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### Alternative Dispute Resolution in the Rights-Based Era of University Education

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#### Introduction

The modern university, functioning more like a business enterprise, is daily confronted by students operating on the basis of a concept of entitlement. When disputes arise or complaints are made, redress is often sought in terms of entitlement based on the payment of fees. A consumer-based notion of value for money or "but I worked hard on that assignment" presents the university ombudsman with a challenge.

The issue is not only a challenge for the Ombudsman as the notion of entitlement has the potential to pervade universities at all levels. For example student recruitment is increasingly focussed on full payment of tuition fees particularly in the lucrative overseas/international markets. The closing of a previously fruitful stream of revenue can play havoc with the university budget which may take a long time to reverse. Factors at play may be such uncontrollable events as the *Global Financial Crisis* or bad publicity in the home country of the target groups of students, eg attacks on Indian students in Melbourne 2 years ago led to a drastic fall in numbers of visa applications which is only now returning to normal. Dispute resolution in such a climate may bring its own special problems.

Academic staff as well as university administrators may also become caught up in the numbers game. There have been several press reports in recent years of academics claiming pressure to pass students whose performance may not meet the necessary standards. Pressure of this type may be very subtle and difficult to substantiate.

### **Impact on Ombudsman's activities**

The rights-based climate in university education mirrors the situation in the wider community. A concept of entitlement to service outcomes is reflected in a 'customer is always right' attitude and a sharp rise in consumer rights litigation. More and more retailers are facing demands for refunds or product replacements accompanied by the threat of resource to the courts. More and more lawyers are advertising their services on the basis of 'no win, no fee!' I am not suggesting the universities and their ombudsmen are yet subject to this degree of pressure, however the concept of rights and entitlements could become the thin end of the wedge. All the more reason why we should be sure that our practice is well grounded in the traditional roles and functions that have underpinned the provision of Ombudsmen services.

Traditionally the role of the ombudsman in university disputes is non-adversarial. Resolution is usually sought by consensus with parties invited to accept responsibility for multi-causation of the problem "I am part of the problem therefore I need to be part of the solution". In these types of disputes the ombudsman acts as a mediator.

An interesting recent experience from my own practice illustrates how an entitlement-on-payment-of-fees attitude can introduce a new dimension. Student A is a mature age student from a rural campus where he studies part-time. He has elected to take a subject which is taught wholly on-line to our four

non-metropolitan campuses. Although the university handbook stated clearly that this was the mode of instruction he demanded that as a fee paying student he should be given face-to-face tutorials. Moreover, as there are face-to-face tutorials for the 254 metropolitan based students they should be withdrawn if his demands were not met. Three alternative tutorial types were offered to him and rejected. The matter is not yet resolved.

It is recognised that there are many other disputes where mediation may not be the appropriate or chosen mode. For example, where the ombudsman finds that the university has breached its own regulations or failed to honour contractual obligations in the administration or provision of academic services. Duty of care issues may also come under this heading. In the above mentioned example the initial opportunity for a mediated outcome has been obscured by the introduction of the financial argument.

### **Mediation - Key Issues for the Ombudsman**

Mediation is increasingly recognised as an effective method of dispute resolution. It has been found to produce outcomes that are lasting. This is held to be the result of both parties to a dispute wanting an outcome which leaves them with a sense of achievement - the classic 'win-win' situation. Agreements based on compromise seem to be more readily 'owned' by the parties and remove the lingering feeling of resentment that often accompanies imposed outcomes i.e. findings of fault or guilt.

With the rise in popularity of mediation, it needs to be recognised that ombudsmen need training in order to perform the role of mediator professionally.

The mediator, in contrast to a judge or arbitrator, has no power to impose an outcome on disputing parties. The mediator's main function is that of assisting

the parties to reach their own agreement. Four of the most commonly identified phases in mediation are establishing ground rules and rapport, followed by defining, processing and resolving issues.

In a paper presented to ENOHE in 2011 I argued that the role and skills repertoire of an ombudsman are akin to those of a social worker and therefore can be said to have therapeutic dimensions. This means that the mediator (ombudsman) aims to assist the disputing parties to change themselves through empowerment and recognition. By empowerment I mean that feelings of confusion, fear, uncertainty and disorganisation are gradually replaced by a growing calmness, clarity of thought, confidence, greater decisiveness which enable the disputant to establish or regain a sense of strength and take control of their situation.

Recognition is achieved when disputants choose to become more open, attentive, sympathetic and responsive to the situation of the other party - if you like, putting themselves in the other person's shoes.

### **Ombudsman as a Mediator**

The role of mediator may contain a whole range of functions which can be brought into play depending on the nature of the dispute. These may interact with other roles and skills. I include the diagram from the 2011 paper to refresh the memory of those of you who shared that session with me. Not all of these will necessarily be part of any one mediation.

- The mediator is a catalyst - in other words the mediator's presence affects how the parties interact. This assumes that the interaction will become positive but there is always a possibility that the discussions may cause further misunderstanding and polarization.

- The mediator is an educator - this function may include stating the principles by which the process will go forward - eg, each party being able to state their grievances without interruption or abuse; an explanation of any rules and regulations bearing on the dispute, etc.
- The mediator as translator - this involves the mediator conveying each party's proposals in a language that is designed to ensure the highest degree of receptivity and acceptability by the listener. This may entail taking out the angry, emotionally loaded words (and deleting the expletives!).
- The mediator as a means of obtaining resources. The ombudsman with the integrity/authority of his/her office may supply information or gain access to support services, arrange meetings with other persons who may assist in resolving the disputes. Clearly the greater the degree of knowledge the ombudsman has will add significantly to the importance of this function.
- The mediator as the bearer of bad news. It is not uncommon, as we know all too well, for concessions to be withheld or proposals to be rejected in whole or in part. Here the ombudsman may prepare the parties in private sessions. This may help to cushion a negative reaction. This is a very important function as anyone who is attacked in this way is likely to respond in like manner. It is the mediator's function to try to create an environment in which an emotional response can occur without causing an escalation of hostilities or further polarization.
- The mediator as a scapegoat. We all know that either or both parties to a dispute may blame the mediator/ombudsman if they don't get their way.

In a rights-based environment the capacity of an ombudsman to mediate may be constrained. Making a disputant aware of the limits imposed by the external environment will sometimes be a necessary caveat.

### **Mediation Training for University Ombudsman**

Depending on the background experiences of individuals we can distinguish between training programmes for the newly appointed and refresher courses for those with significant experience.

#### New appointees

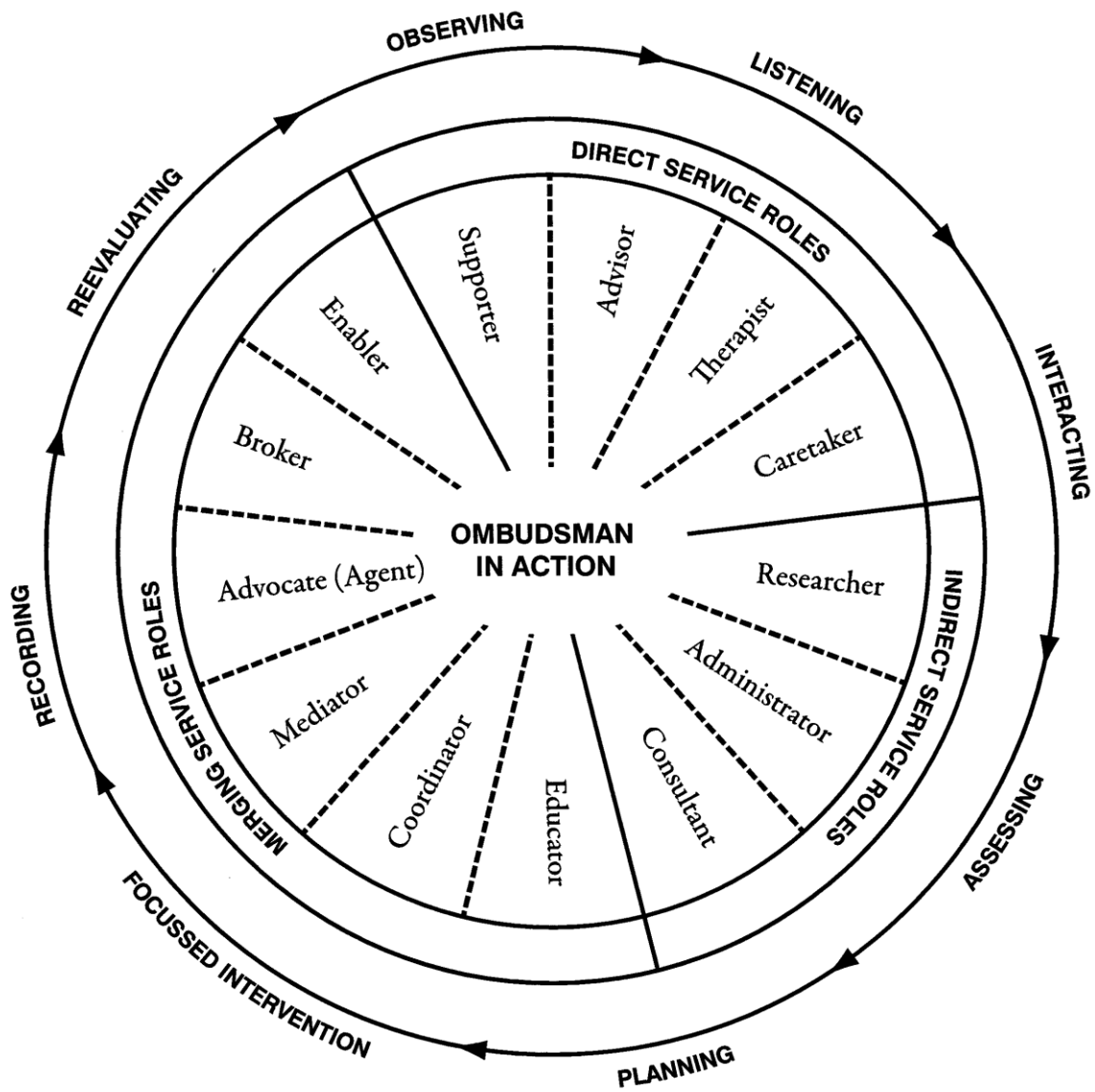
1. Introductory material on human behaviour and the social environment including organisational behaviour, coping with stress, dealing with anger, organisational change.
2. An introduction to interviewing and the dynamics of human interaction - verbal and non-verbal communication, body language. Overcoming barriers to communication. Observing, listening, interacting, managing conflict.
3. Planning, assessing and evaluation, feedback.
4. Key components of mediation.
5. Recording and reporting. Liaison with external bodies.
6. How organisations work including the use of regulations and statutes.
7. Use of role plays.

#### For experienced ombudsmen

1. Review of knowledge and skills in interviewing and case management.
2. Managing unco-operative complainants. Role playing.

3. Recording and reporting within the organisation. Liaison with external bodies.
4. Managing publicity.
5. Whistleblower Legislation. Management of confidentiality and safeguarding the welfare of whistleblower.

## The Common Roles and Tasks of an Ombudsman



Adapted from Baker, R. 1976