

THE OMBUDSMAN AND PARLIAMENT WORKING TOGETHER

***Address by Prof John McMillan, Commonwealth Ombudsman,
to a seminar of State and Commonwealth Parliamentarians,
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The Ombudsman and Parliament

A marked theme in the development of the Ombudsman institution in Australia is its relationship to the Parliament. The first Australian ombudsmen appointed in Western Australia in 1971 and Queensland in 1974 were in fact titled the Parliamentary Commissioner for Administrative Investigations. Intrinsic to that title was the notion that a special function of the Ombudsman is to assist the institution of Parliament in ensuring executive accountability and investigating the grievances of members of the public.

The relationship between the Ombudsman and Parliament has been taken up in other ways in the framework of government. The Victorian Constitution declares the Ombudsman to be an independent officer of the Parliament (*Constitution Act 1975* (Vic) s 94E(1)). In NSW and Queensland there is a parliamentary committee with an explicitly statutory role of examining the reports of the Ombudsman and reviewing the operations of the office (eg, *Ombudsman Act 1974* (NSW) s 31B, establishing the joint parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission). In some States the Ombudsman Act provides that a member of parliament can make a complaint to the Ombudsman on behalf of a constituent, and that Parliament or a committee can refer a matter to the Ombudsman for investigation (eg, *Ombudsman Act 1972* (SA) s 14). Finally, all Australian Ombudsmen provide an annual report to the Parliament, and in some jurisdictions the Ombudsman's reports on special investigations can only be made public by presentation of the report to the Parliament.

My purpose in this paper is to describe another aspect of the relationship between the Ombudsman and Parliament – how the Ombudsman can assist members of parliament and their electorate offices, especially in dealing with the individual complaints of constituents. I will also touch on the Ombudsman's role in making submissions to committees of the Parliament, and publishing reports on other issues of parliamentary interest. Before dealing with those topics I will give a brief description of the structure and work of the office of Commonwealth Ombudsman.

A snapshot of the Commonwealth Ombudsman

The office of the Commonwealth Ombudsman, established in 1977, is now approaching its thirtieth anniversary. The principal function of the office is to

investigate complaints from members of the public about the administrative actions of Commonwealth agencies. Upon concluding that there is an administrative deficiency, the Ombudsman can recommend that remedial action be taken by the agency. Recommendations that are commonly made are that an agency apologise to a person, expedite a decision being made, pay administrative compensation, or reconsider or vary a decision. In addition, the Ombudsman's office itself plays an active role of explaining to people how the law works and is applied by agencies.

Each year a large number of Australians turn to the Ombudsman for assistance: in 2004-05 the office received 17,441 complaints and 12,013 other approaches. Nearly 80% of the complaints are against five agencies with a high client service function: Centrelink, the Child Support Agency, the Australian Taxation Office, Australia Post, and the Department of Immigration.

Complaints to the Ombudsman are free, and can be made by telephone (1300 362 072), email (ombudsman@ombudsman.gov.au), via the web (www.ombudsman.gov.au), in writing (GPO Box 442, Canberra, ACT 2601) or in person at one of the eight separate offices maintained by the Ombudsman in each State and Territory capital. Some of the offices of the Commonwealth Ombudsman are co-located with State Ombudsman offices.

In addition to handling individual complaints, the Ombudsman has two other important functions. One is to undertake 'own motion' investigations. These investigations, conducted on the initiative of the Ombudsman, usually look at systemic problems in government administration that may widely affect members of the public. Recent examples of own motion investigations by the Commonwealth Ombudsman are into complaint handling in agencies, the administration of freedom of information laws, the management of young people in the Defence Forces, the Family Tax Benefit, and the response of the Australian Taxation Office to mass marketed tax schemes.

The other Ombudsman function is to conduct periodic compliance audits of the records of law enforcement agencies, to ensure compliance with legislation authorising telecommunications interception, controlled operations and the use of surveillance devices. The reports of these compliance audits are reported to Ministers and the Parliament.

Another notable feature of the office of Commonwealth Ombudsman is that it also hosts the specialist titles of Taxation Ombudsman and Defence Force Ombudsman. Those titles signify that the Ombudsman has a special role and expertise in selected areas of government administration. For example, in the Defence Force Ombudsman role the office can examine complaints from serving and former members of the Australian Defence Force about employment-related matters, such as promotion, discharge and allowances. Other specialist titles soon to be conferred on the office are Immigration Ombudsman and Postal Industry Ombudsman.

Ombudsman Assistance to Members of Parliament

There are principally three ways in which the Ombudsman can assist members of parliament: investigating individual complaints referred by members of parliament, making submissions to parliamentary inquiries, and publishing reports of parliamentary interest. I will say a little in turn about each of those activities.

Complaint handling

Most of the queries and complaints that are received by parliamentarians in their electorate offices are handled effectively by those offices. To facilitate this work some government agencies have appointed parliamentary liaison officers to ensure that there is a ready point of contact in the agency for parliamentarians. Nevertheless, members of parliament sometimes find it useful to enlist the assistance of the Ombudsman in dealing with a complaint, especially where the issue is complex or an impasse has developed with the agency. I describe below some ways in which the Ombudsman can augment the constituency work of electorate offices; at this point I merely wish to emphasise the importance I attach to this role.

A chief way that I keep abreast of this aspect of our work is by signing all correspondence to members of parliament. This practice is more than symbolic, but enables me to gauge the issues about government administration that are being raised by members of parliament around Australia. Often the member's letter will spell out the grievance in a more pointed or persuasive manner than the constituent was able to do. This is valuable in highlighting the differing expectations that people have of government, which is an important message that Ombudsman offices are established to hear.

I therefore welcome complaints from members of parliament, and encourage them to use the Ombudsman as a supplement or alternative to their own constituency work. To encourage this practice, parliamentary electorate offices are a prime focus in much of the outreach work that my office conducts each year. Last year we conducted 65 outreach activities, 40 of which were visits to rural and regional Australia. On many of those visits we met with MPs and their staff to discuss our work and the types of government issues that were common in the electorate being visited.

Parliamentary inquiries

Another way we strive to connect with the Parliament is by making submissions to and appearing before parliamentary inquiries. The submissions we have made over the past couple of years have covered a diversity of areas in government – the Medicare safety net, governance in the Pacific region, the discretionary powers of the Minister for Immigration, counter-terrorism legislation, the system of military justice, mental health in detention centres, government in Norfolk Island, national security legislation, the review of migration legislation, and the review of the Australian Crime Commission.

It is for others to judge the value of those submissions, but I have been pleased to see the frequency with which Ombudsman submissions have been cited approvingly in parliamentary committee reports. My observation is that committees welcome the insight that an Ombudsman's office can bring to an issue, stemming from the experience of the office in handling complaints across all areas of government, arising from all corners of Australia, and received from a broad cross-section of Australian residents and businesses. The office strives for balance and objectivity in presenting its views, which can be a welcome voice in a parliamentary inquiry that broaches controversial or sensitive issues that have excited both passion and disagreement. The contribution an Ombudsman can make was noted approvingly in a recent report of the Parliamentary Joint Committee on the Australian Crime Commission:

The Committee also wishes to acknowledge the assistance provided by the Commonwealth Ombudsman, Professor John McMillan, and his staff. The Commonwealth Ombudsman plays a vital role in accountability mechanisms of the ACC, through investigating complaints, and auditing records. The Committee considers that regular discussions and exchange of information with the Ombudsman is vital to maintaining the overall effectiveness of the accountability regime. In addition to the briefing on telecommunication intercepts required by statute, Professor McMillan has met with the Committee privately on several occasions and the Committee appreciates his insights and experience. (Report of the Committee, *Examination of the Annual Report for 2003–04 of the Australian Crime Commission* (2005) at [1.5].)

There is scope for developing this role further. The terms of reference for parliamentary inquiries are typically broad. As an inquiry develops, some issues become more important than others. Prior to completing an inquiry a committee may also develop interim thoughts on a preferred solution or model for reform. If the Ombudsman is made aware of the issues that are emerging as more important or unresolved, the office can provide a more informed or targeted submission (or supplementary submission) to the committee. For example, committees sometimes publish reports proposing a new model for complaint handling or dispute resolution; I think some of those proposals could have been more refined or persuasive (and more likely to receive government endorsement) had they been exposed for comment, even on an informal or confidential basis.

Reports

The individual problems that people experience with government are often not unique. Others who are similarly placed may be affected in the same way, or an individual problem may be a pointer to flaws of a different kind in a government program. A core objective of Ombudsman offices is to improve public administration by documenting those wider problems, recommending changes, and monitoring the change process.

One way this is done is in the annual reports of the Ombudsman. A feature of the last two annual reports of the Commonwealth Ombudsman is a chapter on 'Problem areas in government decision making'. Those which have been discussed and illustrated by example are deficient record keeping, inaccurate or misleading advice, disputes about the substance of oral advice, the importance of safety net discretions in legislation, system problems in automated decision-making, difficulties stemming from schemes established on an executive rather than a statutory basis, and people falling through the cracks of government programs. It is hoped that parliamentarians can draw from this research in Ombudsman reports, especially in their parliamentary review role of overseeing the executive branch of government and examining proposed legislation.

The Ombudsman's office also publishes special reports on selected issues, often arising from own motion investigations undertaken by the office. Indeed, some of the most innovative and influential work undertaken by the Ombudsman's office over more than two decades has been captured in these special reports. Examples are the Ombudsman reports on complaint handling, payment of administrative compensation, and recording oral advice: respectively, *A Good Practice Guide for Effective Complaint Handling* (1997), *To Compensate or not to Compensate: Own Motion Investigation of Commonwealth Arrangements for Providing Financial Redress for Maladministration* (1999) and *Balancing the Risks: Own Motion*

Investigation into the role of agencies in Providing Adequate Information to Customers in a Complex Income Support System (1999). Other topics that have been taken up in significant reports in recent times include the administration of freedom of information laws, change of assessment decisions in the Child Support Agency, the Australian Defence Force redress of grievance system, the Family Tax Benefit scheme, complaint handling in the Job Network and the Australian Taxation Office, management of under 18 year olds in the Defence Forces, the Tax Office response to mass-marketed tax schemes, whistleblower protection in the Australian Federal Police, the Australian Crime Commission's handling of alleged corruption, and compliance and detention action by the Department of Immigration.

Those and other publications are available on the Ombudsman website: www.ombudsman.gov.au. It is hoped they provide a valuable resource for parliamentarians and parliamentary committees. We welcome any feedback from MPs as to how these reports can be used, improved or extended into other studies.

Complaint handling – when to call the Ombudsman

There is much in common between the work of the Ombudsman and of members of parliament. We perform a similar role of overseeing executive action, handling complaints and inquiries from members of the public, and drawing attention to problems in law and administration. There are many other differences, not least the democratic role of parliamentarians in advocating a particular philosophy about how government should be undertaken and providing a voice for constituents in the government of the country.

What distinctive role can the Ombudsman play in providing assistance to parliamentarians? I will discuss four ways in which the Ombudsman can supplement the work that parliamentary electorate offices play in handling constituency grievances. The purpose of this discussion is to provide some practical pointers in answer to a question we are often asked: when should an MP refer a complaint to the Ombudsman's office?

Where an independent, objective examination of a disputed issue is needed

Some of the problems that come to parliamentary electorate offices are from constituents who are embittered with a government agency, and mistrust anything that is said or proposed. Sometimes there are many issues and problems rolled together and it is hard to disentangle fact from allegation. Oftentimes the government agency or the Minister has provided an explanation for what occurred, but the constituent disbelieves this. In short, it is hard to know where the truth lies.

A guiding principle of the Ombudsman's office is to be objective and impartial, to listen to both sides of a dispute, and not to take on the role of a representative or advocate for either party. By doing so, the office strives to instil confidence in parties to be open with the Ombudsman's office, and to be reassured that an issue will be appraised on the evidence and according to principles of good administration. The parties will not necessarily agree with the Ombudsman's findings, but there is at least the reassurance that the matter has been looked at by an agency that has no stake in the outcome.

Many of the complaints that are referred to our office by parliamentarians fit this description. Staff in electorate offices confirm that it can be useful to refer a complex or heated dispute to the Ombudsman's office for independent examination.

Sometimes we can resolve the dispute, by approaching it differently, shedding light on an issue that caused misunderstanding, or suggesting that a different remedy be provided. But, as often as not, our investigation concludes by advising the member of parliament that we can find no basis on which to be critical of the agency.

With that in mind, all that we ask of a parliamentary electorate office in referring a hotly-disputed matter to the Ombudsman is that this is done so with a view to bringing closure to the dispute, not more oxygen to inflame it. When we look at a complaint we sometimes decide that some only of the issues require investigation, especially when the disputed issues stretch back many years cannot be effectively remedied, or the only foreseeable outcome is a plausible difference of view as to what in fact occurred. If we receive a complaint that has already been the subject of an earlier investigation or report by an independent consultant or oversight agency, it is doubtful that we can add to that investigation, other than by reading the investigation report to confirm that it covers the essential issues in dispute. That alone can be useful to a parliamentarian's office, in being reassured by an independent Ombudsman that it is time to bring closure to a dispute, notwithstanding a person's unsatisfied grievance.

When access to documents and decision makers is desirable

The *Ombudsman Act 1976* confers upon the Ombudsman the same powers as a Royal Commission to obtain documents from any agency or person, to examine witnesses under oath, and to enter premises (ss 9, 13, 14). My office invokes those formal powers only rarely, but having them means that agencies routinely allow us to inspect files and to talk directly with the actual decision-makers. That is useful in forming a view as to whether a decision was thoroughly and professionally made, or whether an issue in dispute warrants further examination. We are sometimes able to point to an error in a decision that an agency overlooked.

The evidence and documents given to an Ombudsman's office cannot be subpoenaed by another person or agency for use in legal proceedings (*Ombudsman Act* s 33, 35(8)). Investigations by the Ombudsman are required by statute to be conducted in private, and strict secrecy provisions and the *Privacy Act 1988* govern the disclosure of information (s 8(2), 35). A natural justice procedure must be followed before a finding is reached that is critical of a person or agency, allowing them to comment on the Ombudsman's draft finding (s 8(5)).

Those statutory controls on Ombudsman investigations mean that agencies are generally open and approachable, secure in the knowledge that information will be protected and adverse findings will be soundly-based and exposed to prior comment. Cooperating with an Ombudsman investigation does not expose the agency to unwarranted criticism or to legal proceedings for negligence, defamation or other civil wrong. Consequently, in some instances at least the Ombudsman is better placed than a parliamentarian's office to conduct a searching investigation, or to verify that an agency's claims are substantiated by its own records.

The Ombudsman's access to decision-makers can be important in another way. My office follows a practice of contacting an agency at the appropriate effective level, ascending from contact by an investigator, by a team leader, Senior Assistant Ombudsman, Deputy Ombudsman or myself as Commonwealth Ombudsman. In short, if I decide to become personally involved in conveying my opinion and recommendation to the head of an executive agency, it is implicit in this contact that the issue is important, and that discussion of the issue at a lower level has not resolved the dispute. Being able to contact at an agency at numerous different levels

provides an opportunity to refine the area of disagreement and to negotiate a resolution.

Used wisely, this practice can be effective in resolving a full range of issues from the minor to the momentous. This kind of access to and penetration of the decision-making and policy processes of an agency is another way in which an Ombudsman's office can supplement the grievance work undertaken by parliamentary offices.

Where an investigation in private is required

Some investigations demand privacy, confidentiality or secrecy. The provisions of the Ombudsman Act provide a framework for conducting such an investigation. By way of example, a complaint about sexual indiscretion in the Defence Force by a senior officer towards a junior officer will not proceed far unless all parties can be assured that the guarantees of confidentiality and privacy given by the investigator are both realistic and enforceable.

A similar issue can arise if there is a secrecy provision in legislation that prevents disclosure by the agency. For example, the secrecy provisions in taxation legislation mean that the Australian Taxation Office is unable to provide advice to an employee (or their representative) who has complained that their employer failed as required by law to forward payroll or superannuation deductions to the ATO. While the Ombudsman's office is likewise constrained by those secrecy provisions as to what we can disclose, we can at least discuss the issue confidentially with the ATO and inspect the ATO's records. We are then able to provide a reassurance to the employee, albeit without detail, that their concern has been addressed.

This provides another illustration of how the Ombudsman's office can provide assistance by conducting an investigation that may be beyond the legal capacity of a parliamentary electorate office to undertake.

Where an investigation requires specialist skills, resources or knowledge of a government program

The jurisdiction of the Commonwealth Ombudsman to investigate administrative action embraces nearly all areas of government. We have over 140 agencies listed in our database, and have established formal contact arrangements with the majority of those agencies. Over time, the office has dealt with nearly every kind of complaint made against government. The insights and lessons learnt from nearly thirty years of complaint handling are captured in the manuals and records of the office and are part of the resource base available to all investigators.

Most of the problems that people encounter with government arise in a few areas of high client contact – Centrelink, the Child Support Agency, Australian Taxation Office, Department of Immigration, Australia Post and Defence. In each of those areas the office has established a specialist team, located in Canberra, to research the law, monitor complaint trends, maintain a database of complaint issues, and arrange regular contact with the agency both to learn of recent developments and to facilitate efficient investigation. In this way we are able to deal with the full range of issues – the simple and the complex, the ordinary and the unusual, and the general and the specialised.

We strive as well to maintain specialist knowledge of the different remedies that are available to resolve a dispute. An example is the scheme applying in the Australian Public Service for Compensation for Detriment Caused by Defective Administration

(CDDA), which enables payment of compensation in circumstances where there is no legal liability to pay. Knowing when an agency is more likely to pay, and how to frame a claim for compensation, requires a degree of understanding and experience of the scheme. Moreover, the CDDA rules provide that a recommendation by the Ombudsman is a sufficient basis for payment of compensation.

The Ombudsman's office has developed protocols with agencies as to when they are prepared to suspend executive action to enable an investigation to be undertaken. This can be important, for example, when a person is facing deportation, or dismissal from the Defence Force. Another area where specialist knowledge of procedures and remedies can be helpful is in relation to freedom of information requests. The Ombudsman's office has traditionally taken a special interest in FOI laws, and hosts a small specialist team to handle FOI complaints.

Finally, we maintain eight offices around Australia, to ensure that we are accessible to the public and develop local knowledge of the problem areas in government and the contact points in government agencies. Staff from all those offices join together at various times during the year in training programs and other meetings to ensure that the office maintains both a breadth and a depth of the skills required for effective investigation.

Conclusion

The purpose of this paper has been to describe different ways in which the Ombudsman's office can, I trust, provide a useful service to parliamentarians in their dealings with the executive branch of government. It is important to add that we have no wish to detract from or intrude on the constituency function of parliamentarians. We are keenly aware of the effective role played by MPs and their electorate offices in providing a seamless service to constituents, in giving advice, offering counselling, referring issues elsewhere, and resolving problems in both the public and the private sector. It is a valuable part of our system that many complaints against government are resolved through these democratic channels.

It is also the role of the Ombudsman's office to handle complaints and queries about government. Our experience is that some parliamentary electorate offices contact us frequently, while some never do. We invite parliamentarians and electorate offices at any time to 'run a matter past us' – to ring and ask, 'This is the problem: what do you think, can you help?' Sometimes we can help resolve a problem, but not always. Discussing the options can be advantageous in itself.