

OMBUDS CAN, OMBUDS CAN'T, OMBUDS SHOULD, OMBUDS SHAN'T: A CALL TO IMPROVE EVALUATION OF THE OMBUDSMAN INSTITUTION

Introduction

How, who and what reviews the ombudsman institution? To address this question this chapter examines the large scale (whole of organisation) reviews of government and private industry ombudsman which have been undertaken in Australia, the United Kingdom and New Zealand. This study finds that each jurisdiction relies heavily upon professional 'cross-border' ombudsman organisations granting private accreditation to their ombuds¹ members. It concludes that this framework of institutional evaluation requires improvement and suggests that sector-wide standards in the form of periodic evaluation should be introduced.

Part 1 of this chapter discusses the need for evaluation of the ombudsman institution. It suggests that effective evaluation improves stakeholder understanding of an ombudsman office and the roles it performs, and amplifies scrutiny of its operations. However, while individual offices generally evaluate their own individual operations there is an absence of shared generic measures to account for the contributions – both tangible and intangible – that the institution of the ombudsman makes to the system within which it operates. Ombuds have achieved much, the institution is entrenched internationally as an access to justice mechanism and is growing in both scope and application. However, questions such as why ombuds may be the appropriate dispute resolution mechanism for a particular industry or government and the adoption of appropriate measures of 'success' have long been a source of puzzlement. For the most part, this is because effective generic methods to evaluate the overall impact of the institution remain unknown (Stuhmcke 2016). The nature of the ombudsman contributes to this conundrum as inherent in any evaluation are multi-faceted questions as to whom the institution serves and what the focus of its role is and/or should be. These questions are not only difficult with respect to the historical archetype model of an ombudsman but are complicated by the multifaceted nature of the plethora of ombuds operating internationally today.

Having established the obstacles to sector wide evaluation, the chapter then moves on to critique the 'current state of play' in Part II and to suggest improvements to ombuds evaluation in Part III. Currently, ombuds as a dispute resolution mechanism are subject to a lack of formal regulatory oversight, instead the creation and enforcement of norms has been left to private umbrella organisations. Part II analyses these bodies which provide 'accreditation' or 'membership' to recognise institutions as ombuds. Generally, potential members are vetted through an organisation specific application process. These organisations exist globally, regionally, nationally and also by function and industry. For example, the International Ombudsman Institute or IOI is the global organisation for parliamentary ombuds, with more than 170 members. In Part II a detailed analysis is provided of the role of two such accreditation type bodies which perform private accreditation of ombuds – the Australian and New Zealand Ombudsman Association (ANZOA) and the Ombudsman Association (OA). An essential criterion of both organisations accreditation is that members engage in performance evaluation. Part II then drills down to specific analysis as to how the individual members of ANZOA and OA fulfill this requirement of evaluation. In particular, the member institutions of the OA and ANZOA are examined to ascertain how and whether ombuds voluntarily undertake whole of organisation evaluation of their own functions and/or whether there are external requirements, such

¹ This chapter uses the term 'ombuds' as plural for the term ombudsman – see Chapter XX of this book

as a legislative imperative to do so. This analysis shows marked variation between offices – even those with shared membership of a single ombuds organisation.

This disparity in both occurrence and style of evaluation between ombudsman institutions is discussed in Part III. This Part suggests that while each ombudsman institution should be encouraged to have purpose built evaluation of its own unique and nuanced functions, there is a need to improve a shared focus upon when and how larger scale organisational evaluations of each office are undertaken. It is argued that while there is no ‘one size fits all’ model for measuring the effectiveness of ombuds, there should be an expectation that ombuds engage in a minimum level of large scale organisational review. Whether that review should be monitored by global ombuds bodies such as ANZOA and the OA, and how it should be performed, requires further debate and ongoing careful consideration.

Part I: Making a case for evaluation of the ombudsman institution

Evaluation will mean different things to different people. It is a loose term which refers both to the process which aims to improve policy or programs and it may also include evaluation research which applies more scientific methods to measure results of public policy (Marume, Jubenkanda & Namusi 2016, p.1075). It is complex and subtle, changing according to the purpose, focus, criteria and methods used (Burton 1986). As Burton observes, evaluation is necessarily neither objective nor neutral. Indeed evaluation implies making judgments about the value of a program or its practices and thus will apply criterion which, while seeming to be objective, must necessarily involve standard setting that will be values based.

This chapter, while recognising the nuances in terminology and processes, takes the broadest possible approach to evaluation. It begins from the premise that evaluation, embracing performance measurement, review and program evaluation, is critical in ensuring accountability of institutions (World Bank, 2016). Such scrutiny allows the institution to report on its effectiveness in carrying out its mandate, and to demonstrate its public (or other) value. Further, evaluation is widely recognised as an important component for learning and improving and thus enhancing institutional effectiveness (OECD, 2016). Importantly, evaluation is not without cost. For example while evaluation provides information on effectiveness this can create tension between promoting effectiveness and facilitating learning. It also may face challenge as to its authenticity and independence.

As institutions which function to investigate the performance of others it follows that ombuds should themselves be subject to transparent and ongoing evaluation (Stuhmcke 2017). Indeed the effectiveness of ombuds is of interest to ombudsman offices and the stakeholders in the offices including: governments, public policy makers, citizens, government employees, government agencies, society at large, employees of the ombudsman office and government agencies, contractors, other integrity institutions and advocacy groups. Given such diversity of stakeholder interest it is surprising that, for the most part, effective generic methods to evaluate the overall impact of the institution remain unknown and that there is an absence of an accepted or universal evaluation methodology. Indeed early attempts to do so by Danet in 1978 and Hill in 1976 remain among the central scholarly works in this area (Danet, 1978; Hill 1976). This gap is especially perplexing given that ombuds have achieved much attention and accolades and the institution is entrenched internationally as an access to justice mechanism which continues to grow in both scope and application.

Indeed external independent research has historically overwhelmingly supported the success of the institution. Authors making such claims include commentators on: European Ombudsman (Kucsko-

Stadlmayer 2008); the United Kingdom Ombudsman (Seneviratne 2002; the South Pacific Ombudsman (Satyanand 1999); North American and Canadian Ombudsman (Richard, 2003/2004); Latin American Ombudsman (Uggla 2004); African Ombudsman (Fombad 2001); Eastern European Ombuds (Ambroz 2005); Asian Ombuds (Lo & Wickins 2002). However it is also acknowledged that '[M]ost evaluations of ombudsman offices are, at best, approximations' (Aufrecht & Hertogh 2000, p. 389) and that 'evaluating programs like the ombudsman institution is an exceedingly difficult and uncertain endeavour and further that it is impossible to come up with a framework that is foolproof' (Ayeni 1999, p. 169). This impossibility arises as ombuds are more than redress schemes for individuals and as observed by Justice Enderby in *Ainsworth v Ombudsman* (1988) 17 NSWLR 276, 283, are "unique". The unique nature of the institution rests in both its function and its diversification. In terms of function, both public and private industry ombuds may, like courts and tribunals look at whether a decision is lawful and correct, and yet assess the correctness of the decision according to broader principles of fairness and reasonableness (Stuhmcke 2008). A further challenge to the evaluation of ombuds is diversification. Ombudsman offices are disparate. Since the modern of adaptation the Swedish Parliamentary Ombudsman (Riksdagens ombudsman) in 1809 the institution has been transplanted and modified. The result is that numerous and diverse Ombudsman offices now exist on every continent. Government ombuds now perform a large number of functions (Stuhmcke 2016) and may also be private industry ombudsman or a hybrid of both public and private. Private industry ombuds schemes have proliferated and provide an impartial free dispute resolution service for consumers. Ombuds may also be organisational however the discussion of these bodies is outside the scope of this paper.

The function and diversification of the institution thus underscores the 'natural' obstacles in the way of ombudsman effectively measuring outputs, including:

- The ombudsman is part of a wider system – both of government or industry and of integrity organisations. Any one part of the system may be responsible for what performs well or what performs badly making it difficult to attribute success or failure directly to the ombudsman (State Services Authority 2010).
- The essence of the ombudsman institution itself is that it is neutral and often works informally – that it offers options and fosters appropriate and efficient redress of concerns and grievances and may work towards systems changes. There is an inherent subjectivity to the office, which might include assisting individuals to understand or to resolve their own disputes – the lowest point of dispute resolution approach so that often the complaints do not materialise. Likewise, its impact may lead to systemic improvements which prevent an untold number of complaints.
- The practice of ombuds is difficult to evaluate – for example, it has often been disputed as to whether a reduction in individual complaints is a sign of ombudsman success.
- The objectives of ombuds are not to make citizens or consumers happy with their services necessarily but rather to ensure an absence of maladministration in decision making. The focus of the office is therefore upon process not outcome. The result may be dissatisfied stakeholders who may be subject to fair process however who do not think the outcome is fair.

However balanced against this disparity in operation and typology of ombuds is a common history and set of goals and shared characteristics and norms. . For example a central characteristic of ombuds is independence and the perception of independence meaning an ombudsman is not an advocate for the complainant. Similarly ombuds are generally a 'last resort' for unresolved complaints and aim to provide redress in situations where there would otherwise be only more expensive, slow and legalistic alternatives (Stuhmcke 1997). There are also shared norms of ombudsmanship. These are less tangible, perhaps including 'bringing humanity into bureaucracy' (Hill 1978) and promotion of the rule of law (IOI 2017).

As confirmation of these shared norms professional ombuds organisations are now in place globally. These organisations describe themselves as professional bodies offering standards, practice guidance, and professional development for ombuds. These organisations are self-regulatory although they generally operate not due to legislative requirement but rather as peak bodies which act to provide normative expectations as to ombudsman review. Importantly, they review membership according to criteria, accredit offices and aim to improve and set standards of good practice. Indeed, at the more directive end of the self-regulatory framework one such organisation the United Kingdom Ombudsman Association (the 'OA') has exercised powers to expel an institution through removing the right to use the title 'ombudsman'.

It is these organisations that are the focus of Part II. These organisations review membership and provide legitimacy to ombuds offices, they both evaluate ombuds offices and in turn expect ombuds offices to evaluate and improve their own performance. Part II focuses upon these organisations for four reasons. Firstly, in the absence of global ombuds standards professional umbrella organisations, themselves comprised of ombudsman, offer the best exemplar of evaluation criteria applied to the operation of the institution. Secondly, as these organisations are self regulatory bodies the level of compliance and articulation of the evaluative criteria demonstrated by the ombuds members will indicate efficacy of review. Thirdly the umbrella organisations of ombuds perform an important self-accreditation role. Analysis of this role thus provides insight into whether this form of accreditation is sufficient to ensure public and consumer confidence in the institution.

The fourth, and arguably most important reason for this focus, is the growing necessity to consider the broader issue of international sector-wide generic purpose built evaluation. Self-accreditation is increasingly taking place in an international context with the setting of sector-wide standards. This shared universal framework for ombudsmanship accepts that '[C]onsistencies in practice can promote better accountability, more effective practice, and greater legitimacy and credibility of ombuds offices and thereby strengthen and support professionalism of the field' (Houk et al. 2016, p.8) While O'Brien suggests that the OA has avoided professionalising ombudsman, pointing to the limited take up of accredited training by ombudsman staff (O'Brien 2015) and both Hirst and Behrens observe (although in different contexts) that in the UK ombuds are not a profession yet (Hirst 2016; Behrens 2017) it is noteworthy that the umbrella organisations which will be discussed in Part II have begun to create Memorandums of Understanding between each other (MOU 2015). For example the

Australian and New Zealand Ombudsman Association (ANZOA) and the International Ombudsman Institute (IOI) signed a Memorandum observing that:

By signing the Memorandum, both institutions recognized that they share similar objectives to strengthen the concept of ombudsmanship, and encouraging existing and new ombudsman institutions in their work of assisting, enhancing and protecting civil and human rights.

It follows that the issues discussed in this chapter touch upon the question as to whether there is a global ombudsman profession and the appropriateness of private accreditation in assuring evaluation and thus quality of ombudsman service. The answers to both these questions will inform choices as to the requirements professional organisation set for ombuds to evaluate themselves. This discussion is touched on again in Part III.

Part II: Transnational ombudsman organisations: Evaluation of members

As the ombudsman institution adapts and evolves so too have ombudsman organisations. One of the oldest professional organisations with a correspondingly large membership is the International Ombudsman Institute. This is the global organisation for the cooperation of more than 170 independent public Ombudsman institutions from more than 90 countries worldwide. The IOI has four categories of membership, members, voting members, honorary life member and library member with applications for membership being assessed in a “a fair, wide, inclusive and liberal manner in order to favor membership or category of membership” (IOI website, 2017). Apart from the IOI there are professional organisations based on geographical regions such as the OA and ANZOA and the Forum of Canadian Ombudsman and in the United States there are various associations such as the United States Ombudsman Association. There are also smaller regionally specific peak bodies such as ANZEWON which is the Australian and New Zealand Energy and Water Ombudsman Network and NEON – the UK equivalent of the National Energy Ombudsman Network. While these organizations range in purpose and member services, their overall objective is to provide professional development via courses, certifications, conferences and publications on industry trends, and to provide guiding principles of practice or establishment. They also aim to represent a unified voice for ombuds and to feed into policy debate through submissions and public debate.

Ombudsman organisations provide a form of private accreditation or quality assurance. In this role the organisations perform two different types of evaluation of ombuds. Firstly, the organisations operate membership criteria. Offices or individual ombuds may apply for membership. Membership is not a status granted as of right. Thus the self-administered organisations provide a gateway of accreditation through membership. Secondly, the organisations set standards for membership, setting criteria for the work of ombuds, allowing offices to evaluate their performance. Such standards typically include independence, neutrality, and confidentiality as core standards for ombudsman offices (although there are variations in how these terms are articulated) including effectiveness of operations and evaluation. In summary, ombudsman organizations provide accreditation as to quality and define standards by which to establish and measure quality. These are both activities of evaluation.

In this Part the transnational ombudsman organisations of the OA and ANZOA - the professional bodies for ombuds offices in the UK, Australia and New Zealand - are examined in order to analyse these twin functions of evaluation. In the UK, Australia and New Zealand government has assumed a minimal role in regulating the quality of ombudsman services. While legislation exists to establish and circumscribe the operation of all public ombudsman and some industry ombuds the role that

government has performed in the evaluation of ombuds is limited to a handful of external inquiries and statutory reviews as mandated (see Table 1 below). The proliferation of ombuds has accordingly been encouraged by governments with little regulatory oversight. Private accreditation thus fills this gap. This discussion highlights both the benefits and limitations of professional organisations evaluating ombuds.

1. Evaluation through Accreditation

The OA was originally established in 1993 as the British and Irish Ombudsman Association. ANZOA was established ten years later in 2003. The OA, the peak body for United Kingdom Ombudsman, has 32 Ombudsman members with 96 members in total (23 complaint handler members 4 Corporate and 37 individual members) (OA Annual Report 2016) and ANZOA is the peak body for Ombuds in Australian and New Zealand with 22 members. Both organisations include public and private ombuds schemes as members.

Both the OA and ANZOA offer a form of private accreditation in vetting members for specific standards of ombudsmanship. For example Objective 5 of ANZOA states ‘Accord recognition publicly to those persons who satisfy the defined criteria for membership of the Association’ and Objective 7: ‘Formulate and promote standards of best practice to be met by ombuds and their offices in the performance of their duties, including the adoption of the Benchmarks for Industry-Based Customer Dispute Resolution Schemes, or equivalent’. Thus both the OA and ANZOA serve as an assurance of quality for consumers and citizens that its’ ombuds members have met standards established by professional peers. Each organisation is responsible for creating professional ethics and standards – much the same as the professional bodies that oversight the medical profession or the legal profession. To provide an example of quality assurance both organisations have expressed concern with the use and misuse of the title ‘Ombudsman’. Indeed, according to a media release on the ANZOA website one of the 14 ANZOA objectives is to ‘Promote the appropriate use of the title of ombudsman in both the public and private sectors’ (ANZOA Media Release 2017) and ANZOA has actively opposed the creation of creation of schemes which it believes should not bear the name ombudsman. For example, on 7 April 2015 a letter was written by ANZOA to government stating that (ANZOA letter 2015):

“ANZOA welcomes the support for small businesses and family enterprises proposed in the *Australian Small Business and Family Enterprise Ombudsman Bill* (the Bill). However, we cannot support the use of the name ‘Ombudsman’ for the proposed Small Business and Family Enterprise Ombudsman (SBFEO). The SBFEO is not an Ombudsman and should not, in our view, be called one.”

Such active opposition takes place despite the fact that ANZOA (and the OA) have members who do not have the title ombudsman, for example ANZOA has two such members: Nanette Moreau, Commissioner, Utilities Disputes Ltd (NZ) and Susan Taylor, CEO, Financial Services Complaints Limited (NZ). Such public policy advocacy for the restriction on the use of the title demonstrates the leadership role that the OA and ANZOA play in the development of the institution and advocating quality of membership.

Both ANZOA and the OA apply published standards to evaluate membership. The OA has published rules concerning membership assessment and can expel a member which no longer meets criteria. The OA has a re-evaluation process which is intended to take place on a 5 yearly basis (BIO Annual Report 2014/2105 p.8). Little information, including in the rules of the OA, is available on this process. More broadly both the OA and ANZOA have little publicly available information on either organisations’ public website, or other published materials, as to the internal process of decision making around membership or whether there are any appeal rights from such a decision. There is only one publicly documented instance of membership refusal by the OA (and none by ANZOA). This single instance occurred in 2017 when The Retail Ombudsman (TRO) ‘lost the right to use the

respected title of “Ombudsman” (Complaining Cow 2017). The OA website stating that The OA’s Validation Committee “...unanimously agreed that TRO did not meet the OA’s membership criteria” (OA website 2017a). How the decision was arrived at or why it was made is not explained. It follows that the veracity or thoroughness of the evaluation process for both OA and ANZOA is opaque.

In terms of membership the OA states on its website (OA website 2017b):

Ombudsman Membership of the Association is open to ombudsman schemes which meet the published criteria for recognition (Schedule 1) attached to the Association’s Rules (essentially: independence of the Ombudsman from those whom the Ombudsman has the power to investigate; effectiveness; fairness; openness and transparency and public accountability). The word ‘ombudsman’ does not have to appear in the title of the scheme...

ANZOA states that (ANZOA website 2017a):

...membership is personal to the Ombudsman. In ANZOA, the term ombudsman includes people who perform the same independent role in positions such as Complaints Commissioners. Our members come from not-for-profit industry-based, parliamentary and other statutory external dispute resolution offices, which meet accepted high standards of independence, impartiality and effectiveness and observe the *Benchmarks for Industry-Based Customer Dispute Resolution* (the *CDR Benchmarks*).

The OA also has two further categories of membership - *Compliant Handler Membership* is open to escalated complaint-handling schemes and organisations which meet the requirements for such membership published in the Association’s Rules (Schedule 2) *Associate Membership* (Corporate and Individual) is open to organisations such as consumer bodies, professional companies and trade associations, and to individuals who are interested in and support the objects of the Association and have significant relevant expertise.

And further (ANZOA website 2017b):

The Australian and New Zealand Ombudsman Association (ANZOA) is concerned to ensure appropriate use of the term Ombudsman. Our view is that a body should not be described as an Ombudsman unless it complies with six essential criteria addressing independence, jurisdiction, powers, accessibility, procedural fairness and accountability.

According to Professor McMillan, a former Australian Commonwealth Ombudsman and Acting NSW Ombudsman, membership of OA (formerly BIOA) and ANZOA is desirable. Writing in 2008 McMillan observed that “The BIOA executive is rigorous in deciding whether to admit an applicant to voting membership (four members admitted only to associate membership use the term ‘ombudsman’ in their title). It is said that OA accreditation, especially as a voting member, is treated as a desirable goal by members” (McMillan 2008). McMillan’s observation as to the desirability of the status of ‘member’ infers internal debate and discussion as to who should be a member. However there is little commentary on this aspect of either organisation. Of course the creation of differential membership categories in OA² and the focus for both organisations on the protection of the ombudsman brand name indicates that membership criteria and approvals are an ongoing issue. Indeed membership of the OA is becoming increasingly important as –confirms that for a company in the UK to be registered as Ombudsman it must hold membership with BIOA, otherwise it will be fined (OA Annual Report 2014-2015, p.5).

² It is clear that complaint-handler members can move up to be ombudsman members – as is documented in the 2013-2014 Annual Report for the Ombudsman for Children, Ireland, p 4.

The OA and ANZOA have neither statutory nor contractual power over their members and yet act to structure a regulatory regime. This is not to say that either organisation is involved in self-regulation of the ombudsman 'industry'. Nevertheless the peer review that both organisations offer – assuring quality and assessing standards – is a form of self-regulation. The OA and ANZOA offer regulatory standards independent of the State and such standards affect members and non-members alike. Though there is no legal mandate as conventionally understood these bodies nevertheless have informal power to seek behavioural modifications from ombuds members and non-members. While neither organisation is able to enforce standards formally except by membership exclusion, which in itself is an enforcement of standards both bodies nonetheless thus perform an important evaluative function. They assess whether bodies have met the standards set by them and can deny institutions access to their publications, forums and services if they fall short of the principles of ombudsmanship. As private overseers of evaluation of membership applications they have both a permissive mandate and a lack of public transparency around decision-making.

Therefore the process of evaluation of bodies as ombuds by OA and ANZOA itself requires careful evaluation. In evaluating membership both OA and ANZOA take on a compliance function. One concern regarding delegation of the compliance determination function is whether the private model imposes sufficient accountability on private accrediting bodies to ensure that they discharge their compliance determination function in ways that protect consumers and citizens and patients which treats ombuds (both member and non-members) fairly. Here it can be argued that at least with direct government regulation, accountability is presumably imposed through the political process.

Private accreditation thus gives rise to the question as to whether the method and standards used by OA and ANZOA sufficiently protect consumers and citizens. Apart from ensuring that the ombudsman function is being performed in a manner that protects the public it must also be fair to government and industry service providers. In short, OA and ANZOA offer private accreditation of ombudsman, institutions that operate in the public interest and both organisations lack a legal mandate yet exercise considerable power in admitting agencies to their membership. Of course the use of private bodies to have a public regulatory effect is not a new phenomenon (Scott 2003; Braithwaite & Drahos 2000; Black, 1996). Private accreditation has benefits as it can assist government to regulate quality and improve services. Further, private accreditation of ombuds, rather than government accreditation, means that the unique expertise of a body such as the OA or ANZOA may lead to better standards and more rigorous selection of members (Kinney 1994). On the other hand membership assessment is made by an organisation which is neither independent from their membership nor particularly transparent in the application of membership criteria. The danger here rests in negative perceptions of the autonomy and accountability of such bodies. Accreditation, and failure to accredit organisations as members, may harm interests. Two groups are at risk – the individuals who rely on the ombudsman and the ombudsman themselves (both members and non-members).

2. Evaluation as a Standard of Membership

Evaluation as one of the core principles of membership of the OA and ANZOA is now examined to reflect upon the efficacy of this requirement. In October 2009 the OA published the 'Guide to principles of good governance'(OA,2007, p.27) with the principles being 'independence, openness and transparency, accountability, integrity, clarity of purpose and effectiveness'. This statement is intended as high level principles with effectiveness defined as 'Ensuring the scheme delivers quality outcomes efficiently and represents good value for money' (OA,2007,p.3). Effectiveness is explained as "Leadership which defines and promotes the values of the scheme: Keeping to commitments; Good internal planning and review processes; Quality assurance and a process for review of service; Quality

outcomes for complainant, organisation complained about, scheme and all other stakeholders; Recommendations accepted by bodies in jurisdiction; Effective risk management controls; Cost effectiveness and value for money” (OA,2007, p.8). Similarly, ANZOA’s members (which are the individual Ombudsman) must meet accepted high standards of independence, impartiality and effectiveness, and observe the *Benchmarks for Industry-Based Customer Dispute Resolution* (CDR Benchmarks 2015). These benchmarks contain 6 principles: accessibility; independence; fairness; accountability; efficiency; effectiveness. Effectiveness is described as ‘The office is effective by having an appropriate and comprehensive jurisdiction and periodic independent reviews of its performance’ with the purpose being ‘To promote community confidence in the office and ensure that the office fulfils its role.’ (ANZOA website 2017a).

Evaluation which may satisfy this requirement is undertaken at many levels. There are nuanced and less publicised (or publicly available) evaluations undertaken by individual offices. Such practitioner evaluation occurs through ombudsman setting their own goals, evaluating their own measures and reporting on their performance against them. This includes evaluation of (Stuhmcke 2012): Complaint Numbers and Statistics; Complaint efficiency and costing; Budget reporting; Cost benefit analysis; Staff statistical analysis and staffing changes; Customer satisfaction surveys; Comparative complaint analysis; Benchmarking against a strategic plan or value statement; Benchmarking against other offices; Case studies; Office observations (on its own performance); Unsolicited feedback; Comments on performance of agencies; Outreach activities; Speeches; Training; Policy changes; Publicity; Identifying complaints about ombuds themselves and how an office is held to account. Ombuds, including all the members of the OA and ANZOA may and indeed do evaluate their operations in multi-faceted ways. This is valid and desirable.

The purpose of this chapter is to examine the organisational evaluation of members of the OA and ANZOA. Such analysis highlights disparity in approaches. Table 1 below provides a historical analysis of evaluation as undertaken by all the existing membership of ANZOA and eleven of the current OA members. Table 1 confirms that each ombudsman service evaluates its performance differently and to varying degrees.

Methodologically, the analysis in Table 1 was limited by publicly available/ reportable information and information being accessible to a public search on the internet. This work was done under the by a research assistant and directed by the familiarity of the author with the offices work. Independent reviews were researched using the following search strategies: Inspecting annual reports of each Ombudsman for mention of independent or external review; Inspecting legislative instruments for provision of independent or external review (periodic or otherwise); An inspection of the Ombudsman’s website, including corporate, governance, policy, publications and compliance webpages (where available); A search of documents available on parliamentary websites; A database search using: AGIS Plus Text; Australian Public Affairs Full Text; Australian Policy Online; National Library of Australia (and Trove); UTS Library and a generic web search. A methodological limitation is that this Table identifies where an Ombudsman office has been subject to a formal review and excludes more informal styles of evaluation that offices may undertake. Such informal approaches are discussed in Part 3.

Table 1: Evaluation of ombuds where the organisation is the unit of evaluation

Australian Ombudsman	Independent reviews undertaken	Non-independent reviews undertaken	Reviews mandated by legislation	Review mandated by constitution / terms of reference	Ombudsman instigated reviews	Review reports accessible to public	Review through public consultation	Review through industry members/government	Mandatory reviews cyclically
Commonwealth Ombudsman	X					X	X	X	
Financial Ombudsman Service	X			X		X		X	X
Telecommunications Industry Ombudsman	X			X		X	X	X	X
Energy and Water Ombudsman (NSW)	X				X			X	
Energy and Water Ombudsman (Qld)	X				X	X		X	
Energy and Water Ombudsman (SA)	*								
Energy and Water Ombudsman (Vic)	X			X		X	X	X	X
Energy Ombudsman (Tas)	*								
Energy and Water Ombudsman (WA)					*				
Public Transport Ombudsman (Vic)	X			X		X		X	X
Ombudsman NSW	X	X				X		X	
Ombudsman Northern Territory		X							
Ombudsman Tasmania	X		X			X		X	X
Ombudsman ACT	*								
Ombudsman South Australia	*								
Victorian Ombudsman	X		X			X		X	X
Queensland Ombudsman	X		X			X		X	X

Australian Ombudsman	Independent reviews undertaken	Non-independent reviews undertaken	Reviews mandated by legislation	Review mandated by constitution / terms of reference	Ombudsman instigated reviews	Review reports accessible to public	Review through public consultation	Review through industry members/government	Mandatory reviews cyclically
Ombudsman Western Australia	*								
Credit and Investments Ombudsman	X		X	X		X		X	X

New Zealand Ombudsman	Independent reviews undertaken	Non-independent reviews undertaken	Reviews mandated by legislation	Review mandated by constitution / terms of reference	Ombudsman instigated reviews	Review reports accessible to public	Review through public consultation	Review through industry members/government	Mandatory reviews cyclically
Utilities Disputes Ltd Tautohetohe Whaipanga	X				X	X		X	
Banking Ombudsman Scheme	X		X			X		X	X
Insurance and Financial Services Ombudsman	X		X			X		X	X
Office of the Ombudsman New Zealand	*								

UK Ombudsman	Independent reviews undertaken	Non-independent reviews undertaken	Reviews mandated by legislation	Review mandated by constitution / terms of reference	Ombudsman instigated reviews	Review reports accessible to public	Review through public consultation	Review through industry members/government	Mandatory reviews cyclically
Channel Islands Financial Ombudsman	*								

UK Ombudsman	Independent reviews undertaken	Non-independent reviews undertaken	Reviews mandated by legislation	Review mandated by constitution / terms of reference	Ombudsman instigated reviews	Review reports accessible to public	Review through public consultation	Review through industry members/government	Mandatory reviews cyclically
Housing Ombudsman Service (England)					*				
Local Government Ombudsman (England)	X				X	X	X	X	
Property Ombudsman (England, Wales and Northern Ireland)					*				
Public Services Ombudsman (Northern Ireland)					*				
Public Service Ombudsman for Wales	X					X	X	X	
Parliamentary Commissioner for Administration (England and Wales)	X					X	X	X	
Health Service Ombudsman (England and Wales)	X					X	X	X	
Property Ombudsman: Scotland					*				
Financial Ombudsman Service (UK)	X				X	X		X	
Ombudsman Services (UK)	X				X			X	

* no identifiable review / no data available

Table 1 does not infer that where an Office has not undertaken evaluation or where there is no data available that these institutions do not review their performance. Rather the Table identifies large scale organisational formal reviews, either voluntary or mandatory, where those reviews are publicly reported. Importantly, the Table does not attempt to address evaluation typologies such as impact (measuring the extent to which a program has met its set legislative objectives), relative

effectiveness (addressing program strategies to achieve legislative objectives), and project performance (measuring the performance of program operations). The Table is also not concerned with whether such evaluations have been effective or indeed what the reports have concluded about the performance of an office or recommendations for change or even if these recommendations have been implemented. The focus of the Table is upon the following categories:

Independent reviews undertaken – reviews undertaken by a body external to the ombudsman and its governance structure.

Non-independent reviews undertaken – reviews undertaken by a body within the ombudsman and its governance structure.

Reviews mandated by legislation – reviews undertaken were mandated by a legislative instrument.

Review mandated by constitution / terms of reference – reviews undertaken were mandated by the ombudsman's constitution or terms of reference.

Ombudsman instigated reviews – reviews undertaken were instigated by the ombudsman itself, with no external mandate.

Review reports accessible to public – reports of the review available to the public, through the ombudsman's website, other online source or are readily and easily open for inspection in a physical form.

Review through public consultation – reviews undertaken which consulted the public at large.

Review through industry members/government – reviews undertaken consulted industry members, government and closely-associated stakeholders.

Mandatory reviews cyclically – reviews mandated by legislation at regular intervals of time.

Another point to observe when using this Table is that the above categories are broadly applied. For example, 'review through public consultation' can capture reviews which received extensive public consultation of over 400 written submissions and community consultation (ALRC 1999) and 1300 submissions (Forster Review 2005) or those reviews which received 5 written submissions and 12 interviews with 'key stakeholders' (VPTO 2009).

Part 3: Disparity in ombuds evaluation: institutional strength or institutional weakness?

Table 1 shows that organisational large scale evaluation is not uniform amongst members of the OA and ANZOA. This conforms with the following observation (McMillan, 2008):

The industry benchmarks applied by ANZOA include 'efficiency' and 'effectiveness', alongside 'independence' and 'impartiality'...'Efficiency' and 'effectiveness' cannot be measured as objectively: they are goals more than conditions.

The Table confirms the point that evaluation is a goal more than a condition of membership of either organisation. Organisational review is neither uniformly applied by legislatures nor universally pursued by ombuds. By inference this also means that a generic approach to evaluation is not a requirement of either membership of the OA or ANZOA.

At first blush the inconsistency between offices shown in the Table is both surprising and disturbing. Surprising as evaluation is a membership requirement of the professional organisations of the OA and ANZOA and disturbing as there is a normative view that ombuds should demonstrate shared enthusiasm for evaluation. However on deeper reflection this disparity may be appropriate and

indeed embraced as the Table confirms the point made earlier that ombuds, while having shared historical origins, have developed differently and adapted and changed according to the framework within which they operate.

Placing to one side the larger issue as to whether universality is desirable, the Table highlights a number of points which require further reflection. These follow, in no particular order:

- (i) Almost all offices have undertaken independent reviews

The Table confirms general compliance with independent reviews across all 22 offices with reported data. The only exception is the Northern Territory Ombudsman in Australia – an office which has performed non-independent self review only.

Significantly the Table does not identify how many independent reviews were undertaken by each office or when. The question of how frequent such reviews should be is further discussed further below (in cyclical reviews).

There is disparity in longevity across institutions. In Australia one of the oldest offices is the Commonwealth Ombudsman which has been in operation since 1977 and one of the youngest is the Public Transport Ombudsman (PTO) which began operating in 2004. By way of example, in its 13 years of operation the PTO has had two reviews, one in 2009 and one in 2014 (has reviews every 5 years as discussed below), whereas over the 40 year operational period of the Commonwealth Ombudsman the following 5 publicly accessible and reported independent reviews have been undertaken. Of these, only the 1991 Report of the Senate Standing Committee on Finance and Administration has had sole focus on the institution rather than examining the Ombudsman as part of a wider justice system:

- (1) Productivity Commission *Access to Justice Arrangements 2014*
- (2) Access to Justice Taskforce, Attorney –Generals Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System 2009*
- (3) Sackville Report, Access to Justice Advisory Committee, *Access to Justice : An Action Plan 1994*
- (4) Australian Law Reform Commission, *Managing justice: A review of the federal civil justice system 1999*
- (5) Senate Standing Committee on Finance and Administration *Review of the Office of the Commonwealth Ombudsman 1991*

Apart from the Commonwealth Ombudsman the largest number of reviews are from both the Victorian Ombudsman and the Telecommunications Industry Ombudsman each having also undertaken 5 reviews.

Otherwise the amount of reviews undertaken by offices varies markedly. For example, the Tasmanian Ombudsman has one 2013 review undertaken by the Tasmanian Parliaments Joint Standing Committee on Integrity. It is noteworthy that this review occurred long after the Tasmanian Ombudsman became a member of ANZOA, indicating that the independent nature of an evaluation may not necessarily be a key determining factor for membership accreditation.

(ii) Provide public access to information

The general pattern of public information pertaining to the evaluation of ombuds is difficult both to find and document. Indeed five of the 11 members of OA analysed and six of the 23 ANZOA members had no publicly available data. Given, as discussed earlier, that the institution was established to investigate poor administration and to promote public trust in government and industry it would seem that publication of performance evaluation is important to the quality and impact of ombuds.

(iii) Rectify imbalance in consultation with industry/government and consumer/citizen

The large scale organisational reviews of the Australian and New Zealand ombuds rely more heavily on input from government or industry, than the consumer or citizen. Input by stakeholders into the reviews of the OA members seem more evenly balanced.

Of the 13 Australian ombuds who had accessible data public consultation had been used by only 3 offices whereas review through industry members and government occurred much more widely, utilised by 12 of the 13 offices. Interestingly, amongst Australian ombuds private industry ombuds are more likely to involve the consumer public as stakeholders in reviews.

In New Zealand of the three offices that reported publicly all had consulted with industry and government and none with the wider public. In the UK of the 6 offices which had reported publicly 4 had engaged in public consultation and all 6 with government consultation. Thus there is no uniformity between offices as to public consultation but it seems that the OA members are more likely to consult widely with both community and government/industry and amongst ANZOA members private industry ombudsman are most likely to do so (but note there is a disparity between levels and form of consultation – so public ombudsman will have large public forms and private telephone surveys).

Of interest is the fact that where legislation mandates external review there is generally no requirement for public consultation. For example, the Queensland Ombudsman has 5 year mandated reviews and while government is consulted as a stakeholder the wider public is not. Input of various stakeholders into an evaluation process is important, and the input of only one stakeholder may be perceived as a form of regulatory capture (Ayres & Braithwaite, 1991) or as undermining the veracity of the evaluation process.

(iv) Increase ombuds willingness to take on self-evaluation

Table 1 shows that mandatory legislative evaluation is not a universal requirement for ombuds. One alternative to mandated review is that ombuds themselves must be relied upon to undertake self-evaluation. The other alternative is that the requirement for review is entrenched in the Constitution or Terms of Reference for the office.

The number of offices subject to legislative mandated review and self-instigated reviews are exactly the same. There were six self-instigated reviews from the 34 members analysed (18%). Once the 12 offices without publicly identifiable data are removed this ratio improves considerably leaving six reviews from 22 members (27%). Equally six offices have mandated review through legislation. Of course these offices may undertake their own supplementary independent review however this has not occurred with any of those offices.

Of the three jurisdictions Australian had the least self- instigated reviews (See Table 1 – ‘Ombudsman instigated reviews’) with 2 offices from 19 (11%) reviewing their practices, as opposed to 1 in 4 from New Zealand (25%) and 3 from 11 in the United Kingdom (27%). Once we remove offices with no public data from each cohort the figures shift – Australia 4 from 13 (31%) New Zealand 1 from 3 (33%) and the United Kingdom 3 from 6 (50%), noting again that the Table does include all OA members.

A further five offices have a mandated requirement to review their operations under their terms of reference or constitution. Of these only one, the Credit and Investment Ombudsman in Australia is subject to both a legislative mandate for review and a institutional requirement for review.

This leaves 6 of the offices that have publicly accessible data with no legislative or other requirement to self-evaluate. The fact that almost all offices have performed independent evaluation thus indicates there may be no difference in outcome between the way in which performance of evaluation is mandated.

(v) Increase number of cyclical reviews

Of the 34 offices 10 had undertaken cyclical reviews (29%). Again, removing the offices with no data brings this total to 22 offices meaning that 45% had reviewed their performance cyclically. Interestingly, none of these were amongst the OA members. If large scale organisational reviews are seen as desirable, and this is a matter discussed below, one mechanism may be to mandate such reviews to be undertaken cyclically. This can be achieved in a number of ways. Firstly, it can be mandated through legislation. For example the Queensland Ombudsman is governed by the *Ombudsman Act 2001* (Qld). Division 4 of the Act, titled ‘Strategic Review’ states in section 83 that a review must be undertaken every 5 years - a strategic review is defined as including: “(a) a review of the ombudsman’s functions; and (b) a review of the ombudsman’s performance of the functions to assess whether they are being performed economically, effectively and efficiently.”³ Secondly, cyclical review may be made part of the Terms of Reference or Constitution of ombuds. Such as is the case with the Public Transport Ombudsman (Victoria) which has its operations reviewed every 5 years by an independent third party. This is in accord with the *Key Practices* for industry based customer dispute resolution which are complementary to the *Benchmarks for Industry-based Customer Dispute Resolution*, and which recommend periodic independent review where ‘The operation of the office is reviewed regularly by an independent party at set periods’ (VPTO 2015, [6.14]) Finally cyclical review could be a requirement for granting professional membership of ANZOA and the OA.

(vi) Improve feedback on evaluation outcomes

³ For an example of a report see: <https://www.ombudsman.qld.gov.au/about-us/corporate-documents/strategic-review>.

While not documented in Table 1 there is limited detail as to the outcome and actions resulting from the evaluations. Often this information may be in Annual Reports however publicly available reports by Ombudsman which directly address the evaluation inquiries are rare.

The independent evaluations which have been undertaken for all offices generally make recommendations. Table 2 below revisits the list of the 5 independent reviews of the Commonwealth Ombudsman and shows the number of recommendations made.

Table 2: Recommendations and the Commonwealth Ombudsman

Review Year	Review Title	# of Recommendations
2014	Access to Justice Arrangements 2014	83 (12 relevant to Ombudsman)
2009	A Strategic Framework for Access to Justice in the Federal Civil Justice System	58 (5 relevant to Ombudsman)
1994	Access to justice: an action plan (Not available online)	Incomplete data available. (1 relevant to Ombudsman)
1999	Managing justice: a review of the federal civil justice system	138 (0 relevant to Ombudsman)
1991	Review of the Office of the Commonwealth Ombudsman	31

Thus, since 1977 there have been 48 recommendations made by the 3 independent reviews. While it is relatively easily to ascertain what the recommendations are it is comparatively very difficult to determine whether and how they have been implemented.

Conclusion

This chapter approaches the ombudsman institution within an international context. One aim of this chapter is to add a global comparative perspective scholarly and professional literature which already exists in the area of ombudsman evaluation. In 2000 Aufrecht & Hertogh observed that ombuds 'Evaluations range from 'the most informal intuitive sense of goodness or badness to more formalised scientific analysis' (2000), since then there has been a growing rich (Creutzfeldt & Gill, 2016) and diverse literature on evaluation of the institution. Evaluations include 'how to' guides (Asian Development Bank, 2011) to regional evaluations (Gill et. al, 2013) to standardising sector office evaluation (Thomas, et al, 2013) the growth perhaps reflecting the need for ombuds to react to current challenges brought about by social and economic and political change. This chapter augments this literature through an examination of the professional ombudsman organisations in Australian, New Zealand and the United Kingdom to identify whether and how members are reviewed and evaluated with particular focus upon whether cyclical reviews of offices are mandated by legislation and how citizens and consumers as well as industry and government are approached to assess performance evaluation of offices.

As discussed in Part II the role of the ombuds associations in the process of assessing and evaluating ombuds is simultaneously simple and complex. Simple as the organisations exist to ensure standards are set. Complex as it is not clear what role, if any, these organisations have to play when and if the

standards being set are not met. Even in the recent case of The Retail Ombudsman losing the right to use the title 'ombudsman' it is not clear what role, if any, evaluation of performance played in the unanimous decision. There is thus a dichotomy between the expectation of evaluation and ongoing improvement of performance of members of the ombuds associations and any requirement for ongoing periodic and transparent review. This chapter has identified a need for more research around the regulation of the institution so as to promote public and consumer trust in the assurance offered by umbrella organisation such as the OA and ANZOA.

This chapter confirms a pressing need for discussion and debate of the independent review of ombuds with particular focus upon whether and how evaluation of offices occurs. As outlined in Part I, evaluation is difficult and, as the analysis in Part II of this study of publicly accessible information shows, the practice of large-scale evaluation amongst the members of professional ombudsman organisations where an office is the unit of review (rather than a specific function such as complaint-handling) is widespread and diverse but it is also ad hoc and inconsistent. The diversity of current practice evidences the pressing need to investigate the need for sector wide standards and requirements as to periodic consistent evaluation.

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