

# HOW OMBUDSMEN REVIEW AND INFLUENCE PUBLIC ADMINISTRATION

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*Paper delivered to the International Intelligence Review Agencies Conference, Sydney March 2010*

## 1. Introduction

It is a pleasure to participate in this distinguished international gathering of inspectors-general. The work of ombudsmen and inspectors-general is similar and overlaps in many respects, and it is pleasing that an ombudsman perspective is included in your program.

This conference also gives me an opportunity to acknowledge the excellent work of the Australian Inspector-General of Intelligence and Security, Ian Carnell, who will be retiring from office shortly after hosting this conference. Ian has made a substantial contribution in Australia in lifting the profile of his office, developing its functions, forging constructive relations with other oversight agencies, and winning the respect alike of intelligence agencies, parliament and the public.

In this talk I will address in three stages the ombudsman role in improving public administration – by firstly giving a brief snapshot of the Commonwealth Ombudsman role, to provide context for my remarks; by next presenting four case studies of ombudsman work in Australia that has improved public administration; and then by drawing out six strategic principles on how best to improve public administration.

## 2. Snapshot of the Commonwealth Ombudsman

The Commonwealth Ombudsman office has been operating now for over 30 years. We have a strong ombudsman network in this region of the world, started by the New Zealand Ombudsman office that will celebrate its 50<sup>th</sup> anniversary in 2012. There are likewise ombudsman offices in all Australian states that have been operating for more than 30 years.

Each of the offices was established with the primary function of receiving and investigating complaints from members of the public against government agencies. However, each office now thinks of its functions more broadly as extending to the improvement of public administration. This is captured by the Commonwealth Ombudsman office in its banner message: *'helping people ... improving government'*.

The office now describes itself as having five broad functions:

- **Complaint handling.** This remains the core function of the office. In the 2008-09 reporting year the office received over 45,000 complaints and approaches, and investigated roughly 5,000 cases.
- **Own motion inquiries.** Ombudsman-initiated inquiries that result in published reports have become increasingly important.<sup>2</sup> Last year the office published twenty reports on matters as diverse as visa processing, mail redirection, departure prohibition orders, administrative compensation, executive schemes, heritage protection, use of interpreters, immigration detention, re-raising tax debt, industry grant schemes, postal compensation, disability support, taxation compliance visits, use of coercive powers, and government economic stimulus payments.

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<sup>1</sup> John McMillan was appointed Information Commissioner Designate in March 2010. He was Commonwealth Ombudsman from 2003-2010.

<sup>2</sup> The reports are published at [www.ombudsman.gov.au](http://www.ombudsman.gov.au)

- **Statutory audit activity.** The office inspects the records of law enforcement agencies to ensure compliance with the record keeping requirements of laws relating to telephone interception, use of surveillance devices, controlled operations and access to stored communications. Thirty-one inspections were reported on in the last financial year. Other compliance audit activity of the office includes an audit of complaint handling by the Australian Federal Police, and audit inspection of the records of quarantine investigations.
- **Promoting good administration.** The office publishes many guides and manuals directed at improving public administration, such as Better Practice Guides on *Complaint Handling*, *Managing Unreasonable Complainant Conduct* and *Automated Decision-Making*; Fact Sheets on topics such as *Providing Remedies* and *Principles for Good Administration*; and an e-bulletin published three times each year that contains case studies of administrative problems and the lessons for government. The office also makes many submissions (nearly twenty last year) to parliamentary and other inquiries; and it makes presentations throughout the year to public and agency seminars.
- **Other specialist functions.** An example of the assortment of other specialist functions now discharged by the office is that a report is prepared and tabled in the Parliament on each person held in immigration detention for two years or more – over 580 such reports have been prepared in the last five years. These and other specialist functions of the office are captured in the variety of specialist titles conferred by Parliament on the office, such as Immigration Ombudsman, Defence Force Ombudsman, Law Enforcement Ombudsman, Taxation Ombudsman and Postal Industry Ombudsman. Australian State Ombudsmen also discharge many specialist functions, such as reviewing the death of every young or disabled person who is in a care facility or foster care.

### 3. Case studies of Ombudsman work to improve public administration

**Immigration detention.** In 2005, following some highly publicised incidents of wrongful immigration detention, the Ombudsman's office was asked by government (and provided with resources) to investigate a further 247 instances in which people had been detained by immigration authorities and then released when it was decided that the person could no longer lawfully be detained. The method we chose was to prepare a private report to the government on each individual case, and nine public reports that drew the themes together (on themes such as mental health, children in detention, and legal and process errors).

It was a unique opportunity for an oversight agency to apply the microscope to a selected area of public administration. Not surprisingly, we found many errors – far more than was acceptable. Indeed, we found legal or factual errors in nearly all 247 cases, including the detention of 26 people who held Australian citizenship. We thought there were lessons for all of government in this episode, and the ninth report arising from this investigation, *Lessons for Public Administration*, listed ten general lessons. For example:

- '*maintain accurate, comprehensive and accessible records*': many of the cases of wrongful detention arose from an error as simple as misspelling someone's name, misstating their date of birth, or misfiling their visa application
- '*guard against erroneous assumptions*': do not assume that a child of an unlawful citizen will also be an unlawful citizen, or that information provided by state police about a person's identity is correct
- '*actively manage unresolved and difficult cases*': recognise that officers who are otherwise competent and professional can be out of their depth when dealing with unusual cases, and the administrative systems of the agency must be designed to

identify those cases at an early stage, move them onto the desk of a more experienced officer, and constantly review progress so the cases do not drift.

**Executive schemes.** There is a trend in government to distribute grants, benefits and compensation under schemes that are based in agency guidelines and policy statements, rather than in legislation. There is increasing use of executive schemes because of the speed with which they can be set up and their flexibility when circumstances change. They are widely used for purposes such as payment of redundancy benefits, emergency financial assistance, drought relief, health payments, farming restructure, industry incentives and administrative compensation.

Through our complaints we picked up some recurring problems that would not exist to the same extent in schemes based in legislation. Among them, the executive scheme guidelines were sometimes ambiguous and poorly drafted, they were not always published, rule changes were applied retrospectively to reject applications that would otherwise qualify, different versions of a scheme were applied inconsistently within agencies, and there was no right to appeal to a tribunal against a decision under an executive scheme. We highlighted those general problems in a series of published reports. Some reports were on specific executive schemes. An example was a report on a scheme to provide business assistance grants to the equine industry following a quarantine breach at a government facility that led to the escape of a virus that devastated the horing and racing industry. The report was based on five individual complaints, but it led to the government agency reviewing nearly 800 similar cases in which applicants had been denied a business grant, resulting in over 50% being awarded the grant.

Another report we published arising from this project was a general report, *Executive Schemes*, that drew attention to these recurring problems. The report contained eight best practice principles for better administration of executive schemes. One principle, for example, is that agencies should establish procedures for complaint handling and internal review of decisions made under executive schemes.

**Safety net discretions.** Another common problem we detected in government through individual complaint handling was that legislation that is tightly written with rigid criteria and deadlines can exclude deserving cases and have unintended and unfair consequences. We encountered cases of great injustice, in which people languished in detention, or lost government income support, because government agency lawyers took the view that there was no legal power to fix a mistake.

The strategy we adopted to draw attention to this problem was to publish an Issues Paper that highlighted the problem with case studies, and listed possible approaches and remedies. Some remedies simply required a more flexible and creative use of existing powers – for example, payment of administrative compensation, internal review, or finding a work around. Some approaches would require legislative amendment – for example, an explicit Acts Interpretation Act power to fix a mistake.

We invited agencies to a seminar to discuss the Issues Paper. Nearly all agencies accepted the invitation, and a number have since made constructive submissions on the ideas in the paper. These will result in another public report on the consultations.

The problem of unfair legislation and unintended consequences is an intractable problem, and there are no easy answers. This explains why the alternative chosen by the office for airing this problem was an Issues Paper and an agency seminar. Pleasingly, at this early stage, the exercise has been successful in focussing attention on this concept of a safety net discretion and the role that it must play in the design of government programs.

**Compliance auditing.** Twenty years ago we were first given a statutory audit function, to inspect the records of law enforcement agencies to ensure compliance with statutory record keeping requirements relating to telephone interception and use of other coercive powers.

There was a tendency in the office to downplay this role, and to regard it as a technical, record inspection function. It got little mention in descriptions of the work of the office.

We have taken steps to turn that around – by giving greater public profile to this role, preparing lengthier and more targeted reports to government, raising issues we detect through inspections at meetings with government officials, organising a conference with other agencies that discharge the same audit function, and looking for opportunities to develop a similar audit function in other areas of government.

Our view was that the audit technique is a highly effective means of identifying problems that would never be picked up in complaint handling. Agencies take the audit reports seriously, partly to avoid criticism, partly to correct mistakes before they worsen and cause greater damage to the agency, and also because agencies are aware that Parliament is more likely to confer coercive powers upon them if there is independent reassurance from an ombudsman's office that the powers are being responsibly used. The overall result is better public administration.

#### **4. Strategies for improving public administration**

From that brief description of ombudsman work and individual ombudsman projects, I will draw out some strategic principles on how an oversight agency can best improve public administration. Some principles may not apply as easily to an inspector-general function as to an ombudsman function, yet the key message is the same: we need to stand back from the routine of daily work and reflect more broadly on how we can best achieve our common objective of improving public administration.

***Publish and seek publicity for your work.*** Complaint handling and investigations must be conducted in private, but there is a need to publicise that work. The annual report has been the traditional vehicle for doing so, but other opportunities must be seized. Most people, including most within government, do not read annual reports. A variety of other publication methods must be chosen, including specialist reports, issues papers, fact sheets, bulletins, submissions and speeches.

One benefit of a publications strategy is that the messages from the office reach a broader audience. Media references to the work of the office reassure the public that you are a watchdog that does occasionally growl. This demonstrates to the world that there is accountability and transparency in government – as there must be.

Occasional publicity also makes agencies within your jurisdiction take notice of what you are doing. Public criticism of an agency by an ombudsman can instil within agencies a healthy mixture of anxiety and respect. Not least, publicity moves the file to the desk of the agency head, and often the minister. They will think more acutely about their public image and whether their administration is up to scratch.

Another advantage of a strong public profile is that it attracts good staff. People who work in government like to think they are making a difference, and they will more likely apply for a job in a small oversight agency where career prospects can be limited if they have seen publicly that the agency does good work and has an impact.

There are admittedly risks in publicity that must be heeded. Publicity that is inaccurate or exaggerated can fracture the working relationship with an agency. Agencies can be reluctant to heed an Ombudsman's findings and recommendations if the office has got it wrong on a few publicised occasions. It is also important to be clear as to what message is being sent. We always based our criticisms on the individual cases we had investigated and eschewed any suggestion that we engaging in a broader policy debate about the merits of government programs or priorities.

Those risks must be balanced against the impact and effectiveness of publicity. After all, persuasion and publicity are the major tools available to an oversight agency.

**Draw lessons from individual examples.** Government agencies like to remind ombudsman offices that they deal with only a small fraction of the total caseload of the agency. 'Sure', agencies say, *'we made a mistake in that case. Mistakes are inevitable. But look how many people didn't complain – at how often we got it right. If you were balanced that's the real message you should be getting across'*.

Balance is important, but my philosophy is that individual mistakes and problems often reveal more about the health of an administrative system than a plethora of other studies and inquiries. In the ombudsman office we call this 'bottom up' analysis, rather than 'top down' analysis – we say to agencies, *'however good your system, however efficient and professional your staff, it should not be producing problems or injustice of the kind demonstrated in this case. It is not for us to design the new system – that is your role – for our role is to point out where you've got it wrong'*.

This is a highly effective technique for stimulating organisational improvement. There are countless examples from government around the world of that occurring. The substantial reform of Australian immigration administration and detention that occurred in recent years was prompted by about three publicised cases, which were more effective than decades of departmental and other inquiries and litigation in exposing problems in immigration administration. Importantly, too, the publicity surrounding these cases placed the issue on the public agenda and persuaded government ministers that they had to commit resources and political priority to fixing the problems.

Another example from Australia is that a major prompt for establishing our excellent system for oversight of security intelligence agencies, based around the office of inspector-general and the parliamentary committee, was an incident – called the Sheraton Hotel incident – involving the misuse of power by security intelligence officers on a training exercise. Equally, if we look overseas, we can see that individual incidents, such as the Somalia and Arar cases in Canada, or the Abu Ghraib incident in the US military, have been the major catalyst for widespread organisational reform.

**Be constructive and add value.** Government agencies do not like their faults being publicly exposed. Yet they do acknowledge that administrative systems are never perfect, that public accountability is fundamental, and that government should always strive to do better. If an ombudsman office points out how that can be done, the agency will embrace the message. Agencies are then more likely to accept the occasional public criticism. That is why the Commonwealth Ombudsman's office placed great emphasis on publishing better practice guides to good administration, and conducting seminars on complaint handling and similar topics.

By way of example, agencies around Australia were delighted that all Australian ombudsman offices, led by the NSW Ombudsman, joined together to publish a better practice guide to dealing with unreasonable complainant conduct. This is a growing difficulty for all government agencies. They welcomed the frank acknowledgement of the problem by ombudsman offices and the practical guidance drawn from ombudsman experience of how to grapple with unreasonable complainant conduct.

There has similarly been a strong take-up by agencies of the Commonwealth Ombudsman e-bulletin service, which uses simple case studies to illustrate how administrative errors that are small in scale can cause great anguish or disadvantage to individuals. Each case study presents, in no more than about 3 sentences, a complaint investigated by the Ombudsman's office together with the lesson for government – for example, explain clearly to a person why a debt or penalty is being imposed; do not assume the infallibility of automated systems; check that a proper delegation is in place and current; check the file for additional

information before revoking someone's benefit; check internal policies for consistency with legislation; and be sensitive to how a letter conveying unwelcome news will be received by a person. Those principles are not new, but a case study illustrating a breach of the principle is a salutary reminder of the need for vigilance.

As an aside, another advantage of an e-bulletin is that it can reach a wider audience. We were aware that in some agencies a single recipient of the e-bulletin would forward the bulletin to thousands of other employees. For the same reason we have adopted twittering. Single messages provide instantaneous communication and can be retweeted exponentially!

**Follow up on the implementation of recommendations.** Government agencies are busy, and each day new issues and challenges come through the door. With the best will in the world an agency will undertake to implement a recommendation, or to review its administrative practices, but the undertaking will be overtaken by other pressures and languish. (Sometimes, too, with the most scheming will in the world an agency will give such an undertaking and quickly bury it!)

It is essential for an oversight agency to follow up, and to have a system for doing so. My general impression is that oversight agencies have been slow to develop formal follow-up procedures and to report separately. Recently in the Commonwealth Ombudsman office we implemented a formal system of writing to an agency six months after completion of a report and asking for an update on what implementation steps have been taken. The mere fact of this inquiry usually ensures that some action is taken by the agency. We also found it influential to send each report to the parliamentary committee with oversight of a particular program. That would often prompt the committee to take an interest and to raise the issue with the government agency.

A recent and excellent example of this strategy is a report by the Victorian Ombudsman<sup>3</sup> that lists, in a single report, every recommendation of the office from the previous couple of years, the agency response and subsequent action, and the Ombudsman's opinion on what further work is required of the agency. It is a model that I suspect will be picked up by other Ombudsman offices in Australia.

It is interesting to note also that the legislation to establish an Australian Information Commissioner specifically addresses this issue of implementation. One role of the Commissioner is to investigate complaints about agency handling of freedom of information requests. In addition to making a binding determination about an FOI exemption claim, the Commissioner can issue an 'implementation notice' requiring an agency to implement the recommendations arising from an investigation about FOI administration, and the agency must comply with the implementation notice.<sup>4</sup>

**Be flexible and use different techniques and powers:** It is important not to be a one trick pony – a style has limited appeal and is too easily side-lined. An oversight agency is more likely to gain the attention of government, win support and have an impact, if there is some variety and unpredictability in its work. Doubtless it is important to do most what you do best, but it is equally important to have an expertise and reputation that is not bounded.

Examples from the Commonwealth Ombudsman office, many of which I have already given, are that we variously did individual complaint handling, conducted own motion investigations, undertook joint investigations with agencies, developed the audit function, did unannounced visits to immigration detention centres, inspected government premises such as mail handling facilities, joined government officers on compliance visits and raids, published

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<sup>3</sup> Victorian Ombudsman, *Ombudsman's recommendations: report on their implementation* (Feb 2010). See also an interesting report by the Queensland Ombudsman on the implementation of Coroners' recommendations: *The Coronial Recommendations Project Report* (2006).

<sup>4</sup> Proposed new s 89 of the *Freedom of Information Act 1982*.

reports and issues papers, conducted a public conference on complaint handling every two years, participated in agency seminars, and joined agency advisory groups.

***Look for opportunities to extend your functions:*** One reason for the general success of ombudsman offices in Australia is that they have been prepared to adapt and evolve. In the Commonwealth Ombudsman office we took on new functions. Three examples I mentioned earlier are the audit of police complaint handling and quarantine inspections, the review of each case of long term immigration detention, and the adoption of new titles such as Immigration Ombudsman and Law Enforcement Ombudsman. Other examples are that our jurisdiction was extended to the private sector to cover complaints against government service providers; with government funding we established an active support network for ombudsman offices in the Pacific region; and the office will soon take on the oversight and supervision of the whistleblower protection scheme.

Those additional functions and activities have enabled the office to double in size in recent years. Extra resources, extra people and extra activity enable an office to be more effective. It is important that new functions taken on are compatible with the core functions and operating principles of the office – which in our case was the independent examination of government administrative activity<sup>5</sup> – but equally it is important not to have a narrow and frozen view of your oversight role. If you do, as the world changes and government evolves, the office can become a museum piece.

It is important also to be proactive, and to look for new opportunities. Do not wait for government to come knocking. Be open to taking on specialist functions and one-off functions. A new role does not have to be a permanent one. An example I gave earlier is the specialist review we did, at the invitation of government, into 247 cases of wrongful immigration detention. We received extra funding for that limited task, which meant creating and then closing down a unit, but undeniably it was one of the more valuable and influential tasks we undertook in recent years to improve public administration.

## **Conclusion**

Different strategies will be appropriate for different offices, but a strategy is needed if an oversight agency is to be more effective in improving public administration. Oversight agencies are uniquely placed to have that impact.

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<sup>5</sup> This point is developed in J McMillan, 'The Expanding Ombudsman Role. What Fits? What Doesn't?' (2008), [www.ombudsman.gov.au/pages/publications-and-media/speeches-and-presentations](http://www.ombudsman.gov.au/pages/publications-and-media/speeches-and-presentations)