

Designing an effective FOI oversight body - Ombudsman or independent Commissioner?

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Introduction

An essential feature of freedom of information legislation is that an independent body must be given power to review the merits of disputed agency decisions on exemptions, charges and other FOI issues. Which body is best placed to perform that role - a court, tribunal, ombudsman, specialist FOI or Information Commissioner, or a combination of those options?

Australia has grappled with that issue for twenty-five years. Each option has been adopted by one or other of the nine Australian legislatures. The issue is now back on the agenda following the election in November 2007 of a new national Labor Government that made a campaign commitment to establish an independent commission with three commissioners - a Freedom of Information (FOI) Commissioner, a Privacy Commissioner, and an Information Commissioner to head the new agency¹. The Queensland Government has also established an inquiry into FOI that is looking at the same issue.

The recent debate in Australia has focussed on three issues that intersect:

- whether to separate or combine the Ombudsman and FOI Commissioner functions
- whether to separate or combine the Information and Privacy Commissioner functions
- whether to separate or combine the complaint investigation and determinative functions.

As those issues indicate, the debate has moved away from using courts and tribunals as the major FOI oversight body. Partly this reflects a preference for the low cost and flexible role that an ombudsman or commissioner can play. Partly too it recognises the inherent disadvantage faced by an FOI applicant in tribunal or court proceedings, who does not have specific knowledge of the contents of a document for which an exemption claim has been made.

The shift to an ombudsman or commissioner acknowledges also the need for an FOI champion in the system of government. Unless there is an FOI champion, open government will dwindle in importance. Governments and their departments are not inclined naturally to be open and inclusive. Moreover, the functions of government are spread across hundreds of different departments, authorities and committees, all of which are subject to the FOI Act. The operation of the Act will be patchy and uneven unless there is a single oversight body that can focus attention on the whole-of-government responsibility to comply with minimum legislated standards for openness.

¹ See 'Government Information: Restoring Trust and Integrity', Australian Labor Party Election 2007 Policy Document, October 2007.

I will start with a brief sketch of the development of FOI laws in Australia.

The Australian Experience

Development of FOI laws in Australia (in nine jurisdictions)

Australia has a federal system of government, with nine government jurisdictions: a national (called the Commonwealth) system of government, six State government systems, and two Territory systems. Federations offer the opportunity for experimentation and diversity in devising laws. That has been the experience in Australian FOI development. Most of the major options for FOI oversight have been adopted in one or other jurisdiction. Australia therefore provides an interesting case study in FOI design.

Federalism also provides a setting for contest between government systems to out-perform each other in designing laws and programs. It is noteworthy that inquiries into FOI laws have recently been established in three Australian jurisdictions (Commonwealth, Queensland, and NSW) and reforms were implemented in another in response to a damning Ombudsman report (Victoria)².

Ombudsman with an FOI function (Commonwealth, New South Wales, Victoria, South Australia, Tasmania, Australian Capital Territory)

The first Australian Freedom of Information Act was enacted by the Commonwealth Parliament in 1982. This occurred soon after the introduction of a new system of administrative law. It was therefore understandable that the oversight option chosen at the time was a combination of the Commonwealth Ombudsman and the Administrative Appeals Tribunal. The Ombudsman could investigate complaints about agency administration of the FOI Act, and make recommendations change agency decisions and practices. Most FOI decisions - on exemptions, charges and processing refusals - could be appealed to the Administrative Appeals Tribunal, which could make a fresh decision in substitution for the decision under review.

Five other jurisdictions - NSW, Victoria, South Australia, Tasmania and ACT - also relied upon the Ombudsman to perform an FOI oversight role. There were some modifications. For example, the Victorian and ACT Ombudsmen were authorised to commence or intervene in tribunal proceedings on behalf of FOI applicants³. In NSW an agency can remake an FOI decision in response to a suggestion or recommendation by the Ombudsman⁴. In Tasmania, the Ombudsman has a determinative function, to decide any issue that an agency can decide and to substitute a new decision⁵.

² The Commonwealth inquiry is to be conducted by the Australian Law Reform Commission (www.alrc.gov.au). The Queensland inquiry is being conducted by the Freedom of Information Independent Review Panel appointed by the Queensland Government (www.foireview.qld.gov.au). The inquiry in NSW is being undertaken by the NSW Ombudsman, following a government failure to establish a joint inquiry with the Ombudsman (www.ombo.nsw.gov.au). In Victoria, see Victorian Ombudsman, *Review of the Freedom of Information Act 1982* (2007), available at www.ombudsman.vic.gov.au.

³ *Freedom of Information Act 1989* (ACT) s 57; *Freedom of Information 1982* (Vic) s 57.

⁴ *Freedom of Information Act 1989* (NSW) s 52A.

⁵ *Freedom of Information Act 1991* (Tas) s 48.

Separate Information Commissioners (Queensland, Western Australia) and Privacy Commissioners (Commonwealth, New South Wales, Victoria)

The more recent trend in Australia has been to confer the FOI oversight function on an independent Information Commissioner. An office by that name was established in both Queensland and Western Australia in 1992, when FOI was enacted in both States. The Queensland Act provided that the Queensland Ombudsman would fill the role pending the appointment of an Information Commissioner⁶. The Ombudsman fulfilled that role until 2005 when a Commissioner was appointed, although the Ombudsman always gave separate badging and accommodation to the Information Commissioner office.

The office of Information Commissioner in Western Australia always operated as a separate office, although it was recently co-located with the Ombudsman.

The Information Commissioners in both Queensland and WA (as well as the Ombudsman in Tasmania) have a determinative function. That is, they can review any decision of an agency (for example, that a document is exempt) and substitute a new and preferable decision⁷. In 2007 in Western Australia the Government proposed that this determinative function would be transferred to the newly-established State Administrative Tribunal, and that the Information Commissioner would be confined to the roles of conciliating disputed FOI cases and reviewing the FOI processes of agencies. In both States the Information Commissioner position is held by an Acting appointment, while the office is being reviewed.

A development that predates the creation of Information Commissioners was the creation of independent Privacy Commissioners. They have been created by the Commonwealth in 1986, Victoria in 2000, and NSW in 2002⁸. The Privacy Commissioners discharge a similar role to the Information Commissioners, of dealing with individual complaints, making binding determinations, promoting the objects of the legislation, conducting training and public education, and monitoring agency performance under the legislation.

Combined Information and Privacy Commission (Northern Territory)

The Northern Territory is the most recent jurisdiction in Australia to enact freedom of information and privacy legislation, which commenced operating in 2004. FOI and Privacy principles are contained in a single Act, the *Information Act*, which is administered by an (Acting) Information Commissioner.

As noted earlier, the national Labor Government elected in 2007 foreshadowed during the election that it would establish a single agency, with an Information Commissioner, FOI Commissioner and Privacy Commissioner. The division of responsibility between the three commissioners was not spelt out. The Ombudsman and the Administrative Appeals Tribunal would lose their current FOI oversight role.

⁶ *Freedom of Information Act 1992* (Qld) s 61(2).

⁷ *Freedom of Information Act 1992* (Qld) ss 88, 89; *Freedom of Information Act 1992* (WA) s 76; *Freedom of Information Act 1991* (Tas) s 48.

⁸ *Privacy Act 1986* (Cth); *Information Privacy Act 2000* (Vic); *Health Records and Information Privacy Act 2002* (NSW).

Appeals on FOI and Privacy to an administrative tribunal (Commonwealth, New South Wales, Victoria, Australian Capital Territory) or court (SA)

As noted earlier, the approach first adopted in the Commonwealth was to give the determinative function to an independent tribunal, the Administrative Appeals Tribunal. A prominent reason at the time for doing so is that the FOI law was enacted at a time when there had been an unbroken tradition of government secrecy and control of information. The view was taken, rightly I think, that a tradition of official reticence would be broken only by a sudden break from the past. Part of the shock treatment was that the final decision on FOI disclosure would rest with an independent legal tribunal that would conduct open hearings in resolving the great contests about openness and secrecy⁹.

The same approach has since been followed in other Australian jurisdictions that have established a comparable administrative tribunal with a general jurisdiction to review administrative decisions on their merits - in New South Wales, the Administrative Decisions Tribunal; in Victoria, the Civil and Administrative Tribunal; in the ACT, the Administrative Appeals Tribunal; and, as currently proposed in WA, the State Administrative Tribunal. In some jurisdictions, prior to the establishment of a general jurisdiction administrative tribunal, the appellate body was the District Court. That is still the position in South Australia¹⁰.

A later development that has clouded the picture a little is that the filing fee for commencing an action in an administrative tribunal has steadily grown. It is currently \$639 in the Commonwealth¹¹. It is also more common now for government agencies to be legally represented (often by senior barristers) in FOI tribunal proceedings. The steady growth in the jurisdiction and membership of tribunals means also that it is perhaps less likely that the tribunal member hearing a case will be experienced in dealing with FOI issues.

The case for a separate Information Commissioner and Ombudsman

This section of the paper looks at factors that weigh in favour of creating the office of Information Commissioner separately from the Ombudsman. The following section discusses factors that weigh in favour of combining those functions in the one office.

Giving a separate and prominent profile to FOI

The creation of an independent Information Commissioner is a clear signal of the importance attached to freedom of information laws. The underlying message is that the FOI Act is a law of fundamental constitutional importance that warrants supervision by a specialist independent office.

⁹ For example, Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information* (1979) at paras 27.2, 27.23.

¹⁰ *Freedom of Information Act 1991* (SA) s 39.

¹¹ ACT, \$237; NSW, \$55 application fee, and \$230 for an appeal panel; Victoria, free for personal information cases and \$192.80 in other cases.

The dedicated role of an Information Commissioner is to be the FOI champion in government. The chief responsibilities are to promote open government ideals and ensure that all executive agencies honour both the letter and spirit of the FOI law. There are many parts to the role - dealing with complaints from the public about FOI decisions and service delivery issues; providing guidance and direction to agencies about FOI practice; conducting FOI training for agencies; providing similar guidance to members of the public about FOI processes; auditing agency compliance with FOI laws; and providing leadership in government on open government philosophy.

All of those functions sit easily and comfortably in the separate office of an Information Commissioner. An Ombudsman is able to discharge similar functions, although it is more common for an Ombudsman to focus on complaint and investigation functions, and to play less of a role in training, public education, and doctrinal leadership. Consequently, if an Ombudsman is to be the FOI champion, it is probably best to confer upon the Ombudsman a separate statutory role of Information Commissioner, with added profile and additional resources for the task.

Facilitating a determinative role for the Information Commissioner

An abiding principle of Ombudsman work is that the office is neither the representative of government nor the advocate of the complainant. The Ombudsman maintains a neutral and balanced position on all issues in government. A traditional way of safeguarding that principle is to confer recommendatory and not determinative functions on the Ombudsman. The final decision always rests with the agency, subject to a possible appeal to a tribunal or a court.

Consequently, a determinative role in FOI matters would not sit easily in an Ombudsman's office. There is, on the other hand, a similar argument that the role does not sit easily with an Information Commissioner, and that the determinative function best belongs to a tribunal or court. The predominant work of an Ombudsman or Commissioner is complaint handling and investigation. That work is discharged more effectively and quickly when there is a strong and trusting relationship with government agencies, based for the most part on cooperation and informal exchange of documents and opinions. It threatens that relationship if the Commissioner or Ombudsman has the option, at the end of the process, of making the final determination on an FOI issue, particularly an FOI exemption issue.

Nor is it uncommon for government agencies in FOI disputes to instruct senior legal counsel to present their views, and to insist on an adversarial hearing to resolve disputed factual and legal issues. Hearings of that kind are more suitably conducted by a tribunal than by a commissioner or ombudsman.

Insulating the Ombudsman from political and media battles over information disputes

There is a greater chance that agencies will take a defensive and combative stance in FOI matters than in other areas of administrative dispute. Disclosure of information can cause great political damage to governments and embarrassment for officials. Disputes about public disclosure of government secrets are often hard fought. As the NSW Deputy Ombudsman, Chris Wheeler, has observed, *'control over the dissemination of information is of vital*

*interest to people who are in power. Politicians and public officials are likely to perceive FOI legislation as creating risks for them personally, or political risks for the government of the day or risks of damage to the reputation of their agency*¹².

It may be easier for an Information Commissioner than an Ombudsman to take an activist and combative stance in resolving public disclosure disputes. In a sense, it is part of the job of being an FOI advocate and champion. There is more of a risk for an Ombudsman that an activist stance could damage its preferred approach of being outside the battle, and being an advocate of nothing more than legal compliance and good government.

Option of combining Information and Privacy

Some Information Commissioners, internationally and in Australia, have responsibility for both FOI and Privacy. The function of a Privacy Commissioner does not fit as easily in an Ombudsman's office. The complaint and investigation function is common to both, but this tends to be only a smaller part of the Privacy Commissioner's role. Privacy Commissioners have developed a broader focus on how personal information and data is managed by government - what can be collected and how, the way it is stored, how long it can be retained, the use that can be made of it, and who it can be disclosed to.

To discharge those functions properly, the Privacy Commissioner must devote considerable effort to training, development of policies and guidelines, public education, and monitoring agency performance. Increasingly, too, Privacy Commissioners have broadened their jurisdiction and focus to include the management of personal information in the private sector, particularly by banks and finance companies, large corporations, and hospitals and medical centres.

The argument can equally be put that those functions require an office that is separate from all other offices - not just the Ombudsman, but from an Information Commissioner as well. Indeed, there is a risk that the FOI and privacy functions will clash if located in the one office: one function is principally concerned with public disclosure of information, the other with confidentiality and protection of information. Whether that clash is best resolved within one agency, or between two agencies, is a challenging issue.

Jurisdiction over decisions of Ministers

Another important jurisdictional feature is that the Ombudsman cannot look generally at ministerial decisions¹³. And yet, FOI legislation generally applies to the official documents of Ministers¹⁴.

There is no reason in principle why an Ombudsman cannot be given jurisdiction to look at ministerial decisions¹⁵, but it is always important that functional changes of that kind occur

¹² Chris Wheeler, 'FOI - the Need for Review', paper delivered to the Government Lawyers CLE Conference, Sydney, 30 October 2007.

¹³ For example, *Ombudsman Act 1976* (Cth) s 5(2)(a).

¹⁴ For example, *Freedom of Information Act 1982* (Cth) s 11(1)(b).

¹⁵ For example, I have explained in another paper that the Commonwealth Ombudsman inescapably has this role when preparing reports for Parliament on persons held in immigration detention for more than two years:

deliberately and not inadvertently. Of course, the same issue arises of oversight of ministerial decisions for an Information Commissioner.

There are countless instances of Ombudsmen and other statutory office holders having to make decisions that bring them into conflict with Ministers. This is inherently part of an oversight role, but there are risks for the statutory oversight agency if conflict with Ministers and senior government officials is a regular (and inescapable) occurrence. This provides an added reason, in the mind of some, for conferring the ultimate determinative function in FOI matters on a tribunal, headed by a judge. The tenure and traditions enjoyed by judicial officers is an important safeguard if there are large battles to be resolved in government.

The case for combining the Information Commissioner and Ombudsman in a single office

Drawing on the tradition, stature and settled character of the Ombudsman

A distinct benefit that an Ombudsman can bring to any new function is that the office has a tradition, credibility and respect to draw upon. In Australia, Ombudsman offices have been operating successfully for over thirty years. In that time, they have developed a successful model and philosophy for safeguarding the public and dealing with problems in government.

The importance of this stability and strength should never be understated. There are many other complaint, oversight and monitoring bodies that have had a shorter or more turbulent life. Even in Australia, for example, the FOI function has been less controversial when discharged by an Ombudsman's office than when discharged by an Information Commissioner. Contrast, for example, the recent decision of the Victorian Government to implement all the Ombudsman's proposals for reforming the FOI Act, with the public criticism of government made by the outgoing FOI Commissioner in Western Australia for undermining the independence and stature of the office¹⁶. It is noteworthy too that all three Information Commissioner positions in Australia - in the Northern Territory, Queensland, and Western Australia - are currently held by Acting appointees.

Relying on the greater staffing and other resources of the Ombudsman

The greater size of an Ombudsman's office gives it a practical advantage in recruiting staff, training staff, providing career variation and opportunities for staff, and retaining good staff. By contrast, small offices with a specialist oversight function can face greater difficulty in staff recruitment than larger offices with a broader jurisdiction and range of work.

It is probable also that an Ombudsman's office requires less staff to discharge an FOI function, because it already has corporate, human relations and IT staff for other Ombudsman functions. Another advantage of this greater staffing capacity is the ability to deal more easily with peaks and troughs in complaint work, by shifting staff from one area of the office to another. Equally, an established Ombudsman office is often well-placed to discharge a new

see J McMillan, 'The Expanding Ombudsman Role. What Fits? What Doesn't?' (2008) available at www.ombudsman.gov.au.

¹⁶ Information Commissioner, Foreword to the 2007 Annual Report.

function within weeks of the new function commencing, whereas a new office may take months to navigate the establishment phase.

These points are relevant in another way in Australia, because of its expansive geography. My own office maintains nine different offices around Australia. We are thus better placed than any office located in a single city to deal with government issues, wherever they arise, and to develop a working relationship with regional government offices and the local community. Equally, by recruiting staff from around Australia than in a single city, my belief is that we recruit a more diverse range of talented staff.

Integration with other Ombudsman work

There is a substantial overlap between general Ombudsman work and FOI work. Many of the issues are the same - complaints about delay in dealing with an application, about an agency's interpretation of a person's application, the sufficiency of a reasons statement for an adverse decision, the adequacy of a search for missing documents, or a refusal to handle a burdensome request. Those complaints are resolved more by applying principles of good administration that are at the heart of Ombudsman work generally, than by applying specialist FOI jurisprudence. The Ombudsman also has coercive statutory powers that may be needed in exceptional cases to obtain documents, enter premises and take evidence on oath¹⁷.

FOI issues frequently arise in combination with other administrative issues. For example, complaints to the Ombudsman frequently allege that an immigration visa was wrongly denied or a social support benefit wrongly revoked, and that a subsequent FOI request for the documents relating to that adverse decision was not properly handled. The Ombudsman is able to provide a seamless service by dealing with both issues concurrently. This enhances access to administrative justice.

To handle the large number of complaints that are received each year touching all areas of government, Ombudsman offices have established proficient contact arrangements with all government agencies. These arrangements facilitate the speedy and informal resolution of complaints, whatever the issue. This enables FOI complaints to the Ombudsman to be resolved efficiently.

In addition to individual complaint and public contact work arising from FOI disputes, there is a need for the underlying objectives of FOI - greater transparency and accountability in executive government - to be promoted. Those objectives align closely with other Ombudsman work. Indeed, FOI is a natural supplement to that work, and will give the Ombudsman's office an insight into an agency's record keeping and attitude to transparency. Many Ombudsman offices have demonstrated their commitment to FOI by undertaking own motion investigations into FOI administration and publishing manuals on FOI administration¹⁸.

¹⁷ For example, *Ombudsman Act 1976* (Cth) ss 9, 13, 14.

¹⁸ For example, Commonwealth Ombudsman, *Needs to Know: own motion investigation into the administration of the Freedom of Information Act 1982 in Commonwealth Agencies*, June 1999; Commonwealth Ombudsman, *Scrutinising Government: Administration of the Freedom of Information Act 1982 in Australian Government Agencies*, Report No 2/2006; NSW Ombudsman, *NSW FOI Manual*.

Options for reducing the gap between the alternatives

There are necessarily some differences between an Ombudsman and an Information Commissioner, although their primary aim is the same. It is to ensure the smooth and effective operation of the FOI law, as the legislative platform for open government. There are ways of bringing their roles even closer together, by the way in which an Information Commissioner office is established and operates.

Co-locating offices

The Ombudsman and the Information Commissioner can be physically co-located. This can lead, at least at an informal level, to greater cooperation and consultation between the offices. There are also possible cost-savings in sharing facilities and corporate resources.

Creating an office within an office

The two offices can be joined yet separated if the role of Information Commissioner is created as a separate statutory office that is discharged within the Ombudsman's office. The Information Commissioner could be given a separate statutory persona, or be given the status of a Deputy Ombudsman who is subject to the direction of the Ombudsman but otherwise having the power to act independently. That is essentially how the Queensland Information Commissioner operated for many years. There is also a precedent for this approach in the current structure of the office of the Commonwealth Ombudsman, who also discharges separate statutory roles of Postal Industry Ombudsman, Defence Force Ombudsman and ACT Ombudsman¹⁹.

Emphasising 'soft' enforcement options

One difference between an Ombudsman and an Information Commissioner is that the latter is usually given a determinative function, whereas the Ombudsman is not. This difference need not be large in practice, if the Information Commissioner relies on other means to change agency decisions. For example, most Ombudsman offices find that their powers of consultation, persuasion, recommendation and publication are adequate in most circumstances to prompt agencies to change decisions of which the Ombudsman disapproves. Equally, the publication of guidelines and practice manuals can be effective in indicating the decisions that should be made in individual cases.

Focusing on administration of FOI and Privacy laws, rather than on heroic conflicts

FOI can be a public battleground between the government, on the one hand, and the media and the community on the other. Individual decisions - such as exemption claims that are made by way of conclusive certificates - are often portrayed as heroic conflicts between secrecy and openness, between democracy and despotism.

¹⁹ See *Ombudsman Act 1976* (Cth) ss 19B, 19L; and *Ombudsman Act 1989* (ACT).

It is debatable whether disputes of that kind advance FOI objectives, or obscure the finely-balanced nature of the arguments and the issues to be decided²⁰. A core objective of the oversight body, whether Ombudsman or Information Commissioner, is to crystallise disputes and resolve them by applying principles in an even-handed and dispassionate manner. In fact, the obstacle that most people face in making FOI requests is not autocratic resistance by executive government, but inferior administration of the FOI Act by agencies. FOI objectives are best advanced if the oversight body devotes considerable attention to reviewing and improving agency administration.

Parliamentary oversight

If an oversight body reports to a parliamentary joint committee established for that purpose, it can bolster the respect given to the oversight by government agencies. They know they can be the subject of adverse comment to the parliamentary committee and can be called to account in a testing or embarrassing manner in a public forum. The parliamentary committee can likewise develop expertise and stewardship in that area of government practice.

In short, FOI will be strengthened and enlivened if a joint parliamentary committee is established to monitor FOI (and, possibly, privacy). The oversight body, whether a Commissioner or an Ombudsman, should report to it regularly.

Which option?

The arguments in favour of an Ombudsman or an Information Commissioner are evenly weighted. There are some advantages that an Ombudsman can bring to the function - such as its greater resources and experience in administrative oversight. There are likewise some advantages on offer with an Information Commissioner - for example, it is easier to give a Commissioner a determinative role and oversight of ministerial decisions.

Generalisations can be unsafe, but history - in Australia and internationally - seems to suggest another difference. The FOI oversight function usually has a higher public profile when discharged by an Information Commissioner. The Commissioner is more notable for strident advocacy of FOI, and for making landmark rulings on FOI exemption claims. On the other hand, the FOI oversight function is more stable over time when discharged by an Ombudsman's office. Conflicts are more often avoided, and those that occur are soon overshadowed by other features of Ombudsman work that portray its sound relationship with executive agencies and the support it receives from government.

If an Ombudsman is the chosen option, it seems preferable to bestow the function by conferring it upon the Ombudsman as a separate statutory role of Information Commissioner. And, whichever option is chosen, there is much to be said for allowing appeals to be heard by an administrative tribunal with a merit review function. The tribunal provides a better setting, in difficult or hard-fought cases, for allowing the expert presentation and adjudication of competing arguments. The division of responsibility between the tribunal and a commissioner (or ombudsman) also lessens the risk that the fate of FOI will rest on the health of the current relationship between a commissioner and the government.

²⁰ For example, see J McMillan, 'The FOI Landscape after *McKinnon*' (2007) *Public Administration Today* 42.

Another factor that can be decisive is the size of the government jurisdiction and the expected FOI caseload. In a small jurisdiction where the number of FOI cases is low, it makes more sense to give the oversight function to the Ombudsman rather than create a small and possibly awkward separate office. By contrast, in a jurisdiction that handles a large FOI caseload, a separate office is easier to justify. This can, however, be countered by geography. In a geographically large country such as Australia, there are practical advantages in merging the FOI function in an Ombudsman's office that already maintains a national operation.

At the end of the day, there is a need for either an Ombudsman or an Information Commissioner to play an oversight role. Simply stated, FOI will not work well across government unless there is an FOI champion.