

PRESENTATION TO COMMONWEALTH OMBUDSMAN'S 30TH ANNIVERSARY DINNER

Andrew Podger, IPAA National President, 8 August 2007

It is a pleasure to join in the celebrations this evening. The Institute of Public Administration has had a long association with the Administrative Law community, and the office of the Commonwealth Ombudsman in particular. It is an honour to be invited to add our congratulations on your 30th anniversary.

I know thirty years only takes us back to 1977, but tonight is much more like a sixties re-union for me. When I was in Defence with Ron McLeod in the 1990s, I was embarrassed by the circulation around the Department of a Sydney University Gazette celebrating the 25th Anniversary of Alan Cameron's Student Representative Council. As I recall, the heading referred to 'the flower children'. There I was, in black tie, along with the likes of Alan Cameron, Clare Petre, Michael Kirby and Peter Collins. Now Clare – the long-standing NSW Energy and Water Ombudsman - may feel being described as a beautiful flower child is a compliment (and well deserved at that), but my military colleagues were not so generous about the same description of me.

Sadly, Alan could not be with us tonight, nor Ron McLeod, but I am pleased to see Clare here.

Reflecting on the 1960s is more than self-indulgent nostalgia. The truth is that the Ombudsman's office was a creature of the 1960s even if it was not formally established until 1977. Justice Else-Mitchell, who became president of IPAA's ACT division in the late 1970s, advocated the establishment of the office, along with other reforms to Administrative Law, in 1965.

The Administrative Law reform movement gained momentum in the early 1970s under Gough Whitlam, but it was Malcolm Fraser who ensured much of the legislation was passed. Apart from the Ombudsman's office, the reforms included the Administrative Appeals Tribunal (1975), the Administrative Decisions (Judicial Review) Act (1977) and the Administrative Review Council (1976). To these I would add the Freedom of Information Act (1982). The bipartisan support for these reforms was both remarkable and critical to their initial success.

The reforms reflected a new emphasis on the rights of individuals over executive action, particularly within the bureaucracy. The size and complexity of Government had been growing, of course, and the need for some re-balancing was widely recognized. But the shift was profound and, thankfully, has stood the test of time.

I like the description some observers have given to the reforms as complementing the traditional and formal line of accountability upwards from public servants to their agency heads to ministers to Parliament and then to the people. Administrative Law requires the public servant also to be 'accountable' outwards for his or her decisions directly to the citizens affected.

For those, like me, uneasy about the extent to which the balance of public service values has drifted over time towards responsiveness and away from apolitical professionalism, it is reassuring that the Administrative Law reforms have endured, reinforcing the values of impartiality and professional decision-making. Public servants must comply with the law, including the panoply of Administrative Law; in my view, they also have a responsibility to the public interest in the wider process of public administration.

The Ombudsman's role is unique, being independent yet within the executive arm of Government, and being recommendatory not determinative. While these attributes are still the subject of debate, they have contributed to the pragmatic style of the office.

The seven individuals who have held the position of Commonwealth Ombudsman have been substantial contributors not only to this office but also to Public Administration in Australia more generally. Their calibre is also testimony to the continued respect of successive Governments for the office of Ombudsman.

I have had the privilege of personally knowing the last four of them very well. These four had the benefit of building on the pioneering work of Jack Richardson, Geoffrey Kolts and Dennis Pearce, who all had expertise in Administrative Law.

Jack Richardson set the scene. Notwithstanding his legal background – an expert in constitutional law and federalism, trade practices and aviation law – he recognized that the Ombudsman needed to be pragmatic, to deal with matters quickly and efficiently, to use the telephone as well as the written record. While not always successful in this, Finance Ministers and officials mostly found, to their surprise, an office that was highly productive and efficient. (They were not so happy about Jack's milk carton advertisements – 'bamboozled by the bureaucracy? contact the Ombudsman' – but at least he did not appear himself.)

Geoffrey Kolts and Dennis Pearce continued this pragmatic approach, also tempering their legal backgrounds.

The last four Ombudsmen have successfully broadened and strengthened the role of the Ombudsman from those early years.

Alan Cameron came from commercial legal practice, but he also had a long-term interest in the legal rights of disadvantaged Australians having done pro bono work for example with the Redfern Aboriginal Legal Service.

Philippa Smith had a strong NGO background. She and I first worked together when she was with ACOSS and I was working in social security. She brought to the role a keen understanding of the experience of ordinary Australians dealing with the welfare system.

Ron McLeod was a career public servant with substantial administrative experience. He was not just a manager, however. He certainly brought to the role an understanding of the workings of Government and the realities of decision-making practice, but he also understood working people both in and out of Government and had a keen sense of fairness. He was never an apologist for the bureaucracy, but rather a stickler for professional decision-making in the public interest.

John McMillan a National Fellow of IPAA, is perhaps more in line with the first few Ombudsmen with his academic background in administrative law. But his interest was in the practical application, even when we first discussed these issues together at ANU in 1970. He wanted to influence the way public servants make decisions, recognizing the real constraints within which they work. He felt that public servants, as well as the public, could benefit from more open processes.

I suspect all seven have held this view. Despite popular images of Sir Humphreys shunning open-Government, most of my contemporaries welcomed, or at least came to appreciate, the Administrative reforms of the 1970s. The reforms have improved decision-making, building more coherence and structure, as well as fairness, into systems. They have contributed to better training and to employing more senior people in positions with delegated authority.

Where unease amongst senior public servants is most common, it is not so much to protect the bureaucrats (though of course that happens), but more often the desire to protect their political masters. This can be for perfectly legitimate reasons such as protecting the capacity of cabinet to consider issues frankly and fully, but it can also be to please their political masters by helping them to avoid embarrassment. It is this latter incentive that at times troubles me and some other observers.

The bureaucracy's genuine respect for the Ombudsman comes not when they are let off the hook, but from the quality of the assessment, its timeliness and its appreciation of both the experience of the person seeking review and the context in which the decision maker was operating. The damning indictment of the Immigration Department's decisions on asylum seekers by both Mick Palmer and John McMillan did not exonerate the mostly lower level staff who made the wrong decisions, but it makes clear that the context was one of poor leadership, an inappropriate culture and weak information systems. By doing so, the reports contribute substantially to work now underway to resolve underlying problems rather than just correcting a wrong decision and blaming the decision-maker. I have suggested elsewhere that part of the context may have been an excessive desire to be responsive to the government at the expense of due process. Whatever the truth of that, the Ombudsman has, with Mr Palmer, forced the Department at least, to review its culture and the way it ensures that staff uphold all the APS values and meet the full requirements of the law.

For a while, some of the advocates of the new public management reforms of the 1980s and 1990s pooh poohed concern for process as a constraint on achieving results. I think there is now a greater appreciation of the need for what the auditor-general calls 'conformance as well as performance'. If we get the balance right, the lawyers and the economists can both contribute to a bureaucracy more mindful of the public it serves – the lawyers keen to protect the rights of those affected by Government decisions, and the economists looking for services more responsive to the needs and preferences of those who use them – while retaining the traditional democratic principles of responsiveness to the elected Government and open accountability through Ministers to the Parliament. The APS values provide an ethical framework for public servants reflecting each of these dimensions.

While I am not sure that the Administrative Law reforms of the 1970s would today have received the political support necessary for their introduction, they are certainly sufficiently embedded now to withstand most potential opposition. For this we can thank in particular the people who have held the position of Commonwealth Ombudsman, and the staff who have supported them. Congratulations.