

FUTURE DIRECTIONS FOR AUSTRALIAN ADMINISTRATIVE LAW – THE OMBUDSMAN

***Address by Prof. John McMillan, Commonwealth Ombudsman, to the
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The Ombudsman institution has been established in Australia for over thirty years – at the Commonwealth level for 26.¹ During that time, as Katrine del Villar has observed, “the institution has grown from obscurity to occupying an essential place in modern society”.² The future direction for any ombudsman therefore lies principally in continuing that tradition, of which there are many threads.

Chief among them is the successful role played by the Ombudsman in handling and investigating annually many thousands of complaints from members of the public about government administrative decision-making. The issues raised by those complaints are often small in compass – a mailing address misrecorded, or a decision not explained adequately – but significant nevertheless for the person aggrieved.

More lasting change to the system of government in Australia has come from the self-initiated or own motion inquiries undertaken by the Ombudsman, on matters such as internal complaint procedures, government customer service charters, payment of compensation for defective administration, and record keeping of oral advice.³

Yet another accomplishment, though of a more subtle kind, is the practical demonstration by the Ombudsman of administrative law values. Objectivity, transparency, procedural fairness, independent thought and reasoned conclusions are integral to the Ombudsman method of administrative investigation, as increasingly they are to administrative decision-making generally.

On the face of it, therefore, an Ombudsman could tread water, yet still make a splash while staying afloat. However – if I may strangle that metaphor – when there are quickly moving currents in the stream of government, treading water

¹ The first Australian Ombudsman was established in Western Australia in 1971: *Parliamentary Commissioner Act 1971* (WA). The Commonwealth Ombudsman was established by the *Ombudsman Act 1976* (Cth), and the appointment of the first Commonwealth Ombudsman commenced on 1 July 1977.

² K Del Villar, “Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsmen” (2003) 36 *AIAL Forum* 25 at 44.

³ Eg, see the following reports by the Commonwealth Ombudsman: *Issues Relating to Oral Advice: Clients Beware* (1997); *A Good Practice Guide for Effective Complaint Handling* (1999); *Balancing the Risks* (1999); *To Compensate or Not to Compensate* (1999); and *Report on Investigation of Administration of FOI in Commonwealth Agencies* (1999).

will result in a steady drift backwards. I will discuss three important challenges that presently face the office of Commonwealth Ombudsman.

Adapting to government change

In method and outlook the office must accommodate the significant structural and philosophic change that has been occurring steadily in Australian government. The *Ombudsman Act 1976* itself reflects this change. The Act was drafted at a time when there was a far clearer delineation between public and private sector decision-making and service delivery. The Act – and, consequently, the jurisdiction of the Ombudsman – has not been amended to keep pace with the outsourcing of government service delivery, non-traditional styles of government employment, nor the creation of different forms of government agency.

Legislative amendment to close that growing gap in the Ombudsman's jurisdiction may be needed, as recommended by the Administrative Review Council and the Joint Committee of Public Accounts and Audit.⁴ But that alone will not be a sufficient response, either in the short or the long term. It seems unavoidable, in the new framework of government, that there will continue to be bodies discharging a public sector function that fall beyond the Ombudsman's formal jurisdiction. Special arrangements therefore need to be put in place at an administrative and contractual level to ensure that there are procedural safeguards for members of the public who deal with those bodies. An example, from my own office, is the work undertaken over the past three years to ensure that an effective complaints handling process is part of the contractual Code of Conduct observed by each Job Network provider.⁵

Other examples abound of how the legislative structure for Ombudsman investigations has not kept pace with governmental change. For example, the Ombudsman's oversight of the Australian Federal Police is not covered by the *Ombudsman Act 1976* but is captured in a separate and to some extent different investigation code in the *Complaints (Australian Federal Police) Act 1981* (Cth). The awkwardness and complexity to which that bifurcated system can give rise has been exacerbated by the subsequent creation of some other law enforcement bodies – such as the Australian Crime Commission, Crimtrac and the Australian Protective Services – which are covered by the *Ombudsman Act* rather than the *Complaints (AFP) Act*.

Legislative imprecision besets the office in other ways too. For example, an issue I may need to address is whether legislation imposing a privative clause,⁶ which ostensibly defines the scope of legal error in the context of judicial review, has a collateral impact on the role of the Ombudsman in investigating administrative decision-making that is subject to the privative clause. Another issue that arises periodically is whether the *Privacy Act 1988*

⁴ Administrative Review Council, *The Contracting out of Government Services*, Report No 42 (1998) Ch 4; Joint Committee of Public Accounts and Audit, *Contract Management in the Australian Public Service*, Report 379 (2000).

⁵ A report on this matter (*Complaint Handling in the Job Network*) is due to be published in August 2003 (see www.comb.gov.au).

⁶ Eg, *Migration Act 1958* (Cth) s 474.

(Cth) impedes the ability of government agencies to provide information to the Ombudsman other than in response to a formal statutory demand.

A governmental change of a different kind that can likewise pose testing questions for the Ombudsman has been the creation of other agencies with an overlapping function of administrative investigation. In the last year, for example, two new Inspectors-General have been created – the Inspector-General of Taxation, and the Inspector-General of the Australian Defence Force. The creation of specialist bodies, while independently justifiable, nevertheless prompts a deeper structural and philosophic issue to do with the growth and possible proliferation of investigatory bodies and models. For example, another proposal currently under discussion within government is the creation of a Postal Industry Ombudsman, which could subsume the jurisdiction I currently have over Australia Post.⁷

A larger issue confronting the Ombudsman is to define its distinctive role in the system of government.⁸ The need to do so arises from the fact that there are now far more bodies performing an overlapping function. At the time of its creation, the Ombudsman's office largely stood alone, in an administrative law and regulatory landscape that included a few tribunals and a less active court system. There are now a plethora of different agencies that undertake administrative investigation and review. Anti-discrimination, equal opportunity and human rights commissions have been established. The Auditor-General's function has expanded to include government efficiency audits and the improvement generally of public administration. Public service commissions have likewise become more active in defining the values of public service and good administration. Anti-corruption commissions exert a strong focus on public sector corruption and standard-setting. Most executive agencies have both formal and informal complaint mechanisms, oversight bodies and community consultation procedures. Parliamentary committees are more active in reviewing government administration. Inspectors-general, of taxation, defence and intelligence and security have been established. Industry ombudsmen, covering both the private and the public sector have proliferated in areas as diverse as telecommunications, banking, health insurance, superannuation, and energy and water.

Public profile

The office of Ombudsman is by now well-known in Australia. (Having an awkward title that many people find difficult to pronounce can be an incongruous advantage!) But the stature and public profile of an office does not necessarily correspond with knowledge of its existence. An objective of

⁷ The fragmentation of titles and roles already occurs to some extent within the existing structure, in as much as the Ombudsman is also designated separately as the Taxation Ombudsman and the Defence Force Ombudsman.

⁸ I have developed this point a step further in another seminar paper available on the Ombudsman website (www.comb.gov.au), "The Ombudsman's Role – Looking Backwards, Looking Forwards". See also R McLeod, "Twenty Five Years of the Commonwealth Ombudsman" (2003) 36 *AIAL Forum* 15; A Stuhmcke, "The Commonwealth Ombudsman: Twenty Five Years and no Longer Alone" (2003) 36 *AIAL Forum* 54; C Petre, "The Future of the Relationship between Parliamentary Ombudsmen and Industry Ombudsmen" (2003) 36 *AIAL Forum* 63; and Del Villar, above n 2.

mine is to narrow that gap so far as the office of Commonwealth Ombudsman is concerned.

One reason for doing so is the importance in principle of emphasising unremittingly the existence and role of the accountability agencies in our system of law government. Their work is partly done simply by reminding others of their existence – by being known and being seen. An additional value symbolised by the Ombudsman's office that needs emphasising is that the impact of government on the individual should be a prime consideration in government administration. It is not, of course, the only or even the central consideration: government is often driven by budgetary, political and other imperatives at a macro level. Nevertheless, many decisions impact ultimately at an individual level, sometimes in a way that is unexpected and discordant. Institutions such as the Ombudsman are a reminder that individual considerations are not to be overlooked, and the strength of recognition they receive is likely to vary according to the public profile accorded to complaint mechanisms including the Ombudsman.

Beyond those points of principle, I have an abiding concern that the profile of the Ombudsman has slipped at the level of institutional thinking. One sign is the trend I mentioned earlier of creating specialist complaint mechanisms, sometimes by subtraction from the Ombudsman's jurisdiction, at other times by creation of an overlapping mechanism. The rationale for doing so in any individual case may be strong, but at the threshold it is important to take account of the role played by existing bodies such as the Ombudsman. This point came home to me recently when I was visiting an immigration detention centre, and the centre manager told me in answer to a question that I was one of about 130 such visits that would be hosted by the centre each year. Undoubtedly the growth in oversight mechanisms in our society is a creditable development, but it is as important to guard against the creation of a bewildering oversight framework.

Another example of my concern is the recent report in the ACT of the Bill of Rights Consultative Committee. Like many other reports of its kind, the discussion in the report of the existing mechanisms to protect human rights makes no mention of the Ombudsman's office (nor, for that matter, of administrative law).⁹ Yet, both symbolically and at a practical level, the Ombudsman's office captures what in my view is the most fundamental of all human rights, namely the right to complain against and to challenge the government in an independent forum. Indeed, not a day goes by in my office when human rights standards and principles are not a central focus of discussion and analysis in the investigations we undertake into matters such as law enforcement, withdrawal of social security benefits, detention of immigrants, treatment of young children, and the exercise of government coercive power. The point of this observation is not to join issue with the

⁹ ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003) 30-32. The Human Rights Bill proposed in the Report also fails to take account of the human rights role already played by the Ombudsman. For example, the exclusive jurisdiction to hear human rights claims conferred on the ACT Supreme Court (cl 6) would detract from the valuable and informal role already played by the ACT Ombudsman in areas covered by the Bill, such as disputes concerning public housing and corrective services.

merits of the proposal for an ACT bill of rights, but to reinforce another point. In the current climate of debate about domestic and international standard setting, the pivotal role that long-established administrative law bodies such as the Ombudsman already play is often not fully understood.

Another prominent role I believe an Ombudsman's office can perform is to display leadership in defining the standards for good administration. This is not a role to be performed in solo, but in conjunction with other bodies such as the Australian National Audit Office, the Australian Public Service Commission and, of course, executive agencies. This suggestion ties in with a view I had aired publicly before appointment as Ombudsman, that as a society we have drifted steadily and undesirably towards defining issues in government and society as problems that require a legal solution by the definition of judicially enforceable legal standards.¹⁰ Administrative law, for example, is permeated increasingly by opaque and elastic standards (such as the obligation to observe natural justice, and to consider all relevant matters) that make it difficult to advise confidently whether a planned decision will be lawful and withstand legal challenge. The Ombudsman is well-placed to play a role in assigning a non-legal content to decision-making standards, in a way that is not disruptive and is attuned to the realities of government and social regulation.

Funding

It has been customary for Australian government ombudsmen to bemoan publicly and regularly the funding shortage they face.¹¹ It is perhaps to be expected that I will conform to that tradition. Let me not disappoint, and give three examples to echo my concern.

The first example is of the library of the Ombudsman's office. In short, there is no longer a library, because it was closed down a couple of years ago as an alternative to reducing the number of investigation staff. If I may draw a comparison, to my knowledge each of the 46 Federal Court judges has (as one would expect) a library with at least 3 or more sets of law reports, yet the Ombudsman's office nationally is devoid of that resource. Indeed, my personal home library of administrative law materials is far superior to that of the national government office I now occupy.

¹⁰ Eg, "Judicial Restraint and Activism in Administrative Law" (2002) 30 *Federal Law Review* 335; "Better Decision-Making – By What Standard?" (2002) 105 *Canberra Bulletin of Public Administration* 43; and "Liability for Government Failure to Act: a Public Law Perspective" in J Jones & J McMillan (eds), *Public Law Intersections* (CIPL, 2003) 1. A recent example of how problems in public administration are increasingly recast as legal issues is the decision of the High Court in *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51. In issue was whether a decision of a Minister was invalid by reason that an officer who participated in preparing advice to the Minister had a conflict of interest in the decision. Although the High Court rejected the argument by majority, it had been upheld unanimously by the Full Court of the Supreme Court of Western Australia, thus illustrating the indeterminacy of the legal standards under consideration.

¹¹ Eg, Commonwealth Ombudsman, *Annual Reports: 1984–85*, p 3–4; 1987–88, pp 31–33; 1988–89, pp 3 and 20–21; 1989–90, pp 15–16; 1990–91, pp 115–116; 1995–96, pp 7–8, and 45–47; and 1996–97, 'Resources', chapter 10.

My second example is of the Ombudsman's budget for outreach activity. For at least the last couple of years, the budget has been zero. I recall when I last worked in the office in the 1970s that we regularly undertook visits to regional Australia (I personally did a tour around Tasmania), but that no longer occurs. True it is that we now operate a far better telephone and internet service for lodgment of complaints, but that is not a substitute for outreach among the diverse regional, social and ethnic groups of Australians who are otherwise less likely to have contact with the Ombudsman's office.

Nor is outreach simply a one-way exercise in communication, of advertising the existence of a complaint service to those who might choose to avail of it. Outreach is an interactive activity. As I see it, a distinctive responsibility of the Ombudsman's office is to bring outside values into the business of government. Legislative rules, government policies, and administrative decisions that seem fine on paper often impact on people in ways that are unexpected and misunderstood. An Ombudsman's office, when it is fulfilling its potential, is uniquely placed to speak and listen to both sides of a dispute, and to come to understand the differing perspectives that may be brought to bear on a grievance or a dispute. The office will be unable to fulfil that potential if it lacks a presence in the Australian community.

Thirdly, in the most recent Commonwealth Government budget, funding was allocated for an additional 2041 new full-time positions in the Australian government administration (1230 in Tax). As that recognises, there is a need for a great many more administrative actions and decisions to be undertaken within government. The Ombudsman's experience is that an increase in the scale of government activity is often accompanied by an increase in the number of problems and grievances felt by members of the public.¹² Yet there was no corresponding or proportionate increase in the Ombudsman's budgetary allocation.¹³

My office may not be alone in the executive arm of government in feeling the impact of limited funding. Small agencies, however, often suffer disproportionately by efficiency dividends, enforced savings and other funding reduction policies. The amounts in question are not significant: in stark terms, an annual budgetary increase of \$1M – 10% of a budget such as ours – makes an enormous difference to a small agency.

The easy path for the Ombudsman's office would be to reduce operational costs by maintaining an office in only one or two capital cities, as many other statutory and regulatory authorities and industry ombudsman do. However, it has always been an article of faith of the Commonwealth Ombudsman – but, increasingly, a costly article of faith – that there should be an office in each capital city.

¹² By way of illustration, the 2003 Budget also foreshadowed that the increased staffing would allow an additional 3,000 investigations into welfare fraud, and an additional 321,000 payment reviews by Centrelink. Many of the complaints to the Ombudsman arise in such areas.

¹³ A small increase was given for law enforcement and major investigation work that is quickly offset by increased insurance costs and forthcoming wage increases

A point on which we hope to do some work in the office is to demonstrate that effective oversight and scrutiny of a non-litigious kind can be a cost saving and advantage to government. When things go wrong in government the legacy can be very costly. Preventing error is a core Ombudsman objective. I will use the example of government contracting to illustrate this point. It is an area that is inherently susceptible to costly disputation, because of the inherent fluidity and indeterminacy of the process, and also because of the amounts of money at stake. There are signs in Australia,¹⁴ but more so in other countries, of the potential for litigation and judicial review of government contracting. An alternative that may be preferable and far less disruptive and costly is for bodies such as the Ombudsman to be key oversight bodies in this area. Oversight of government contracting has long been an active concern of the Ombudsman's office, though again it is an activity that can be complex and resource-intensive if undertaken properly.

Looking ahead

The present draws from the past. Institutions such as the Ombudsman that are deeply rooted in government history and practice have a promising future. However, there are always challenges on the horizon to be faced by the office and to be understood by the rest of government.

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¹⁴ Eg, *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; *MBA Land Holdings Ltd v Gungahlin Development Authority* [2000] ACTSC 89.