

THE ROLE OF THE OMBUDSMAN IN PROTECTING HUMAN RIGHTS

Address by Prof John McMillan, Commonwealth Ombudsman, to conference on 'Legislatures and the Protection of Human Rights', University of Melbourne, Faculty of Law,

21 July 2006

The theme of this conference is the effectiveness of the legislature in protecting human rights. A sub-theme is whether parliament is more or less effective than courts. Hence the title of today's opening session: "Who best protects rights: legislatures or the courts?"

I will give a different answer to that question: the most active protector of rights in Australia is in fact the executive branch oversighted by a system of independent agencies. The office of Ombudsman is one example of an independent oversight agency that is beyond the judicial and legislative branches of government. There are many other such agencies that play a similar role in human rights protection, including human rights and anti-discrimination commissions, privacy and information commissioners, inspectors-general of different kinds, administrative tribunals, and auditors-general conducting performance audits of executive decision-making and service delivery.

This extensive framework of oversight agencies has largely been established in the last twenty years. It has transformed government, in terms of its accountability and sensitivity to individual rights. Yet the significance and effectiveness of this transformation is not much commented upon in legal and academic discussion.

This new system of oversight and accountability has developed in response to the shortcomings of legislative and judicial method in providing effective practical protection of people's rights. It is therefore curious that our debate about human rights should be framed as a choice between judicial and legislative options. We needed new mechanisms for rights protection for one important reason: there is a continuing and substantial growth in government – in functions, in complexity and in size.

From the perspective of the ordinary citizen, government now plays a role that is substantially different to the role that government played in earlier times. A few examples illustrate this point:

- People are nowadays more likely to travel, to resettle and to seek asylum, and government has responded with more complex laws about migration, and by establishing resettlement programs, detention centres, and offshore processing.

- Family patterns and expectations have changed, giving rise to a Child Support Agency that administers complex and, in the mind of some, intimidating laws that control the financial obligations of parents.
- An Australian Taxation Office of roughly 22,000 employees administers nearly 10,000 pages of taxation legislation that embody the complexity that has developed in our working arrangements, business structures, financial arrangements, government incentives, and support programs.
- The same can be said of the social support laws administered by Centrelink, an agency of 25,000 employees engaged in over 50 million transactions each year, which not only dispenses benefits, but collects debts from people who were overpaid, evaluates people's family arrangements, assesses people's job skills, and stores personal information about most Australians.
- There is now a plethora of security intelligence agencies that undertake security vetting, monitor communications between people, exchange information with other countries, and that can detain and question people.

The activities of government throw up an endless range of difficult and novel human rights issues. Was it right for a government agency to impose a penalty of 25%, 50% or 75% on a person who submitted an erroneous taxation return? Should a person with no legal right to enter or remain in Australia be held in an immigration processing or detention centre? Should a garnishee order be issued against a parent who has failed to provide support to a separated family? Should a social security benefit recipient be believed when there is no computer record of documents that they claim to have submitted to government? How much information and explanation should be given to a person who is judged to be a security risk?

Those and countless other human rights questions that arise daily are of great consequence to many Australians. Their quality of life and enjoyment of citizenship can hinge quite directly on how effectively those questions are resolved. But how are they to be resolved?

The legislature plays a key role. It frames the legislative rules that provide the ultimate answers. The legislature is also an important national forum for debating issues and scrutinising the suitability of laws. But whether those laws are being interpreted and administered correctly is a practical issue, in which there is limited scope for the legislature to be involved.

The judiciary also plays an important role – indeed, ultimately the conclusive role in deciding the legality of executive action. But again, as a practical exercise in human rights protection, the judicial role is limited in scope. Courts cannot choose which issues to examine: the range of issues that receive judicial scrutiny is adventitious and episodic. Most areas of government decision-making receive little if no judicial oversight. Courts provide only a restricted set of remedies – to declare something invalid, enjoin unlawful behaviour, require an issue to be reconsidered, and occasionally to award damages. Frequently those remedies do not resolve the whole of a dispute. Nor is a court able to follow through, after having given judgment, to monitor what happens, either in the immediate case or in other similar cases.

It was in response to those shortcomings in the capacity of traditional mechanisms to address the multiplicity and complexity of problems that people now encounter in dealing with government, that new institutions such as the Ombudsman were established. They have much to offer.

The growth of Ombudsman oversight in Australia

The new oversight bodies provide an accessible complaint service to all members of the public. A growing framework of Ombudsman offices in Australia – covering all levels of government, and major industries such as banking, telecommunications and energy supply – handle upward of 150,000 complaints from the public each year.

An important side-effect is that people now know and appreciate they have a protected right to complain against government and big business. The right to complain, when securely embedded in a legal system, is surely one of the most significant human rights achievements that we can strive for. In a public awareness survey recently undertaken by my office, which asked respondents what they could do if they had an unresolved complaint with a government agency, close to 60% responded they could complain to their local member of parliament or the Ombudsman. Only 3% would approach a lawyer.

On the other side of that picture, in a recent survey in which NSW government agencies were asked to rate the relative importance of oversight bodies to their own agency, the Ombudsman was at the head of the list, followed by the Independent Commission Against Corruption, the Audit Office and the Premier's Department. Parliamentary committees and courts were fifth and sixth on the list.¹

Ombudsman offices deal with rights problems in all areas of government. Human rights discussion in Australia in recent years has focussed mostly on three areas of government activity – immigration, policing and the counter-terrorism response. My office deals prominently with each of those areas, in complaint handling, own motion investigations and discussion with government agencies.² But we deal as well with all other areas of government. The database of my office currently lists 149 Australian Government agencies about which we have received at least one complaint. In terms of what matters most to the public, the three areas in which we presently receive the largest number of complaints are social support entitlements, child support obligations and taxation.

¹ National Integrity Systems Assessment Final Report, *Chaos or Coherence: Strengths, Challenges and Opportunities for Australia's Integrity Systems*, December 2005 at 25. (www.griffith.edu.au/centre/kceljag/nisa).

² The activity is described each year in the annual report of the office, available at www.ombudsman.gov.au. An example of a recent report that dealt with a sensitive human rights issue in the immigration area is Commonwealth Ombudsman, *Department of Immigration and Multicultural Affairs: Administration of s 501 of the Migration Act 1958 as it Applies to Long-Term Residents*, Report No 1, 2006.

The flexibility and effectiveness of the Ombudsman model

The flexibility of the Ombudsman model enables it to change and develop to take account of changes in government. For example, government now relies far more on executive rather than statutory power, to underpin programs as diverse as the management of immigration detention centres, payment of lost redundancy entitlements, job capacity assessment, financial case management, work referral for job seekers, provision of disaster relief, and the award of administrative compensation.

Other administrative law review mechanisms do not generally apply to decisions made under non-statutory power, either because of jurisdictional limitations³ or the lack of statutory criteria to evaluate whether the administrative conduct was lawful. Ombudsman offices are not hampered in the same way; by and large they are the only independent oversight agency that can review the exercise of non-statutory power.

In the same way, Ombudsman jurisdiction and activity has extended in response to the fact that government programs are now administered by private firms that lie on the other side of the public/private divide. Drawing from the inherent flexibility of administrative investigation, my office has for some time looked at how government contractors behave in managing detention centres, administering the Job Network, or delivering postal services. This jurisdictional extension was recently confirmed by an amendment to the Ombudsman Act that confers an explicit jurisdiction over Commonwealth service providers in the private sector.⁴ Equally, the Government has announced that my office will have jurisdiction over the actions of government officials and contractors in offshore processing centres.⁵ That solution may not meet the criticism that some have levelled at the offshore processing proposal, but it would at least preserve some independent oversight of immigration decision-making in offshore areas.

The remedies we provide are likewise flexible and adaptable. While the Ombudsman has only non-determinative powers, the remedial armoury includes options that can be an effective and practical way of resolving a human rights dispute. In many instances all that a person wants is an apology from government, a proper explanation of what happened, payment of expenses or administrative compensation, or an undertaking that the system has been changed to ensure that a rights violation will not occur again.

Safeguarding human rights through systemic change

Protection of rights in individual cases is the motivating objective of lawyers and advocates. So it should be, but real rights protection for the community comes when there is systemic change. This again is a role that Ombudsman

³ Eg, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) applies only to a 'decision made under an enactment'; see also *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179. Generally, administrative tribunals can only review decisions made under statute.

⁴ *Ombudsman Act 1976* (Cth) ss 3(4B), 3BA.

⁵ Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

and like offices can undertake more effectively than courts and parliamentary committees. A legacy of Ombudsman work over thirty years is that most government agencies have established their own professional internal systems for complaint handling. Examples are the Complaints Resolution Unit in Centrelink, ATO Complaints in the Australian Taxation Office, and the Fairness and Resolution Branch in the Australian Defence Force.

Those agency complaint mechanisms handle tens of thousands of individual complaints and problems each year. The mechanisms have a close proximity to and regular interaction with both frontline bureaucrats and senior level managers; in the result, internal complaint handling has a sensitising effect on government that few other review mechanisms can manage. The Ombudsman's office works closely with government agencies to ensure that internal complaint handling within government is professional and complies with best-practice standards, such as the Australian Standard on complaint handling.⁶

Systemic change can be brought about in other ways as well. A specialised task discharged by my office is to conduct a periodic inspection of the records of intelligence and policing agencies, to ensure they are complying strictly with the detailed laws that cover telephone interception, electronic surveillance, and controlled operations.⁷ Reports from these inspections are provided to the Parliament. This compliance auditing function is an effective way of maintaining regular oversight of whether there is legal compliance in the use of coercive and intrusive government powers.

Similar work is undertaken by the Inspector-General of Intelligence and Security in relation to the records of the Australian Security Intelligence Organisation. The Inspector-General – whom I might add is as independent-minded and scrupulous as any judicial officer I know – sits in on the first day of every questioning detention session by ASIO. His office and mine also have administrative protocols with policing and national security agencies, to ensure that members of the public are promptly informed of their right to contact our agencies if they are subject to arrest or questioning.

Another technique for ensuring systemic change is own motion enquiries and reports. By way of illustration, a vexed issue in Australian administrative law, that has given rise to countless cases in courts and tribunals, has been decisions made under s 501 of the *Migration Act 1958* to cancel the visas of Australian residents on the ground of bad character due to criminal convictions. Decisions made under s 501 have led to the removal from Australia of people who arrived here as babies, grew up in Australia, lost all connection with their country of citizenship, and were even unaware they did not hold Australian citizenship. My office recently published a report on that

⁶ AS ISO 10002-2006.

⁷ See *Telecommunications (Interception and Access) Act 1979* (Cth) s 84, *Crimes Act 1914* (Cth) Part 1AB, *Surveillance Devices Act 2004* Pt 6 Div 3.

topic based on a study of 35 individual cases.⁸ A large number of recommendations were made that the Government has accepted; my office is now in regular contact with the Department of Immigration to monitor the implementation of the recommendations.

A similar example from the State arena was the report in July this year of the Victorian Ombudsman, on the conditions in which people are being held in police cells and prisons.⁹ This report arose from individual complaints received by the Victorian Ombudsman. The opening sentence of the report states its human rights objective: *'A society's level of civilisation can be judged by how it treats people detained in custody. These are persons who, for whatever legally sanctioned reason, are compulsorily deprived of liberty by the State and to whom the State owes a duty of care for their safety, security and well-being.'*

The State Government responded to the report by announcing that it would close cells in 54 police stations in Victoria and spend an additional \$3.8M to upgrade facilities at 13 watch houses.¹⁰ That, it seems to me, is practical human rights protection.

Safeguarding human rights through proactive oversight work

As those examples illustrate, a great advantage that Ombudsman offices have over courts, and to some extent parliamentary committees, is that we can follow up on complaints and report findings: we can be proactive, not merely reactive. A recommendation found in most Ombudsman reports is that the agency shall provide advice at a predetermined date on what action has been taken to implement the Ombudsman's findings. Added pressure can be applied if inadequate action is taken by an agency. In nearly four years I have had to make only one report to the Prime Minister under s 16 of the Ombudsman Act about an agency's failure to implement an Ombudsman recommendation; the report was effective in prodding the Government to amend legislation that I had judged to have a discriminatory operation between partnered and single parents.¹¹

Follow-up activity with government agencies occurs informally as well. In the last couple of months I have addressed all senior executive officers in the Department of Immigration and in Centrelink, and over time address senior management in other agencies. My experience is that those meetings provide a unique opportunity that is not generally available to other oversight mechanisms, to highlight problem issues and to explain why and how they must be addressed. The regular dialogue that ombudsmen and inspectors-general undertake at all operational and policy levels within agencies, can be an important means of stimulating cultural change within government.

⁸ Commonwealth Ombudsman, *Department of Immigration and Multicultural Affairs: Administration of s 501 of the Migration Act 1958 as it Applies to Long-Term Residents*, Report No 1, 2006.

⁹ Victorian Ombudsman, *Conditions for Persons in Custody* (2006).

¹⁰ Victorian Minister for Police, Emergency Services and Corrections, *Media Release*, 'Police Cell Overhaul: \$3.8M Upgrade, Delapidated Lock-ups to Close', 19 July 2006.

¹¹ Commonwealth Ombudsman, *Annual Report 2004-2005* at 59.

Nor is our follow-up activity limited to executive agencies. We engage with Parliament: so far this year my office has appeared before and made submissions to parliamentary committees on immigration, defence, policing, taxation and counter-terrorism laws. We engage also with the media – an option open to few adjudicators – and in that way highlight and explain both the importance and the complexity of the rights issues that we encounter. Likewise, by regularly addressing university and community forums around the country, we ensure that discussion about human rights, and how to protect them, is not an exclusive activity that is engaged in only by those who have an audience in a court or legislative forum.

Diminishing lawyers' domination of human rights protection

One of the drawbacks of rights charters that are judicially scrutinised and interpreted is that lawyers, subtly and gradually, come to dominate the process of rights protection.¹² Many regard the involvement of lawyers as a self-evident strength, and undoubtedly they are skilled in the protection of individual rights. But there is a downside to legal domination that is not sufficiently appreciated, namely, that a system managed by lawyers can be inefficient and at times ineffective in delivering practical protection to people.

My general experience as Ombudsman is that when agencies bring in their lawyers it can become appreciably more difficult to get an easy resolution of a problem. Jurisdictional and technical issues start to arise; the dogmatic assertion of polarised views can be more common; and attention can switch from the whole picture and talk of outcomes and solutions, to finer points and procedural issues. With lawyers, we can talk as much about how to address an issue, as we do about the issue itself.

A great strength of Ombudsman and similar offices is that they are not dominated by lawyers. My investigation staff includes a fair number of lawyers, but they sit alongside other investigators with backgrounds in teaching, nursing, community service, and public administration. The multi-disciplinary blend is a strength of the office. Pleasingly, too, more than half the senior executive staff are women, who are attracted to administrative law and dispute resolution mechanisms that are not rooted in the adversarial system.¹³

If we are serious in our endeavour to have mechanisms of oversight and accountability that are pluralist and representative in nature, then we need to give increased emphasis to non-traditional mechanisms. The composition and orientation of Ombudsman and like offices are well suited to ensuring that

¹² Here I interpolate that at the human rights conference at which this paper was delivered I asked the audience of over 100 how many had not had legal training; over 80% of the audience had a legal background.

¹³ At 30 June 2006, the staffing profile of the office was: 146 staff, of whom 91 were women; in the Senior Executive band, 5 of the 9 staff were women; and in the Executive band, 32 of 59 staff were women. The same balance is not found in other oversight agencies where there is legal domination.

rights protection is more broadly based in the skills and experience of the community.

Immigration oversight – a case study in human rights protection

I will end by noting briefly some of the recent work undertaken by my office in relation to immigration oversight. Immigration is interesting because it is an area that nowadays is frequently mentioned in discussion about the need for more active and aggressive mechanisms for human rights oversight. Immigration is interesting too because it is the most litigated, reviewed and scrutinised area in the history of Australian government administration. At times over fifty per cent of cases and appeals in the Federal Court and special leave applications in the High Court have been immigration matters. Most of our landmark administrative law cases in the last couple of decades have been immigration cases. Public law and human rights scholar and advocates in Australia have also become frequent commentators on immigration issues.

That volume of litigation and legal advocacy has been less effective than the commitment to political and bureaucratic change that was triggered by a couple of inquiry reports (in the Rau and Alvarez cases¹⁴) and by the energy of some members of parliament. Part of the new framework for change is that my own office has a specialist role as Immigration Ombudsman,¹⁵ we make a report to the Minister and Parliament on every person who has been in detention for two years or more,¹⁶ and we are reviewing 248 individual cases referred by government in which a person may have been wrongfully or unlawfully detained.

This new system of active oversight of immigration and detention is having an impact. When we commenced this function in July 2005 there were 149 people who had been in detention for more than two years; another 77 were due to reach the two year mark within six months if not earlier released. By July 2006 the number in detention for two years had fallen to 66. During that period my office had managed to interview 167 people in detention, and prepare reports to the Minister in 70 cases. A strong theme in the reports is that active steps must be taken to avoid indefinite detention. If this new system of continuous oversight and active engagement is successful in preventing indefinite detention, it will have produced a result that the High Court felt unable for legal and constitutional reasons to deliver in *Al-Kateb v Godwin*.¹⁷

What my office's investigation and reports on immigration cases also show is that human rights protection is not just about declaring and embracing human rights standards. Often, it is more about highly practical issues – developing computer systems that speak to each other; training detention and compliance

¹⁴ *Inquiry into the Circumstances of the Detention of Cornelia Rau*, Report by Mr Mick Palmer AO APM, July 2005; Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, Report No 3 of 2005.

¹⁵ *Ombudsman Act 1976* (Cth) s 4(4).

¹⁶ *Migration Act 1958* (Cth) s 486O.

¹⁷ (2004) 208 ALR 124.

staff in how to detect and manage mental health problems; developing the ability of those staff to identify a person's nationality and translate their name correctly; and removing privacy obstacles to the strategic communication among government officials of the personal identifying details of detainees.

Summary

In summary, human rights protection is ultimately a practical exercise. Human rights principles enacted by the legislature are an important platform for that exercise. So too are courts that can definitively resolve the meaning of those legislative principles. But equally important is a comprehensive system of other agencies and mechanisms that can practically apply those principles in a myriad of different situations.