> Caiden G, MacDermot N and Sandler A, “The Institution of Ombudsman” in *International Handbook of the Ombudsman: Evolution and Present Function* (Greenwood Press, 1983).

All government departments and agencies have the potential to infringe the human rights of members of the public both in framing the law and policy and during the daily administration of government.<sup>4</sup>

As the power and interference of the State in the lives of its citizens has increased, so too has the imperative of ensuring observance and abidance by public authorities with the human rights of members of the public. Wrong decisions can have significant impact on the individual and his/her enjoyment of human rights.

International human rights instruments ratified by Australia do not form part of our law until implemented into domestic legislation. Wherever human rights norms have been incorporated into domestic NSW law and are breached by NSW government agencies, this can be subject of an adverse finding by the Ombudsman.

However, even where international instruments have not been enacted into domestic law, the human rights embodied in such instruments can be relevant to the Ombudsman in the discharge of his or her functions.

In assessing the conduct of public authorities and public officials, the NSW Ombudsman is not bound by strictly legal considerations. Under the *Ombudsman Act 1974* (NSW), the Ombudsman is able to make a finding of wrong conduct where the conduct is:

- contrary to law;
- unreasonable, unjust, oppressive or improperly discriminatory;
- in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory;
- based wholly or partly on improper motives, irrelevant grounds or irrelevant consideration;
- based wholly or partly on a mistake of law or fact;
- conduct for which reasons should be given but are not given;
- otherwise wrong.

Unincorporated international human rights norms may be relevant to the work of the Ombudsman in at least two ways:<sup>5</sup>

- Where necessary or appropriate, they can be used by the Ombudsman as an interpretative guide to construe existing domestic laws;
- The Ombudsman may consider international human rights norms as an informal source of principles of fairness and justice. As noted above, the Ombudsman is authorised to make reports and recommendations in cases in which conduct is unfair, oppressive or wrong, although not actually violating an existing law. It is open to the Ombudsman to find conduct by a public authority that evinces a failure to respect human rights is not in keeping with good administrative practice.

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<sup>4</sup> Reif L, Marshall M and Ferris C (eds) *The Ombudsman: Diversity and Development* (International Ombudsman Institute, University of Alberta, 1993).

<sup>5</sup> See generally Reif at al, *ibid*, at 98.

### Effect of a Bill of Rights on the work of the Ombudsman

A Bill of Rights, if introduced, would be able to be used by the Ombudsman as part of his or her legal arsenal in the process of undertaking an investigation, and if justified, making recommendations to government.

The Bill of Rights would be available to the Ombudsman as a source of inspiration in the development of requirements for government action by analogy to the situations covered by the Bill of Rights.

Under our statutory framework we may also have a role in drawing to the attention of Parliament any discrepancies that are discovered between the Bill of Rights and other NSW laws or administrative policies.

The introduction of a Bill of Rights can be expected to result in an increase in the complaint load of the Ombudsman by reason of:

- increased awareness of rights
- expansion in the concept of breach of law

Thereafter, the impact of the Bill of Rights on the work of the NSW Ombudsman depends to a large extent on the identity and powers of the body charged with enforcing/overseeing compliance with the Bill of Rights.

Whereas human rights issues that arise in the course of the investigation of maladministration will continue to be broadly within the Ombudsman's jurisdiction to investigate and comment upon, the Ombudsman's Office operates as a remedy of last resort. The majority of human right complaints would be most appropriately dealt with in accordance with any alternative avenue established for individuals to pursue remedies for human rights infringements.

If the monitoring/enforcement body is judicial or quasi-judicial in nature, there may still be a significant role for the Ombudsman to play, particularly where judicial intervention is unlikely to be sought (eg conduct of police officers towards persons suspected of committing an offence but against whom the case is dropped), or unlikely to address the underlying systemic causes of the human rights violation. This is because judicial and quasi-judicial remedies are subject to a number of limitations that the Ombudsman's Office does not share. The judicial/quasi-judicial system is reactive and has a case-by-case orientation. By contrast, the Ombudsman's power to institute inquiries on his or her own initiative and to make recommendations for future improvements provides opportunities to promote respect for human rights that are not available to courts or tribunals.

Yours faithfully

Chris Wheeler  
**Acting NSW Ombudsman**