

## **ADMINISTRATIVE LAW: DOES THE PUBLIC BENEFIT? FUTURE DIRECTIONS IN ADMINISTRATIVE LAW**

***Alan Cameron, Commonwealth Ombudsman***

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When I spoke at this time last year on this theme, the principal focus was on the review of my office about to be undertaken by the Senate Standing Committee on Finance and Public Administration. This was the first parliamentary review of the office in its 14 year life. The report was published recently, and concluded that the Ombudsman made 'a positive contribution to Australian public administration'. I regard that as a vote of confidence in the Office of the Commonwealth Ombudsman.

The Committee made specific recommendations aimed at maintaining and strengthening this contribution; it suggested that even 'modest additional funding' will achieve that objective. It called for no major changes in direction, and found that the Ombudsman represented no impediment to the commercial efficiency of any organisation – indeed that an effective complaints handling mechanism increases commercial efficiency (paragraph 9.1–9.3; the page and paragraph numbers are references to the Report unless otherwise indicated.) I propose today to concentrate on the Report and its implications, particularly on what changes one may now expect to see.

### **Response to recommendations**

My submissions to the Committee are published in Hansard, including my concluding submission in which I summarised what I hoped the Committee would deal with and recommend (Volume I of Hansard Submissions page 920), and the masochistically inclined among you are able to compare my wish list with the Committee's conclusions. I will deprive you of that pleasure. Virtually all of my suggestions with respect to the jurisdiction of the Ombudsman have been adopted.

The Committee decided against even the limited form of determinative power, namely that a recommendation in a report to parliament (of which there have only been two in 15 years) should take effect as an instrument subject to disallowance by either house as an instrument subject to disallowance by either house of parliament. This had been suggested by others including the Banking Ombudsman, and I commended it for consideration – but I am content with the Committee's view and their reasoning. The Committee felt that the likely opposition from departments and the rarity of the relevant circumstances meant that the major change of direction which this would entail could not be justified (paragraph 3.27). Interestingly, the Queensland Parliament is in the process of giving its Parliamentary Commissioner or

Ombudsman not only an additional hat, as Information Commissioner, but also determinative powers in the Freedom of Information area.

I did not press for the power to order a stay of action, and the Committee decided against it (paragraph 3.34). I urged an extension of the provisions for act of grace payments; there has been a trial over a period of years with some devolution of responsibility for such payments to secretaries of departments, provided there was consultation with the Department of Finance and a recommendation from my office. The Committee recommends that if such a system is to continue, it be subject to a dollar limit of \$5,000 (and annual payments not exceeding \$1,000) rather than the present limitation of \$5,000. (paragraph 3.48)

Our resources, I had urged a revision in the base funding of the office from around \$5 million each year, to \$6 million, plus \$1 million dollars for a new computer system. The Committee has endorsed the need for the new computer system and for additional funds for specific functions, although I am disappointed that the Committee has not been as explicit about the dollars needed for these functions as I had asked; it will now be up to the government to respond.

As for my office's relationship with the parliament, I had encouraged the Committee to consider whether the parliament wished to initiate a closer relationship so that the Ombudsman would relate more to parliament rather than the executive government. One of my predecessors told the Committee that he had wondered whether the Commonwealth Ombudsman might be excluded from the international ombudsman community because he was appointed solely by the executive arm of government (paragraph 8.8). The Committee suggested two or three steps which could be taken in this case.

First, the Committee proposed a special joint meeting twice each year of the relevant House and Senate Committees to consider matters arising from Ombudsman reports (Recommendation 30 paragraph 8.28). The Committee also suggested that the Chairs and Deputy Chairs of the relevant committees be consulted on future appointments, in order to ensure bipartisan support for such appointments; we have not had any political appointments as ombudsman in the commonwealth arena. (Recommendation 31 paragraph 8.32). Somewhat similar proposals are emerging in New South Wales, and the spectre of confirmation hearings may not be that far off. Finally, the Committee supported amendments to the Act so that the government must respond to a special report to the Parliament within threemonths, to overcome the difficulty that the government may simply do nothing in answer to such a report (Recommendation 2 paragraph 3.29)

While those suggestions will be useful if adopted, I believe that the longer term should and will still see the Ombudsman become more closely identified with the parliament in our governmental system. I propose to continue my personal efforts to develop closer links between MPs and the office, not to embroil the office of ombudsman in politics, but to ensure that the Ombudsman plays an active role in the accountability of bureaucracy to the citizens.

### **The role of the Ombudsman**

While the Senate Committee concluded that the office has provided an effective complaints handling service, it did suggest some strengthening of the general investigative capacity to handle individual complaints, which has been likened to swatting flies, without diverting too much to investigations of major problems, the

equivalent of lion taming, for which he is not necessarily best equipped (paragraph 2.68).

Needless to say, I accept that individual complaint handling is 'neither ignoble nor unimportant' (paragraph 2.71), but I regret that this report may be seen therefore as encouraging the view of the ombudsman as merely a flyswatter, rather than a lion tamer. Flyswatting is in my view a most inappropriate description of the role, because swatting a fly does nothing to discourage another! In other words, the office must always find out not only whether the complainant has a genuine gripe and ensure that it is fixed, but must also check that the same thing has not happened in other cases, and if it has, that it is corrected for them too. After all, looking closely at a single complaint or what seems to be a pattern of similar complaints may reveal a problem in the system which, if not fixed, will simply lead to further complaints in the future. There is little point in applying a bandaid or quick fix solution if a festering sore lies undiscovered beneath.

An example, not hypothetical, concerns an agency which was required to pay casual staff a mileage allowance. One of them complained to my office that s/he had not been paid the right amount. On enquiry, it emerged that the wrong amount had indeed been paid, and the shortfall was promptly paid. But I would not regard the complaint as fully resolved unless and until the circumstances of the underpayment had been sufficiently clarified that one could be reasonably certain that all those concerned had been fully paid, not just the original complainant. And that usually involves finding out how the under payment occurred. I do not regard that as an investigation of a systemic error, but rather than the proper investigation of the original complaint. Nor shall I be too fussed if that is to be characterised as fly swatting.

The report noted that proliferation of the ombudsman-type activities, and urged that, when decisions are taken in future to establish such bodies, the task should be given to the Commonwealth Ombudsman, to take advantage of the existing expertise and office structure. That seems to me to be sensible; my office has special expertise which should be used as widely as possible, and also needs a sufficient critical mass of staff and work to make it an interesting and worthwhile place to work. I shall return below to several recent developments in this regard.

### **Critical comments**

The review gave people on both sides of the bureaucratic fence their first and best opportunity to sound off about the Ombudsman, and quite a few (33 individuals and 14 organisations) took the chance. The Senate Committee received submissions from several complainants who had alleged serious maladministration or official corruption, had taken their complaints to the Ombudsman but were dissatisfied with the outcome (pages 67 and 15). The Committee undertook no detailed review of such individual complaints and how they were handled, and I do not believe that parliamentary committees should; but it did suggest that such matters will frequently be so different in character to the more usual work of the Ombudsman that a specialist investigative unit within the office will be needed to handle major investigations. The value of the office continuing to have a role in investigations of major issues is shown by examples like the unauthorised charging of fees by the Immigration Department some years ago, and the review of the investigation into the crash of a Mirage fighter.

Government agencies also took the chance to respond. The Australian Statistician suggested that the Ombudsman investigation into the Household Expenditure Survey

some years ago had gone beyond the proper function of the office (page 18); I rejected that criticism in a submission to the Committee (Volume I of Hansard Submissions, pages 874–878). The ABC continued to challenge the Ombudsman's right to look into programming matters; the Senate Committee proposed that the Ombudsman's right to pursue complaints of misrepresentation by the ABC should be clarified legislatively pending the establishment of an independent complaints handling mechanism for all electronic media (paragraph 4.19).

## **Police complaints**

At first glance, the most startling recommendation of the Senate Committee was the suggestion that the role of investigating complaints against the police be taken away from the Ombudsman unless adequate resources were made available to do it properly. However, this was not based on any dissatisfaction with the performance of the Ombudsman in the work he presently does, but instead arose from the lengthy delays experienced in resolving complaints, due to the lack of available staff (with consequent ill effect for both police officers and complainants), and the credibility gap inherent in a system which involves police conducting all the investigations, and the Ombudsman being limited to reviewing the results. The Committee concludes that 'independent, external review of the investigation of police complaints is essential... that such review must be timely (and) should involve independent primary investigation of some cases' (paragraph 5.64). To date only one such investigation by the Ombudsman's office itself has ever been conducted.

## **Funding**

I had certainly hoped that a review by an independent parliamentary committee would help to break the impasse which seemed to have arisen over the perennial calls for extra funding by successive Ombudsmen. The Senate Committee, while not recommending a wholesale expansion of the office, proposed what it calls 'a one-off strengthening of the Ombudsman's operational capacity' (paragraph 6.29), relating principally to the costs of dealing adequately with the police complaint function, redeveloping the antiquated computer system, and promoting the existence and services of the office to low income and disadvantaged groups. Of course, success in the latter will put more strain on the office's resources. The Committee concluded that there would be 'a net public benefit in meeting [these] resource needs' (paragraph 6.27). These proposals were correctly characterised by the Committee as 'modest', but the Committee 'would expect [them] to be funded' (paragraph 9.8). I hope that was a strong enough hint! The annual cost of implementing the recommendations is not likely to exceed a million dollars. We will not know the outcome for some time yet.

## **Charging for services, and secondments**

Any suggestion for charging either complainants or agencies for the work of the Ombudsman was rejected, except in cases where some specialist role like the proposed telecommunications industry ombudsman is given to the Commonwealth Ombudsman (paragraph 6.41), as the Committee suggested (paragraph 5.21). The Committee's suggestion (paragraph 6.56) that the government might require agencies subject to the greatest number of complaints to fund the secondment of staff to the office on rotation, would also lead to a net increase in resources. But such secondments, while supported by the Committee, have recently been criticised, by implication if not expressly, by Senator Bishop (Estimates Committee A, 1 April 1992) on the basis that they are perceived to allow agencies to spike criticism within my office. They do not do so, but I am concerned that there may be a perception to that effect.

## **Surveys**

One of the great benefits of this first independent review was that it included a survey of complainants (Appendix III), to see whether they were satisfied with the service provided by the office, and of complaint files within the office, with strict precautions being taken to ensure the privacy of all those contacted or whose files were perused. The survey of files showed for example, that financial remedies obtained through the office in a sample of just of 200 cases ranged from \$10 to \$46,500, with most being under \$500. The circumstances included an act of grace payment to compensate a student who had been obliged to repay AUSTUDY unfairly, as a result of an anomalous regulation. Client reaction was visible only if a letter or card had been received, but was favourable in 15% of the cases and unfavourable in 4%. The \$46,500 payment was a Telecom complaint which involved a major company complaining that it had been overcharged over a lengthy period for the provision of statements on all its 814 extensions – the payment reflected the statement charges and interest. (Details are on page 157.)

The survey of complainants (Appendix IV), on the other hand, involved sending out survey forms to those complainants whose files were closed during a particular period. One hundred were dispatched and 53 returned. These showed generally a high level of satisfaction with the manner of the Ombudsman's investigation, and in particular a high correlation between satisfaction with the outcome and resolution in favour of the complainant – as one would expect. (See pages 163–4)

The Committee restricted itself of necessity to complaints and complainants; I am as interested in those who do not know about the Ombudsman. A survey of public awareness was foreshadowed in last year's annual report, and a contract for that survey, on a national basis, is about to be let.

## **Future appointments as Ombudsman**

I was sensitive about the word Ombudsman last year; it was one of the issues (few in number) on which clear divergences appeared – the rest of the Senate Committee and I favoured retaining the word, but the Chair, Senator Coates, advocated moving to the word Ombud, to remove any taint of gender-specific language.

The Senate Committee concluded that it might be desirable if the next appointee as Ombudsman were not a lawyer. The office functions not so much as a part of the legal system, but as an alternative to it where an administrative solution is sought rather than a legal one; certainly it is not necessary to be a lawyer. Compared to my three predecessors, who have been respectively a professor of law, a first parliamentary counsel, and another professor of law, my background as a partner in a corporate law firm, and a managing partner for some years to the almost total exclusion of legal practice, makes me the least lawyer-like of the four appointees. A legal background is certainly of assistance in the role, as it is in the public administration generally, but I will be content if the best candidate to replace me in due course is a woman or man without the glow of a legal qualification (see paragraph 2.69).

## **Other developments**

There have been other reports during the last 12 months, the implementation of which will have a major impact on my office.

First, there is the Administrative Review Council's Report No 34, Access to Administrative Review by Members of Australia's Ethnic Communities. The principal findings so far as they affect my office are as follows:

*'The Ombudsman should:*

- *publicise the fact that his office is available as a **central reference point** for those who are dissatisfied with a government decision, but who do not know what remedies are available.*
- *adopt a **leading role** in the **dissemination of information** about administrative review, particularly the basic message that one can complain of appeal.*
- *(in consultation with other review agencies) take a leading and coordinating role in the promotion of administrative review, especially towards specific communities whose need can be demonstrated.*
- *receive additional resources to enable these recommendations to be implemented.'*

I must stress, as the ARC did, that implementation of this report is entirely dependent on my office receiving the resources to carry out the suggested role.

Then there is the response by the various governments to the Report of the Royal Commission into Aboriginal Deaths in Custody. There have fortunately been no Aboriginal deaths in federal custody. The government has agreed that my office needs the capacity to investigate this kind of complaint directly, and resources must in my opinion be found now to ensure that any complaint of that kind, even those not involving a death, can be investigated without the involvement of the Internal Investigation Division.

I have already mentioned the telecommunications industry ombudsman. If my office were to be given this role, as agent or under contract, it would be the first time that a parliamentary ombudsman has simultaneously acted as a private sector ombudsman; more trail blazing, but perhaps only for a few years. The importance of independence for the successful performance of the role of the ombudsman in any arena may well mean that this is one role which even in the private sector ought to be or can be performed by a public official, at private expense.

We do occasionally acquire jurisdictions or powers unknowingly. That appears to have happened with recent Bankruptcy legislation (Act No 9 of 1992) which obliges the Inspector General to review certain decisions if requested to do so by the Ombudsman. Any impression that such legislation may give that he did not so when requested in the past, would be mistaken if understandable.

Finally, it may be time to blow the whistle. The final report of the Committee reviewing Commonwealth Criminal Law (December 1991) has recommended that there be statutory protection for whistleblowers who disclose their information to an independent agency of the Commonwealth, and suggest the Ombudsman or Auditor-General, or a specially created agency, for this purpose. Consistently with the views of the Senate Committee that proliferation of such agencies is not to be encouraged, I have indicated that I regard that as an appropriate role for my office to play.

Another issue for the future includes the role of the Ombudsman, and indeed the rest of the administrative law package, with respect to government business enterprises. The Senate Committee did not make a specific recommendation, contenting itself with a procedural change so that 'government companies and all other government bodies' (not defined) (paragraph 4.33) would be within Ombudsman jurisdiction unless specifically excluded; the grounds upon which any might be excluded were

not defined either. But it did adopt the preliminary view of the ARC as a 'sound basis for settling the matter', namely:

- in principle, where there is a genuine 'level playing field' between the GBE and the private sector, the accountability mechanisms for all should be the same
- where there had been a significant Ombudsman workload for the GBE before corporatisation, there should continue to be an ombudsman-type mechanism
- consideration should be given to the form of that mechanism with the Banking Ombudsman providing one model
- while the GBE has community service obligations, is subject to ministerial direction or, in particular, is not subject to full competition, the Ombudsman should retain jurisdiction.

The ARC will report on this issue generally shortly.

## **Conclusion**

It will be clear from the foregoing that the office is not standing still, but we do still run a risk of being run over in the traffic. The Exposure Draft paper published by the Management Advisory Board/Management Improvement Advisory Committee last year entitled *Accountability in the Commonwealth Public Sector* relegated the Ombudsman, and the Auditor-General, to the status of adjuncts to accountability. While I found it hard to become excited by this appellation, since I regarded it as the inevitable result of a narrow definition of accountability, getting the right profile for the Commonwealth Ombudsman is not easy.

Observers like Senator Bishop find it worrisome that there is not more criticism of the Ombudsman from the agencies with which the office deals; the Senate Committee, of which she is not a member, clearly had the same difficulty, until it heard from chief executives and other officers of those agencies. I have certainly been nervous that the low profile of the Commonwealth Ombudsman may be justified because it is in fact something of a tame cat, compared for example to my New South Wales counterpart.

My staff are aware that I came to the position with the conviction that it was fundamentally wrong that the office was staffed solely by public servants; if you are not one when hired, and most are, you become one on appointment. While I am satisfied that the professionalism of the officers means that in practice, it hardly ever will make any substantial difference to the final outcome of particular complaints, I still believe that the office would gain from a broader background of experience and outlook among its staff. What I and my successors will then need to be wary of is perhaps an excess of zeal to round up the usual suspects. That is, a desire to collect bureaucratic scalps by substituting one's own preferences, rather than testing decisions against the touchstone of whether they were reasonable.

I predict that future scholars may opine that the Senate Committee missed an opportunity to redefine the role and take it forward, in an era with much more regard being had to public sector management issues than when the office was created. The office was created in a spirit of benevolence to individual citizens, as shown in the phrase '*grievance man*'. In the present era of risk management, we are concentrating on ensuring that the risk management falls upon the government rather than the citizen, since it is the government which has elected to cut staff numbers and ensure efficiency, to reap the benefits of lower costs.

You may say that there is no substantive difference between the two descriptions; I am inclined to think there is a real difference, if only because adopting the latter approach may change significantly one's attitude to the role. If the government has deliberately chosen to save money by cutting staff, cutting corners, taking risks, then the public has a **right** to an effective ombudsman – it is no longer, if it ever was, a matter of benevolence.