COVER SHEET

University Ombuds: Issues for Fair and Equitable Complaints Resolution

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Synopsis: Increasingly universities around Australia are appointing university ombuds to assist in the resolution of student complaints against academics. This paper explores a number of key issues relevant to the dispute resolution practice of university ombuds, particularly in relation to ensuring fair and equitable process and outcomes.

Introduction

Effective complaints resolution between students and academics is a challenge for universities. The contemporary context for this challenge in tertiary education is one where deregulation has increased the potential for maladministration and created a need for mechanisms to protect students. A growing focus in universities on quality assurance and competitive performance has also required the development of grievance and complaint handling processes for students that are appropriate and just.[2]

Some universities in Australia are responding to the challenge by appointing senior academics to the office of university ombud. Currently, 5 of Australia's 38 universities have an office of ombud,[3] while others have an equivalent or similar

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[2] A Stuhmcke, (2001) "Grievance Handling in Australian Universities: the case of the university ombudsman and the dean of students" 23(2) Journal of Higher Education Policy and Management 181at 188.

[3] These are Central Queensland University (established in 2000 at its Melbourne campus and throughout the university in 2001), La Trobe University (established in 1993), Queensland University of Technology (established in 1999), University of Technology, Sydney (established in 1989), and the first Australian university to have such an office – the University of New England (established

office known as the Dean of Students.[4] The fact that "the nature and form of the 'professional' grievance handler is far from uniform"[5] in Australian universities has been noted as a difficulty with the growth and development of the ombud's office. Overall, however, the efficacy of the office is supported by the fact that in the United States university ombuds are now a feature of most university campuses.[6]

The concept of "ombudsman" or "ombud" is itself not easy to define as "increasingly, since the 1960s, the office has proliferated in numbers, diversified in categories and types and mutated its functions and purposes."[7] Classical notions of the office of ombudsman originated in Sweden in 1809 and aimed to provide citizens with protection from government maladministration through grievance procedures that were neither strictly legal nor political.[8] However, as long ago as 200 BC the Romans had officers whose role was to protect the rights and interests of the citizenry and deal with their complaints.[9]

A university ombud can generally be defined as "an independent officer of the university who receives and investigates complaints from students about administrative injustices or maladministration."[10] They are "a confidential and informal information resource, communications channel, complaint-handler and dispute-resolver, and a person who helps (the university) work for change."[11] As a member of academic staff who is also concerned with issues of justice for students, a university ombud is not allied to a particular segment of the university

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in 1977). Note also that the University of Sydney had such an office but it was disbanded in 1993. Also the University of Tasmania's office was disbanded in 1992.

4 See Stuhmke (2001) at 185 for a table of Australian Universities and the various ombudsman-like roles that exist. 18 of the 38 Australian Universities have a position of ombudsman, dean of students or similar role.

5 Stuhmke (2001) at 181.

6 Stuhmke (2001) at 183. Rowe asserts that there are "several hundred organizational ombudspeople working in academic institutions in the United States and Canada": M Rowe, (1995) "Options, functions and skills: what an organizational ombudsman might want to know" 11(2) Negotiation Journal 103-114 at note 2.

7 Stuhmcke (2001) at 182 referring to R Gregory, (1997) "The ombudsman observed" *International Ombudsman Yearbook*. The Hague at 77-101.

8 Dickson J in *Re British Columbia Development Corp and Friedman* (1984) 14 DLR (4th) 129 at 137.

9 Dickson J in *Re British Columbia Development Corp and Friedman* (1984) 14 DLR (4th) 129 at 137.

10 Stuhmcke (2001) at 182.

11 Rowe (1995) at 103.

but rather owes allegiance to the university community as a whole.[12] Further, the existence of an ombuds office in a university can be said to evidence a commitment on the part of the institution to principles of good administration.[13] From a purely strategic perspective, it also provides a university with greater control in how it manages grievances between students and academics.[14]

University ombudsmanry is, however, "a profession in evolution",[15] and important aspects of professional practice remain uncertain and ill-defined. For example, the University and College Ombudsman Association's guidelines assert that the three key requirements of an ombudsman are independence, neutrality and confidentiality,[16] however, there is much diversity within the profession as to how these principles operate in practice.[17]

This article considers key factors relating to the effective resolution of complaints by university ombuds in an attempt to address and clarify some of these important issues. Part 1 of the article considers the role of a university ombud, particularly in relation to the informal resolution of complaints by students against academic staff. Part 2 considers practical issues arising in relation to a university ombud's dispute resolution practice, for example voluntary participation, power, neutrality and confidentiality. This analysis focuses on concerns with the fair and equitable resolution of complaints by ombuds, and includes suggestions for enhancing university ombuds' dispute resolution practice.

Part 1 - University Ombuds: Their Dispute Resolution Role.

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12 Stuhmcke (2001) at 182.

13 For example, in terms of universities in Queensland, the 5 principles of good administration provided in the *Public Sector Ethics Act* (Qld) apply. These principles are: respect for the law and system of government, respect for persons, integrity, diligence and economy and efficiency.

14 See also D Bevan (2002) "Address to Student Ombudsmen Conference", Paper presented at the 3rd Australasian Conference of Ombuds and Deans of Students in Higher Education, QUT Brisbane, 14 February 2002 at 2 available at www.qut.edu.au/ombudsman.html at 9.

15 Rowe (1995) at 106.

16 R Wolff (2001) *QUT University Ombudsman Annual Report 2000* at 4 available at www.qut.edu.au/ombudsman.html.

17 See Rowe (1995) at 104.

A university ombud in the context of a university usually has two basic functions. The first is to assist in the resolution of individual complaints, and the second is to contribute to the improvement of administration and teaching within the university.[18] This article is focused on the former role.

The role of the university ombud in terms of informal complaints resolution complements rather than replaces the formal mechanisms that exist for the resolution of student complaints.[19] These formal systems include policy-based internal mechanisms and formal administrative hearings such as disciplinary committees.[20] External avenues also exist to resolve complaints in the form of, for example, government ombudsmen and the court system.[21] However, as Fleming has noted "the vast majority of administrative decisions [related to grievances] in universities are made without resort to a formal process."[22] Further, as the Queensland Ombudsman has acknowledged, formal modes of investigation of administrative complaints "are resource intensive and are not always the most effective way of achieving a satisfactory outcome for the complainant and the agency."[23]

In terms of fulfilling the complaint resolution role most university policies give university ombuds a wide discretion to deal with matters as they see appropriate.[24] Assistance to parties in dispute may be in the form of advice, counsel, investigation or process provision.[25] The university ombud may determine that a relatively non-interventionist role such as listening, providing and receiving information, referral, reframing issues or developing options is

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[18] For example, at QUT the University ombudsman is also involved in administrative functions of the University including membership of University Committees: see www.qut.edu.au/ombudsman/about.html.

[19] Stuhmcke (2001) at 182.

[20] Stuhmcke (2001) at 182.

[21] Stuhmcke (2001) at 182. For an example of issues arising in relation to using the state ombudsman for the resolution of a university administrative complaint see: M Newcity (1984) "Ombudsman Heal Thyself" 9(4) Legal Service Bulletin 175, G Masterman, (1985) "A Complaint Against Macquarie University Law School" 10(1) Legal Service Bulletin 17, and M Newcity, (1985) "'Ombudsman Heal Thyself' Revisted" 10(2) Legal Service Bulletin 90.

[22] Fleming (1997) at 142.

[23] Bevan (2002) at 8.

[24] For example, see the QUT Manual of Policies and Procedures section E/9.3.

[25] Rowe (1995) 106-111 and MP Rowe, (1991) "The Ombudsman's Role in a Dispute Resolution System" 7(4) Negotiation Journal 353 at 354-356.

appropriate. As Rowe has said, "people who call on an organizational ombudsperson typically need options."[26]

A university ombud may, alternatively, decide that a more active mode of assistance such as informal third-party intervention, shuttle diplomacy, or classic mediation is suitable. Generally an ombud should not "investigate formally for management for the purpose of adjudication; keep case records for the employer; or make management decisions."[27] This is because such actions overtly conflict with assertions of independence.

The dispute resolution role of the university ombud "shares many of the features of the classical government ombudsman."[28] That is, they are generally the last administrative resort[29] and operate free from formal university procedures and strict rules of evidence.[30] It might also be said of both forms of ombud that the "role may be one more of influence than authority."[31] Further, both positions share a commitment to fairness, accessibility, responsiveness, and to the extent that confidentiality allows, openness and accountability.[32]

Contemporary government ombuds and university ombuds also emphasise resolving complaints informally.[33] This emphasis correlates with a growing trend generally in society for parties in dispute to use alternative dispute resolution options.[34] In particular, the mediation process is increasingly being used by ombuds as a way of providing a structured process to disputants' discussions.

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26 Rowe (1995) at 105.
27 Rowe (1995) at 105.
28 Stuhmcke (2001) at 182-183.
29 For example, students at QUT are required to have exhausted all other reasonable steps in finding a resolution before they contact the university ombudsman: www.qut.edu.au/ombudsman/contact.html.
30 Stuhmke (2001) at 182-183.
31 P de Jersey, (2002) "Contemporary Decision-Making – Courts and Universities", Paper presented at the 3rd Australasian Conference of Ombuds and Deans of Students in Higher Education, QUT Brisbane, 14 February 2002 at 2 available at www.qut.edu.au/ombudsman.html at 7.
32 Bevan (2002) at 10.
33 Bevan (2002) at 8.
34 M Delaney and T Wright, (1997) *Plaintiffs' Satisfaction with Dispute Resolution Processes*, Sydney: Law Foundation of New South Wales on behalf of the Justice Research Center at 3.

Pearce has identified a number of reasons why public ombuds offices are considered positive. These issues apply equally to the office of university ombuds and connect directly with the informal nature of the office's dispute resolution practice. They include: the speed with which matters can be processed, accessibility, cost-effectiveness, and the non-threatening nature of such processes for the parties.[35] Doi has commented that the office succeeds because it is committed to the basic principle of arriving at a fair and equitable conclusion in each case.[36]

Whilst the informal dispute resolution processes used by university ombuds have many positive characteristics, there are also issues for concern. The dilemma for university ombuds is to achieve procedural and substantive fairness in the informal processes they administer. The next section of this paper examines a number of issues that impact on a university ombud's ability to assist parties to a fair and equitable resolution of their case.

Part 2 - Issues that Impact on the Fair and Equitable Resolution of Complaints by University Ombuds.

Informal dispute resolution processes such as those offered by university ombuds offer significant advantages of efficiency and cost-saving as compared with formal processes. They are also considered to be more caring and focussed on the needs and interests of parties than formal processes. However, these advantages need to be considered along-side a number of criticisms including, for example, that informal processes allow disguised forms of coercion through failing to provide formal protections.[37] For ombuds to be able to assist parties in dispute to a resolution that is fair and equitable they need to be aware of potential problems in this context. The issues considered below apply

[35] D Pearce, (1993) "The Ombudsman: review and preview the importance of being different" 11 Ombudsman Journal 13-36 at 14.
[36] HS Doi (1974) "Reply" *Conference of Australian and Pacific Ombudsmen*, Wellington, 19-22 November, Office of Ombudsman, 8-12 cited in Stuhmcke (2001) at 183.
[37] For a critical discussion of informal justice processes see R Abel (ed) (1982) *The Politics of Informal Justice* Academic Press: New York.

analyses of informal processes, which often centre on mediation, to the dispute resolution practice of university ombuds.

Voluntary participation

Involvement with the university ombud in relation to a dispute or grievance is ostensibly completely voluntary for all parties. There is no compulsion for students to access the office, and no compulsion for academics or other staff to engage in the complaints resolution processes administered by the ombud, such as mediation.

Voluntary participation is linked in informal processes to party satisfaction and compliance with agreed outcomes. That is, the fact that a person voluntarily chooses to participate is considered an indicator of their commitment to that process and to reaching an agreed outcome.[38] Theoretically, in a voluntary process a party (or the third party facilitator[39]) can withdraw from or terminate the process at any time, without giving an explanation or incurring any sort of penalty.[40]

The rhetoric of voluntary participation in relation to an informal process does not, however, mean that pressure or coercion will not exist to encourage a party to participate. Boulle comments that there are "gradations of voluntariness",[41] and notes that participation is not genuinely voluntary in situations where, for example, a party enters under a threat of litigation, or as a result of an inability to afford other dispute resolution options, or as a result of a pressuring community such as friends, family or people within an organisation.[42] In the university context a fear

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[38] See, for example, R Ingleby (1993) "Court Sponsored Mediation: The Case Against Mandatory Participation" 56 Modern Law Review 441.

[39] See L Boulle, (1996) *Mediation: Principles, Process, Practice*, Butterworths: Sydney at n.28.

[40] Boulle (1996) at 15.

[41] Boulle (1996) at 16. See also B Wolski (1994) "Voluntariness, Consensuality and Coercion: In Defence of Mandatory Mediation" unpublished LLM paper, Bond University where the dimensions of voluntariness are explored.

[42] Boulle (1996) at 16.

of more formal university processes might result in significant pressure to participate in the informal processes offered by the university ombud.

It cannot therefore be assumed that a student or an academic is participating in a truly voluntary way simply because the process is labeled "voluntary". Dispute resolution conducted in a context of pressured participation may result in a potentially inequitable outcome. That is, the pressure that forces the party's participation may then consequently result in their agreement to an outcome which may not be in their interests.

In this regard the fairness and equitable nature of the dispute outcome is clearly compromised. A possible strategy to prevent inequities arising in this context is to develop thorough intake processes that raise these issues overtly with each of the parties. Also, private sessions can be used by mediators to openly discuss with the parties issues related to any perception of pressured participation.

Party Control and Ombud Power

One of the most attractive principles of the informal processes available to complainants through the university ombud is that the parties remain relatively in control of their dispute.[43] The ombud has no direct decision-making authority over the parties, and it is the parties themselves who actively seek to resolve the issues in dispute between them. This principle of active party control over the dispute is linked, at least theoretically, to party satisfaction with dispute outcomes.[44] It is also associated, however, with claims that the ombud's office is a 'toothless watchdog' with "no real power, being expected to negotiate resolution on the basis of goodwill."[45]

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[43] See generally, J Folger, (1994) *The Promise of Mediation – Responding to Conflict Through Empowerment and Recognition,* San Francisco: Jossey-Bass Publishers, and R Charlton and M Dewdney, (1995) *The Mediators Handbook – Skills and Strategies for Practitioners*, Sydney: LBC Information Services, and H Astor and CM Chinkin (1992) *Dispute Resolution in Australia*, Sydney: Butterworths.

[44] Delaney and Wright (1997) at 4.

[45] Stuhmcke (2001) at 183.

This latter claim is not accurate and the party control principle should not allow any underestimation of the importance of the university ombud's role, and the potential extent of their real power and authority. That is, whilst ostensibly ombuds have no decision-making authority over the parties, they are not without influence and power.

Information and academic experience and expertise are "classic sources" of ombud power.[46] There are, however, many other sources of real power in terms of an ombud's interaction with parties in dispute. For example, they are able to affirm and commend good academic practice, and as commendations may be seen as rewards they provide considerable power.[47] Ombuds also "illuminate bad behaviour as well as good, raising the concern of sanctions from authorities."[48] An ombud's "moral authority" results from their commitment to justice and fairness and is also a source of power.[49] Further, an ombud's relationships and connections with authority figures in an organization are said to empower him or her.[50]

These sources of power give an ombud considerable authority in moving the parties towards agreement. Therefore, in terms of ensuring that an equitable and fair resolution is reached in every case a university ombud must be mindful of how their authority is perceived by the parties, and how the parties are reacting to it. For example, a student impressed by an ombud's moral authority may defer to their opinion or advices in the process even if they do not agree with them. Or an academic may agree to an outcome that they feel the ombud supports on the basis that the ombud may then commend them.

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46 Rowe (1991) at 358.
47 Rowe (1991) at 357.
48 Rowe (1991) at 358.
49 Rowe (1991) at 358.
50 Rowe (1991) at 358.

Further, an ombud must take care to ensure that they do not use their authority to steer parties in certain directions to achieve a resolution that satisfies merely their own values or biases, and not the interests of the parties.[51]

Therefore, although the parties are theoretically in control of the process and the ultimate outcome to their dispute, the ombud has an ability to strongly influence what the likely outcome of the dispute will be. In order to ensure that the end result of the process is fair and equitable an ombud must be aware of the potential implications of party perceptions of his or her power.

Neutrality

Related to the issue of university ombud power is the notion of ombud neutrality. Neutrality on the part of the third-party intervenor is generally considered central to informal justice processes.[52] This is perhaps because the concept has a "legitimising function"[53] as it replicates a central ideology of more formal processes such as litigation,[54] and also because it can be linked to party perceptions that justice is "manifestly and undoubtedly being seen to be done."[55]

The term neutrality is sometimes used interchangeably with impartiality.[56] Boulle suggests, however, that a clear distinction needs to be made between these terms.[57] "Neutrality" is said to refer to a third-party intervenor's lack of

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[51] This has been shown through research to occur in some instances in mediation: R Dingwall and D Greatbatch (1993) "Who is in Charge? Rhetoric and Evidence in the Study of Mediation" Journal of Social Welfare and Family Law 365, D Greatbatch and R Dingwall (1989) "Selective Facilitation: Some Observations on a Strategy Use by Divorce Mediators" 23 Law and Society Review 613.

[52] Rowe refers to the ombud as a "designated neutral": Rowe (1995) at 103. See also Charlton and Dewdney (1995); G Tillet (1991) *The Myths of Mediation,* The Centre for Conflict Resolution, Macquarie University; H Astor (2000) "Rethinking Neutrality: A Theory to Inform Practice – Part I", 11 Australian Dispute Resolution Journal 73, and Astor and Chinkin (1992) at 102.

[53] Boulle (1996) at 18-19. See also Astor (2000) at 74 referring to S Cobb and J Rifkin, (1991) "Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation" 11 Studies in Law and Politics 69 and C Harrington and S Engle Merry (1998) "Ideological Production: The Making of Community Mediation" 22 Law and Society Review 709 .

[54] That is, the concept of neutrality in mediation, for example, is seen as counterbalancing the ideology of judicial neutrality: Boulle (1996) at 18-19.

[55] GA Flick, (1984) *Natural Justice: principles, and practical application* (2nd ed) Sydney: Butterworths at 155 quoted in Fleming (1997) at 146.

[56] The word independence is also used, for example, the QUT university ombud's materials explain that whilst they "are an employee of QUT, [they operate] ***independently***": www.qut.edu.au/ombudsman/about.html.

[57] Boulle (1996) at 19.

knowledge of, and disinterest in, the matter of dispute. Neutrality focuses on issues such as a connection with the parties, any background involvement in the issues, or an interest in the substantive outcome. "Impartiality" is said to relate to how the dispute is handled, and how the third-party intervenor treats the parties. A lack of bias is central to the concept, as are objectivity, fairness and even-handedness.[58]

On the basis of these distinctions it is not possible for ombuds to be neutral although it is possible for them to be impartial.[59] University ombuds, as human agents, will necessarily bring certain personal and professional opinions to the dispute resolution process.[60] They cannot be neutral because they work for the university and are a colleague of one of the parties to the complaint (that is, the academic). Most often ombuds are appointed on a fractional basis and so are usually teaching and supervising students themselves during the term of their appointment.[61] They have almost certainly been students themselves at some time, and have experiences as a result that will inform their work as ombuds.

A breach of neutrality could therefore occur as a result of the ombud's own work history, experience or collegial connections creating a preconceived idea of the case and what would be an appropriate conclusion to it; for example, the ombud may have been involved in a similar type dispute when they were a student. A breach of neutrality could also occur if an ombud were to use his or her knowledge of the parties to influence the way they help generate settlement options or resolution strategies. On one hand the ombud may be concerned to protect their relationship with fellow academics in case of future professional interactions on committees, for example. On the other hand, it does not follow that an ombud's collegial connections will always work in favour of their

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58 Boulle (1996) at 19.

59 As Kurien has said "[t]rue neutrality is impossible to attain because of differing individual cognitive schemata.": GV. Kurien, (1995) "Critique of Myths of Mediation" 6 Australian Dispute Resolution Journal 43 at 52. Boulle says that whilst a mediator should always be impartial, they may not always be neutral: (1996) at 20. Stuhmcke asserts that an ombud is unable to be independent: (2001) at 183.

60 See G Davis, *Partisans and Mediators* Oxford: Clarendon Press, 1988.

61 QUT's appointment is 50% fractional – see Wolff (2000) at 5.

academic colleague. For example, the ombud might consider that the academic has been promoted too quickly or may have already had dealings with them on a committee with which they did not agree.

In short, it is impossible for university ombuds to be neutral in disputes between members of staff and students. An ombud will want outcomes that will best advantage the whole university community, but will be influenced and affected by the fact that they themselves are an academic, and have in the past been a student. They will have a deep knowledge of the context of the dispute, and probably an on-going professional relationship with one of the parties to the dispute.

More generally, also, it is acknowledged that the concept of neutrality in informal processes is fraught with difficulty.[62] In fact, "some writers refer to neutrality as the most pervasive and misleading myth about mediation, arguing that it is neither a possible attainment nor a desirable one."[63]

Nevertheless claims are made that university ombuds are 'third party neutrals' who are dispassionate about the disputants, the dispute and the outcome, and are non-partisan, and non-judgmental.[64] In one sense, this argument is supported by the fact that ombuds have no power to make a decision for the parties. The claim is also seen as central to the viability of the office in that the rhetoric serves to preserve the appearance of its independence and is said to contribute to its effectiveness.[65]

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[62] Boulle (1996) at 19. Astor comments that neutrality is "a highly contested term for mediators" and has been "subjected to constant analysis, debate and redefinition." Astor (2000) at 74.

[63] Boulle (1996) at 19. See also G Tillet (1991) *Resolving Conflict – A Practical Approach*, Sydney: Sydney University Press, Tillet (1991), Kurien (1995). And Astor and Chinkin warn that "it is not sufficient simply to claim mediator neutrality (as) mediators have considerable power in mediation and there is evidence that they do not always exercise it in a way which is entirely neutral as to content and outcome.": Astor and Chinkin (1992) at 102. The research of Greatbatch and Dingwall asserts that mediators are not neutral in their mediation practice: Dingwall and Greatbatch (1993), Greatbatch and Dingwall (1989).

[64] Rowe (1995) at 112.

[65] Rowe (1995) at 103.

However, a claim of neutrality that is not real has the potential to undermine the integrity of an ombud's process in a number of ways. First, it can risk an ombud's credibility. That is, if an ombud is seen not to be honest about their interests they may lose the trust of the parties. Secondly, it can compromise the parties' participation in the process, if that participation is grounded in an overestimation of what the ombud can provide in terms of neutrality. In particular, for example, where students are not alert to or conscious of the issues, discussed above, that compromise an ombud's ability to fulfill the promise of neutrality. Thirdly, there is conflict between a claim of neutrality and any effort by an ombud to advocate for, or openly work to assist or protect, the weaker party. Such intervention is unavoidably non-neutral.[66]

It is far better, we would suggest, for an ombud to openly contextualise claims of neutrality by acknowledging his or her sectional interest. They are then free to more honestly claim and demonstrate an ability to be impartial and fair.[67] That is, the ombud will be freer to assert that whilst they cannot advocate for either party, they will also not allow any power imbalance between the complainant and the respondent to determine the outcome.[68] The ombud will treat both parties with respect and courtesy and will ensure that the implementation of the chosen process does not favour one party over another.

The parties will be more likely to perceive an ombud as able to achieve these things if he or she openly discusses their perspective and context.[69] Further, acknowledgment on the part of the ombud of their principled interest in the outcome is likely only to advance their standing in the eyes of the parties.

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66 R Field (2000) "Neutrality and Power: Myths and Reality" 3(1) The ADR Bulletin 16.

67 See the Australian Standard on Complaints Handling under "Fairness": AS4260, 1965, para 3.3

68 On this point it is relevant to consider that informal dispute resolution processes can "behind a mask of neutrality, serve to enforce the existing inequalities and produce 'compromises' which will invariably favour the more powerful.": R. Matthews, (1988) *Informal Justice?,* London: Sage Publications at 12. Ombuds may need to recognise that affirmative interventionist action (but not advocacy) on behalf of one of the parties is sometimes needed to achieve a balanced and equitable agreement.

69 This might even extend, for example, to disclosing, in some instances their personal views on, and responses to, conflict: M. Kirby, (1992) "Mediation: Current Controversies and Future Directions" 3 Australian Dispute Resolution Journal 139 at 146.

Confidentiality

Confidentiality, an essential principle of many informal processes, has been referred to as both an ethic and strict practice of ombuds' business.[70] Confidentiality allows ombud administered processes to operate in an open and honest atmosphere, and gives each party the security to disclose information to the university ombud, as well as to the other party, that they might otherwise not disclose.

Confidentiality in relation to ombuds' processes generally means two things. First, that internal to those processes the ombud commits not to disclose any private information to the other party, without their express consent. And secondly, that communications are not generally to be divulged outside the process by the ombud or the parties.

Rowe has commented that ombuds "typically will not answer questions from anyone, including senior management, about those with whom they may have had contact – and they maintain the privacy of everyone with whom they have spoken – unless they have permission to speak for the purpose of informal problem resolution."[71] If confidentiality is upheld an ombud should not be called as a witness in later proceedings, and their notes should not be recovered and produced as evidence in subsequent formal processes. Also neither party should disclose or try to rely, in later formal proceedings, on anything said in informal processes administered by ombuds.

There are, however, a number of practical problems with the notion of confidentiality.[72] The first is that it is essentially an ethic of practice that has no

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[70] Rowe (1995) at 104. See also QUT's statement of confidentiality in relation to dealings with the ombud's office at: www.qut.edu.au/ombudsman/about.html.

[71] Rowe asserts that typically ombuds "will not appear in formal proceedings inside or outside their organizations" even where parties have given them permission: Rowe (1995) at 104.

[72] Davies and Clarke have acknowledged that "[p]reserving the confidentiality of ADR processes is one of the most difficult legal issues facing the ADR movement today": I. Davies and G. Clarke, (1991) "ADR Procedures in the Family Court of Australia" Queensland Law Society Journal 391 at 399.

solid foundations or guarantees associated with it, even where it is articulated as a formal institutional policy. The common law doctrine of privilege may work to protect the confidentiality of ombuds' proceedings,[73] however, this protection is by no means certain.[74]

Secondly, there is the potential for abuse of the principle. That is, confidentiality provides a party with no real protection from a failure on the part of another party to disclose information, no protection from their disclosure of false information, and no protection from a party using the process as an information 'fishing expedition'.

Thirdly, there may be times when confidentiality will, in practice, need to be broken.[75] For example, Stone considers in relation to mediation, that if an agreement is induced by fraudulent misrepresentations on the part of a party the courts may intervene, and the fundamental principle of confidentiality will be outweighed by the need for judicial intervention.[76]

The answer to these dilemmas lies in the fact that strict guarantees of confidentiality can only be provided by statute.[77] Therefore, unless a university's Act has been amended to ensure confidentiality in the practice of the university ombud, assertions of confidentiality are based on goodwill and institutional policy rather than on any solid legal foundation. These assertions may carry little weight if the dispute proceeds to a more formal forum, such as a court, where parties are bound, for example, by orders to produce documents or to appear as

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[73] See the Australian Law Reform Commission, Evidence (Vol. 2) Interim Report No.26, AGPS, 1985 at Appendix C: "Differences and Uncertainties in the Law of Evidence". See also the High Court of Australia decision of Rodgers v. Rodgers (1964) 114 CLR 608 at 614 for the application of this doctrine in the matrimonial context. See also, Boulle (1996) at 281-293.

[74] See Boulle (1996) at 282 – 290. Rowe states that ombuds "maintain that there is (or should be) a privilege which belongs to the office.": Rowe (1995) at 104.

[75] M Stone (1998) *Representing Clients in Mediation – A New Professional Skill*, London: Butterworths at 21-22.

[76] Stone (1998) at 21.

[77] For example, the Family Law Act provides in s.19N that evidence of anything said or any admission made in a mediation is not admissible in any court. S.5.3(4) of the Dispute Resolution Centres Act, 1990 (Qld) makes similar provision, and s.5.3(2) extends a defamation-like privilege to a mediation session; in addition s.5.4 requires that mediators take an oath of secrecy.

a witness. It is preferable, therefore, for any assurance to parties of confidentiality to have its foundation in a legislative source.

Another possible option is to protect confidentiality expressly by contract. For example, through Agreements to Mediate that specifically include a clause that "binds the parties and the mediator not to disclose to persons outside the mediation any information or document used in the mediation."[78] Also possible is a contractual provision between the ombud and the university in which the university agrees that they will not call the ombud in their own defence.[79] However as Boulle notes, these sorts of provisions "have not yet been considered by Australian courts."[80]

Until such practices can ensure the confidential nature of informal processes administered by ombuds, parties should be made aware of these issues before they choose to participate. Also, parties should be encouraged to use any private sessions with the ombud to discuss their fears or concerns on this issue; for example, that they are anxious to speak frankly for fear of any possible later misuse of information divulged. These practices are central to achieving a fair and equitable outcome for the parties.

Skill Issues for Ombuds

In ombuds administered informal processes the parties are heavily reliant on the dispute resolution skills of the ombud for the successful resolution of the complaint. Skills issues relate specifically to an ombud's appropriate use of sources of power and authority in relation to the parties, to an ability to "adapt the process to suit the individual needs of the parties in conflict,"[81] and to the provision of fair and equitable process to the parties for the resolution of their dispute. It is also a crucial skill of an

[78] Boulle (1996) at 289.
[79] Rowe (1995) at 104.
[80] Boulle (1996) at 289.
[81] Kurien (1995) at 50.

ombud that they are able to communicate effectively to the parties what outcomes are possible through various process options and what each particular process involves.

Currently, it seems problematic for the equitable and fair resolution of complaints that an ombud's key skill and training requirements remain ill-defined. Rowe has noted some specific skills that ombuds require, such as those relating to "maintaining confidentiality and neutrality, maintaining statistical records and using them appropriately, and using data – in a fashion consonant with confidentiality."[82] Other skills seem to be relatively vague, however. For example, Rowe states that an ombud should "show common sense, and continually strive for good judgment, respect, and compassion."[83] Further, an ombud "should learn how to use inoffensive humour to defuse stress and tension,"[84] and an ombud "should continually try to learn more about preventing and dealing with reprisal, and how to help people who fear reprisal."[85]

It seems crucial to the development of sound ombud practice that the skills required in the office are better identified and articulated. It follows from this that these skills need then to be taught, assessed and monitored.

Whilst an ombud can acquire some of the necessary skills of their practice through experience, reading, self-reflection, workshops at professional conferences, and discussions with other ombuds, it is formal training, particularly in dispute resolution and communication skills, as well as in issues such as those addressed in this article, that needs to be emphasized to ensure adequate skill levels in ombuds. Formal skills are particularly necessary for an ombud to practice mediation effectively.

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82 Rowe (1995) at 111.
83 Rowe (1995) at 111.
84 Rowe (1995) at 111.
85 Rowe (1995) at 112.

To be effective, this training should take a formal and structured form as it is insufficient to rely on the instinctive qualities of those appointed to the office, or to hope that through study or self-reflection alone they will develop the necessary skills. However, an important complement to formal training should be acknowledged in the form of collegial interaction.[86]

Instigating a national system of university ombud training would ensure quality of practice and competency levels, and this in turn would contribute to more equitable and fair practice in dispute resolution processes administered by ombuds. Formal ombud training programs would also provide a forum for collegial interaction and networking which would complement the current annual conference that is held for Australian university ombuds.

Issues Related to Data Collection

Although the office of ombud "has been criticised for a lack of accountability",[87] university ombuds are usually required to collect data in relation to the cases they handle. A good database is considered "vital for trend analysis and for strategies for reducing complaints of particular kinds, managing workloads and the progress of individual complaints, and producing statistical reports of performance."[88] Whilst these statistics are interesting and important at one level, the maintenance of such databases can give rise to a number of issues of concern.

First, for example, such complaints handling indicators "generally measure basic information such as number of complaints and timeframes but not the value of the service delivered."[89] Secondly, the keeping of such records in informal processes can place a high value on settlement rates that results in a concentration on the parties simply reaching some form of agreement instead of on the quality of that

[86] De Jersey (2002) at 9-10.
[87] Stuhmcke (2001) at 183.
[88] Bevan (2002) at 9.
[89] Bevan (2002) at 9.

agreement.[90] Settlement statistics can then be used as indicators and evidence of an ombud's ability to 'produce results'.[91] The ombud's desire to see a resolution may therefore encourage them to take a more interventionist role, which may be potentially contrary to the interests of the parties, especially if it is driven by the ombud's own opinions, experiences or values.

Therefore, it is possible that situations where parties have in fact succumbed to coerced capitulation (perhaps from a desire to end the dispute, or to escape the pressures of the dispute or the process) are reframed as 'successful resolution' and statistically analysed as 'agreement'.[92] These statistics are clearly not accurate and do not reflect an equitable or fair process or outcome. Rather they reflect a distortion of the process and a misrepresentation of what ombuds are able, in reality, to achieve. This is a serious matter in informal proceedings where the veracity of the representation cannot be tested as a result of confidentiality and privacy issues.

The dangers of a university focusing on settlement data must therefore be acknowledged in terms of the potential impact on the equitable and fair outcome of cases, and the hazards of an ombud's possible preoccupation with settlement rates must also be acknowledged and addressed.

Privacy

One of the key benefits of informal processes is that they protect parties from public scrutiny of their dispute. The emotive and difficult content of most academic disputes, exacerbated by issues of reputation or wanting to protect future career prospects, heightens the desire of participants to keep the issues out of the public

[90] R Ingleby, (1990a) "Catholics, Communists, Alternative Dispute Resolution and Bob Dylan" 1 Australian Dispute Resolution Journal 18 at 20. See also, DG Pruitt, RS Peirce, NB McGillicuddy, GL Welton and LM Castrianno (1993) "Long-Term Success in Mediation" 17(3) Law and Human Behaviour 313.

[91] R. Ingelby (1990b) "Why Not Toss a Coin? Issues of Quality and Efficiency in the Evaluation of Alternative Dispute Resolution" Papers Presented at the 9th Annual AIJA Conference, 18-19 August, Melbourne, 51 at 55 says this in relation to mediation in general.

[92] Ingleby (1990a) at 20 questions the reframing of mediated outcomes in this way.

arena. And there are many other asserted benefits of what is known as private ordering.[93]

However, problems can arise for parties where academic disputes are resolved away from the public interest yardsticks developed by more formal processes, or by the courts. Formal processes, in focussing not on maximizing the ends of private parties but on identifying and giving force to objective values,[94] are said by some to offer a "proper resolution" to a dispute.[95]

Formal processes also offer the weaker party, in this instance usually the student, certain protections. Without these protections, such as the ability to test the assertions and credibility of the other party, their vulnerability is exacerbated. This is a key reason why ombuds need to be aware of the issues discussed above, and trained in appropriate ways to deal with the disadvantages associated with informal dispute resolution processes.

Conclusion

The issues addressed in this article raise some significant difficulties in terms of ensuring that fair and equitable results ensue from complaints procedures administered by university ombuds. Many of these difficulties could be addressed, and their negative impact limited, if there were a greater focus on training for university ombuds. That is, university ombuds will be in a better position to ensure fair and equitable results in their processes with a more sophisticated understanding of these issues, and that understanding can only be developed through structured training programs. The development of a national training program for university ombuds should therefore be a priority within the profession.

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[93] See, for example, RH. Mnookin and L. Kornhauser, (1979) "Bargaining in the Shadow of the Law: The Case of Divorce" 88 Yale Law Journal 950 at 974.
[94] See OM Fiss (1984) "Against Settlement" 93 Yale Law Journal 1073 at 1085.
[95] HT Edwards (1986) "Commentary - Alternative Dispute Resolution: Panacea or Anathema?" 99 Harvard Law Review 668 at 676.