

LION HUNTER

Alan Cameron, Commonwealth Ombudsman

*Presentation to the Australian Institute of Administrative Law
Canberra, 26 September 1991*

My immediate predecessor was fond of quoting an American commentator to the effect that while the office of an ombudsman was 'not very well equipped for hunting lions, ... it can certainly swat a lot of flies'. A well disrespectful commuter to this national capital may be forgiven for observing that, when summer finally arrives, someone will have to swat the flies, so it may just as well be the Ombudsman. However, I think the time may have come to change the emphasis within my office, so that we have set out to hunt more lions, on the basis that thereby, that which attracted the flies in the first place will be reduced and the flies will tend to go away of their own accord.

Tempting though it is to seek to continue this analogy throughout this talk, there is a distinct risk of scatological humour replacing serious analysis; therefore, let me now speak ambiguously of what I mean. My office now receives over 30,000 approaches a year. Fortunately around 20,000 are misplaced – the caller is really looking for a state ombudsman, or an industry ombudsman or is simply complaining about private enterprise, or is looking for a telephone number – an increasing phenomenon now that directory assistance has become slower and less user friendly. But that still leaves over 10,000 contacts which require some consideration, by a total staff of around 70. Again, fortunately, many of these can be dealt with virtually instantly, because it is obvious that we cannot help, or should not because they have another remedy open to them, or whatever.

But the sheer number of complaints which remain and require action by my office, ranging from a telephone call, or a letter, means that my staff tend naturally and inevitably to concentrate on handling that person's immediate concern. The person is frequently emotionally involved in the cause of their complaint, and I do not want my staff to be so remote and detached from their complainants' feelings that they have no emotional reaction in response. But this natural desire to remove the immediate cause for complaint, and move on to do the same for the next, may mean that we do not achieve the optimum result overall.

For example, underlying deficiencies in departmental training or practices are less likely to be identified and drawn to the department's attention. A second consequence, which I mention but immediately concede is trivial, is that annual reports of such an office would be rather boring. A third, of far greater significance, is that the staff of such an office would tend to be pre-occupied with processing the

complaints, rather than giving them individual attention. We all know that the chief characteristic of flyswatting is that it is a process that never ends.

But what concerns me is that unless we do occasionally seize upon major issues, we will miss out on our work having any exemplar effect. Unless there is the occasional cause celebre, the incident which brings the Ombudsman to bureaucratic and public attention quite forcibly, the office runs the risk of being thought to be trivial, and perhaps being trivial, because it deals only with matters identified by others as trivial, even if highly important to those directly concerned.

I have therefore sought to introduce some changes in how the office works, in order to increase the chance of the exemplar effect having a chance to apply. The Deputies and I now constitute an executive, to which investigation officers are encouraged to refer matters of moment at an early stage. Despite our notorious lack of resources, a policy task force has been established to seek to ensure that any such matters can be given due priority; unless there are investigation officers who do not receive the calls and letters which flood in and distract them from the priority matters, those matters will rarely come to attention.

To a person brought up on the 'grievance man' concept of the Kerr Committee, this may well seem heretical. That Committee thought in terms of individual complainants receiving individual solutions, but that seems now to me to be too limited. Nevertheless, I want to stress that I am not just talking about identifying and remedying what are usually called systemic problems; I am seeking to have an impact in part by highlighting issues which require attention because of their general impact, even when no particular remedy can be found.

Incapable of determination

One area where action by my office in one or two instances might have significant flow-on effects is in the police complaints area. At present, as most of you would know, our role is in practice confined to reviewing and reporting on the results of investigations conducted by the Internal Investigations Division of the Australian Federal Police. It was not the intention of the Law Reform Commission that this should be our sole role, but a shortage of resources has prevented any significant investigations by my office. At the same time there has continually been a high proportion of complaints under the *Complaints (Australian Federal Police) Act* which cannot be determined one way or the other, a source of frustration to complainants and officers alike.

The proportion of complaints which were not capable of resolution was 26% in the year to 30 June 1991. This is clearly quite unsatisfactory, and we will address that this year. Hopefully with the assistance of extra staff to be recommended by the Senate Committee reviewing my office, it will be possible to conduct some of the investigations of those matters which on first blush are clearly going to involve a conflict of evidence. Such investigations will enable my staff to form an opinion as to who should be believed in cases of a stark dispute as to the facts; but there may need to be a legislative change as well.

When the police complaints regime was originally proposed, the Law Reform Commission suggested that the civil standard of proof then in operation before the Police Appeal Board should continue: I quote from para 167 of ALRC Report No.1:

Although the standard is the civil standard, the degree of satisfaction will, quite naturally, depend upon the seriousness of the charge laid. The

*Common Law has in this regard proved itself a flexible and appropriate instrument as is shown by a reading of the decisions of the High Court of Australia in *Briginshaw v. Briginshaw* (1938) 60 C.L.R. 336, *Helton v. Allen* (1940) 63 C.L.R. 691 and *Rejcek v. McElroy* (1965) 112 C.L.R. 517. In the Commission's view the present position should not be changed. Indeed to do so might well put at nothing the power of the Tribunal to determine that class of misconduct by police, which while not warranting criminal prosecution, must be punished if the good order and discipline of the force are to be maintained.*

Nevertheless, a regulation was promulgated in 1985 making all disciplinary proceedings subject to proof on the criminal standard. That seems to me to be unreasonable; and puts police officers in a preferred position over public servants. (The *Complaints (Australian Federal Police) Act* was amended in 1987 to allow for the standard of proof to be the subject of regulations, and there should therefore be considerable doubt about the validity of the 1985 regulation.) I propose to suggest its repeal in any event, thereby allowing the return to the flexible standard expounded in *Briginshaw*, which for those who have forgotten, provides in the words of Mr Justice Dixon, that 'when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found ... The seriousness of an allegation made, ... or the gravity of the consequences flowing from a particular finding ... must affect ... whether the issue has been proved to the reasonable satisfaction of the tribunal'. That standard ought to hold no fears for an officer; the criminal standards tends to dissuade my office and the IID from pressing matters where reasonable satisfaction is felt, but not beyond reasonable doubt.

Nor am I convinced that my office is necessarily restricted at present to reporting based on the criminal standard. The complainant, the Commissioner and the officer are entitled to my officer's view of the complaint, even if disciplinary proceedings cannot ultimately be taken. That is no more unjust than the process of a Royal Commission or other commission of enquiry. We may, in those cases, offer an opportunity to respond to our draft reports in police matters more formally than we do at present.

It is a worldwide phenomenon that police complaints are hard to resolve, but our strike rate is not satisfactory to the police officers or the public.

Reports to parliament

Taking on major cases, especially ones where the government already has a strong view, may well lead to more cases coming to the point where a report to the Parliament has to be considered. The assumption at the time the Ombudsman Act was drafted was that Parliament would intervene to require the executive to remedy a problem identified by the Ombudsman. The lack of action on each of the only two Section 17 Reports to date may throw some doubt on the assumption, but my concern now is whether I can take the 'risk' of lodging any more Section 17 reports.

I have decided not only to take two matters to the Parliament, on the basis that, while the cases were persuasive, they were not compelling. It was certainly in my mind, however, that if I were to report to Parliament and again be rebuffed, it may look to some people as though my office were incompetent or ineffective, and this may be a difficult claim to negate. My personal perspective is that history shows that the instances at Commonwealth level of Ombudsman recommendations which are controversial with government are so few that the government ought to be prepared to go quietly even when it disagrees with the Ombudsman.

Is there any alternative? There may be. Several witnesses at the Senate Committee raised the possibility of the Ombudsman being entitled to designate a report to Parliament as a category of disallowable instrument, so that it would take effect unless either house of parliament moved to disallow it within 15 sitting days. The recent determination of the NSW Legal Fees and Costs Board provides an example of the device and its effect, as it was duly disallowed.

At the risk of killing the proposal before it has got off the ground, I mention that the *Remuneration Tribunal Act* also provides a mode for this suggestion. The advantage is that the government can choose to prohibit the decision if it regards it as unworkable for financial reasons or because of the dangerous precedent it would set; on the other hand, if the decision relates to a body like the ABC over which the government is unwilling or unable to exercise control, the decision is taken without its having to act.

I look forward to a debate on the desirability of such a change – I know that in one important respect, it breaks the rules of ombudsmanship, by providing a determinative power, but in substance if not in form, the power is given to the parliament. (It would not be a disallowable instrument as defined in section 46A of the *Acts Interpretation Act*, however, in order to ensure that a mere notice of motion was not sufficient to prevent it taking effect. The instrument may well have to be in the form of a requirement to pay compensation.)

Finding the right remedy

Another lion at which my predecessors have taken aim from time to time but been unable to do more than wound, is the tendering process. The recommendation in the Industrial Sugar Mills case that the unsuccessful tenderer should be compensated for its loss of profit was not accepted by the government, or acted upon by the parliament, even though supported by the Senate Committee on Constitutional and Legal Affairs. There also being a convincing case that the appropriate remedy in such cases is the reimbursement of the costs of the tender, I propose to continue Dennis Pearce's policy of restricting my recommended remedy in most cases to such reimbursement. Dennis explains the reasoning so well in the 1987–88 annual report that I will leave you to read that.

The question of the appropriate remedy is one that continues to arise in quite difficult circumstances. Let me construct a hypothetical case. Assume a veteran complains that he had been misled about his eligibility for a Defence Service loan, with the result that he had committed himself to acquiring a swimming pool to be funded by the loan, before he was told that there had been an error and he was not in fact so entitled. He had certainly acted with alacrity, in that he had committed himself to the construction of the pool on the same day that he claimed to have been misled, with the result that the correction of the error the following day was too late to prevent his loss. You may say, what loss? Well, the pool company apparently told him that to cancel the contract would cost him \$6,000 of the \$12,000 price; he sought no legal or other advice on that proposition. He used other money which he had to pay for the pool, but still wanted compensation for the lost opportunity to use the loan to which he believed he had an entitlement. By the time we came to consider the matter, he had completed the construction of the pool, which with surrounding works cost closer to \$20,000. But he had also sold the house and moved on. He produced a letter from the real estate agent saying that the pool had added only \$12,000 to the value of the home.

I find it difficult to see that such a complainant has really suffered a loss of a kind which merits an act of grace payment. I cannot find much material which sets out the principles underlying the calculation of act of grace payments, but it seems to me that those rules must include the following.

1. Claimants must themselves take reasonable steps to mitigate their loss. In this case, I would query whether failing to take steps to cancel the contract was reasonable. Perhaps the loss was the nominal amount to which the contractor would have been entitled on termination, but once the complainant chooses to go ahead and build the pool, even that "loss" may have been subsumed.
2. The result must not be to enrich the claimant, meaning that subsequent events can and should be taken into account to decide whether there was a loss and of what amount. In the hypothetical case, the benefit of having the pool and the subsequent sale at a price which substantially recouped the cost of the pool, have to be taken into account.
3. Any set of principles worthy of the name would have three elements. I cannot think of a third which is entirely satisfactory, but let me venture for discussion the proposition that the overall reason of the case must be considered. The posited situation has some unreasonable features but assume that at the time you are considering the claim, you become aware that the same person has lodged a further claim, on the basis that he has visited another office, explained his veteran status over the counter, again been told that it seems that he is entitled, and again goes out and makes a commitment, only to be informed quite correctly within 24 hours that he is not and never has been entitled. Such a person would seem to have made an art form out of so describing his history as to create the impression that he has an entitlement; clearly one should reject the second claim, in my view, but should that take affect the first? One does not seek to exclude the claim of gullible, but should one be sympathetic to the guileful?

Ombudsman as plaintiff; as simple as ABC

When I was preparing to address students at Wollongong University recently, I was told by the lecturer that he still had a problem convincing students to take the ombudsman part of the course seriously, because there were so few cases in the law reports. That is certainly true, and perhaps the reason is that ombudsmen do not want to take the risk of losing. My predecessor and I have both gone on record as saying that we consider it inappropriate to litigate the dispute over jurisdiction with the ABC; the uncertainty may well come to an end shortly, with the government about to release a white paper on the subject. There is also a private member's bill before the parliament which will explicitly put the ABC within my jurisdiction for all purposes – the mover has said that it is his aim to make the Ombudsman the '*arbiter of good taste*' on the ABC. Some would say that would be a part-time job.

Be that as it may, the Attorney-General's Department submission to the Senate Committee suggested that it would not be inappropriate to resolve this question by litigation – after all, the parliament had specifically amended the Act to provide for the referral of such matters. Having regard to that comment, and the fact that user-pays for legal services comes in next July; if the government does not resolve the ABC issue one way or the other quite soon, I do intend to review the possibility of a federal court action. I suppose that in the context of lions as targets, an organisation run by David Hill is in the category of a mountain lion.

I am making my own contribution to the judicial workload at present, if unwillingly. For the first time, a complainant to my office has applied to the Federal Court for judicial review of my decision not to re-open his complaint. The Senate Committee has been interested in where complainants dissatisfied with the Ombudsman's office could go for redress – the answer at present is generally to the Ombudsman himself.

Parliamentary committees, whether general or specific, do not provide an appropriate vehicle for reviewing the handling of individual complaints. I might say that the lack of a formal appeal is no more unusual in my view than the finite number of appeals available in the court system; it is because the Ombudsman has not determinative power that no more obvious appeal mechanism is needed. I look forward with real interest to the court's hearing and decision.

Access to administrative review

A research project of the Administrative Review Council, conducted under the aegis of the Multicultural Australia Project, has found a low level of understanding of the administrative review system generally in various ethnic groups which it surveyed. The Report, which was launched on Monday by the Attorney-General in Melbourne and in a shameless publicity stunt by me (almost) simultaneously in Sydney, recommends that my office act as a central reference point for those who are dissatisfied with a government decision, but who do not know what remedies are available. It is also suggested that my office adopt a leading role in the dissemination of information about administrative review, particularly the basic message that one can complain or appeal. Subject to resources permitting, I will be happy to do so.

Coincidentally, I have noticed that I am not alone in considering the issue. The Ontario Ombudsman's Annual Report 1990-91 noted that it had been one of her major objectives to deal with public awareness of how to access the Ombudsman's services, correct knowledge as to what those services are, and public access to the services. To assist in achieving this objective, she commissioned a survey on public awareness, which confirmed her suspicion that 'far too few people were aware of the Ombudsman – particularly the people who might be more vulnerable to unfairness and who have limited resources to deal with the problems which result'.

The survey conducted by telephone of randomly selected Ontario residents, revealed the following:

- One person in five said they had a complaint in their dealings with government administration, most frequently about delay or unfairness; most had done nothing about it.
- Those most vulnerable (defined as membership of a racial minority, arrival in Canada within the last five years, a single parent, or limited in daily activities for health reasons) have a higher proportion of complaints.
- 0.6% (sic; six people in every thousand) contacted the Ombudsman about their complaint.
- 69% were aware of the Ombudsman, and generally had an accurate perception of the Ombudsman's jurisdiction and mandate – but awareness was positively correlated with education, negatively correlated with vulnerability. And awareness was low compared to Ontario Human Rights Commission (95%) and the Worker's Compensation Board (97%).
- 52% of Ontarians feel that they are not well protected against unfair government action. This sense is particularly marked among those who are most vulnerable.

To place the level of recognition for the Ontario Ombudsman in context, for I believe it is very high, I should say that she has one of the largest and best funded Ombudsman offices in the world, with a network of offices, and a staff of 120. Nevertheless, I wonder what your guesses would have been as to the level of knowledge in the community at large in Australia of the jurisdiction and mandate of the Ombudsman; of course, in this room, I would expect a perfect score of 100%. The menu for dinner tonight doubles as a survey form, but in flagrant violation of relevant privacy principles would not be anonymous. I hope in any event to have given you food for thought.