



**Submission by the
Commonwealth Ombudsman**

**ACCESS TO JUSTICE
ARRANGEMENTS [INQUIRY INTO
AUSTRALIA'S SYSTEM OF CIVIL
DISPUTE RESOLUTION]**

**PRODUCTIVITY COMMISSION ISSUES PAPER,
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Submission by the Commonwealth Ombudsman, Mr Colin Neave AM
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1 INTRODUCTION

This submission responds to the current inquiry into Australia's system of civil dispute resolution undertaken by the Productivity Commission.

This submission primarily relates to clause 8(a) and (b) of the Terms of Reference in the Productivity Commission's Issues Paper of September 2013, which references alternative mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution. It also responds to Part 9 of the Issues Paper: *Using informal mechanisms to best effect.*

2 BACKGROUND

2.1 History of the Ombudsman function

The office of *Justitie-ombudsman* was introduced by the Swedish Parliament in 1809 to act as a defender of the people in their dealings with government. The original Ombudsman was therefore an independent arbiter of disputes between the citizen and government, enshrined in law, and more than a century passed before the next Ombudsman was created in Finland.

Ombudsman functions expanded around the world following World War II. This was due in part to a greater international focus on the protection of human rights and freedoms as well as a move towards independence and democracy in many developing nations. The growth of the welfare state also meant that government activities began to reach into citizens' daily lives in new ways.

After Denmark and Norway implemented Ombudsman systems in the mid-1950s, New Zealand became the first English-speaking country to set up an Ombudsman in 1962.

Since then, the concept of an Ombudsman as an independent person who can investigate and resolve disputes between citizens and government has spread to more than 120 countries and is considered an essential accountability mechanism in democratic societies.

The independent investigation of complaints motivates governments and government agencies to improve the quality of decision making and the delivery of services, with the guiding principle being to examine whether the administrative action under investigation is unlawful, unreasonable, unjust, oppressive, improperly discriminatory, factually deficient or otherwise wrong.

2.2 Office of the Commonwealth Ombudsman (OCO)

The OCO was established in Australia by the *Ombudsman Act 1976* (the Ombudsman Act). Access to Ombudsman services is free, and the office exists to safeguard the community in its dealings with Australian government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

The Ombudsman Act provides that the Commonwealth Ombudsman (Ombudsman) is to investigate the administrative actions of Australian Government departments and agencies and sets out the limits on his jurisdiction. For example, the Ombudsman may not investigate some actions related to Australian Government employment, or the actions of judges and ministers. The Act provides the Ombudsman with an extensive range of powers to investigate actions following complaints or on his own motion and permits him, in some circumstances, to decline to investigate; for example, the Ombudsman may decline to investigate until a matter has been raised with the relevant agency.

The Ombudsman Act enables the Ombudsman to report in a number of ways following an investigation, although it requires the investigation itself to be conducted in private and with fairness to anyone likely to be criticised.

The Commonwealth Ombudsman's role has grown and diversified since the office was established in 1977. The Ombudsman Act confers six specialist roles on the Ombudsman:

- Defence Force Ombudsman: to investigate action arising from the service of a member of the Australian Defence Force
- Immigration Ombudsman: to investigate action taken in relation to immigration (including immigration detention)
- Law Enforcement Ombudsman: to investigate conduct and practices of the Australian Federal Police and its members
- Overseas Students Ombudsman: to investigate complaints from overseas students about private education providers in Australia
- Postal Industry Ombudsman: to investigate complaints against private postal operators

- Taxation Ombudsman: to investigate action taken by the Australian Taxation Office.

3 RESPONSE TO TERMS OF REFERENCE

3.1 Scope of the Ombudsman function

The Ombudsman has strong coercive powers to obtain access to documents, examine witnesses, enter premises, and extend protection and immunity to witnesses, but cannot override the decisions of other agencies. Instead, the Ombudsman resolves disputes through consultation and negotiation and, if necessary, by making formal recommendations to senior levels of government.

The aim is to resolve complaints impartially, informally and quickly, so as to avoid more formal processes including legal representation, justice services and litigation. A key element of the Ombudsman's role is independence—he is neither an advocate for complainants, nor a spokesperson for government agencies.

The Ombudsman also undertakes the role of the ACT Ombudsman in accordance with section 28 of the *ACT Self-Government (Consequential Provisions) Act 1988 (Cth)*. Services are provided to the ACT Government under a services agreement.

3.2 Statutory functions

The Ombudsman has four major statutory functions. These are: handling and investigating complaints; conducting self-initiated (own motion) investigations; performing audits and inspections; and carrying out specialist oversight tasks.

Complaint investigations

Handling complaints about the administrative actions of Australian Government officials and agencies is one of the OCO's core functions. A fundamental feature of Australian democracy is that people have a right to complaint about government agencies to an independent organisation without hindrance or reprisal, and to have the complaint resolved on its merits.

In the first instance, the OCO advises complainants to try to resolve problems with the relevant agency, especially if the OCO has confidence in the agency's complaint-handling processes. To this end, the OCO is able to assist agencies to develop service charters and effective complaint-handling systems.

Most investigations are conducted informally, but more complex investigations require the review of many files and documents, formal interviews and independent specialist advice. The Ombudsman has no legislative powers to force an agency to change a decision or to provide a service and must rely on agencies to cooperate to resolve problems. However, the majority of recommendations made by the Ombudsman are accepted by agencies.

Complaints provide a rich source of information about how well an agency is performing and what improvements it might make. The information can point to problems with an agency's services or program delivery or to a need to improve how complaints are handled.

Own motion investigations

The Ombudsman may choose to use his 'own motion' power to initiate an investigation into the administrative actions of Australian Government agencies following receipt of several complaints about the same issue, indicating a recurring problem. These investigations often arise from insights gained through the handling of individual complaints and the office's other oversight responsibilities.

An own motion investigation can look comprehensively at the scale of a problem, the likely causes, and possible remedial action, either specifically in an individual case, or generally by a change to legislation or administrative policies or procedures. Most own motion investigations result in the publication of a report, and the Ombudsman has published reports on matters as diverse as suicide and self-harm in the immigration detention network, youth allowance, student refunds, visa processing, mail redirection, administrative compensation, use of interpreters, immigration detention, re-raising tax debt, postal compensation, disability support, use of coercive powers and income management decisions.

Compliance audits

The OCO conducts statutory audits and inspections. For example, the OCO inspects the records of law enforcement agencies, including the Australian Federal Police (AFP) and the Australian Crime Commission, to ensure compliance with legislative requirements relating to covert activities, such as telephone interception, use of surveillance devices and controlled operations.

Specialist oversight tasks

The Ombudsman conducts a range of specialist oversight tasks. For example, as Immigration Ombudsman, he has a primary role in immigration detention oversight in reporting to the Minister for Immigration and Border Protection on the detention arrangements for people in immigration detention for two years or more (and on a six-monthly basis thereafter). The Ombudsman's reports, as well as the Minister's response, are tabled in the Parliament. In addition, the Immigration Ombudsman also oversees immigration detention facilities through a program of regular announced and unannounced visits to detention centres.

A new specialist oversight task is in the area of Public Interest Disclosure. The *Public Interest Disclosure Act 2013* will commence operation on 15 January 2014. The Public Interest Disclosure scheme seeks to create a usable and effective framework for managing internal disclosures from within the public sector.

3.3 Complaints to the OCO

In 2012-2013 most of the approaches and complaints we received about Australian Government agencies in our jurisdiction (76%), related to the following five agencies (or programs within the agencies):

- Centrelink (Department of Human Services) – 5,093 complaints (28% of the total we received)
- Australia Post – 3,652 (20%)
- Australian Taxation Office – 1,795 (10%)
- Child Support (Department of Human Services) – 1,736 (10%)
- Department of Immigration and Citizenship – 1,547 (8%).

Common factors leading to the lodgement of complaints to the OCO include: delay and administrative drift; lack of responsiveness and transparency; flaws in service delivery; disputes about oral advice; errors in record-keeping; blockages in internal communication; human error and mistakes that cause damage; complexity leading to confusion; misapprehension; and consequences that cannot be undone.

Remedies provided by the OCO fall into two broad categories:

- remedies that result in resolving the individual dispute between the parties
- remedies that result in improving the practices or processes of the agency or service provider concerned.

Remedies can include an apology; expedition of an action; reconsideration or change in a decision; a better explanation; a financial remedy, or a change in law, policy or practice.

Many individual complaints to the OCO reflect a feeling of powerless, and are often a measure of 'last resort' before deciding to take up legal action. However, many complainants are unable to afford legal representation or access formal justice services, and the OCO provides a timely, flexible and accessible service by which complainants can avoid formal and expensive dispute resolution processes.

Complainant feedback to OCO, 2012:

'I, along with many others, am extremely frustrated and disillusioned that (in my case after X years of trauma and humiliation at the hands of a Government Department (Y), the Z Review and my submission has so far come to absolutely nothing after repeated emails, phone calls and letters to both the Minister and the Prime Minister. Your actions however, have yielded more response in one week than the rest of it put together and I thank you sincerely for your efforts. There is no other avenue I can take as legal action is out of the question due to high costs...'

'The results you presented to me far exceeded my expectations and it is a leap forward in faith and trust that people like myself who cannot afford a lawyer can receive support when they feel they have been unfairly treated by a Government Department'.

3.4 Complaint investigation

In investigating a complaint, the OCO, as an impartial and independent body, gathers information from both parties (the complainant, and the agency) before reaching a conclusion on the merits of the evidence presented. While the Ombudsman has formal powers to request documents relevant to an investigation or to require a person to attend a specified place and answer questions, the large majority of complaints are resolved without using these formal powers. Furthermore, the emphasis of Ombudsman work is on achieving remedies for complainants and improving public administration.

In cases where the OCO decides not to investigate but decides that the matter is best handled by the relevant government agency, the OCO has established a 'warm transfer' process whereby the complaint is transferred, with the complainant's written consent, to the agency, with a request that the agency contact the complainant within three business days.

In cases where the OCO decides to investigate, where the investigation establishes that an error has occurred, the OCO will consider whether the agency should take action to remedy the problem. This could be a remedy for the complainants and, if the problem appears to be broader, other remedial action can be recommended, for example a change to agency policy or procedures.

It is recognised that the advantages of independent investigation need to be weighed against considerations of fairness and equity. For this reason it is essential that the OCO must be impartial and independent, and be mindful of avoiding any perception of advocacy, either for complainants or for agencies.

Sometimes a person and an agency fundamentally disagree about what has happened, whether an error was made or a loss incurred. If so, alternative dispute resolution through a third party may be the better path to follow. This option can also be more suitable when a person distrusts an agency, or a problem seems intractable because of the time that has passed since it first arose.

Case Study 1: Department of Human Services: Centrelink - Write-off of family tax benefit debt

Ms B received family tax benefit (FTB) for her children, which is paid subject to an income test. Each year, an FTB recipient and his or her partner must lodge their income tax returns to show that the FTB recipient was entitled to the payments they received from Centrelink for the financial year. Ms B's partner had not lodged income tax returns for the financial years 2004–05, 2005–06, 2006–07 and 2007–08. As a result, Centrelink raised a debt of around \$56,000 against Ms B for the FTB she received in those years.

When Ms B separated from her partner in 2010, Centrelink decided to temporarily suspend (write off) recovery of her FTB debts. The temporary write-off was inadvertently cancelled on 15 March 2011. The error was partially corrected in September 2011 and the debts for the 2005–06, 2006–07 and 2007–08 financial years were again temporarily written off. However, during the period March 2011 to September 2011, Centrelink withheld all of Ms B's FTB top-up payments and income tax refunds to recover her FTB overpayments.

As a result of our investigation, Centrelink fully corrected the error in October 2012. Centrelink wrote off the FTB debt for the 2004–05 financial year and returned approximately \$9,800 to Ms B that had been incorrectly applied to her written-off debt. Centrelink also apologised to Ms B for its mistake.

Case Study 2: Australian Taxation Office - Administrative errors on tax assessment

Mr F, a pensioner living in an aged care facility, contacted the Ombudsman as he was worried about a large debt he had incurred after lodging his annual income tax return. Debt collectors were pursuing him for payment of the debt but he had no means to pay. Mr F complained to our office as he believed there was a mistake with his return as, instead of a small refund, he received a bill. Mr F had written to the Australian Taxation Office (ATO) about his tax return but he had not received a reply.

Our office asked the ATO to review the matter. The ATO, after considering Mr F's age and circumstance, decided to place debt collection activity on hold while it completed the review. The ATO determined that keying errors had occurred on Mr F's tax return. The ATO corrected the errors and issued an amended assessment which provided a refund plus credit interest. The ATO also wrote to Mr F to advise him of the outcome of the review. Mr F wrote to our office to acknowledge the helpful assistance provided by the ATO Complaints area in resolving his issue.

Case Study 3: Department of Human Services: Medicare - Incorrect rebate information

Mr H, who speaks little English, complained to our office in July 2012. Medicare had provided him with a handwritten quote stating that he would receive \$727.70 for his Medicare rebate entitlement for medical treatment under the Enhanced Primary Care Scheme. Following treatment, Mr H lodged his claim with Medicare and received a rebate payment of \$245.00. His complaint to Medicare was dismissed. It appears that Medicare did not consider providing an interpreter to ensure that Mr H was made fully aware of his entitlement in relation to a claim. Medicare acknowledged that it provided Mr H with incorrect rebate information and that it was evident that he decided to proceed with dental work on the basis of this information.

We asked Medicare to consider assisting Mr H to lodge a claim for compensation under the Compensation for Detriment caused by Defective Administration scheme, with the assistance of an interpreter. In June 2013 Medicare advised that it had decided to offer compensation of \$485.00 to Mr H. Mr H advised that he was happy with this outcome but not with the time it had taken.

3.5 Agency engagement and early identification of systemic issues

The OCO is investing in strengthening relationships with government agencies, providers and appropriate peak bodies, to place greater emphasis on improving public administration through early intervention. The OCO has sought to work more collaboratively with agencies, building relationships based on trust and a 'no surprises' approach for both agencies and complainants. To this end, the OCO has established community roundtable forums, meetings with peak bodies and other outreach activities.

The OCO has moved, over the past decade, from being an office solely concerned with individual grievances to one that has focused more attention on working with agencies to equip them to deal with the immediate complaint, and to create systems that enable them to learn from the experience. The OCO aims to reduce the number of disputes that need to be assessed or investigated this office by building agency complaints handling capacity and stop the same disputes being repeated.

Paying greater attention to systemic issues can be seen in various aspects of the work of the OCO. For example, the office now spends more time analysing complaint trends to identify emerging and systemic issues, and helping agencies to develop prevention strategies at an early stage. In response, agencies have started to approach the OCO seeking assistance in advance of problems emerging and also briefing the office where they see a potential problem developing. This enables the OCO to refer people back to the place within the agency to solve it without extensive involvement on our part.

Numerous ongoing complaints about the same issue are usually a sign of a systemic or recurrent problem that requires further investigation and possible action by the agency. For example, the complaints might reveal that legislation is being wrongly interpreted or applied, an internal manual contains confusing guidelines or incorrect advice, recordkeeping needs to be improved, or staff need further training.

Case Study 4: Department of Immigration and Citizenship - Clothing for female detainees

When we visited an immigration detention facility in Darwin, detainees raised a concern about the suitability of the clothing issued to female detainees. The facility had a policy of providing only unisex clothing that included two long or short sleeved t-shirts, one pair of shorts and one pair of tracksuit pants regardless of gender. The absence of optional skirts and dresses for wear by females was raised with us during a group discussion with the detainees who expressed concerns about this practice.

When we raised these concerns with the Regional Management of the detention centre, we were advised that this practice would cease and that culturally appropriate female clothing suitable to tropical climates would be made available to the detainees.

By identifying and actioning systemic issues the number of individual disputes can be minimised and matters can be resolved before more formal processes, including judicial processes, are entered into. To this end, a Complaint Own Motion investigation has recently been initiated by the OCO.

3.6 Agency Complaint Management (OCO Own Motion investigation)

The OCO is currently gathering information from across all Commonwealth and ACT agencies to inform an Own Motion investigation into complaint management across the Commonwealth and ACT. An agency survey has been issued with a target response date of 31 October 2013.

Once the survey results have been received and collated, this investigation will assess common themes in complaint handling and provide an overview of the current state of complaint handling across the Commonwealth and ACT, and how the complaint-handling environment may have changed over time.

As part of this thematic analysis, it is anticipated that areas of public administration that are at higher risk of creating problems that require resolution may be identified. In addition, the results of the investigation will inform a revision of the Ombudsman's *Better Practice Guide to Complaint Handling*.

It is intended that a final report highlighting common complaint handling themes across the Commonwealth and ACT jurisdictions will be published in May 2014.

4 CONCLUSION

The preferred approach of the OCO is one that requires not just the exercise of powers in a rigid pre-determined way but that encourages flexibility which, in turn, promotes collaboration and cooperation while adhering to the principles of transparency and accountability.

In particular, where more than one agency is involved in a dispute, and when third parties become involved, complainants can be faced with conflicting messages, and administrative processes that are complex even to experts in the field. From the complainant's perspective the Ombudsman plays a vital role in interpreting policy and providing a better explanation. Complainants are able to challenge the state by asking questions about standards of service and demand transparency in how they are treated by government agencies, or how decisions are made. The OCO has the necessary powers and becomes a mechanism by which they can do this.

The OCO's transition to an agency that is interested in the individual issue and its broader systemic cause is essential if the office is to remain relevant to a public that has an increasing number of other forums in which to air its concerns and grievances.

The establishment of the OCO was directed towards ensuring that government departments and authorities are responsive, adaptive and sensitive to the needs of the public. For many disadvantaged and vulnerable people, the OCO provides an affordable and practical mechanism for resolving disputes concerning Australian government administrative decision-making, since the costs of legal representation or accessing justice services are often prohibitive or disproportionate to the issues in dispute.