

FUTURE DIRECTIONS – THE OMBUDSMAN

*Address by John McMillan, Commonwealth Ombudsman
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Life in the Ombudsman's office in the past year has been anything but dull. We are poised to take on an additional function of assessing the situation of long-term immigration detainees.¹ A new position of Postal Industry Ombudsman is to be established and located in the office of the Commonwealth Ombudsman.² New statutory functions have been conferred on the office to conduct periodic compliance audits of records of the Building Industry Taskforce and relating to the use of surveillance devices.³ Budgetary allocations were given for new programs in two other areas: a four-year outreach program to regional Australia, and to handle contract complaints arising under the Australian-American Free Trade Agreement. Another area of significant budgetary growth, supported mainly by AusAID grants, is a linkage and support program to nine Ombudsman offices in the Asia-Pacific region.

On the horizon are two other developments that affect and potentially detract from the Ombudsman's role. One was a report on the military justice system, that endorsed the Ombudsman's criticisms of that system but proposed a new system of oversight based more on the concept of an independent tribunal to deal with military grievances.⁴ The other is the Government's proposal to create an Office of Law Enforcement Integrity to investigate police corruption, and to reform the system for investigating police complaints contained in the *Complaints (Australian Federal Police) Act 1981* (Cth).

This paper takes up some of the broader issues posed by those changes, concerning the structure of the office and the way that it conducts its government oversight function.

The Ombudsman structure and placement in government

A growing challenge for the office is to integrate both its specialist and its generalist functions. The generalist function has been the core role of the office since its creation, of investigating any complaint from a member of the public about an instance of Commonwealth administration occurring anywhere in Australia. Close to 20,000 such complaints are received each year and dealt with in the eight separate offices of the Commonwealth Ombudsman.

While that generalist function retains its importance, there is a growing trend in government and society to call for the creation of specialist mechanisms for dealing

¹ *Migration Amendment (Detention Arrangements) Act 2005* (Cth), inserting a new Part 8C into the *Migration Act 1958* (Cth).

² Postal Industry Ombudsman Bill 2005.

³ *Surveillance Devices Act 2004* (Cth) s 55, *Workplace Relations Act 1996* (Cth) s 88AI

⁴ Senate Foreign Affairs, Defence and Trade Committee, *Inquiry into the Effectiveness of Australia's Military Justice System*, June 2005.

with complaints in designated areas of government administration and regulation. In the last year or so there have been proposals by parliamentary committees, political leaders and public commentators for the creation of an aviation ombudsman, children's ombudsman, small business ombudsman, aged-care ombudsman, media ombudsman, arts ombudsman, franchising ombudsman, sports ombudsman, university ombudsman and funeral industry ombudsman.⁵ Already there are specialist oversight bodies that bear some comparison to the Ombudsman, such as the Inspector-General of Taxation, the Inspector-General of the Australian Defence Force and the Inspector-General of Intelligence and Security.

There are often good policy reasons for creating specialist ombudsmen or oversight mechanisms. But there is equally a danger of overlooking the benefits provided by an established agency with a generalist function. As to my own office, our size means that we can maintain separate offices in each State and Territory, conduct outreach in regional areas, employ staff with a diversity of skills, maintain a training program, operate a sophisticated case management system, swiftly move staff to functional areas of temporary need, provide support to ombudsmen in the Asia-Pacific region, and develop new functions.

The debate will not however be won by extolling the benefits of generalist as against specialist bodies. The greater challenge is to integrate both dimensions. One way the Commonwealth Ombudsman's office has been addressing that challenge is to reposition itself as a generalist agency, hosting a cluster of specialities. The seeds of that approach were sown some time ago, when the specialist roles of Defence Force Ombudsman and Taxation Ombudsman were conferred on the Commonwealth Ombudsman.⁶ Legislation to add the role of Postal Industry Ombudsman is currently before the Parliament.

Logically that approach could be extended – for example, a role of Immigration Ombudsman, or Law Enforcement Ombudsman. For the moment, the challenge for the office has been to develop its expertise in selected areas, by creating specialist teams within the office, and by targeted training and strategic planning. The adaptation of the Ombudsman role to changes in government service delivery may well be important to the continued relevance of the office.

This links to a broader structural question that I have discussed elsewhere,⁷ concerning the location of the ombudsman and other oversight bodies in the framework of government. The range of agencies that review and oversight the executive branch of government is now extensive, having grown especially in the last two decades. The list includes Auditors-General, ombudsmen, administrative tribunals, independent crime commissions, privacy commissioners, information commissioners, human rights and anti-discrimination commissions, public sector standards commissioners, and inspectors-general of different kinds. Constitutionally those bodies are part of the executive branch of government, but functionally that classification is becoming strained. Their statutory independence and watchdog role differentiate them from other executive agencies that exist to administer law and policy under the supervision of the elected government.

A possible alternative is to think of these bodies as discharging a new function in government, and belonging to a new arm that might be titled the review and integrity

⁵ For references see J McMillan, 'The Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 1 at 4.

⁶ See *Ombudsman Act 1976* (Cth) ss 4(3), 19B(2).

⁷ McMillan, above n 5.

branch of government.⁸ As that indicates, the way that we look at government and the role of agencies such as the Ombudsman's office should not be static. Traditional descriptions of the office of Ombudsman no longer fit easily with the diverse functions the office discharges.⁹

Techniques of administrative law oversight

A continuing challenge for the Ombudsman's office is to fulfil its objective of contributing to the improvement of public administration. The small size of the office (100 people) compared to the larger size of the Commonwealth public service (over 130,000 under the Public Service Act alone) is one dimension of that challenge. Another dimension of the challenge is that the work of the office mostly arises in areas of government administration that have four features:

- The complaints to the Ombudsman's office arise mostly in areas where there is a high volume of decisions or transactions (numbering in the millions) being undertaken by large agencies that employ thousands (in some cases, tens of thousands) of staff, such as Centrelink, the Australian Taxation Office, the Child Support Agency, Australia Post, the Department of Immigration, and the Australian Defence Force;
- Most of those areas concern financial transactions between the government agency and members of the public, for example, in administering income support laws, collecting taxation, or assessing child support liability;
- The laws being administered in those areas are highly complex, and are often not well-understood by those at the front-line, or even at times at the back desk; and
- The government clients frequently have an ongoing relationship with the agency, for example, in receiving a benefit or paying taxation.

Collectively, those features mean that the Commonwealth Ombudsman is usually less concerned with controlling maladministration or abuse of power, and more concerned with identifying how improvements can be made and remedies can be provided within an administrative system that is large, complex and technical.

One way the office has taken up that challenge in the past has been to publish reports and guidelines for improvement in areas of special difficulty – such as *Issues Relating to Oral Advice: Clients Beware* (1997), *A Good Practice Guide for Effective Complaint Handling* (1999), *Balancing the Risks* (1999) and *To Compensate or not to Compensate* (1999). More recently we have addressed the challenge tried in the annual report by targeting the “Problem Areas in Government Decision Making”. Areas targeted in the 2003-04 report included record keeping, oral advice, the lack of safety net discretions, and schemes established by executive action. Other topics to be taken up in the 2004-05 report include falling between the cracks of government programs, and inconsistent decision-making.

Another issue of growing importance is the use of administrative audits by Ombudsman offices as a tool of administrative oversight and accountability. My own office has a statutory function of periodically auditing compliance by law enforcement authorities with the record-keeping obligations imposed by legislation authorising telecommunications interception, controlled operations and the use of surveillance devices.¹⁰ On an own motion basis we have audited administrative decision-making

⁸ The idea was first put forward in J J Spigelman, ‘The Integrity Branch of Government’ (2004) *AIAL National Lecture Series on Administrative Law* No 2.

⁹ See also B Barbour, ‘The Ombudsman and the Rule of Law’ (2005) 44 *AIAL Forum* 17.

¹⁰ See *Telecommunications (Interception) Act 1979* (Cth) s 84, *Crimes Act 1914* (Cth) Part 1AB

in other areas: a recent example was an audit of change of assessment decisions by the Child Support Agency.¹¹ A more extensive program of administrative audits is carried out by the NSW Ombudsman, especially of policing.

Recent reports of the Commonwealth Auditor-General illustrate the important role that administrative audits can play in measuring government compliance with the core administrative law values, of legality, rationality, fairness and transparency. Examples are Australian National Audit Office (ANAO) performance audits on the administration of health care cards (Audit Report No 54, 2004-05), the conduct of security investigations (No 41, 2004-05), Centrelink's review and appeal system (No 35, 2004-05), Centrelink's complaints handling system (No 34, 2004-05), the administration of taxation rulings (No 7, 2004-05), the management of customer debt by Centrelink (No 4, 2004-05), administration of FOI requests (No 57, 2003-04), processing of asylum seekers (No 56, 2003-04), management of immigration detention centre contracts (No 54, 2003-4), ATO management of aggressive tax planning (No 23, 2003-04), the Aboriginal law and justice program (No 2003-04), appeals by veterans against disability compensation decisions (No 58, 2003-04), client support in the Child Support Agency (No 7, 2002-03), and confidentiality provisions in government contracts (No 2000-01).

The work of the ANAO should be welcomed by the administrative law community, but equally that community should be troubled to ask some deeper questions about the adequacy of the techniques traditionally relied upon in administrative law to control government action. A heavy and at times exclusive emphasis is given to reviewing individual decisions, whether by judicial and tribunal review and administrative investigation. Those techniques are dwindled in importance, but it may be that they are less effective than administrative audits in controlling Commonwealth decision-making that has the features I noted earlier. The challenge for administrative law is of two kinds: to develop new tools for oversighting the legality and propriety of government decision-making; and to actively contribute to the work of the ANAO and other bodies so as to ensure that the administrative audits conducted by those bodies properly reflect the administrative law values and objectives that are increasingly used as a benchmark in the audits.

Inquiring into administrative problems

The Ombudsman's office has recently been given a new function of conducting an independent assessment of the adequacy of the arrangements for the detention of any person held in immigration detention for more than two years. The Ombudsman's assessment is to be undertaken after receiving a report from the Department of Immigration and Multicultural and Indigenous Affairs, and the assessment is then to be tabled in the Parliament by the Minister.

This is a different role for an Ombudsman's office to play, but it nevertheless fits neatly with various features of the office: its accustomed role and experience in investigating immigration and detention issues; the statutory independence of the office; the traditions and reputation of the office for bringing an independent mind to sensitive issues of public administration; and the statutory powers of the office to conduct an unhindered investigation by obtaining access to all relevant documents, premises and people.

The conferral of this role on the Ombudsman's office has occurred amidst a larger public debate concerning the investigation of immigration detention issues. A focus

¹¹ Commonwealth Ombudsman, *Child Support Agency Change of Assessment Decisions – administration of change of assessment decisions made on the basis of parents' income, earning capacity, property and financial resources* (2004).

of much of the debate has been the inquiry being conducted by Mr Mick Palmer, former Commissioner of the Australian Federal Police, into the detention of Ms Cornelia Rau. That inquiry has since broadened, first to inquire into the removal from Australia of Ms Vivian Alvarez, and subsequently to inquire into a further 200 matters identified by the Department as possibly raising similar issues.

The Palmer Inquiry¹² was established by executive action of the Minister for Immigration, and relies solely on executive power for the conduct of the inquiry and to provide a report to the Minister. This has attracted some critical public and political comment, much of it saying that what is required is a royal commission, a “full judicial inquiry” or an inquiry with judicial powers of inquiry. There have as well been suggestions in the media that my own office would be an appropriate body to conduct an inquiry of this kind, or to continue the inquiry into the other 200 matters identified by the Department.

I will not enter that particular debate concerning the Palmer Inquiry. The report will soon be available, and it will then be possible to have a more informed debate about the adequacy and the limits of executive (or non-statutory) inquiries. I will, however, make some general observations about the legal basis for the conduct of administrative inquiries, in part to correct some misconceptions that I think have crept into the public debate.

The first has to do with the concept of a “judicial inquiry” or an inquiry with “judicial powers”. Neither concept makes any sense from a legal perspective. If a serving member of the judiciary is appointed to conduct an inquiry, constitutionally it is not a judicial inquiry, but an executive inquiry by a person who happens to be a judge.¹³ The distinction is important both constitutionally and practically. The judge does not bring the powers of the Court to the inquiry. Unless there is a statute conferring power, the judge will not have the powers otherwise exercisable by a court to require the production of documents, to take evidence under oath, to extend immunity to witnesses, to enter premises, and to punish by contempt a failure to comply with a direction by the judge. Nor will the report of the inquiry be anything other than a report to government, which has the discretion to implement or ignore the report, or publish or suppress it, as can be done with any other executive document.

All that the judge brings to the inquiry is the aura of independence and objectivity that is a hallmark of the judicial branch. While that is doubtless important, there is no reason to assume that an inquiry conducted by a person with different qualifications will be less effective. The value and reputation of any inquiry will depend ultimately on the professionalism with which it is conducted and the quality of the report that is prepared for government.¹⁴

Another option is for an inquiry to be established under the *Royal Commissions Act 1902*. (Cth). An inquiry of that kind has coercive authority to obtain any necessary evidence, and can act independently of government direction in the way the inquiry is conducted and in attracting publicity to the proceedings. On the other hand, a characteristic of royal commissions is that they can be expensive and protracted, typically taking more than a year to inquire and report.

¹² The initial title for the inquiry was the Inquiry into the Cornelia Rau Matter. The title was later changed to the Inquiry into Referred Immigration Matters. The terms of reference are available at www.inquiry.com.au.

¹³ Eg, see *Wilson v Minister for Torres Strait Islander Affairs* (1996) 189 CLR 1 and *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 57, discussed in R Creyke & J McMillan, *Control of Government Action* (2005, LexisNexis) 258-261.

¹⁴ For examples, see T Sherman, ‘Executive Inquiries in Australia: Some Proposals for Reform’ (1997) 8 *Law and Policy Papers* 3-5.

A point sometimes overlooked is that the Ombudsman is tantamount to a standing royal commission, being endowed by statute with the powers, protections and immunities to conduct a far-reaching inquiry into any issue of government administration.¹⁵ Specifically, the *Ombudsman Act 1976* (Cth) confers power upon the office to require the production of information or documents from any person, to examine witnesses under oath, and to enter premises (ss 9, 13, 14). The Ombudsman and other staff of the office are not compellable before a court, tribunal or similar body to disclose information or documents that have been obtained during an Ombudsman inquiry (s 35(8)). The Ombudsman and staff are not liable to an action, suit or proceeding in respect of any action taken in good faith in conducting an inquiry under the Ombudsman Act (s 33). There is a similar protection against civil action for any other person who has provided information or documents to the Ombudsman (s 37). Lastly, like a royal commission, the Ombudsman has a discretion to decide how the inquiry is to be conducted (s 8(2)), including the power to release any information in the public interest (s 35A(1)).

This short summary indicates that many factors will be considered when an inquiry is being established by government. There are two that I wish to emphasise. The first is that it can be important for an inquiry into a controversial issue of public administration that touches on issues of potential legal liability to be conducted under a statutory framework. The major reason (but not the one often highlighted in public discussion) is that it is important for an inquiry to be able to reassure witnesses that the evidence they give is not at risk of later being used in legal proceedings, including legal proceedings against the witness for defamation or breach of confidence. Equally, the statutory basis for the inquiry overcomes any obstacle to giving evidence posed by the *Privacy Act 1988* (Cth) or legal professional privilege.

The other point to which I would draw attention is the over-importance (as I see it) that is attached to an inquiry being conducted by a judicial officer or a practising lawyer. Doubtless there are examples of such inquiries that have made a major contribution to public administration in Australia: instances popularly cited are the Stewart Royal Commission into illegal telephone interception (the 'Age Tapes') and the Fitzgerald Inquiry in police corruption in Queensland.¹⁶ On the other hand, there are as many less appealing examples. A local example is the ACT coronial inquiry into the January 2003 bushfires, that seems far from completion yet has cost an estimated \$10M or more in legal costs. The Victorian Royal Commission into the Intergraph Ambulance dispatch system is another example of an inquiry that ran substantially over time and budget.

Nor should there be any assumption that legal or judicial wisdom is more likely to deliver a sounder result. It can be delicate to give examples, but a recent instance is the finding of a coronial inquiry into the accidental death of a child in a school parking lot that legislation be enacted banning the drivers of four wheel drive vehicles from stopping within 200 metres of school premises.¹⁷ The diversity of considerations of a non-legal kind that frequently arise in public inquiries bespeak a need for a diversity of experience in conducting inquiries.

¹⁵ Whether the Ombudsman has the resources to conduct a royal commission style of inquiry is a different issue.

¹⁶ Respectively, Justice D G Stewart, *Report of the Royal Commission of Inquiry into Alleged Telephone Interceptions*, 30 April 1986, Parliamentary Paper No 155/1986 (Cth); and G E Fitzgerald QC, *Report of Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, 3 July 1989 (Qld).

¹⁷ 'Ban 4WDs from schools: coroner', *The Australian*, 18 May 2005, p 3.