



**Submission by the
Commonwealth Ombudsman**

**REVIEW OF THE *ROYAL
COMMISSIONS ACT 1902***

**INQUIRY CONDUCTED BY THE
AUSTRALIAN LAW REFORM COMMISSION**

Submission by
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The Ombudsman

The office of Commonwealth Ombudsman is established by the *Ombudsman Act 1976*. The Ombudsman has a national office in Canberra and offices in all state capitals, Darwin and Alice Springs. The Ombudsman is also the Defence Force Ombudsman, the Law Enforcement Ombudsman, the Immigration Ombudsman, the Taxation Ombudsman, the Postal Industry Ombudsman and, under ACT self-government legislation and the *Ombudsman Act 1989* of the ACT, the ACT Ombudsman.

The Ombudsman has the principal function¹ of conducting investigations of actions related to matters of administration following complaints or on the Ombudsman's own motion and has the powers necessary to perform that function. A person seeking to initiate an investigation by making a complaint in good faith does so without being liable in civil proceedings². The Ombudsman may, for example:

- request or require information or documents from a person, with the person not generally subject to adverse legal consequences on account of complying³ and generally not able to refuse to comply with a notice requiring information or documents⁴
- ask questions of any person or require any person to attend and answer questions, for which purpose an oath or affirmation may be administered to a person required to attend
- enter the premises of a Commonwealth agency or its contractor to conduct an investigation there⁵.

The Ombudsman may, during the course of an investigation, expand its scope, cease to investigate all or some elements of it, combine it with other investigations of related issues or spawn a new investigation from a matter arising during the course of inquiries. Where appropriate, the Ombudsman may act cooperatively with one of his state counterparts or with another Commonwealth or state body in relation to the Australian Crime Commission or the Australian Commissioner for Law Enforcement Integrity. The Ombudsman can cease an investigation and refer a complaint to any of several specified bodies where it would be more appropriate for that other body to deal with it⁶.

The Ombudsman and delegates have a qualified immunity from suit⁷ although this is usually taken to exclude judicial review action. They are not compellable in proceedings in relation to information acquired during the course of an investigation⁸.

¹The Ombudsman also conducts inspections and oversight activities under the *Telecommunications (Interception and Access) Act 1979*, the *Surveillance Devices Act 2004*, the *Crimes Act 1914* and the *Migration Act 1958*

² Section 37, *Ombudsman Act 1976*

³ Essentially, the person is not subject to a penalty, evidence of the disclosure cannot be given in proceedings against the person, the disclosure does not breach privacy and does not jeopardise legal professional privilege. See *Ombudsman Act 1976* s 7A(1A)-(1E), s 8(2A)-(2E) and s 9(4)-(5A)

⁴ See s 9, s 36(1) which creates an offence and s 11(2) relating to orders to compel a person to comply with a notice. The provision in s 9(3) for an Attorney-General's certificate exempting a person from having to comply has not been used in current memory

⁵ See s 14, *Ombudsman Act 1976*

⁶ See s 6(4A)-(10), s 6(13)-(21), *Ombudsman Act 1976*

⁷ See s 33, *Ombudsman Act 1976*

⁸ See s 35(8), *Ombudsman Act 1976*

Most investigations

In the case of a majority of complaints, the Ombudsman's office decides not to investigate for any of a number of reasons set out in s 6 of the Ombudsman Act, with the most common including:

- that a matter could and should first be taken up with the relevant agency
- that a matter could and should be subject to some other review process
- that investigation is not warranted in all the circumstances
- that the complainant has been aware of the matter for more than 12 months.

The Ombudsman conducts several thousand investigations a year, mostly related to the approximately 20,000 complaints made in a year. Most of these investigations are conducted quickly and with minimum formality – an Ombudsman investigator asks one or two rounds of questions or requests some documents and receives answers which may resolve the complaint to the investigator's satisfaction. In many cases, the agency accepts that a remedy of some kind⁹ would be appropriate and decides to provide it. The investigator then informs the complainant of the outcome. The investigator will often follow up at some time to make sure the agency has done as it agreed.

Larger investigations

The Ombudsman also conducts a number of more substantial investigations. These can arise from a complaint or, more commonly, on the Ombudsman's own motion. The Ombudsman exercises this latter power when, for example:

- complaint trends show an emerging or serious issue
- an agency or Minister considers that a matter requires credible and thorough external investigation. Some examples include report 03/2005 (the *Alvarez* matter) which was referred to the Ombudsman when it became clear that it was one of a substantial number of cases where people appeared to have been wrongly detained, report 15/2008 (where an agency sought the Ombudsman's consideration of a tender issue) and report 03/ 2008 (the *Westralia* investigation) that arose from an allegation made to the Department of Defence.

Coercive investigation powers are more likely to be used in these cases, and there will more commonly be a need to accord procedural fairness through the statutory process before the Ombudsman makes express or implied criticism¹⁰. An advantage of the Ombudsman model is that the Ombudsman may commence an investigation very quickly and with great flexibility as to its process and objects.

Some of these investigations lead to reports to agencies, and details of some (including edited reports) appear on the Ombudsman's website¹¹. It is for the Ombudsman to determine whether to provide a public version of a report, although he must have accorded procedural fairness before releasing the information¹².

⁹ For example, an apology, a reopening of a matter, a better explanation or compensation

¹⁰ Section 8(5), *Ombudsman Act 1976*

¹¹ www.ombudsman.gov.au, under 'Publications'

¹² See s 35A for the Ombudsman's power to make disclosures in the public interest which underlies these reports

Some examples of published reports from recent years include:

- Detention Arrangements: the Case of Mr W (Report 6/2009)
- Re-raising Written-off Tax Debts (Report 4/2009)
- Use of Interpreters by specified Commonwealth Agencies (Report 3/2009)
- Australian Crime Commission: Use of Certain Powers under Div 2, Part II, *Australian Crime Commission Act 2002* (Report 10/2008)
- DIAC: Safeguards System (Report 7/2008)
- Referred Immigration Cases (several reports relating to people detained by DIAC, despite having a right to be in Australia). Report 11/2007 drew together the lessons for public administration from the eight previous reports.

The subjects of these and of the many other substantial investigations have something in common with Royal Commissions, in that both they and Royal Commissions can arise from matters such as:

- systemic issues in administration
- cases of alleged significant failure in particular administrative actions
- the need for lawful and fair processes when agencies exercise powers that affect rights.

These reports help agencies to understand what the Ombudsman expects of them. The Ombudsman's office generally follows up on the implementation of recommendations made in such reports.

This disclosure process exists alongside, and sometimes coincides with the express reporting powers in the Ombudsman Act, specifically:

- the power to report to an agency head, with a copy to the Minister¹³
- the power to inform the Prime Minister of an investigation and recommendations to which the Ombudsman considers the agency response inadequate¹⁴
- the power to report to both Houses of the Commonwealth Parliament¹⁵
- the Ombudsman's Annual Reports¹⁶.

Practical issues

The Ombudsman's office has a strong staffing base, comprising about 150 staff. Its staff members have a wide range of qualifications and experience in the public and private sectors. The overall number is sufficient to enable the office to change its focus from one subject area to another by changing the duties of some staff.

Where and when an additional function is added, with extra resources, experienced staff can be moved quickly to perform it, with generalist positions being occupied by staff with a mix of experience, qualifications and abilities. The office has staff with a wide range of qualifications and prior experience in the public and private sectors. There are varying levels of security clearance, depending on the requirements of the work area.

¹³ Section 15, *Ombudsman Act 1976*

¹⁴ Section 16, *Ombudsman Act 1976* – there have been about 30 such reports

¹⁵ Section 17, *Ombudsman Act 1976* – there have been two such reports

¹⁶ Section 19, *Ombudsman Act 1976*

The office has a policy of rotating staff between different investigation teams and between investigation functions and inspection and roles that deal with process, policy, advice and outreach. In this way, lessons learnt can be passed on and the office as a whole gains from the experiences of each of its staff.

The office has specialised and trained staff dealing with information technology, human resources, financial management and record management.

The office is geographically spread, meaning that it can conduct interviews and view premises without the need to move staff or complainants and witnesses. It has a highly effective information technology and communications system, incorporating document capture, which allows it to ensure that staff at any of the state offices can conduct or complete any investigation or part-investigation. The complaint management system, Resolve, also allows sensitive information to be corralled so it can be accessed only by staff who have demonstrated a genuine need for it. Staff access to the Resolve system is logged and the system is protected from external access.

These features – flexibility, scalability and existing infrastructure - have made the Ombudsman's office an option often considered by Government when allocating new oversight functions. They enable new matters to be dealt with at incremental cost, rather than through the establishment of a new agency. They allow the reputation of the office for integrity, impartiality and fairness to be harnessed to ensure that new functions can be managed well from the outset.

Royal Commissions and the Ombudsman

The Commonwealth Ombudsman is sometimes said to have powers similar to those of a Royal Commission. The use of these investigative powers can be triggered by a complaint from any member of the public or on the Ombudsman's own motion. The terms of reference for an investigation, as well as its time limits and resources, can be set by the Ombudsman, rather than by the Letters Patent issued by the Governor-General.

There are, in fact, a number of other distinctions – the Ombudsman conducts investigations in private, rather than through open hearings. The Ombudsman's processes have been developed over years to minimise formality and the need for representation, because in large part the costs of representation would present a barrier to complaining and cooperation with investigations. The Ombudsman is a standing office with a range of functions rather than an entity created to carry out a specific function.

As well as the protection of witnesses which is common to both the Ombudsman and a Royal Commission, the Ombudsman Act provides protection from civil liability to complainants who make complaints in good faith¹⁷.

Actions of Royal Commissions

The Ombudsman is excluded from investigating the actions of Royal Commissions because a Commission is expressly not a Department or prescribed authority under

¹⁷ See s 37, *Ombudsman Act 1976*

the *Ombudsman Act 1976*¹⁸. This is consistent with the treatment of courts, which are excluded from the Ombudsman's jurisdiction¹⁹. On the other hand, the Ombudsman can and does investigate the administrative actions of court officials.

However, jurisdiction could be given to the Ombudsman to enable members of the public to complain to an independent person about matters such as staff conduct and tender and contract management by a Royal Commission. As the life of a Royal Commission is limited, its administrative actions could be deemed to have been taken by the department or agency responsible for the *Royal Commissions Act 1902*.

Alternatives and supplements to Royal Commissions

The Issues Paper raises possible new models of Commonwealth public inquiry. I note that the range of matters which may lead to demands for the calling of a Royal Commission or similar inquiry should be capable of being addressed in a range of ways. Not every matter will warrant the administrative overhead of a Royal Commission, and not every kind of action is best ventilated in the open processes which distinguish Royal Commissions from other inquiry bodies.

One option might be for the functions of existing Commonwealth oversight agencies (including, for example, the Ombudsman and the Auditor-General) to include providing assistance to Royal Commissions and other inquiries in areas where the oversight agency has a specific role or where its procedures and expertise may be of use to the inquiry. In that way, the inquiry could tap into the expertise of bodies which already deal with specific subjects, and could increase its own efficiency by taking advantage of their lower-key and less formal processes.

Where the proposed scope of an inquiry is broadly consistent with what is already able to be done by an oversight agency, another option might be that the oversight agency could be tasked with the whole of the inquiry, and given any necessary, temporary, expansion to its powers, functions and resources for the purpose of conducting the inquiry.

Supporting and administering inquiries

Our experience is that any form of administrative activity can lead to problems and complaints. Those issues can be unavoidable, but they are more likely to arise where staff undertake unfamiliar tasks. This may be a common situation in an inquiry, such as a Royal Commission, where the staff, managers and chief executive are brought together for a single, time-limited purpose and where the lead figure is selected for expertise that may not include routine administration. Inconsistencies between expectations and approaches to administrative tasks may vary, and that may lead to inefficiencies and complaints.

It is suggested that the ALRC consider options to enable inquiries to be supported through an existing agency, which could provide the expertise needed to deal with

¹⁸ See s 3(1), subparagraph (a)(v) of the definition of 'prescribed authority', *Ombudsman Act 1976*

¹⁹ They would not be prescribed authorities and, in any case, s 5(2)(b) excludes the Ombudsman from investigating the actions of judges and s 5(20)(ba) excludes the Ombudsman from investigating the actions of staff exercising powers of the court or performing functions or exercising powers of a judicial nature

routine administration in a consistent and predictable way, and which could continue to deal with administrative matters arising from the inquiry but which outlive its existence.

Public and private inquiry processes

The Commission's Issues Paper drew attention to the general principle that inquiries be conducted in public, but with the capacity for specific evidence to be given in private and subject to non-disclosure requirements. The Ombudsman, as noted above, conducts his investigations in private, though he may public a report or an outline of the results of an investigation, almost invariably in a de-identified form²⁰. Where the Ombudsman decides to publish, that is a decision by the Ombudsman, not subject to direction by any Minister or official.

This is a reasonable approach where investigations typically relate to a single matter or a specific individual. It could reasonably be adopted by an inquiry into events relating to identifiable individuals, especially if they related to sensitive personal information. It would also be reasonable to be adopted where an inquiry deals with an inherently sensitive matter²¹. I suggest that, while the default position might lean towards openness, inquiries need to be given some legislative guidance about the circumstances that may warrant a departure.

Summary of proposals

The Ombudsman could be given jurisdiction to investigate the administrative actions of Royal Commissions, with those actions deemed to have been taken by the department or other agency responsible for the *Royal Commissions Act 1902*.

The ALRC should consider, as an alternative to separate inquiries, whether in appropriate cases an existing oversight agency (such as the Ombudsman) could be tasked with conducting an inquiry into an area related to its general operations and provided with the temporary powers, functions and resources needed to complete that task. The temporary powers and functions could become operative when, for example, a Minister makes a request to the agency or when Parliament (or a Committee) so determines.

The ALRC should consider mechanisms which would enable the general administrative functions associated with a Royal Commission to be handled by an existing agency to ensure consistent quality and that matters arising after the inquiry concludes can be finalised.

²⁰ Through disclosure under s 35A or a report to the Parliament under s 17, although some investigation information is disclosed in annual reports (s 19).

²¹ For example, an inquiry relating to intelligence services