

THE OMBUDSMAN, IMMIGRATION AND BEYOND

*Address by Prof. John McMillan, Commonwealth Ombudsman,
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I want to focus on the 'beyond' part of my title, and to look at where the office is heading. The reason is that we are in the midst of a period of great change in the office. The best way of describing what the office is doing now is to look at where it is heading. I will briefly describe that change before picking out five themes that describe our future directions.

- We start the picture with an office that has been in existence for 28 years, which is spread across eight offices in each State and Territory, and which deals with up to 20,000 complaints a year (mostly against Centrelink, ATO, CSA, DIMIA, Australia Post and Defence).
- The work of the office was largely stable over that period—staff numbers in the annual report were 72 in 1990, 86 in 1996, and 82 in 2003. When the recent round of recruitment is completed the staff numbers will reach over 140. In fact, just this morning we decided to take space in another building because we cannot house the 90 plus Canberra-based staff in the existing accommodation.
- This growth in staffing and activity in the office has come about by the acquisition of new functions by the office. Much of the growth has occurred in the immigration area, because of two specialist roles recently given to the office, of reviewing the situation of long term detainees, and reviewing 220 other cases ...
- But there has been growth in other areas as well. In addition to the two traditional functions of complaint investigation and own motion investigation, the office has a growing role in compliance auditing to ensure compliance by law enforcement agencies with legislative requirements relating to telephone interception, electronic surveillance, and controlled operations.
- The office will soon develop a role of Postal Industry Ombudsman that applies to postal service providers in the private as well as the public sector.
- Legislation before the Parliament will also give the office a general jurisdiction applying to contracted services, by deeming the services provided to the public by a government contractor to be the actions of a government agency.
- Other activities have also been extended, such as an outreach program in regional Australia that involves at least one outreach activity each week, and the development of a mutual support network among Ombudsman offices in the Asia-Pacific region

- It is interesting to note that there are comparable developments at State level. An example is the NSW Ombudsman's office, which has grown from a staff of 14 in 1975 to nearly 200, and now exercises functions such as the oversight of reportable deaths, and monitoring of child abuse allegations. In a comment that applies equally to my office, the NSW Ombudsman Bruce Barbour recently observed that these developments 'challenge our traditional notions of what a public ombudsman is and does'.

I will now look at the implications of some of those directions.

1. Re-positioning the Ombudsman's office in the structure of government

I can best introduce this point by noting that the office may soon host seven different titles—Commonwealth Ombudsman, ACT Ombudsman, Defence Force Ombudsman, Taxation Ombudsman, Immigration Ombudsman, Postal Industry Ombudsman and (possibly) Law Enforcement Ombudsman. I have been a strong supporter of this development, which has been a response to a number of interlocking pressures and trends.

One is that there is a public expectation that in selected areas of government that fall under the spotlight of public accountability, an oversight body will bring to that role a distinctive profile and a specialised understanding of the area being monitored. This is illustrated by the Government's recent decision to re-badge our existing and long-standing role of overseeing immigration as a new role of Immigration Ombudsman. The extra funding that will come with that role will enable the office to play a more active role than hitherto, in conducting own motion investigations, monitoring activity (such as compliance) that is more prone to complaints, developing expertise in complex areas such as detention health, participating in departmental training activity, and liaising with non-government organisations.

Unless the Ombudsman's office can host specialist functions, there is a growing risk of its jurisdiction splintering and being replaced by a larger number of specialist oversight agencies. There are signs of that trend in the recent past—the creation of bodies such as the Inspector-General of Taxation, the Inspector-General of the Australian Defence Force, and the Inspector-General of Intelligence and Security. I don't suggest that the role of those bodies should have been given to the Ombudsman, but they illustrate both a trend and a challenge for the Ombudsman's office. The dangers and the opportunities are both illustrated by recent changes to State Ombudsman jurisdiction. In some States, functions have been taken away from the Ombudsman and given to a specialist body: examples are the Information Commissioner function in Queensland, and the police complaints jurisdiction in Western Australia. On the other hand, new functions have been conferred on State Ombudsman offices: examples are the oversight of reportable deaths in NSW, and the Energy Ombudsman function in Western Australia.

The Commonwealth Ombudsman's office is responding to these trends and pressures by repositioning itself as a generalist office with a cluster of specialities. This enables us to develop a specialised oversight program in

selected areas of government, but it also means that we can bring to all areas of our work the insight and experience that one gains from dealing with problems across the spectrum of government. That experience has in the past enabled the office to undertake some of its best work, in correcting the common problem areas in administrative decision-making, such as complaint handling, recording oral advice, explaining decisions, and assessing claims for compensation.

Another important reason for repositioning the office as a generalist office with a cluster of specialities is that an established office is often better placed to deal quickly and effectively with new challenges. For example, the new Immigration Ombudsman function was conferred less than four months ago, and is now fully-functioning, dealing with the long-term detention cases, visiting detention centres around Australia, handling an increased number of complaints, and making reports to parliament and parliamentary committees. That is possible only because the office can readily draw from its own experience and tradition, its national infrastructure of eight separate offices, and its tried and developed case management systems.

2. Understanding better the nature of our work

It is customary to use generic language to describe the role of the Ombudsman. A common description is that the role of the Ombudsman is to investigate complaints received from members of the public about the administrative actions of government, and to make recommendations for reform, ultimately to the legislature. The same description is given to Ombudsman offices in Australia and internationally, conveying the idea of a universal methodology for overseeing government.

One can derive strength from a common purpose, but there is equally a danger in simplifying important differences. And there are important differences between the jurisdiction of the Commonwealth Ombudsman and the Australian State Ombudsmen. The majority of complaints to the State Ombudsmen arise in areas such as policing, local government, corrections, juvenile justice, and public transport. The investigation of those complaints often focuses on allegations of abuse of power by government, questionable behaviour, conflict of interest, and insensitivity.

Many of the complaints to the Commonwealth Ombudsman are about Centrelink, the Australian Taxation Office, the Child Support Agency and Australia Post. Features that are common to the complaints against those agencies are that they stem from highly complex laws, that are administered by large agencies that employ tens of thousands of employees around Australia; the laws and administrative procedures are not well understood by government clients, or sometimes even the administrators; the complaints are often about money, including debt recovery; and the complainants have an ongoing relationship with the agency that is at risk of becoming toxic.

Those differences in the Commonwealth Ombudsman's jurisdiction impact on our work in many ways, which we are now exploring. We are giving added emphasis to the development of specialised teams in the office that

understand the complexity of the laws in question. We are developing a Public Contact Team in Canberra, through which all complaints are channelled so that we can better pick up the complaint trends around the country and in complex areas; this will free investigation officers to devote more time to dealing with the complex cases. We are re-defining our statistical and reporting categories, to focus more on the assistance and remedies we provide to complainants, and less on making an artificial judgement about whether the complaint was upheld or dismissed, or there was a defective agency decision. And we are exploring the use of different oversight mechanisms, such as administrative audits to examine whether there are systemic difficulties in complex administrative systems.

The differing nature of Commonwealth and State Ombudsman jurisdiction can be relevant in other ways too. My general impression is that there is more media interest in NSW in the role of the State Ombudsman than the Commonwealth Ombudsman, perhaps because my State counterpart is reporting upon such matters as child abuse, deaths in custody, and over-zealous behaviour of public transport guards. Not surprisingly the two areas of the Commonwealth Ombudsman's jurisdiction that attract most media attention are immigration detention and military justice.

It is likewise my impression that a State Ombudsman can more easily gain an audience with a Minister, because the State Ombudsman is dealing with issues at the heart of politics. The defining issues on the federal political agenda—foreign relations, interest rates, and industrial relations—are rarely the concern of an Ombudsman. The focus of advocacy and lobbying in my office is more likely to be senior departmental officers, and that endeavour will often be more successful when conducted away from the glare of public confrontation.

Interestingly, my office can also learn a great deal from the industry ombudsman, such as the Banking, Telecommunications and Energy Ombudsman. There is a close correspondence between many of the issues arising in their jurisdiction and in my own. Many complaints to the industry ombudsman are received from continuing customers, faced by rules they don't understand, that are constantly changing, and that result in a financial burden or disadvantage. The relationship that my office is currently developing with industry ombudsman schemes contrasts with the experience elsewhere, which sees industry ombudsman excluded from the International Ombudsman Institute, and industry ombudsmen responding in Australia by establishing their own association (provocatively called the Australian and New Zealand Ombudsman Association).

3. Lessons from Rau and Alvarez

The two reports on the Rau and Alvarez cases prepared by Mick Palmer and Neil Comrie have been a watershed in public administration and external oversight. The changes that those reports caused to the structure and program of the Department of Immigration are well known to this audience. Those reports also lie behind the increase in functions, funding and profile of

my own office. But the lesson of those reports should also prompt us to ask some deeper questions about administrative law and government oversight.

We are prompted to engage in deeper inquiry by this circumstance. It is often said that administrative law oversight provides a brake upon the abuse of power; that it leads to better decision-making; that it infuses administration with principles of rationality and proportionality and the like; and that in a system of separation of powers, administrative law is the main institutional mechanisms for ensuring executive compliance with law, and upholding the rule of law.

It is hard to see those claims reflected in the Rau and Alvarez reports. And yet, on conventional public law theory, they should have been. After all, DIMIA is the most reviewed and scrutinised of all Commonwealth agencies. Each year tens of thousands of immigration decisions are reviewed in courts and tribunals, making it the highest volume area of review in the High Court, Federal Court and Federal Magistrates Court. Every aspect of DIMIA operations has been thoroughly scrutinised by the Ombudsman, HREOC, the ANAO, the IDAG and parliamentary committees.

The uncomfortable conclusion from the Rau and Alvarez reports is that administrative law, at least in this episode, failed to deliver on the challenge it had set itself. The theme of both reports, accepted without qualification by the Government and the Department, was that there were deep-seated problems to be corrected only by far-reaching cultural and managerial change. Administrative law oversight had not caused that change. Rather, it came about through political debate and commitment to change.

This in turn raises other questions, to do with the limitations of administrative law—whether it plays as much of a role as often claimed in securing good decision-making, and indeed whether overactive review can in fact worsen rather than improve the standard of public administration by misdirecting attention to the wrong issues. I will put those questions to one side, because my principal concern in this talk is the implications that Rau and Alvarez have for the role of the Ombudsman.

And the implications are many. The challenge confronting us in the new role of Immigration Ombudsman is to ensure that problems of the kind exposed in those reports do not reappear. A different program of oversight will thus be required that relies on methods other than individual complaint investigation to identify and correct recurring problems in departmental administration and regulation. We also have to pay continuing attention to whether changes and improvements that we recommend are embedded in departmental practice, notably in State and regional offices.

Another important lesson from Rau and Alvarez is that a single and well-written report can be more effective in triggering political and departmental change than a decade of oversight by courts, tribunals and investigation agencies. The same lesson can be seen in other areas as well. The major revamp of Customs administration stemmed from the report in the Midford Shirts imbroglio. There is the prospect that the Senate report on Military

Justice will have a similar effect on Defence. In a more limited sphere, two reports this year by my own office, on Redress of Grievances and on the management of under-18s in the defence forces, have stimulated more change than other forms of oversight have managed to do.

In summary, the lesson for all investigation bodies, including my own office, is that their effectiveness will be a function of how strategic they are in performing their work. At the end of the day the only powers of the Ombudsman's office are to persuade and to publish. They can be powers of great effectiveness when used wisely.

4. Investigation/inquiries as a new form of regulation in government

The Rau and Alvarez reports illustrate another point—that investigations and inquiries are steadily developing as a new form of regulation in government. Independent inquiries are nothing new, and royal commissions and other forms of inquiry extend far back. But these usually occurred at the edge of government, when something went wrong.

Inquiry mechanisms are now built into the fabric of government in a more penetrating and systematic manner. There are now a substantial number of statutory authorities with an inquiry function, such as Ombudsmen, inspectors-general, discrimination commissioners, merit protection agencies and anti-corruption bodies. Inquiry mechanisms are written into the statutory procedures for decision-making, in areas as diverse as taxation, heritage protection, corporate regulation and child support assessment. The Government's response to the Military Justice report included the creation of a new investigations unit in Defence.

It is also the experience of my own office that many of the larger complaints we receive are about issues that have already been the subject of an independent report commissioned by the agency. Indeed, it is quite common nowadays for agencies to respond to us by saying that they will conduct their own inquiry into the issue in dispute. Examples from DIMIA are the reports they commissioned in the riot at Port Hedland and the transfer of detainees from Maribyrnong. It is apparent also that there is now a large industry of consultants and law firms that make a business of undertaking investigations and inquiries for government agencies.

This development is of great interest to my own office in a number of respects. It firstly shows the important role, often a central role, that investigations now play in government regulation and the development of public policy. There was a time, immortalised in *Yes Minister*, when the preferred way of burying an issue was to appoint an independent inquiry. I think that has changed. Many government agencies see investigations and inquiries as the mechanism for resolving a problem. If an inquiry report is well-reasoned, I think the modern view is that it should generally be implemented rather than pigeon-holed. This is illustrated by the government response to recent reports such as Rau and Alvarez; but it has also been the experience of my own office in recent reports we have published on defence, immigration and child support.

This poses an exciting challenge for investigation agencies such as my own. But it likewise focuses attention back on the investigation side of the process. The growing importance of inquiries and investigations is not necessarily matched by developing expertise in how to conduct investigations and inquiries. Beyond the realm of policing, investigation skills do not attract disciplinary interest in the separate way that other skills often do. It is easier, for example, to study mediation, or financial management, or policy development. As to investigation as a discrete skill, there is little on offer in the way of training and other courses on how to conduct investigations. It is not a matter that is generally taught by universities or others. Nor are there manuals to which one can easily turn, to gain guidance and answers to common problems.

Our legal framework for conducting investigations is also deficient: there is, for example, no Commonwealth inquiries statute that confers legal powers on inquiries, and provides both the inquirer and witnesses to the inquiry with protection and immunity against legal proceedings. The absence of this statutory backing for executive inquiries became important in the Rau/Alvarez inquiries, and was a reason why the completion of the Alvarez inquiry was transferred to the Commonwealth Ombudsman's office. The Ombudsman Act does provide that framework, enabling the office to act as a royal commission could in conducting a far-reaching inquiry into any issue of government administration.

5. Repositioning the Ombudsman's office in the constitutional system

The picture that I have presented shows, I hope, that bodies such as the Ombudsman's office nowadays play a role in the government accountability system that is not fully understood. A common stereotype of the Ombudsman's office, especially in legal and academic literature, is that the office is characterised by two features: the Ombudsman mostly handles minor grievances about administrative procedure and fact-finding; and that the office lacks determinative power, relying on 'soft' rather than 'hard-edged' remedies.

That stereotype of the Ombudsman's office is propelled by conventional thinking, rooted in the separation of powers, which contrasts the role of the Ombudsman with the role of courts. Whenever discussion turns to upholding the rule of law, to holding government accountable, and to protecting human rights, it is customary in legal and academic commentary for the discussion to focus on the role of courts and judicial review.

That is misleading in a number of respects. It glides over the substantial areas of government administration that are barely touched by judicial review, but are daily subject to a high volume of review by ombudsmen, tribunals, internal review and similar mechanisms. Examples are decision-making and service delivery in Centrelink and Australia Post. Nor does judicial review ordinarily deal with decisions made under executive power, which is of growing importance in all areas of government. Examples are decisions made under the GEERS scheme, the CDDA scheme, and trades skill recognition. Government service delivery that is undertaken by private sector contracted

service providers, such as Job Network providers, also generally falls beyond the scope of judicial review, but not necessarily Ombudsman or similar review.

These shortcomings in conventional thinking about control of government and protection of rights are evident in the current debate about accountability mechanisms in existing and proposed counter-terrorism legislation. Much of the debate is focused on whether there are limitations on judicial review of questioning and detention powers, and restrictions placed on access to lawyers. Without discounting the importance of those issues, it is worth noting that little is said about the role of the Ombudsman and the Inspector-General of Intelligence and Security in overseeing action taken respectively by the Australian Federal Police and the Australian Security Intelligence Organisation. My counterpart, the Inspector-General, makes regular visits to ASIO to inspect the documentation for all search warrants and questioning and detention warrants issued under the ASIO Act, and attends the questioning sessions conducted by ASIO. The IGIS has the powers of a royal commission, and reports to a special parliamentary joint committee that oversees ASIO, ASIS and DSD. On any view the IGIS plays an active, central and continuing role in ensuring that public law values are upheld in the government security intelligence system.

In my view the role of ombudsmen, tribunals, inspectors-general and like bodies is not well-understood in legal and academic thinking. The significance of their role is often overlooked and understated. A contributing cause of this misunderstanding is a timeworn and unrealistic view of the separation of powers, which positions these agencies in the executive branch of government, and treats the judiciary alone as the justice and oversight branch of government. An alternative constitutional theory would, focused on how our system has actually evolved, would describe four branches of government — parliament, courts, the executive, and (what I would loosely call) an oversight, review and integrity branch of government.

Within our governmental system there are now a large number of independent statutory bodies whose task is not to deliver government services and formulate policy, but to oversight and review the executive agencies that perform those tasks. The oversight and review agencies include ombudsmen, administrative tribunals, auditors-general, inspectors-general, privacy and information commissioners, human rights and anti-discrimination commissioners, and independent crime commissions. The chief role of these agencies is to ensure legal compliance, good decision-making, and improved public administration within the executive branch of government. We will enhance respect for public law values within government by readjusting our constitutional theories to take account of this new and effective system for control of government action.

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