

The expanding Ombudsman role: What fits? What doesn't?

Presentation by Prof. John McMillan to Australia Pacific Ombudsman Region meeting in Melbourne

Why is this an issue?

Expansion - demonstrating the relevance and adaptability of the Ombudsman model

Traditionally the core Ombudsman functions have been investigation of individual complaints; and own motion investigation of government administrative actions, particularly issues of systemic importance. Most offices increasingly give greater focus to own motion investigations, primarily because of the more developed system for handling complaints within agencies. This enables the Ombudsman to concentrate more strategically on problem areas in government.

In recent years Ombudsman offices in Australia have been expanding their range of functions - examples include auditing agency records, conducting training seminars for government officers, publishing guides to good decision making and complaint handling, whistleblower protection, review of witness protection, legislative reviews, applying a human rights focus to government oversight, reviewing child abuse incidents and reportable deaths, acquiring an industry Ombudsman role (for example, energy and water), and establishing a regional support network for Ombudsman offices.

The growth in the range of functions now discharged by Ombudsman offices demonstrates the adaptability of the Ombudsman model, and ensures the continuing relevance of Ombudsman offices.

Expansion - the key to growth

A perennial concern of Ombudsman offices is their meagre funding, especially as contrasted to the growth in size and functions of the government agencies the Ombudsman oversees. History indicates that Ombudsman offices do not get extra funding and support from government by bleating about their restricted funding. On the other hand, recent developments illustrate that Ombudsman offices will be given extra funding by government if they can demonstrate their ability and effectiveness in discharging new functions. Indeed, a strong theme in contemporary budgetary policy around Australia is that government agencies face annual efficiency dividends that can reduce their core funding, but this can be countered by acquiring a new function that attracts additional funding. The adoption of new functions has been the key to the doubling in size of my own office in recent years.

Getting the model right - the key to Ombudsman success

Though growth and expansion are important, it is equally important that Ombudsman offices do not take on inappropriate functions. Equally, the discharge of new functions should be adapted to align with the essential principles of the Ombudsman model. This is important to the long-term stability of Ombudsman offices. A major reason why Ombudsman offices have been so successful over more than thirty years in Australia in expanding and maintaining their relevance and effectiveness is that they have been careful to ensure that they have maintained a strong focus on adhering to Ombudsman essentials. By contrast, many other oversight bodies have gone through considerable turmoil and restructuring over the last three decades as they have struggled to identify their role in government.

Commonwealth Ombudsman case studies

In the remainder of this talk I discuss issues that have arisen in my own office when we have taken on new functions. At the end of the day, as statutory bodies, we do not have the final say on what new functions we acquire, and how we discharge them. That said, governments do listen to us when there is talk of new functions, and often there is considerable scope for our offices to decide how a new function will be discharged.

Auditing

Compliance auditing of agency records is now a substantial function of many offices: for example, my own office has a team of six who are engaged full-time on this function. Examples include the periodic inspection of police records relating to telephone interception, electronic surveillance, controlled operations, stored communications, and the registration of child sex offenders. The purpose of an inspection is to ensure strict compliance by law enforcement agencies with the detailed statutory requirements applying to those intrusive law enforcement functions.

Many Ombudsman offices have developed the auditing function in other ways, usually on an own motion basis. For example, my own office has undertaken audits of freedom of information administration, child support assessment decisions, notification of visa decisions, complaint handling in agencies, and payment of administrative compensation under the scheme for Compensation for Defective Departmental Administration. Auditing is fast becoming an important accompaniment to complaint handling and own motion investigations. It is significant that it is now seen as an appropriate Ombudsman role.

It is important for Ombudsman offices to bear in mind that the objective of auditing can be different to the objective of complaint investigation. The latter is primarily focussed on addressing a grievance expressed by a person. By contrast, the purpose of statutory audit functions of the kind we discharge is to stimulate improvements in law enforcement administration and to reassure the public and parliament that law enforcement powers that are otherwise hidden from public gaze are being exercised in strict compliance with detailed legislative requirements.

It is therefore incumbent on the Ombudsman's office to ensure that *every* audit is carefully and professionally conducted, and properly reported. That imposes a correlative obligation on the office to ensure that the auditing staff have the appropriate skills and office support. This can impose different demands on the office than its complaint handling and investigation work.

Review of decisions as well as process

Ombudsman investigations have customarily focussed on the way in which decisions are made, and less on the merits of the decisions under investigation. So long as a decision maker acts correctly, considers all relevant matters, and reaches a decision that is reasonably open to be made, the Ombudsman will not ordinarily be critical of the decision reached. The Ombudsman can conclude that an administrative action or decision was 'unreasonable, unjust, oppressive or improperly discriminatory' (Ombudsman Act s 15), but that is for exceptional cases.

This restraint by Ombudsmen is borne of many factors, including the limited resources of the office to examine all decisions comprehensively, the limited power of the Ombudsman to make a recommendation, and deference by the Ombudsman to the role and authority of executive agencies. There is a contrast with the role of merit review tribunals, which can substitute a new decision if not satisfied on all the evidence that the decision under review is correct or preferable. It is inherently part of a tribunal's role to review the merits of decisions.

Some of the new functions that Ombudsman offices discharge tilt at that traditional focus on process rather than merits. One new function of my office is to prepare a report on the appropriateness of the arrangements for the detention of every person held in immigration detention for more than two years (*Migration Act 1958* s 486O). Over 400 reports have been prepared. The reports mostly avoid commenting on the merits of the decision to take a person into detention or to refuse a visa that would allow the person to be released from detention. Occasionally, however, I have seen the need to comment directly on those issues and to make a firm recommendation that a person should be granted a visa or placed in an alternative detention arrangement (such as community detention). Examples are where the person has been in detention for a lengthy period without any resolution in sight of their immigration status, or where a person is suffering from serious mental distress.

Another role that can be difficult for an Ombudsman's office to discharge without broaching the merits of decisions is the review of freedom of information complaints. Ombudsman offices generally view their FOI oversight role as a special one that requires them to be a champion of open government. Freedom of information legislation confers many discretions upon agencies, and the manner of exercise of those discretions will in practice influence how well the FOI legislation is operating. Examples are the discretions to release an exempt document, and to impose, waive or reduce an FOI access charge. It is a difficult question for an Ombudsman's office whether it should pressure an agency to exercise those discretions in favour of public access, even though a contrary decision is legally and reasonably open to an agency. It is probably hard for the Ombudsman's office to avoid that stance if it is discharging its FOI oversight role as an FOI or Information Commissioner.

The transformation of the Ombudsman's role arises more squarely if the Ombudsman is called on to exercise a determinative function. A customary feature of industry ombudsman schemes is that the Ombudsman can make a binding determination, for example, requiring a bank or telecommunications provider to revoke a charge or to pay compensation. The Western Australian and Tasmanian Ombudsman now discharge an energy and water ombudsman role. My own office of Commonwealth Ombudsman discharges a Postal Industry Ombudsman role, although the ultimate power is to make a recommendation and report to the Minister, rather than a determination (*Ombudsman Act 1976* s 19V).

The Information Commissioners in Queensland, Western Australia and Northern Territory all have a determinative function, for example, to decide that a document is not exempt or to set an access charge. The Rudd Government has proposed creating a new office of FOI Commissioner, with a determinative function to replace the Administrative Appeals Tribunal. My own office has suggested¹ that it could host the FOI Commissioner function, although a topic for debate would be whether this should include a determinative role.

Another interesting Government proposal that arose in 2007 (now lapsed) was to confer upon my office the separate role of Access Card Ombudsman, as an element of the proposed scheme for an Access Card that would be issued to all recipients of government health and welfare benefits. It was anticipated that millions of cards would be issued, and that many disagreements could arise about the personal details to be entered on cards. Access card decisions would ultimately be appealable to the Administrative Appeals Tribunal, but interposed between the government decision maker and the AAT would be the Access Card Ombudsman to undertake a less formal and inexpensive modified case review of disputed decisions.

Extended jurisdiction

The jurisdiction of a government ombudsman is classically focussed on the administrative actions of executive agencies. Three new roles discharged by my office have blurred the jurisdictional lines.

First, we now have an explicit jurisdiction to investigate complaints against government service providers, defined as a non-government entity that is providing goods or services to the public under a contract with a government agency (Ombudsman Act s 3BA). This extended jurisdiction is important in enabling efficient investigation of complaints about immigration detention, which is managed by a private company, and against non-government organisations that play a pivotal role in assisting job seekers and benefit claimants as part of the Welfare to Work and Job Network programs.

Secondly, the Postal Industry Ombudsman role of my office can deal with complaints against both Australia Post (a government business enterprise) and private postal operators that register with the scheme. Presently nine private operators are registered².

Thirdly, an interesting jurisdictional challenge arises in my Immigration Ombudsman role of preparing a report on each person held in immigration detention for more than two years. The report goes to the Minister for Immigration. Under the *Migration Act 1958*, many of the decisions that either have been or can be made in respect of a person who is in long-term detention are decisions of the Minister (for example, the grant of a visa to enable a person's release from detention). The Ombudsman does not have jurisdiction to investigate action taken by a Minister (Ombudsman Act s 5(2)(a)). Accordingly, recommendations to the Minister in the immigration reports are generally framed only as a recommendation that the Minister consider an issue. On occasions, however, it has been necessary to go further and express support for a particular substantive outcome by recommending that a visa be granted or a person be placed in alternative detention. Interestingly, too, the new Minister for

¹ Commonwealth Ombudsman, *Scrutinising Government: Administration of the Freedom of Information Act 1982 in Australian Government Agencies*, Report No 2/2006, at page 33.

² See www.pio.gov.au.

Immigration recently announced that he would consult with the Ombudsman on how to proceed with all 61 long-term detention cases³.

Advocacy role

A cardinal feature of the Ombudsman model is that the Ombudsman is independent, objective and even-handed. The Ombudsman is not an advocate or agent of the complainant or the agency. At most, the Ombudsman is an advocate for good administration, and for practical and effective resolution of the problems that people encounter with government.

That distinction can sometimes be tested, especially in some of the specialist roles discharged by Ombudsman offices. I have already noted that it is difficult for an Ombudsman to be a true champion of open government without looking at the merits of agency decisions under the FOI Act to deny access to documents or to impose access charges.

The same challenge arises in another area. The Commonwealth Government, partly on Ombudsman pressure⁴, established the scheme for Compensation for Detriment Caused by Defective Administration (CDDA). As a scheme established by executive and not legislative action, CDDA decisions to refuse payment of administrative compensation are not reviewable by the Administrative Appeals Tribunal or under the *Administrative Decisions (Judicial Review) Act 1977*. The Ombudsman is the only clear-cut external review mechanism of CDDA decisions. Furthermore, the scheme lists a recommendation of the Ombudsman as one of the criteria for payment of compensation. Because of Ombudsman advocacy of this scheme, our special review and oversight role, and - it has to be said - the customary reluctance of agencies to pay compensation to aggrieved members of the public, it is difficult always to take a neutral stance when investigating individual agency decisions to decline CDDA compensation.

A role that was once proposed as a possible Ombudsman role is the role now discharged by the separate office of Inspector-General of Taxation. While my office investigates individual taxation complaints, the Inspector-General examines systemic issues in tax administration. In the way the office has developed, it has been more of an advocate for change than is customary for an Ombudsman's office, and it would be difficult now for that office to be subsumed easily into an Ombudsman office⁵.

Joint Ombudsman/agency investigations

Independence is the defining principle of an Ombudsman's office. That independence is most apparent when the Ombudsman issues a public report that is strongly critical of government agency action.

A new direction taken by my office in recent years is a preparedness to participate in a joint investigation with an agency, leading to a joint report. Two examples are a joint Ombudsman

³ Senator Chris Evans, Minister for Immigration and Citizenship, Press Release, 'Minister to review long-term detention cases', 12 March 2008.

⁴ For example, Commonwealth Ombudsman, *To compensate or not to compensate: own motion investigation of Commonwealth arrangements for providing financial redress for maladministration*, Sept 1999.

⁵ Since this paper was delivered the Government has announced that the office of Inspector-General will remain and will not be subsumed into some other office.

and Australia Federal Police report on police watch house operations (holding cells), and a joint Ombudsman and Defence report on the redress of grievance system for dealing with internal defence complaints⁶.

This is an exceptional course to take, but can be justified on the basis that it is an effective way of pooling the wisdom of both agencies - the knowledge that police and defence have of their own systems, combined with the Ombudsman's perspective on good administration and complaint handling. The practical reality is that my office did not have the resources at the time to undertake those large-scale investigations by itself, and certainly not within the short time frame both reports were completed. Our observation since preparing both joint reports is that police and defence have been strongly committed to implementing the proposals which they had jointly authored.

A joint investigation poses a special challenge for an Ombudsman's office. Not least, it has to be clear from the outset that the report will be published, and that if agreement is lacking the Ombudsman may choose to withdraw from the process or present a separate report. My experience is that those matters can be worked out in a way that does not threaten the Ombudsman's independence, but facilitates influential investigations that may not otherwise occur.

In a modified way we have used the same approach with agencies when faced with other complex complaints that could benefit from both agency and Ombudsman investigation. For example, as to complaints about improper action in agency contracting, we will sometimes leave the agency to undertake the investigation (often by engaging an independent consultant) but insist that we are consulted about the terms of reference for the investigation and that we receive an interim and final report. If not satisfied with the agency action, we may choose to do our own supplementary investigation.

Participation in executive review and policy development

To be effective an Ombudsman's office has to establish a good working relationship with executive agencies. When this exists, we can rely on agencies to consult us about the steps they are taking to implement Ombudsman recommendations. It is a short step from that interchange and cooperation for the agency to invite an Ombudsman representative to participate in an agency committee that has been established to guide a process for administrative reform.

This again poses a challenge. Is the Ombudsman's independence threatened by participating in an executive forum that is reviewing agency practice and policy? My office is cautious, but again we have been prepared on some occasions to accept those invitations from agencies. For example, a representative from my office has been a member or observer on three committees established by the Department of Immigration to guide the creation of a College of Immigration, to monitor Values and Standards and to provide advice on Detention Health. The Department's reform program was partly a response to critical reports that we had published on immigration compliance and detention, and we decided that a constructive way of ensuring the implementation of our recommendations was to engage closely with the Department.

⁶ Commonwealth Ombudsman, *Review of ACT Policing's Watchhouse Operations*, Report No 6/2007; and *Review of Australian Defence Force Redress of Grievance System*, Report No 1/2005.

We have similarly accepted an invitation to be an observer on a high-level interdepartmental committee that is guiding the Government's Northern Territory Emergency Response (NTER). That program is addressing problems of violence, substance abuse and social decay in Aboriginal communities. We established a special team to undertake outreach and to receive complaints in the communities where the NTER was being rolled out. We have found that we can act more effectively and quickly in highlighting systemic administrative problems if we establish a strong dialogue with government officers.

It is also a feature of the Commonwealth Ombudsman role that the Ombudsman is an *ex officio* member of two government advisory committees. I am a member of the Administrative Review Council, which advises the government on administrative law reform, and I was a member of the Security Legislation Review Committee, which reviewed counter-terrorism legislation⁷. I have recently accepted an invitation by the Attorney-General to be a member of a committee to review the *Legislative Instruments Act 2003*. The Attorney is required to establish such a committee after three years of operation of the Act⁸.

The membership of those committees includes senior level officers from agencies that fall within the Ombudsman's jurisdiction and against which complaints are made and investigated. For example, other members appointed by the Government to the Administrative Review Council include the Secretary of the Attorney-General's Department, the Secretary of the Department of Immigration and Citizenship, and a senior officer of the Department of Prime Minister and Cabinet. This imposes a special responsibility on the Ombudsman to work closely and informally with executive officers in committee and research work, whilst safeguarding the independent oversight role of the Ombudsman in relation to their agencies.

Closing Thoughts

The effectiveness and durability of the Ombudsman will ultimately rest on whether the office adheres to the fundamental precepts of the Ombudsman model. Those are well established, but how they apply from one instance to the next is not always clear-cut. Difficult questions are more likely to arise if we strive - as I believe we must - to be adaptable and flexible in order to grow and remain relevant. It is important that we highlight these difficult questions and continue to debate them. Other Ombudsmen may respond differently to some of the challenges posed in this paper, but it is important that there is discussion of these issues.

⁷ *Administrative Appeals Tribunal Act 1975* s 49; *Security Legislation Amendment (Terrorism) Act 2003* s 4(4).

⁸ *Legislative Instruments Act 2003* s 59.