

THE OMBUDSMAN'S ROLE – LOOKING BACKWARDS, LOOKING FORWARDS

Address by Prof John McMillan, Commonwealth Ombudsman, to the Australian Public Service Commission Leadership Lunchtime Seminar

Sydney, 25 June 2003

It is a pleasure so early in my period in office to be invited to address this gathering, but the invitation also provides me with both an opportunity and a challenge. The opportunity is to raise one's head from the desk, to peer beyond the columns of files and papers, and to have a broader perspective on the daily workflow. The challenge is to think ahead – to develop vision as well as perspective.

For me this opportunity and challenge comes, coincidentally, at a strategic time. As I was musing about a theme for this talk it struck me that this week marks my hundredth day as Commonwealth Ombudsman. The period in office started very well for me – the first day was a public holiday, Canberra Day. Regrettably, it's got harder ever since.

In a world of journalistic desire, there is nowadays probably a hope or expectation that the head of an organisation, reflecting on their first hundred days, should deliver a message of comfort to the audience, telling of the dramatic change that has occurred and that has measurably improved the lot of everyone. Franklin D Roosevelt, after all, fulfilled his pledge to introduce the New Deal in his first 'hundred days'! My first hundred days has, by melancholy contrast, been curiously different, looking backwards as much as forwards. The reason is that I am in the interesting position of returning to an office in which I worked 24 years previously – coming back, as one colleague unkindly observed, to finish properly a job that I started 24 years ago.

When, 24 years ago, I worked as a Principal Investigation Officer with the Commonwealth Ombudsman, the office was in its early days. A major challenge at that time was to define not only the role of the Ombudsman, but also the method of investigation, the relationship of the office with executive agencies, its responsibility to complainants, its linkages with parliament – plus a host of other difficult and foundational questions. And, as is so often the case with new institutions of this kind, answers were not to be found in the legislation establishing the office, nor for the most part in the parliamentary and other materials that were part of the birth ceremony. The *Ombudsman Act 1976*, for example, was no more enlightening than observing in s 5 that the Ombudsman can investigate "action that relates to a matter of administration". Assisted only by that Delphic guidance, the Ombudsman's office had to carve out a philosophy of its own existence.

The answers that were forged in those early days are still highly prescriptive. The office to which I now return is, in many ways, the same as the office in which I worked so many years ago. The legislation establishing the office is

largely unchanged; the office continues to focus on its dual role of investigating individual complaints and improving public administration; the method by which investigations are conducted is very similar; the same words are used to describe the office in brochures and annual reports; and the public perception of the office is along the same lines.

Yet in other important ways the governmental and legal context in which the Ombudsman's office functions is nowadays very different – and context is all important: a cliché, but a truism.

One contextual difference about which much has been written is that government service delivery has been substantially outsourced over the last ten years:¹ the *Ombudsman Act*, still largely unchanged, was written at a time when there was a sharp difference between the public and the private sector.

Another noticeable contextual change is that the problems that confront government have in some respects a different order of complexity. The Taxation Act, for example, was hitherto a much smaller document, easier to navigate, and much less of an issue for people in the way that they structured their finances, their investments, their retirement planning, their family relationships – in short, their lives.² Similarly, the categories of social security entitlement were far fewer, and there was no category as inherently conditional and variable and apt to have as unpredictable an impact upon people as the family assistance benefit.³ Nor were there immigration detention centres playing a high profile role in defining social values in the manner they do in contemporary Australian society. In short, the complaints that an Ombudsman's office dealt with 24 years ago were qualitatively different in many ways: then, defective administration was easier to identify, easier to define, and often simpler to remedy.

Another contextual change is that there are now far more investigatory bodies and mechanisms than in earlier years. At the time of its creation, the Ombudsman's office largely stood alone, in an administrative law and regulatory landscape that included a few tribunals and a less active court system.⁴ Now, there are a plethora of different agencies that undertake administrative investigation and review. Anti-discrimination, equal opportunity and human rights commissions have been established. The Auditor-General's function has expanded to include government efficiency audits and the improvement generally of public administration. Public service commissions have likewise become more active in defining the values of public service and good administration. Anti-corruption commissions exert a

¹ Eg, Administrative Review Council, *The Contracting out of Government Services*, Report No 42 (1998); R Creyke, "Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government" in J McMillan (ed), *Administrative Law under a Coalition Government* (AIAL, 1997) 20-64.

² Eg, Commonwealth Ombudsman, *ATO & Main Camp - Investigation into the Australian Taxation Office's Handling of Tax Deduction Claims by Investors in Main Camp* (2001)

³ Eg, Commonwealth Ombudsman, *Own Motion Investigation into Family Assistance Administration and Impacts on Family Assistance Office Customers* (2003).

⁴ R Creyke & J McMillan, "Administrative Law Assumptions ... Then and Now" in Creyke & McMillan (eds), *The Kerr Vision of Administrative Law – At the Twenty-Five Year Mark* (CIPL, ANU, 1998) 1-34.

strong focus on public sector corruption and standard-setting. Most executive agencies have both formal and informal complaint mechanisms, oversight bodies and community consultation procedures. Parliamentary committees are more active in reviewing government administration. Inspectors-general, of taxation, defence and intelligence and security have been established. Industry ombudsmen, covering both the private and the public sector have proliferated in areas as diverse as telecommunications, banking, health insurance, superannuation, and energy and water.

Collectively those developments pose a question that is as important practically as it is philosophically and symbolically: what is the distinctive role nowadays of a government ombudsman?

Other philosophical challenges are thrown up by those trends. For example, 24 years ago, as I noted earlier, the Ombudsman's office was located in the public mind in an administrative law setting. Even then, however, different labels (that still have currency) such as "parliamentary ombudsmen" and "industry ombudsmen" were used to differentiate between categories. More recently, it has become fashionable to describe ombudsmen as "integrity" commissioners, philosophically grouped with anti-corruption commissions and auditors-general. How important is that nomenclature? Does it define or transform the nature of the office?

Those questions, which are as important as they are difficult, are ones that unavoidably confront any Ombudsman. This talk would be insufferably long if I attempted to answer all of them – or even some of them comprehensively. Instead, I shall explore in general terms how I think those questions need to be addressed. Essentially, it is by focusing on two core issues: why has the Ombudsman model been as successful as, in my view, it has been; and what, nowadays, is the distinctive role of an Ombudsman?

The success of the Ombudsman model of administrative investigation

I should initially say a few words about that presupposition, that the Ombudsman model has been and continues to be successful. The presupposition is drawn from much of what I earlier said:

- thirty years after it was first established in Australia⁵ the Ombudsman office is largely unchanged;
- there is a high degree of government and public acceptance of the office;
- Ombudsmen continue to receive a high number of public complaints and inquiries – in my own case nearly 20,000 complaints and a further 20,000 contacts each year;
- the Ombudsman's office has never been bedeviled by major controversy, as some other investigatory and regulatory bodies and administrative law review agencies have been;

⁵ The first Australian Ombudsman was established in Western Australia in 1971 (*Parliamentary Commissioner Act 1971* (WA)). Legislation establishing the office of Commonwealth Ombudsman was enacted in 1976, and the first Commonwealth Ombudsman commenced on 1 July 1977.

- the Ombudsman model has been widely copied in the private sector, by the creation of industry ombudsmen;
- there are now international benchmarks defining what can be classified as an Ombudsman's office;⁶
- and, probably most importantly of all, the various Ombudsmen in Australia have played a causative role in engineering major and permanent systemic change to the way that government is carried out, for example, by the widespread introduction of internal complaint procedures in agencies, the adoption of government customer service charters, the expansion of the schemes for payment of compensation for defective administration, and the acknowledgement by agencies that oral advice should be documented.⁷

Many reasons lie behind that success, but chief among them is that the office has mastered the fine art of striking a balance between the competing pressures that permeate much of its work. The question of balance can arise in many different ways.

Doubtless the most prominent activity where balance is needed is in working effectively with both parties to every investigation – with the complainant, invariably a member of the public; and with the government agency about which a complaint has been made. It is, on the one hand, essential for the Ombudsman's office to work cooperatively with government agencies. Already in the short period I have occupied the office, I see clear-cut examples of where the public can be helped more effectively if the Ombudsman has the trust, confidence and respect of the government agency under investigation. An agency will be less guarded, more open and even prepared to go the extra mile in exploring the dimensions of a problem and the solution if there is a cooperative relationship. The point needs no elaboration, that a relationship built upon belligerence and hectoring will be unproductive.

On the other hand, the Ombudsman must maintain an independence of the executive government that is sufficient to leave the Ombudsman free to criticise an agency when appropriate and to shine a public spotlight on decision-making problems and executive deficiency. That, to my mind, is an essential part of the Ombudsman's role – a role that, if not discharged by the Ombudsman, may not be discharged by anybody in government. Publicity can serve many purposes. It is intertwined with our notion of the public accountability of government. Publicity can alert other members of the public to a grievance they are enduring but not pursuing. Publicity about a problem can also bring more people into the debate about how a problem should be resolved. Publicity can also hasten a solution to a problem.

⁶ Eg, see the website of the International Ombudsman Institute – www.law.ualberta.ca/centres/ioi.

⁷ Eg, see the following reports by the Commonwealth Ombudsman: *Issues Relating to Oral Advice: Clients Beware* (1997); *A Good Practice Guide for Effective Complaint Handling* (1999); *Balancing the Risks* (1999); *To Compensate or Not to Compensate* (1999); and *Report on Investigation of Administration of FOI in Commonwealth Agencies* (1999).

Yet, to look again at the other side of the balance, adverse publicity can sometimes be more threatening and egregious to an executive agency than any other form of accountability. There is perhaps nothing that can more quickly destroy an effective working relationship with an agency than an overuse or inappropriate use of publicity as a tool of accountability.

As those observations suggest, I find the issue of publicity to be among the more difficult and confronting issues that I deal with as an Ombudsman, not just now, but – I conjecture – over the next five years. The topic comes up frequently in conversation, both in and outside the office.

It is clear, on one side of the debate, that some observers would like the Ombudsman to display more the style of some other regulators, and to nurture a higher public profile, perhaps to be more combative, more censorious, more adversarial. My guess, however, is that it would be counterproductive to do so, and ultimately disadvantage the public.

Equally, however, executive agencies need also to be hard-headed in accepting that any public statement is capable of over-dramatisation or misrepresentation. I encountered that dilemma the other day, in talking to one newspaper about inquiries my office was undertaking into injuries suffered by young people in government service. I said to the journalist, rather equivocally, that this was of course a sensitive and controversial issue. My immediate fear (which fortunately didn't materialise) is that the banner headline would then read "Ombudsman investigates sensitive and controversial issues in government agency". (This reminds one of the anecdote about the Pope visiting Washington. As he alights from the plane a journalist asks, "Pope, will you be visiting any discotheques while in Washington". To which the Pope inquires, "Oh, are there discotheques in Washington?" Needless to say the headline next day reads, "Pope's first question: are there any discotheques in Washington?")

Striking a balance between working cooperatively with government agencies, yet being independent of those agencies, is therefore a key to the Ombudsman's success. In other areas too a balance must be struck.

There is a need for balance in representing a complainant and articulating their grievance, but not taking on the role of advocate of the complainant's cause. At any moment in time someone will allege that the balance is wrong. Indeed, after only three months in the job, I understand that I have already provoked one complainant to urge many members of parliament to take whatever action they can to have me removed from office as soon as possible!

A third area where balance is needed is in the allocation of investigatory resources, between the investigation of individual complaints, and the conduct of own motion inquiries and preparation of reports on systemic defects in public administration. Both activities must be undertaken, yet both are resource intensive in their own different ways and potentially threaten the effectiveness of the other role.

Finally, at a more personal level, I am faced with the need to strike a balance between continuity and innovation. I occupy an office that has nearly three decades of experience and wisdom behind it; the value and importance of that heritage should not be discounted. On the other hand, a particular virtue of the Commonwealth Ombudsman's office has been, in my view, the appointment of a new Ombudsman every five years – I am now the seventh Ombudsman since 1977. This periodic change in the office distinctly provides an opportunity for renewal and renovation.

In summary, striking the correct balance between the competing pressures that permeate every aspect of the Ombudsman's work is to my mind the key to the continued success of the office.

The distinctive role of the Ombudsman in a contemporary setting

I noted earlier that the Ombudsman is now one of many similar bodies that undertake administrative investigation. Does the Ombudsman any longer play a distinctive role?

No longer is it adequate, in my view, to answer in broad generalities that the Ombudsman investigates complaints about government administration, or that the Ombudsman improves public administration. Those criteria do not distinguish the office sufficiently from other administrative investigatory agencies. Generic criteria do not explain adequately why, in a structural sense, you still need an Ombudsman – or, looking ahead, why it is important to have a better-funded Ombudsman. Nor do broad generalities provide definitive and practical guidance to Ombudsman staff as to the objectives to be pursued in each investigation, or as to how far an investigation should be taken.

To take an example of a different kind, it is nowadays important that investigatory agencies have a clear view as to how they relate to each other. For example, I could investigate administrative wrongdoing by the Privacy Commissioner or the Human Rights Commissioner, and they could equally examine a breach by me of the standards that they administer. But should we investigate each other, or does that question require a qualified answer? Just recently in Tasmania the issue had to be addressed: the Director of Public Prosecutions asked the Ombudsman to investigate the Anti-Discrimination Commissioner (which reminds us that not every *ménage à trois* is necessarily a happy one.) And, unsurprisingly, the dispute ended up in the Supreme Court – which held that the Ombudsman had jurisdiction to investigate the Anti-Discrimination Commissioner, and intimated that the Ombudsman's adverse findings against the Commissioner were correct and reasonable.⁸

I have faced similar issues. Should I, for example, accept an invitation from a government agency to investigate a long-running complaint that had been made, in one instance, about its administrative action, and in another

⁸ *Anti-Discrimination Commissioner v Acting Ombudsman* [2003] TASSC 34

instance, about administrative action by a statutory authority for which it had portfolio responsibility?

All those are complex issues to which there are no straightforward answers. Answers nevertheless have to be given from time to time, drawing not only from the *Ombudsman Act* but also from underlying theory about the role of the Ombudsman. I shall briefly advert to two considerations that in my view are elemental in addressing any such issue.

In the first place, the central role and perspective of the Ombudsman is, in my view, to look at the impact of government on the individual. Government decisions are driven by many imperatives – political and budgetary objectives, historical considerations, workplace constraints, and so on. What is a good or desirable decision can reflect very much the perspective of the analyst. However, a common feature of most administrative decisions is that they can impact in one way or another upon members of the public. A chief role of the Ombudsman, usually at the instigation of a complainant, is to investigate whether the impact of government administration on the individual is harsh, or discriminatory, or generally unacceptable. It is rightly said that the role of the Ombudsman is to investigate whether there has been defective administration by an agency, but that question is necessarily intertwined with the broader issue of the impact of government decision-making on the individual. Even the best rules and policies can have unintended and disconcerting consequences.

This perspective does distinguish the role of the Ombudsman from other similar bodies. Many agencies in government – such as audit offices and public service commissions – undertake inquiries into the standards of public administration and whether there has been defective decision-making. An inquiry of that kind can be inward looking, focused on the internal competence and efficiency of government, but equally it can be outward looking, focused on the impact that government is having on the individual. If the latter, then an Ombudsman perspective can be important if not essential. In some cases, indeed, it would be better that the inquiry be undertaken by the Ombudsman in preference to another agency.

There is a correlative obligation on the Ombudsman's office to cultivate that perspective, and to better understand the impact that government has on others. That obligation has to be met in many ways. The most regular and familiar way is by speaking to complainants, and by undertaking outreach activity. Even internally, however, in the course of investigation, it is important to remember that inquiries usually start and should end by gauging the impact that government decision-making is having on others. There is often a risk of losing that perspective and transforming an inquiry into a general exercise designed to improve government administrative practice. The line is a fine one, but should not be ignored for that reason.

A second distinctive role of an Ombudsman's office is to bring outside values into the business of government.⁹ Every organisation and institution is guided by a set of values that are often laudable and help to ensure the integrity of the institution. Nevertheless, every set of values is selective and (to borrow the usual parody made of hospitals and schools) is at risk of reflecting the efficiency and self-preservation of the institution, more than the interests of the clients. The danger always is that external values are not well understood within an institution.

Government especially must be astute to this danger. Many government policies and systems are acknowledged as having a potentially harsh impact on people. Across the spectrum of government, there is power to detain for indefinite periods, to search premises and to seize property, to appropriate for one purpose money owing to a person under a different scheme, to deny or withhold benefits, and to impose penalties and other detriments. It is well understood within government that powers of a coercive and detrimental nature must be exercised in strict compliance with the legislative rules. But that alone is not a satisfactory approach to the exercise of such power: it is equally necessary to appreciate the context in which the power is exercised and the differing perspectives – the outside values, as it were – that should bear upon its exercise.

Part of the Ombudsman's function is to ensure that those outside values play a role in government decision-making. It can often happen that the outside values and the internal rule orientation lead to the same unhappy conclusion, that a legislative scheme has the inflexible potential to operate very harshly. Nevertheless, the way that decisions are made can be tempered by the values that bear upon the process.

Conclusion

I have given a partial selection of some of the challenging and fascinating issues that confront me as a new Ombudsman. The issues arise in an old office, but in a government climate that is always changing. Many of the issues are of broader relevance to how government relates to the community and how it should discharge its function. They are, to that extent, issues that concern us all, and on which I urge others to form a view. Thank you for the opportunity to share with you some of my early thoughts on how I propose to address them.

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⁹ I acknowledge my colleague, Kay Templeton, Assistant Ombudsman (Sydney) for this point.