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DEVELOPMENTS IN ADMINISTRATIVE LAW

*Ron Fraser**

Government initiatives, inquiries, legislative and parliamentary developments

Report on ASIO legislation

The Senate Legal and Constitutional References Committee reported in December 2002 on the Australian Security Intelligence Organisation Legislation (Amendment) Bill 2002 and related matters. Unsurprisingly, most of the Committee's report deals with the preconditions for, and the conditions of, exercise of ASIO's proposed powers to detain and question persons believed to have information about terrorist offences. The report recommended changes to the Bill, but Government Senators expressed a number of reservations. In addition, chapter 9 of the report, on 'Protocols and safeguards', contains a short section on the question of judicial review of actions under the Bill. The Bill provided for a person being questioned to be told of his or her rights, including the right to seek a judicial review remedy. Other relevant accountability mechanisms referred to in the Bill included the role of the Inspector–General of Intelligence and Security and the Ombudsman.

The Committee noted that a judicial review application could be made to the Federal Court, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), or under s 39B of the *Judiciary Act 1903* (Cth), or to the High Court under the provisions of s 75(v) of the Constitution, and referred to differences of view concerning an action for, or in the nature of, habeas corpus. The Committee drew attention to several factors that could tend to limit the practical value of judicial review in this context. These arose from the nature of the discretion, considerations relating to national security sensitivities, and practical considerations relating to evidence, time and the role of the legal representatives and/or approved lawyers under the Bill. The Bill was not passed by the Senate after some of its amendments were rejected by the House of Representatives, but was reintroduced into the House on 20 March 2003. (***Report of the Senate Legal and Constitutional References Committee on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters,*** December 2002***,*** available from:

http://www.aph.gov.au/senate/committee/legcon_ctte/index.htm)

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Senate Scrutiny of Bills Committee

The following aspects of proposed bills are among the matters the Senate Scrutiny of Bills Committee has drawn to the attention of Senators in its *Alert Digests* and *Reports* for 2003 up to 19 March:

- Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 2) 2002: The Committee was concerned with whether there was sufficient Parliamentary scrutiny of the progressive incorporation in delegated legislation of changes to the Australian and New Zealand Food Standards Code and the international Codex Alimentarius. It left the Senate to determine whether information on the changes contained in annual reports or a separate document would provide sufficient Parliamentary scrutiny. (***Alert Digest No. 1 of 2003***, 5 February 2003 and ***Second Report of 2003***, 5 March 2003))

- Migration Legislation Amendment (Protected Information) Bill 2002: The Bill was in part designed to prevent review by the courts of the exercise of the Minister's power under s 503A of the *Migration Act 1958* (Cth), to permit the disclosure of specific confidential information communicated by gazetted law enforcement and intelligence agencies. The Committee noted that the amendments were the same as other privative clauses in the Act, and that they made rights and liberties dependent on non-reviewable decisions; it left the Senate to determine whether they did so unduly. (***Alert Digest No. 1 of 2003***, 5 February 2003)

- Migration Legislation Amendment Bill (No. 1) 2002: The Committee left the Senate to determine whether the abrogation of the rules of natural justice was an undue breach of personal rights in relation to a declaration under s 33(9) of the Migration Act that it is undesirable for a person with a special purpose visa (such as crew members of ships and aircraft, military personnel, government guests, etc.) to travel to and enter, or remain in, Australia. The Committee accepted that there may be substantial reasons for abrogating the rules of natural justice in this matter, but noted that because of the effect on personal rights the exclusion of natural justice should occur only in exceptional circumstances. (***Second Report of 2003***, 5 March 2003)

- In the Committee's *First Report* for 2003, it made some interesting comments on the purposes of Explanatory Memoranda, noting that they should contain a full explanation of the background to the bill and its intended effect, including a substantial discussion of the issues relating to the Committee's terms of reference in addition to notes on clauses. The Committee intended to write to the Department of the Prime Minister and the Office of Parliamentary Counsel about these concerns and report back to the Senate. (***First Report for 2003***, 5 February 2003 at 20)

The Committee's *Alert Digests* and *Reports* may be accessed via the Committee's website:

http://www.aph.gov.au/senate/committee/scrutiny/index.htm

From the Annual Reports

Among the annual reports of government agencies for 2001–02 tabled in Parliament in the last half of 2002, the following reports relating to administrative law agencies or mechanisms may be of interest to readers. Some of their highlights are mentioned below. Copies of reports may be obtained from the agency websites set out below or often from the agency itself in hard copy.

- Administrative Appeals Tribunal (AAT): Initiatives taken by the new President, Justice Garry Downes, AM included establishment of a Tribunal Constitution Committee to examine the effectiveness of multi-member tribunals and propose principles for the constitution of one, two and three member tribunals. The President noted that he had been appointed for one year from April 2002, during which the Government was expected to finalise proposals for change that would not necessarily take the same form as the proposals included in the Administrative Review Tribunal Bill (and see below under heading 'Administrative review and tribunals'). The report includes a chapter on decisions of interest.

  http://www.aat.gov.au/about.htm

- Administrative Review Council (ARC) (26th Annual Report): The report includes a Tribute to its late President, Ms Bettie McNee, and notes the appointment of new President Mr Wayne Martin QC. It notes the launch in October 2001 of the ARC's publication *A Guide to Standards of Conduct for Tribunal Members*. The report as usual includes copies of letters of advice to government concerning aspects of administrative review, administrative law and public administration, although the number of these has diminished in recent years. The Council is pursuing ways in which consultation with it by agencies early in the legislative process may be encouraged. (Other ARC matters are dealt with below.)

  http://www.ag.gov.au/www/arcHome.nsf

- Commonwealth Ombudsman and ACT Ombudsman: The Commonwealth Ombudsman's report identifies a decline in complaints to the Ombudsman's office (19,263), due partly to a decline in complaints concerning the GST and the new tax arrangements, and partly to better public knowledge of agency complaint handling units. 5,143 complaints were investigated, in 29% of which the Ombudsman identified an agency defect (down from 35% in 2000–01). There was an increase in the number of more complex matters and complaints raising systemic issues. The Ombudsman conducted 12 major investigations of which ten were under his own motion powers. The report noted that complaints continued to rise in the immigration area particularly in relation to the policy of mandatory detention. The Commonwealth Ombudsman acts as the ACT Ombudsman under arrangements agreed between the two governments; there was a very slight decrease in complaints received. The website of each Ombudsman is:

  www.ombudsman.gov.au and http://act.ombudsman.gov.au

- Federal Court of Australia: The court's report noted that there had been a significant reduction in the number of matters commenced in the court due

largely to conferral of jurisdiction in a number of areas on the Federal Magistrates Court. The addition of a migration jurisdiction to that court's jurisdiction had resulted in a small decrease in first instance applications to the Federal Court, but there was a 78.5% increase in migration appeals to the Federal Court. In view of the large growth in appeals to the court, it might be necessary in the future for the court to seek legislative changes to assist in managing this workload, 'such as broadening the leave to appeal requirements'. Appendix 8 contains summaries of decisions of interest, including several with administrative law significance. The court's website is at:

http://www.fedcourt.gov.au

- Federal Magistrates Service: The Federal Magistrates Service is known as the Federal Magistrates Court when it exercises judicial functions. It is a lower level court with the objective of providing enhanced accessibility and simplicity of procedure. In addition to its family law, bankruptcy and other jurisdictions, the court's jurisdiction at its establishment in 1999 included many administrative law matters, including applications under the ADJR Act and appeals from the AAT transferred by the Federal Court, but excluding visa-related decisions of tribunals under the Migration Act. The latter jurisdiction was conferred on the court in October 2001, and is concurrent with the jurisdiction of the Federal Court. There has accordingly been a significant increase in the court's migration work.

  http://www.fms.gov.au/

- Freedom of Information Act 1982: There was a rise in requests of 4.88% over the previous year to 37, 169, of which 90% were for documents containing personal information; 86% of requests were made to the Departments of Veterans' Affairs and Immigration and Multicultural and Indigenous Affairs, and to Centrelink. There was a 21% increase in requests for amendments of personal records (617 across seven agencies) of which around 70% resulted in alteration and/or notation of records. The report noted that *FOI Memorandum No. 98* on exemptions had been updated as at 31 December 2001. The website is at:

  www.ag.gov.au/foi

- High Court of Australia: The report noted the announced retirement of Justice Mary Gaudron from 10 February 2003. There was an increase of 34% in the number of matters filed over the previous year; in the court's original jurisdiction there was an increase from 81 to 300 applications, 96% of them in the immigration jurisdiction. Section 476(4) of the *Migration Act 1958* had the result of restricting the capacity of the court to remit immigration matters to the Federal Court. The court was also concerned with the number of self-represented litigants with extremely little chance of success; while adverse implications for access to justice needed to be avoided, this growing problem could not be left unchecked. The court's website is at:

  http://www.hcourt.gov.au

Government announcement on reform of AAT

The federal Government has announced that it will not seek to reintroduce the Administrative Review Tribunal legislation in the current Parliament. It remains convinced that amalgamation of tribunals would provide real benefits and will investigate amalgamation options in the future. In the interim, it will investigate reform of existing tribunals on an individual basis, starting with the AAT. Areas of amendment could include procedures of the AAT, constitutional requirements and greater use of ordinary members, directed to delivering 'informal, fast and fair merits review, unfettered by costly and legalistic procedures'. The Government has not indicated what consultative processes it will employ in formulating its reforms. (***Commonwealth Attorney–General's News Release*****,** 6 February 2003)

Report of review of discrimination cases

A review by the Human Rights and Equal Opportunity Commission (HREOC) has shown that legislative changes have improved the way anti-discrimination cases are handled. The review focused on court decisions over the two years following legislative changes made in response to the decision in *Brandy v HREOC* (1995) 183 CLR 245 to the effect that HREOC could not make binding decisions. The changes enable those wanting binding decisions to go directly to the Federal Court or the Federal Magistrates Court following unsuccessful conciliation. The report analyses developing case law and concludes that the approach of the courts is not more conservative or legalistic than under the previous system. (**HREOC**, ***Change and Continuity: Review of the Federal Unlawful Discrimination Jurisdiction September 2000 – September 2002*****; Commonwealth Attorney–General's News Release,** 14 March 2003) The review will be available from HREOC's website at:

www.humanrights.gov.au

Administrative Review Council's (ARC) report on the Council of Australasian Tribunals

The last 'Developments' section ((2002) 35 *AIAL Forum* 1) referred to the establishment in June 2002 of the Council of Australasian Tribunals (COAT). The present report contains the ARC's report on COAT's establishment and other useful documents concerning its organisation and activities. (**ARC, *Report on the Council of Australasian Tribunals*****,** October 2002, copies of which may be obtained from the ARC, Robert Garran Offices, National Circuit, Barton, ACT 2600; the ARC's website is:

http://www.ag.gov.au/www/arcHome.nsf)

Judicial review

(All decisions mentioned may be accessed on the Australian Legal Information Institute website http://www.austlii.edu.au)

ARC Discussion Paper on the Scope of Judicial Review

With consummate timing, in view of the decision of the High Court in *S157/2002 v Commonwealth* concerning the effect of traditional privative clauses (see next item), the ARC has released its discussion paper on the scope of judicial review. Its aim is to explore the desirable balance between the rights of individuals to test the legality of administrative actions by judicial review, and ensuring that the work of government is not unreasonably frustrated. The paper examines the nature and scope of judicial review under both the ADJR Act and the constitutional writs, together with legislative and other ways in which historically its application has been limited, and raises a series of discussion points. It includes a substantial section concerning proposed considerations in developing a guide to the scope of judicial review (Part V). The outcome of the project is expected to be the publication of a set of guidelines to assist stakeholders to identify the circumstances in which, bearing in mind the constitutional constraints, the exclusion of judicial review is appropriate. Comments and submissions are sought by 4 July 2002. For copies of the paper and address for submissions see the preceding item. (**ARC, *The Scope of Judicial Review: Discussion Paper***, March 2003)

High Court limits scope of privative clause in s 474 of the Migration Act

In two companion decisions with wide-ranging implications (see next item), the High Court unanimously rejected the Government's sweeping arguments concerning the application of the privative clause in s 474 of the *Migration Act 1958*, while not accepting arguments that s 474 was completely constitutionally invalid. (For the arguments before the court concerning s 474, see 'Developments in Administrative Law' in (2003) 35 *AIAL Forum* 1 at 5.)

The provisions of s 75(v) of the Constitution – which 'secures a basic element of the rule of law' (Gleeson CJ) and 'introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review' (joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ) – had the result that it was not open to the Parliament to prevent an applicant seeking a writ referred to in that provision in cases where it was alleged there had been jurisdictional error. Similarly, the time limit for applications to the courts in s 486A of the Migration Act was valid but did not apply where it was alleged there had been jurisdictional error. Privative clauses are to be interpreted strictly and conformably with the Constitution, and s 474 did not apply to purported but invalid decisions. A privative clause does not protect all decisions that conform to the 'three *Hickman* provisos', as argued by the Government; rather, its protections only apply where those provisos are satisfied (see joint judgment).

As a result, the applicant in the first matter (*S157/2002*) was free to initiate proceedings on the basis of an alleged breach of procedural fairness which, if established, would constitute jurisdictional error. In the second matter (*S134/2002*), the court by a majority of 5:2 found no jurisdictional error in the failure of the Refugee Review Tribunal (RRT) in considering claims for refugee status to take into account information before it concerning the presence in Australia on a protection visa of the applicants' husband and father, which would have entitled the applicants to protection visas as members of his family. On that view there was no obligation on

the RRT to consider other categories of protection visa. The minority (Gaudron and Kirby JJ) took the view that the RRT was required by the Migration Act to consider *all* the criteria for obtaining a protection visa, and not just those for the specific class of protection visa sought. (***Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 195 ALR 1**)

Appeals following High Court decision on privative clause in s 474 of Migration Act

Before the High Court's decision in *S157/2002* (above), numerous Federal Court decisions had applied the narrow view expressed in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 193 ALR 449 that, following the enactment of s 474 of the Migration Act, ordinarily only decisions which offended against the three *Hickman* provisos could be reviewed by the courts (see 'Developments in Administrative Law', (2003) 35 *AIAL Forum* 1 at 4).

Appeals against such decisions are beginning to come through. In one case, for example, the Full Court of the Federal Court (Moore, Tamberlin and Hely JJ) noted that many decisions, including *NAAV*, were wrong in light of the High Court's decision. In view of the primary judge's criticisms of the RRT's reasoning, the Full Court considered that the appellant had raised issues of substance concerning apprehended bias and an unreasonable finding of jurisdictional fact, and remitted the matter to the primary judge for further hearing and determination. (***NADH & ors v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 19**, 19 February 2003)

Allegations of 'bad faith'

General principles applicable to a determination of whether a decision constitutes a bona fide attempt to exercise a power of review by the RRT were stated by Mansfield J in *SBAU v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 70 ALD 72 (2002) and endorsed by the Full Court in *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749. These included the propositions that an allegation of bad faith is a serious matter involving personal fault on the part of the decision maker, that the allegation is not to be lightly made and must be clearly alleged and proved, and that the circumstances in which the Court will find an administrative decision maker has not acted in good faith are rare and extreme. Nonetheless, such findings have been made in some cases, including *SBAU*. (See also the qualification expressed by a differently constituted bench in *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431, 18 December 2002.) Presumably appeals based on alleged bad faith will be rarer following *S157/2002* (above).

Procedural fairness and apprehension of bias

The High Court, by a majority of 6:1, has held that a ministerial decision to issue a mining exploration licence in Western Australia was not invalid as involving a breach of procedural fairness on the ground of reasonable apprehension of bias. The Minister had made his decision after consideration, among other matters, of a

departmental submission in the preparation of which two officers had been involved who, or whose son, had shareholdings in one of the corporate applicants for the licence. The majority held that on the facts of the case the Minister did not know of the interests of either officer, and was not himself biased or influenced by the officers in making his decision. In the view of Justice McHugh it was not enough that 'a person with an interest in the decision played a part in advising the decision-maker'.

Justice Kirby delivered a powerful dissent, in which he drew attention to the developing legal and social context of accountability and the expectations of the public integrity of Ministers and departmental officials. The relevant test was whether 'a reasonable member of the public *might* conclude that there is a *possibility* that the decision could have been affected by the earlier participation in it of officers' who had undisclosed interests that would be advanced if the Minister accepted the departmental recommendation. The question of apprehension of bias should be capable of determination in advance, and should not depend on 'whether or not the administrator(s) involved *in fact* exercised their capacity to influence the decision'. (***Hot Holdings Pty Ltd v Creasy* (2002) 193 ALR 90**, 14 November 2002)

Procedural fairness and legitimate expectations in decision making process

A five-member bench of the High Court has rejected an application for relief on the ground of the failure of the Immigration Department to contact, as it said it would, carers of the applicant's children concerning the relationship of the applicant to his children. The statement was made in the course of advising the Minister on the exercise of his power to cancel a visa on character grounds (Migration Act, s 501). The applicant was serving a sentence for a serious offence. All judges were of the view that the applicant would suffer no unfairness in practice as the Minister in fact had all the information that could have been put to him concerning the relationship between the applicant and his children.

The court rejected the argument that the applicant had a legitimate expectation that the Department would either contact the carers or inform him that it had changed its mind about making contact. All judges discussed the concept of legitimate expectations, and distinguished between the developing law in England on this issue based on the notion of 'abuse of power' and the Australian position: a legitimate expectation could not create a substantive right in Australia. In some cases 'a legitimate expectation may enliven an obligation to extend procedural fairness', or where such an obligation already exists may 'bear upon the practical content of that obligation' (Gleeson CJ). The notion of legitimate expectations had played a part in developing the modern law concerning natural justice/procedural fairness but was now of limited utility (McHugh and Gummow JJ), or was apt to mislead (Callinan J). The reasoning in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 was criticised in some judgments. (***Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 195 ALR 502**)

Decisions of the Federal Court on detention under the Migration Act

At the time of writing, the Full Court of the Federal Court had reserved its decision in relation to the Minister's appeal against the decision of Merckel J in the *Al Masri* case, discussed in the last 'Developments' section in (2002) 35 *AIAL Forum* 1 at 6.

In the meantime, a variety of views has been expressed by single judges of the court in matters raising the same basic issues. Some judges have felt bound to apply his Honour's decision on the ground that they were not convinced that he was 'plainly wrong'. Others have doubted its correctness, while still others have declined to follow it, for example, on the ground that the reasoning of Merckel J was in error because it was based on analogies from previous cases and not on the plain words of s 189 of the Migration Act (***SHFB v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2003] FCA 29**, per Selway J, 30 January 2003).

In another significant decision, the Full Court of the Federal Court upheld the constitutional validity of s 196 of the Migration Act, dealing with the period of detention, on the principal ground that it does not prevent courts from ordering release of a person who is not lawfully detained (***NAMU & ors v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2002] FCAFC 401**, 9 December 2002).

Another decision of the Full Court with the same composition as in *NAMU* also raised issues concerning detention. The court upheld its power under s 23 of the *Federal Court of Australia Act 1976*, despite ss 189 and 196 of the Migration Act, to make interlocutory orders for release of an asylum seeker held in detention, pending trial of the arguable claim that a delegate of the Minister had earlier made a decision granting a protection visa although the alleged decision had not been dated or notified to the applicant. The Migration Act did not unambiguously provide authority for continued detention of a lawful non-citizen, or repeal the court's power to make an interlocutory order for the respondent's release in the present circumstances. (***Minister for Immigration and Multicultural and Indigenous Affairs v VFAD*** **[2002] FCAFC 390**, 9 December 2002. The primary decision was discussed in the previous 'Developments' section in (2002) 35 *AIAL Forum* 1 at 6 under the erroneous name of *VAFD*, now reported at (2002) 194 ALR 304. The heading was also erroneous in referring to habeas corpus.)

Requirement to provide reasons for decision to cancel visa

By a majority of 2:1, the Full Court of the Federal Court exercised its discretion to find that the Immigration Minister should provide his reasons (as required by s 501G(1)(e) of the *Migration Act*) for deciding to cancel the appellant's visa on the ground that he did not meet the character test in s 501. The appellant, who had a criminal record, was a non-citizen who had come to Australia when only 6 months old and technically had remained an alien despite growing up in Australia (see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Te* (2002) 193 ALR 37, decided on 7 November 2002 during the appeal proceedings in this matter). New counsel for the appellant abandoned all existing grounds of appeal but sought an order that the Minister provide reasons for his decision.

The majority (Allsop and Jacobson JJ) held that the briefing paper presented to and signed by the Minister did not explain why he exercised his discretion as he did, what he took into account and what weight he gave matters; moreover, there was a real connection of the order sought with the final disposition of the appeal. In exercising their discretion, the failure to make clear how the decision conformed to 'a careful and humane balancing of the effects of the decision with other relevant matters'

outweighed changes in the applicant's legal strategy, and the lapse of time since the decision was made. Justice Sackville in dissent held that, in the absence of any ground of appeal, such an order would not relate to a matter in which the court had jurisdiction, and in any case he would have refused to exercise his discretion to grant it. (***Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 196 ALR 332**)

Ministerial guidelines not authorised by law

In a matter that has aroused controversy between conservationists and farmers, Kiefel J in the Federal Court made a declaration that administrative guidelines in effect provided an exemption to growers from a statutory obligation to refer to the Minister certain actions concerning grey-headed, and spectacled, flying-foxes, an exemption not authorised by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The guidelines were made following consultations between the relevant Commonwealth and State Ministers and reflected the view that taking a certain proportion of these species would not endanger them.

There was no decision under the EPBC Act or conduct to which the ADJR Act could apply. There was also no duty of the Minister for performance of which a writ of mandamus would lie under s 39B of the *Judiciary Act 1903* (Cth). However, while the statement in the guidelines about not making referrals did not itself cut across the Minister's statutory duty to consider each case, it would have the effect of deterring such referrals. In the court's view the statement amounted to the granting of an exemption which was not authorised by the Act. (***Humane Society International Inc v Minister for the Environment and Heritage* [2003] FCA 64**, 12 February 2003)

Administrative review and tribunals

See also above on government announcement of reform of the AAT.

Power of Federal Court to give directions as to constitution of Refugee Review Tribunal

A majority of a five-member bench of the High Court has held, on differing grounds, that the Federal Court had power under the now repealed s 481 of the Migration Act to direct that the Refugee Review Tribunal (RRT), on remittal of a matter to it by that court, be constituted by the same person who made the original tribunal decision found by the Federal Court to be based on an error of law. Gummow and Hayne JJ did not consider it necessary to reach a final decision on the question of power. The Minister did not deny that the Federal Court had power to direct that the RRT be differently constituted. All members of the bench except Kirby J held that the Full Federal Court erred in exercising its discretion to direct that the RRT be constituted in the same way on the basis that the visa applicant should have the benefit of the initial findings of fact. In their view, the remitted decision must be based on all the information before the RRT at the rehearing, and there could be no preservation of the findings of fact made in the first hearing.

Justice Kirby dissented on the basis that the 'very purpose of such a power was to allow the Tribunal, in appropriate circumstances, to pick up its consideration of the

matter, at the point at which the earlier decision was reached'. The decision maker was 'obliged to give "further consideration" to the earlier decision, freed from the error of law identified by the Federal Court', and was not fettered in its inquisitorial role. The court 'should hesitate long before intervening' in relation to the exercise of such a broad and flexible power. (***Minister for Immigration and Multicultural Affairs v Wang*** **[2003] HCA 11**, 12 March 2003)

Reinstatement of a dismissed application not confined to administrative error

The Full Court of the Federal Court (Wilcox, Carr and Downes JJ) has declined to follow the obiter view of an earlier Full Court in *Brehoi v Minister for Immigration and Multicultural Affairs* (1999) 58 ALD 385 that s 42A(10) of the *Administrative Appeals Tribunal Act 1975* (AAT Act), which deals with reinstatement of an application that 'has been dismissed in error', was limited to situations where there had been an 'administrative error', i.e. the provision amounted to a 'slip rule'. The present court held that, whatever the idea behind the provision evidenced in the explanatory memorandum, its clear wording did not confine it to errors of an administrative kind. In refusing the appeal, however, Wilcox and Downes JJ (Carr J dissenting) said there was no evidence that the original proceeding had been dismissed in error, and the AAT could not have properly reinstated the application. Justice Carr considered there were grounds for concluding the dismissal was in error. (***Goldie v Minister for Immigration and Multicultural Affairs*** **(2002) 36 AAR 238**)

Ombudsman

Appointment of Professor John McMillan as new Ombudsman

The Prime Minister has announced the appointment of Professor John McMillan as the new Commonwealth Ombudsman to replace Mr Ron McLeod, AM. Professor McMillan commenced his five-year appointment on 17 March 2003. He held the Alumni Chair in Administrative Law at the Australian National University and was a founding member of the AIAL, serving as its President before his appointment. He has written extensively on many issues in administrative law, most recently undertaking (together with Professor Robin Creyke of the ANU) a major empirical study of the impact of administrative law on government administration (see eg (2002) 9 *AJ Admin L* 163). An expanded version of his inaugural professorial lecture on open government was published recently. Before commencing university teaching in 1983, Professor McMillan played a large part in the campaign for Freedom of Information legislation in the 1970s and 1980s, and has been active in other community groups. *AIAL Forum* congratulates Professor McMillan on his appointment. (***Prime Minister of Australia, Media Releases*****,** 7 March 2003; **John McMillan, *Twenty Years of Open Government: What have we learnt?*, CIPL Law and Public Policy Paper 21,** 2002)

Ombudsman's report on family assistance scheme

The Commowealth Ombudsman has released a report concerning his investigation of the family assistance scheme, including the Family Tax Benefit (FTB). He raised concerns with the scheme's operation, particularly the large number of debts, their size and the impact on low income families. Among the report's 18 recommendations

for improving the system were the waiving of debts in some circumstances, including where they resulted entirely from errors by the Family Assistance Office; measures to avoid overpayments where children earned more than anticipated; and allowing families to receive their full entitlement to family assistance when lodging late tax returns. The Ombudsman noted that sole parents faced particular obstacles that increase the likelihood of FTB overpayments. He suggested the Government consider broader policy change to improve the system against its overall policy objectives for government assistance. (**Commonwealth Ombudsman, *Report on Own Motion Investigation into Family assistance administration and impacts on Family Assistance Office customers*,** February 2003; **Commonwealth Ombudsman, *Media Release***, 2 February 2003**)**

Freedom of information & privacy

Passage of Northern Territory Information Act

The Northern Territory has enacted an Information Act that combines provisions for access to government information, access to and correction of personal information held by public sector organisations, the protection of privacy, and appropriate records and archives management in the public sector. The legislation provides for oversight of the freedom of information and privacy provisions of the Act by an Information Commissioner. (***Information Act 2002* (NT),** assented to 8 November 2002; second reading 14 August 2002**)**

Web symposium on 'National Security and Open Government: Striking the Right Balance'

The February 2003 issue of *FoI Review* (No 103) contains information about a symposium on the above topic consisting of a series of contributions published on the Internet over the next two months. The first contribution is by Toby Mendel, with the title 'National Security vs Openness: An Overview and Status Report on the Johannesburg Principles', and is now available on the following website.:

http://www.freedominfo.org

That website is sponsored by an online network of freedom of information advocates, and features current items from around the world. Interested readers can subscribe to an update digest by going to the website.

The symposium is a joint venture of Open Society Justice Initiative and the Campbell Public Affairs Institute of the Maxwell School at Syracuse University, and one of the organisers is Professor Alasdair Roberts, the Institute's Director, who has himself written widely on the topic of freedom of information and national security; see his website at:

http://www.faculty.maxwell.syr.edu/asroberts/

Other developments

Reports on breaching and penalty practices in the social security system, and on proposals for a new social security system

During 2002 there were several independent and official reports on issues relating to breaches and penalties in the social security system, as well as government responses to some of their recommendations. There is an assessment of government responses to that point, as well as references to the reports of other bodies such as the Ombudsman, in the November 2002 progress report of the Independent Review established by a number of organisations involved in provision of services in the social security area. The principal reports and their locations are as follows:

- Independent Review of Breaches and Penalties in the Social Security System, *Making it Work*, Sydney, March 2002, and *Progress Report on Implementation*, Sydney, November 2002, both available from the website of the Australian Council of Social Service (ACOSS):

  http://www.acoss.org.au/papers

- Productivity Commission, *Independent Review of the Job Network: Inquiry Report*, Canberra, September 2002, available at:

  http://www.pc.gov.au/inquiry/jobnetwork/finalreport/index.html

- Senate Community Affairs References Committee, Report on Participation Requirements and Penalties in the Social Security System, Canberra, 25 September 2002, available at:

  http://www.aph.gov.au/senate/committee/clac_ctte

- Commonwealth Ombudsman, *Social Security Breach Penalties – Issues of Administration*, Canberra, 4 October 2002, available at:

  http://www.ombudsman.gov.au

In addition, on 12 December 2002 the Ministers for Family and Community Services and for Employment and Workplace Relations issued a paper entitled *Building a simpler system to help jobless families and individuals*. It proposes a fundamental restructuring of the social security system through introducing a common payment with add-ons in particular circumstances ACOSS has welcomed the initiative. The Ministers seek written submissions on the issues raised in the paper by 20 June 2003 (send electronically to welfare.reform@facs.gov.au, or to the address given in the paper). On the basis of submissions and consultations, the Government proposes to develop more specific options for reform. The paper and a brochure may be obtained from the following website:

www.facs.gov.au/welfare_reform

Revised version of ARC guidelines on statements of reasons

In light of the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1, the ARC has revised and reissued its two valuable publications giving guidelines to decision makers on preparing statements of reasons. (**ARC, *Practical guidelines for preparing statements of reasons* and *Commentary on the practical guidelines for preparing statements of reasons*,** October 2002, available from the ARC's website referred to above in 'From the reports'**)**

TWENTY FIVE YEARS OF THE COMMONWEALTH OMBUDSMAN

*Ron McLeod**

Paper presented at ANU Public Law Weekend, Canberra, 2 November 2002.

Background

This year, my office has been marking its 25th anniversary, having opened its doors in Canberra for the first time on 1 July 1977.

I think that the audience for this paper will already know of the origins of the office of Ombudsman – how the idea of an independent inquirer and reporter that emerged in Sweden in the 19th century was adopted by the Kerr Committee.[1]

Because of the many differences in parliament and government between Sweden and in Australia, it was clear that an Australian Ombudsman would perform a different role from the original model. From the start, Australia created its own version of an Ombudsman, using overseas experience and applying the wisdom of the reviewers of Australian public law. The institution has grown and changed since then to meet the needs of the community and to reflect contemporary political realities.

Role of the Ombudsman

In the lead-up to the appointment of the first Ombudsman, there had been considerable debate about whether the holder should be a "champion of the people", advocating on behalf of citizens in dispute with government agencies. Doubts were also expressed about whether an Ombudsman created within the public sector would be sufficiently powerful and independent to ensure that individual grievances could be satisfactorily investigated and resolved.

In the event, the Ombudsman was created as a statutory office under enabling legislation, providing the authority to receive and investigate complaints from the public about the administrative actions of agencies, with formal reporting lines to agency heads, ministers and the Parliament, and with the capacity to make suggestions or recommendations for redress, where appropriate.

With a small staff of high quality and a budget of less than $500,000, the first Ombudsman, Professor Richardson, built the office from nothing to become an

* *Commonwealth Ombudsman.*

important player in Commonwealth administration. His first annual report set out his understanding of the role and responsibilities of the Ombudsman and in particular his interpretation of the independence of the office:

> Paramountly, the Ombudsman must be impartial. If he is not, he will impair the standing of the institution. Complainants must feel that they can trust the Ombudsman. Equally, a department or authority required to answer for its actions should not have to face a partisan Ombudsman or an Ombudsman concerned to conduct an investigation relentlessly to find fault somewhere if he can… Accordingly, I believe I have an obligation to ensure that a complainant's case is fully presented. From this point the need to be impartial, objective and reasonable is paramount.[2]

I do not intend to go into great detail about the changes in jurisdiction and operation of the Commonwealth Ombudsman since 1977. Instead, I would like to consider whether after 25 years we still have an Ombudsman function as originally intended and whether the jurisdiction, powers and ability to function remain robust. I will also briefly consider whether there are improvements which could be made or better ways to meet government and community expectations of the institution of Commonwealth Ombudsman.

At least in relation to the handling of complaints, it would appear that the Ombudsman has achieved a great deal. We have successfully finalised over 500,000 complaints and have conducted numerous "own motion" investigations on major administrative issues. We have issued around 20 special reports to the Prime Minister and Parliament and over 100 public reports on outcomes of investigations, including recommendations for remedies and systemic changes.

Jurisdiction

The jurisdiction of the Ombudsman has been widened a number of times to take in complaints about Australian Federal Police, Freedom of Information, the National Crimes Authority and serving members of the Australian Defence Forces, among others. We have been given specific powers to monitor telecommunications interceptions and controlled operations conducted by law enforcement bodies and now have an oversight role in relation to the national criminal intelligence DNA database (CrimTrac).

Since self-government in the ACT in 1989, the Commonwealth Ombudsman has held the dual appointment as ACT Ombudsman.

My legislation has been amended a number of times and now probably represents the most accessible and straightforward statutory complaint mechanism in Australia. By this I mean that complaints can be lodged orally (in person or by telephone), by letter, fax, email or internet and may be made anonymously. Complaints may be accepted from groups, organisations, representatives, non-citizens and persons not resident in Australia.

The jurisdiction of the Ombudsman extends to almost all Commonwealth government departments and agencies and to all functions of public administration other than national security operations and most internal public sector employment issues, with the major exception in the latter instance of the Defence Force. The

ability of the Ombudsman to investigate and report on individual complaints and to initiate "own motion" investigations gives us the ability to resolve specific grievances as well as to assist in improving public administration by making recommendations for systemic and procedural change. I have no concerns about my jurisdictional coverage, almost all bodies in the Commonwealth family are covered and I have no barriers to investigation of matters that commonly arise.

Powers and ability to function

Similarly, in my view the Ombudsman has the appropriate investigative powers to adequately perform the roles expected of the office. We do not take lightly the powers such as those to require people to attend and be interviewed under oath or to require production of documents and records.[3] Their very existence means that my investigators can on almost all occasions work with the cooperation and assistance of agencies and individuals without the powers being used. Indeed, the use of the formal powers is sometimes invoked more for the protection of those involved rather than for coercive reasons.

It is important to note that the strong powers are for use by my office in investigating and seeking to resolve complaints, not to produce evidence for other proceedings. In my opinion, they assist my office to investigate effectively and promptly, without posing any risk to the rights of citizens or agencies.

There has been considerable discussion over the years about the level and source of funding for my office. While we work with a quite modest budget of around $8.5 million per year, I believe that we are able to deliver effective services to the community, with physical representation in all state and territory capital cities and a staff of around 80 officers. Overall, the institution of the Commonwealth Ombudsman remains able to function and to deliver administrative justice to the community in a very satisfactory fashion.

Changes in our operating environment

Despite my general confidence that the current overall model for the Commonwealth Ombudsman is about right, there have been many developments in the administrative and political environments over the past 25 years which have caused us to change our methods of operation and structures. Some of the more significant of these have been:

- The creation and proliferation of specialist complaint bodies and industry ombudsman to deal with administrative complaints in particular areas. Perhaps the most significant for my office was the establishment of the Telecommunications Industry Ombudsman in December 1993. That body now handles over 60,000 consumer complaints per year about telecommunications service providers, including Telstra, which had previously been a major source of complaints to my office.

- In a similar vein, most Commonwealth agencies now have quite sophisticated complaint and review systems to deal with grievances from their customers. My office has played a significant role in supporting and advising on these

mechanisms, including the development of a best practice guide and we regularly undertake evaluations of complaint schemes in some of the larger agencies. The developments in agency complaint handling has enabled my office to confidently refer complaints in the first instance to agencies (and to industry ombudsman where they exist), which allows us to more strongly focus our resources on investigating and resolving the more significant or intractable issues.

- My office took a leading role in encouraging the development by the Commonwealth of more accessible and flexible mechanisms for making payments of compensation for defective administration. In particular, the Compensation for Detriment caused by Defective Administration (CDDA) scheme has streamlined procedures and assisted my office in making more effective recommendations for remedies to complaints. The Department of Finance and Administration has recently endorsed a policy that if the Ombudsman recommends that compensation should be payable, that in itself, is sufficient for an agency to adopt the recommendation and make an appropriate payment.

- Outsourcing and contracting out of government services have posed dilemmas for investigative and auditing bodies, including my office. The increasing trend for Commonwealth-funded services to be delivered to the public by private contractors has raised issues of the accountability of such arrangements and the rights of citizens to seek review of decisions, to have access to information and protection of privacy. We have continued to accept and investigate complaints about service provision and to seek explanations from agencies, even where the actual service has been delivered by a contractor, despite there being some legal uncertainties. I have been pleased with the significant recent decision taken by government to ensure that in the future outsourcing and contracting out will not limit or remove citizens' rights including that of access to my office.

- In line with many major government agencies, our office now very largely delivers its complaint services by telephone or electronically through email or internet communications. We have developed a quite sophisticated website, providing our clients with a wealth of information and the ability to lodge a complaint and to give and receive feedback on-line. I believe that this change to our methods of service delivery has given us the potential to reach a wider audience and to keep pace with changing community preferences. It has also helped us to better understand many of the issues facing large agencies in delivering services through call centres and other electronic means. However, we have deliberately kept our network of offices open and if anyone rings our offices they will talk to a live operator, not a recording. This is an important symbolic aspect of our desire to maintain a close personal relationship with the community we serve.

Overall, I think that the institution of the Commonwealth Ombudsman has coped well with the major changes in public administration and the environment which have occurred, particularly over the last 15 years. Of course, we continue to work in a dynamic administrative and governmental structure, and the need to continually review and revise our practices and structures. In this context, I would like to briefly

mention some of the suggestions for change or improvement to the office and functioning of the Commonwealth Ombudsman.

Are there better ways for the Commonwealth Ombudsman?

There is a constant debate about the independence, impartiality and effectiveness of Ombudsman and the ethics and principles which they should embody. Perhaps I can briefly touch on a few of the issues worthy of consideration.

- There is an argument that an Ombudsman should hold lifetime tenure or be appointed in a manner similar to a judge, to remove the position from the reality or perception of political influence. This situation applies in at least one Australian jurisdiction. On the other hand, many consider that lifetime appointments can result in the occupant becoming stale or set in bureaucratic ways which might hinder progress in achieving remedies for defective administration. A related argument is that an Ombudsman should not be part of the executive government but be an officer of the Parliament, not reporting to the Executive and having a resource allocation made directly by the parliament based on the Ombudsman's own submissions. While recognising the strengths of the arguments for the independence of an Ombudsman from direct influence by a minister or government, I can say that in my own experience I have been able to fulfil my responsibilities with no interference from executive government and generally with high levels of cooperation from agencies and departments. My independence from improper influence by a member of the government is guaranteed by the nature of my enabling legislation. And to have direct access to the Prime Minister, when and if I need it, is an advantage, not a disadvantage. My high level access has been a powerful incentive for agencies to not take my recommendations too lightly.

- Some Ombudsmen have powers to make determinations on complaints and to enforce their recommendations for remedies, usually with a review available in a court or tribunal. While my office has very strong investigative powers, with very minor exceptions I do not have the power to make determinations. While some of the complainants to my office would like the Ombudsman to make a binding determination of their issues, in my view the current arrangement is preferable. The method of operation and our investigative approach would change if the Ombudsman was to be given determinative powers. Instead of gathering information with a view to resolving problems and improving administration, we would be obliged to collect evidence in a form which could be presented before a court or tribunal. I think that in the majority of cases this would have a detrimental effect on the timeliness of complaint handling and would place the Ombudsman in a much more adversarial position with government agencies. To my mind, one of the great advantages of our current model is that it allows for the timely and flexible resolution of a high number of complaints, largely through relatively informal and cooperative processes. The courts have generally not interfered with the way in which Ombudsmen approach their work and reach their conclusions. If we had determinative powers, I am certain the courts would be much more prepared to review the actions or decisions of Ombudsmen.

- Some suggestions for change have related to the extension of the informal complaint-resolution approach of the Ombudsman into established areas of Alternative Dispute Resolution such as mediation and conciliation. In some instances, my office already facilitates negotiation between complainants and agencies to assist in achieving appropriate outcomes acceptable to all parties. We also sometimes recommend that the parties engage professional conflict resolution or expert appraisal services to assist in circumstances such as settling on appropriate figures of compensation for losses caused by defective administration. We have not pushed Commonwealth Ombudsman services beyond that point, partly because we are not resourced to do so, and partly because of uncertainty about whether this would limit our ability to make formal reports on investigations, including specific recommendations for remedies and procedural changes. I do not have a problem with the Ombudsman being seen as the "honest broker" in achieving appropriate outcomes, but think that as mediator or conciliator we may risk becoming a party to the conflict, rather than the independent and impartial investigator envisaged in the Australian model which has served the community well. Nevertheless, I am aware that other "ombudsmen", such as in France, have a much more strongly developed tradition of mediation.

- There has been recent debate over whether the Ombudsman should have greater powers over freedom of information issues, or become in effect an "Information Commissioner." Other Ombudsmen have this role and I do not see it as incompatible with my other functions.

- Some would favour the Ombudsman having a role in investigating complaints about public sector employment. I do not propose to canvass the various arguments on this issue other than to say that there appear to be some areas of administration where complaints can "fall through the cracks" and aggrieved parties have found that there are no review or complaint avenues available. In my view, the Ombudsman is well placed to take on added roles in such areas, because of our wealth of experience in almost all aspects of government administration, our proven record in effective and impartial complaint handling and the breadth of the jurisdiction we already cover.

Katrine Del Villar's paper[4] poses the question "Who guards the guardians?" She presents a case for greater parliamentary involvement with Ombudsmen. I have no great problem with that, but would say that Katrine's paper doesn't fully canvass the extent of *ad hoc* involvement we already have with Parliament through its various committee processes.

International Perspective

I now want to make some remarks about the development of ombudsmanship around the world. For the last two years I have been Vice President of the Australasia and Pacific Region of the International Ombudsman Institute (IOI). The IOI is a non-government, non-profit international professional body made up largely of Ombudsmen from around the world. In the last ten years the number of national Ombudsmen has expanded considerably. The institution is represented in excess of 130 countries and there is an expanding array of Ombudsmen at the provincial and

local level in many countries, as well as many industry and specialised Ombudsmen. The concept has also been picked up with enthusiasm by the private sector in many countries, a good example of public sector best practice giving a lead to the private sector.

While as I mentioned earlier, the Scandinavian experience is popularly associated with the modern origins of the office, researchers have pointed to examples in ancient Rome, in China and in some Islamic countries, of the existence of officials who have been empowered to investigate abuses or inefficiencies by public institutions or bodies which have adversely impacted on citizens. The concept therefore seems to have had a long, albeit somewhat disjointed history, however, its development since the middle of the last century has been spectacular to say the least.

It is a particularly flexible model, which has found favour in a wide range of countries with quite different legal, political, social and cultural traditions.

The growth of Ombudsmen has been given enhanced impetus in recent times as developed countries and bodies like the World Bank have given high priority to assisting developing democracies to put in place a range of improved governance and accountability arrangements. The willingness of donor countries to continue to provide substantial financial and other forms of support to the developing nations of the world is becoming increasingly dependent upon strengthening their institutions of government. This trend has helped to stimulate a considerable number of countries to introduce Ombudsman offices as part of their institutional re-building programs.

In our own region we have seen the emergence of an Ombudsman in Thailand and Indonesia in the last couple of years. Closer to home, almost before the physical rebuilding of the country began, the East Timorese created an Ombudsman office. There are very few countries in the Pacific basin which now do not have national Ombudsman offices. Those that do not have them under consideration.

As my office has reached a greater maturity, we have been able to consider the broader aspects of the role of ombudsmanship and to offer some direct assistance to emerging Ombudsman offices in the countries in our region. In the last 12 months, for example, with the support of AusAID, we have hosted study tours and attendance at international seminars for Ombudsmen and their staff from Indonesia, Thailand and East Timor. Later this month, we are sponsoring three Indonesian Ombudsman staff to attend a three-week training course at the Australian National University, to be followed by a week of on-the-job training in my office. We plan to extend these initiatives to additional activities and other Ombudsman offices in future years.

The popularity of the Ombudsman model and its adoption and adaptation to a wide variety of specialised or limited jurisdictions, is to be applauded, and generally reflects a growing level of awareness or sensitivity to the rights of individuals as citizens or as consumers to have some independent means of redress if they are unhappy with how they have been treated, either by their government or by big business. The idea of an Ombudsman being available to assist individuals in dealing with the significant power imbalance they often face in dealing with these large organisations and agencies remains a powerful reason for their creation.

This popularity, however, carries some downsides. The term 'Ombudsman' has often been used fairly loosely without much regard to the underlying features of a body which warrants this label. In the USA, the term has become so widespread in its use that it now represents nothing more than a synonym for anyone who deals with complaints. Those of us who believe the term should be used in a more discriminating fashion than this try hard to maintain a degree of purity in its use, but we are fighting something of a losing battle. The risk is that as usage of the term becomes even more widespread, it will lose its meaning.

This can easily lead to those distinguishing features which have given real meaning to the use of the term being lost sight of, and in so doing the value and the understanding of the role of true Ombudsmen is likely to be damaged.

Essential Qualities of an Ombudsman

I would now like to comment on what qualities I believe are needed in a good Ombudsman. This will help to flesh out what I believe is the essential nature of the office.

Independence and impartiality

Independence and impartiality are important characteristics of the office. An Ombudsman has to have the strength of character to be prepared to criticise government when criticism is called for. Much has been written about the apolitical role of public servants in giving frank and fearless advice and the debate continues about whether there has been a weakening of this as the character of the Public Service has changed. But for an Ombudsman, independence, impartiality and the courage to criticise are of fundamental importance.

Understanding of law

An Ombudsman must understand the nature of the law and be able to interpret it, drawing on legal advice as necessary. The Ombudsman is not a substitute for the courts, but does have an important role in explaining and applying the law, particularly in cases where it is impractical or unnecessary to contemplate an approach to the courts. Much of the value of an Ombudsman is that they can generally quickly and without expense to the complainant, give a greater sense of certainty or assurance as to the proper application of the law, without the need to take the matter further. Ombudsmen do not need to be lawyers, but they do have to have the facility to understand the law, to read and interpret legislation and know when they need to seek expert legal advice to assist in reaching a conclusion.

Knowledge of government

An understanding of the nature of the political and legislative processes, how Executive government works and the role of the Public Service is very important. You need to know the nature of the beast you are dealing with, how it will react, how best to deal with it and to bring it to submission.

Rationality

A capacity to deal with issues on their merits in a systematic and objective fashion is essential to the credibility of the office, both from the point of view of the complainant and of the organisation being complained about.

Persuasiveness

As most Ombudsmen rely solely on their persuasive powers to convince agencies to respond to recommendations, they need to be able to gain the confidence and respect of the agencies. This is best achieved through adopting a highly professional approach (logical, detached, balanced, thorough, fair). Putting a lot of effort into seeking to negotiate an appropriate outcome with an agency, in a non-adversarial, consultative atmosphere, in my experience usually pays dividends. A reliance on bluster rarely succeeds. Similarly with complainants, many of whom will be disappointed with the outcomes, the Ombudsman needs to have a convincing and sensitive approach, especially when the conclusion is that the complaint is not justified or proven.

Empathy

An empathy with your clientele is essential. This does not mean that you always blindly take the side of your complainants. You are not an advocate for their cause in the way a lawyer is for a client. You only become an advocate if you conclude, after investigation, that they have been wronged, and when you energetically pursue a remedy on their behalf.

Passion for work

You must have some degree of passion for your work. You have to believe in the value of the office and the role it can play, not just in correcting individual wrongs, but in helping to improve the quality of the administrative process and in so doing strengthening the community's confidence in government.

Service delivery

You also have to believe in the importance of government agencies meeting high and realistic standards of service delivery. You have to have the same attitude to the work of your own office. Bureaucratic delay is one of the most common complaints you deal with, and one of the advantages of your own office is it can give quick and effective support to complainants with a minimum of fuss and formality. As a consequence, your own office must be seen to be dealing with its complaints load in a timely fashion. Criticism of an agency for being tardy will fall on deaf ears if your own office's performance isn't above reproach.

Respect of parties

The office of Ombudsman will only be effective while it commands the respect of the public and of the government agencies it deals with. A loss of confidence from either direction is a death knell for an Ombudsman. The personal qualities and approach of

an Ombudsman therefore must be directed towards ensuring that this does not happen.

Common sense

Finally, and above all else, an Ombudsman needs to have good sound common sense. My legislation does not constrain me to always reach my conclusions within a reasonable interpretation of the law. I can go beyond the law if an action or decision, while lawful, is considered to be unreasonable, unjust, oppressive or improperly discriminatory, or in all the circumstances is considered to be just plain wrong.

This is a powerful provision, it is only applied occasionally, but it nevertheless gives an Ombudsman the capacity to exercise the wisdom of Solomon and to be unconstrained in reaching a conclusion on an individual citizen's circumstances. I have always felt that the backing this provision gives to reach a sensible conclusion rather than one which conforms in all respects with the law, with policy, with departmental guidelines, etc, is at the heart of what ombudsmanship is all about.

Has the Commonwealth Ombudsman been a success?

At a dinner to celebrate the 25th anniversary of the Commonwealth Ombudsman, the Commonwealth Attorney-General (Hon Daryl Williams AM), speaking on behalf of the Prime Minister, made the following assessment of the achievement and status of the office since its creation:

> Overall, the institution of the Commonwealth Ombudsman has succeeded and prospered because it has remained true to its basic principles and the roles expected of it by the community and the Parliament. The Ombudsman continues to offer to the public complaint services which are free of charges, independent and impartial.
>
> I believe that the Commonwealth Ombudsman as an institution has thus achieved a high level of credibility and moral authority, based on the integrity of its investigations and the fairness and practicality of the solutions put forward to resolve complaints and systemic issues. The Ombudsman has become an integral and indispensable component of the administrative review system in Australia, helping to ensure that administrative justice is available to all Australians.

In my last Annual Report,[5] which was tabled earlier this week, I commented that after a career of 44 years continuous service with the Commonwealth, I feel honoured to be concluding my official career shortly heading up an office which epitomises so well the best traditions of the Public Service. I hope my successors will feel the same and that the office continues to be an enduring and significant feature of the administrative law landscape in this great country of ours for many years to come.

Endnotes

1 Commonwealth Administrative Review Committee Report 1971, Parliamentary Paper No. 14 of 1971.
2 Commonwealth Ombudsman, First Annual Report, 1978, 7.
3 *Commonwealth Ombudsman Act 1976*, ss 9, 13, 14.
4 "Who guards the guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsmen" (2003) 36 *AIAL Forum*, p 25.
5 Commonwealth Ombudsman, Annual Report 2001-2002.

WHO GUARDS THE GUARDIANS? RECENT DEVELOPMENTS CONCERNING THE JURISDICTION AND ACCOUNTABILITY OF OMBUDSMEN

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Paper presented at the ANU Public Law Weekend, Canberra 2 November 2002.

For this is not the liberty which wee can hope, that no grievance ever should arise in the Commonwealth, that let no man in this World expect; but when complaints are freely heard, deeply consider'd, and speedily reform'd, then is the utmost bound of civill liberty attain'd that wise men looke for.

John Milton, *Areopagitica*.[1]

Introduction

Writing in 1980, Kevin Cho said "Australia rivals Canada in its passion for Ombudsman",[2] there being at that time executive ombudsmen[3] (or Parliamentary Commissioners) in each of the States, the Commonwealth and the Northern Territory.[4] Since that time, ombudsmen in Australia have "gone forth and multiplied".[5] The past decade or so has witnessed the expansion of the ombudsman concept into the private sector, with the creation of industry ombudsmen schemes at both national and State levels to handle complaints about privatized essential services,[6] as well as complaints about industries which were never part of the public sector.[7] The ombudsman model has also been chosen to deal with single-issue complaints within a particular industry, a recent example being the proposed Music Industry Ombudsman which will have jurisdiction over censorship, but not other aspects of the music industry.[8]

Not only have specialist ombudsmen been established at both Commonwealth and State levels, but the public ombudsmen in many jurisdictions have been given additional functions, some of which represent a dramatic departure from their traditional role. In recent years, the Commonwealth Ombudsman has been given jurisdiction to investigate complaints against the National Crime Authority, the Commonwealth and NSW Ombudsmen have been tasked with monitoring compliance with controlled operations legislation, Victoria's Ombudsman has been given a very broad jurisdiction over complaints by whistleblowers, and the NSW Ombudsman has acquired both investigatory and supervisory jurisdiction in relation to complaints of child abuse, not just in relation to public sector employees.

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Concerns have been expressed that the conferral of additional jurisdiction may compromise ombudsmen's reputation for impartiality and independent investigation, by conferring functions without the resources necessary to carry them out properly, and, in some circumstances, by giving ombudsmen a monitoring role without the ability to investigate.

Cases brought against ombudsmen in recent years have highlighted their considerable ability to damage an individual's reputation, in investigating such matters as allegations of sexual abuse,[9] professional misconduct[10] and police corruption.[11] Yet, despite the substantial influence possessed by ombudsmen, there has been little attention given to means of ensuring their accountability for the exercise of their investigatory powers. Developments relating to ombudsmen's obligation to disclose documents pursuant to freedom of information legislation,[12] the role of the courts in reviewing the exercise by ombudsmen of their powers,[13] and the connection between ombudsmen and parliaments appear to be as ad hoc as the accretion of additional areas of jurisdiction. An opportunity to reconceptualise the role of ombudsman was recently passed up when Queensland became the first jurisdiction to complete a comprehensive review of its Ombudsman. After a major independent review[14] and parliamentary review[15] of the office, the Queensland Parliament enacted the *Ombudsman Act 2001*, which largely replicates the substance of existing legislation.

Before continuing, it is worth briefly mentioning two recent developments which will not be considered further in this paper. Last year, the Telecommunications Industry Ombudsman (TIO) survived a constitutional challenge brought by two internet service providers who had failed to join the TIO scheme as required by legislation.[16] The case focused on the constitutional limitations on Commonwealth ombudsmen schemes, limitations which do not affect ombudsmen at State level or those established by industry without Commonwealth legislative backing. Secondly, South Australia has recently passed legislation that will expand the jurisdiction of the Ombudsman to cover government business enterprises, State owned corporations and outsourced government services, as well as giving the Ombudsman an "administrative audit" role.[17] Much has been written over the past decade about the need to extend public sector methods of accountability, including ombudsman review, to corporatised, privatised and outsourced bodies providing government services,[18] and there is no need to rehearse the debate here.

Expansion of Statutory Ombudsmen's Jurisdiction

It is axiomatic that the role of public sector ombudsmen is, in Justice Kirby's words, "improving public administration and increasing its accountability"[19] by providing an independent review of administrative actions taken by a range of executive agencies.

Legislative developments in recent years have brought some executive agencies which have traditionally been excluded from the ombudsmen's purview, including the National Crime Authority, within jurisdiction. The Victorian Ombudsman has been given sweeping new powers to investigate and oversee the investigation of complaints by whistleblowers. Parliaments have also conferred on ombudsmen functions not directly involving the resolution of citizens' grievances against government, such as under controlled operations legislation.

Additionally, in New South Wales the Ombudsman has been given jurisdiction to investigate cases involving alleged child abuse. This represents a fundamental departure from the traditional role of ombudsmen in two respects: it empowers the Ombudsman to investigate actions taken by private bodies, including private schools and child care centres, and it involves investigation of matters wholly unrelated to administration, namely, whether child abuse has occurred.

The vesting of additional functions in the various ombudsmen is testimony to their success in handling complaints,[20] but it can also be perceived as somewhat "ad hoc".[21] In some instances, the acquisition of these additional roles may not be appropriate, for, as Pearce has noted, ombudsmen have not had the same level of success in the performance of these functions as in their traditional complaint handling.[22]

Complaints relating to policing

In general, ombudsmen exercise a reinvestigatory role with respect to complaints against police.[23] That is, although in some jurisdictions a complaint may be made either directly to the ombudsman or to police,[24] there is either a legislative requirement or an administrative arrangement to the effect that the investigation of grievances is conducted initially by police and the ombudsman's role is to monitor police internal investigations and ensure they are conducted properly.[25] Ombudsmen usually investigate only if they are not satisfied with the outcome of the internal investigation. The exception is New South Wales, where since 1993 the Ombudsman has had a power of direct investigation over the use of police powers, in addition to a supervisory jurisdiction over primary investigations conducted by police.[26]

Boyce v Owen – reinvestigatory power against police

A recent case from the Northern Territory, *Boyce v Owen,*[27] highlights the vexed relationship between ombudsmen and police. In that case, a journalist from the *Northern Territory News* questioned Northern Territory police about whether a senior police officer had acted improperly in tipping off the subject of a search warrant after signing the warrant. Police instigated an internal inquiry, and informed the Ombudsman of this. Two weeks later, the internal investigation was completed and the material was sent to the Ombudsman for his "independent consideration … [and] advice on whether or not … the particular allegation can be sustained".[28] The Ombudsman decided the matter needed further investigation and wished to reinterview witnesses. The police officer whose conduct was in question, Superintendent Owen, challenged the Ombudsman's jurisdiction.

The Court of Appeal of the Northern Territory held that the Ombudsman had no jurisdiction to conduct the investigation. The Ombudsman's jurisdiction to investigate complaints against police is enlivened only when either a complaint is made by a "person aggrieved" to police and referred by the Commissioner of Police to the Ombudsman, or where a complaint is made direct to the Ombudsman.[29] The Court held that there was no valid complaint made by the *Northern Territory News*, because a journalist was not a "person aggrieved", having no greater interest than

ordinary members of the public.[30] Thus, the matter having been raised in the first instance with the police, the Ombudsman had no power to reinvestigate the matter.

Complaints against the NCA

Since October 2001, the Commonwealth Ombudsman has had jurisdiction to investigate complaints about the administrative actions of the National Crime Authority (NCA).[31] The Ombudsman may transfer complaints about the NCA to another Commonwealth, State or Territory authority for investigation if that authority has jurisdiction to investigate the complaint and could more effectively or conveniently deal with it.[32] This is similar to existing provisions which permit the Ombudsman to decline to investigate a complaint which could be more appropriately dealt with by another body, such as the Privacy Commissioner, the Public Service Commissioner or an industry ombudsman.[33] The Ombudsman may also make cooperative arrangements with equivalent State and Territory bodies which have power over the NCA or certain members of staff of the NCA, to determine which authority should investigate complaints in a given case.[34] These provisions are necessary in view of the fact that the NCA is not solely a Commonwealth body, but a transjurisdictional body which employs Commonwealth and State staff, including seconded State Police.

The amendments giving the Ombudsman jurisdiction over the NCA also protect sensitive information by prohibiting the Ombudsman from exercising his or her power to obtain information or documents relevant to a statutory investigation, where disclosure by the NCA would endanger a person's life or create a risk of serious injury.[35] Further, the Ombudsman must not disclose information given to the office by the NCA if the Attorney-General certifies that disclosure would be contrary to the public interest because it would prejudice a person's safety or fair trial, the effectiveness of an NCA investigation or the operations of a law enforcement agency.[36]

Controlled operations

Also in 2001, the Commonwealth Ombudsman was allocated the task of monitoring and reviewing compliance with controlled operations legislation[37] by the Australian Federal Police (AFP) and the NCA. With the passage of the *Measures to Combat Serious and Organised Crime Act 2001* (Cth), the powers of the AFP and NCA to conduct controlled operations were greatly enhanced, including by:

permitting officers to conduct controlled operations in relation to any "serious Commonwealth offence", not just drug-related offences;[38]

indemnifying officers against civil as well as criminal liability for any acts undertaken in the course of a controlled operation;[39]

extending the immunity from criminal and civil liability to persons other than law enforcement officers who take part in an authorised controlled operation;[40] and

authorizing controlled operations for up to 6 months rather than 30 days.[41]

To provide a counterbalance, additional accountability measures and safeguards were created, including a new monitoring and review role for the Ombudsman. This is modelled on, and largely mirrors, the powers and functions of the NSW Ombudsman in overseeing controlled operations in that State.[42] The NCA and the Commissioner of Police must make quarterly reports to the Minister giving details relating to each controlled operation.[43] The Ombudsman must also be given copies of these reports, and may require additional information about particular controlled operations mentioned in the reports.[44] The Ombudsman must inspect the records of the AFP and the NCA in relation to controlled operations at least once every 12 months; and may inspect the records at any time to ascertain whether the controlled operations provisions are being complied with.[45]

The Ombudsman is then accountable to the Parliament. In addition to detailed annual reports by the Minister,[46] the Ombudsman must report annually to both Houses of Parliament on his or her supervisory function reviewing controlled operations, including comments "as to the comprehensiveness and adequacy of the reports which were provided to the Parliament by that law enforcement agency."[47]

It is important to note that the Ombudsman's role does not extend to the investigation of complaints relating to the conduct of controlled operations by the AFP or the NCA. The role is limited to monitoring compliance with the legislative formalities, and in this respect parallels the Commonwealth Ombudsman's existing role in overseeing the issue of warrants for telecommunications interception.[48]

Commentary

The investigation of complaints against the police "has proved problematical in every jurisdiction".[49] Although the investigation of complaints is the core function of ombudsmen, complaints against police differ from other areas of ombudsmen's responsibility in that many complaints involve allegations of criminal behaviour, often with no independent witnesses.[50] The resources required to investigate allegations of criminality are far more demanding than to investigate a bureaucratic delay, for example. It is commonplace to observe that ombudsmen are generally under-resourced,[51] and often unable to investigate complaints against police adequately, particularly complaints involving allegations of significant criminality. Thus, in most cases they rely on police internal investigation and there is no external, independent review of complaints by the ombudsman.[52] As Alan Cameron has noted, there is a "credibility gap inherent in a system which involves police conducting all the investigations, and the Ombudsman being limited to reviewing the results."[53]

Both the Senate Committee and the Australian Law Reform Commission recommended that police complaints be removed from the Ombudsman's jurisdiction, because of resource considerations and the serious nature of the complaints.[54] *Boyce v Owen* provides yet another reason to consider this, namely, that technical jurisdictional limitations such as standing can prevent ombudsmen from exercising their reinvestigatory powers even in those few cases in which they choose to do so.

The selection of the Commonwealth Ombudsman to scrutinise the administrative actions of the NCA and to monitor the AFP's and the NCA's compliance with

controlled operations legislation is a testament to the office's integrity and high public stature.[55] The Parliamentary Joint Committee on the National Crime Authority had recommended that the Commonwealth Ombudsman should have oversight of controlled operations, partly in order to "reassur[e] the community of the integrity of the system"[56] by providing an independent external source of accountability. However, this contradicted the recommendation of the only Commonwealth parliamentary committee to expressly consider the role of the Ombudsman, which recommended the removal of the analogous role in relation to telecommunication interception warrants from the Ombudsman, on the ground that the function was not appropriate for the Ombudsman.[57]

Further, the conferral of jurisdiction on the Ombudsman to investigate complaints against the NCA goes directly against the recommendation of the Australian Law Reform Commission, which was that complaints against the AFP and the NCA be given to a separate body which would deal both with individual complaints and corruption issues.[58]

As Pearce has observed, an "Ombudsman should not be asked to perform functions just because a government wants to say that they have been entrusted to a body of integrity."[59] The Ombudsman is not the only public office with a reputation for integrity and independence. For example, in Queensland the conduct of controlled operations is approved by the Controlled Operations Committee[60] which is constituted by a retired Supreme Court or District Court judge, the chief executive of the police service and the chief executive of the Crime and Misconduct Commission.[61] The Committee reports to the Minister, and the reports must be tabled in Parliament.[62]

Further, giving the Ombudsman jurisdiction to oversee compliance with the legislative formalities "creates the false impression that the Ombudsman has the power to investigate complaints about action taken under the Act."[63] It also diverts attention and resources away from the Ombudsman's mainstream functions.[64] At a time when ombudsmen are already burdened with more functions than they have the resources to perform, the recent legislative amendments may be yet another example of what Richardson describes as conferring on the office "additional functions without proper thought about the budgetary implications."[65]

Complaints by whistleblowers

Whistleblowing, or disclosure of protected information in the public interest, is another area of complaints that has been allocated to ombudsmen in some jurisdictions. Last year, Victoria became the fifth jurisdiction in Australia to introduce legislation to protect whistleblowers.[66] The Victorian legislation can be characterized as second generation legislation, in view of the level of detail it prescribes and the strong investigative and monitoring role it accords to the Victorian Ombudsman.

Victoria's Whistleblowers Protection Act 2001

The *Whistleblowers Protection Act 2001* (Vic) gives the Victorian Ombudsman jurisdiction to investigate disclosures by whistleblowers of improper conduct by public officers and public bodies. Improper conduct is defined to mean corrupt

conduct, a substantial mismanagement of public resources, or conduct involving substantial risk to public health or safety or to the environment that would constitute either a criminal offence or grounds for dismissal.[67] In general, a whistleblower has a choice to disclose improper conduct to the Ombudsman or to the relevant public body (or the Chief Commissioner of Police for disclosures relating to police).[68] If a public interest disclosure[69] is made to the Ombudsman's office, the Ombudsman has a duty to investigate it unless it is trivial, frivolous, vexatious or more than 12 months old.[70] However, the Ombudsman may refer matters to the Chief Commissioner of Police, the Auditor-General, or the relevant public body for investigation, if he or she considers it appropriate.[71] The Ombudsman may request the secondment of police officers or staff of a public body to assist in investigations.[72] The Ombudsman reports the results of his or her investigations either to the responsible Minister or to the head of the public body.[73] If insufficient steps have been taken to implement the Ombudsman's recommendations, the ultimate sanction is to report to Parliament.[74]

If a whistleblower complains to the relevant public body or the Chief Commissioner of Police rather than to the Ombudsman, that body investigates the complaint and the Ombudsman monitors the investigation.[75] The Ombudsman has power to take over an investigation, if the public body refers it to the Ombudsman,[76] if the whistleblower requests it,[77] or if the Ombudsman is not satisfied with the progress of an investigation.[78] A report on the result of the investigation is made to the Ombudsman as well as to the relevant Minister.[79] Thus, the Ombudsman has either primary or supervisory jurisdiction over all complaints made by whistleblowers in Victoria.

The Ombudsman also has a standard-setting role in preparing and publishing guidelines for the procedures to be followed by public bodies in relation to complaints by whistleblowers and their investigation.[80]

Commentary

The Victorian legislation differs from the legislation in the other four jurisdictions in the primacy which it gives to the Ombudsman as complaint investigator, and the level of detail it prescribes about the conduct of investigations.

In South Australia and New South Wales, the Ombudsman is empowered to receive only complaints relating to maladministration.[81] Complaints about the waste of public money must be made to the Auditor-General,[82] and complaints about police must be made to the relevant police complaints authority.[83] In Queensland, the Ombudsman has no special role in investigating complaints and is not even referred to in the legislation, although clearly he or she would be able to receive complaints from whistleblowers relating to maladministration.[84]

It could be difficult for whistleblowers not wishing to complain to the relevant government agency to identify the correct independent body to whom complaint can be made. The Victorian model has the advantage of simplicity in that virtually all complaints can be made to the Ombudsman. This is also the case in the ACT, where the Ombudsman and the Auditor-General are authorized to receive complaints from any person. However, in the ACT the Ombudsman exercises a residual investigatory jurisdiction – he or she may only investigate if he or she considers "there is no other

proper authority that can adequately or properly act on the disclosure; or that any proper authority that should have acted on the disclosure has failed, or been unable for any reason, to adequately act on the disclosure".[85] Otherwise, the complaint should be referred to the relevant government agency for investigation.

None of the other four statutes contain any detail about how investigations are to be conducted, or provide for the monitoring of investigations. The Victorian legislation is unique in that regard, and in its provision for the Ombudsman to set standards for government departments and agencies to adopt in their internal dealings with complaints made by whistleblowers. It represents a model which could usefully be adopted in other jurisdictions considering amendment to their legislation.

Complaints of child abuse

In New South Wales, in a radical extension of the traditional role of ombudsmen, the Ombudsman has been given jurisdiction to investigate cases involving alleged child abuse arising out of the actions of both key public agencies providing services to children and certain private bodies, including private schools and child care centres.

New South Wales child abuse legislation

In 1998, in response to the Wood Royal Commission's *Final Report into Paedophilia*, (which reported in August 1997), the New South Wales Parliament conferred on the State's Ombudsman new and unprecedented powers[86] to investigate allegations of child abuse in the context of the child-related employment screening scheme. Child abuse is broadly defined to include sexual abuse, physical assault, ill-treatment or neglect, and "exposing or subjecting a child to behaviour that psychologically harms the child".[87] The aim of conferring these powers on the Ombudsman is to overcome the potential "conflicts of interest when agencies investigate child abuse allegations made against their staff."[88]

The legislation places an "absolute obligation"[89] on the heads of designated agencies to inform the Ombudsman of every allegation or conviction of child abuse made against an employee, and of the disciplinary action or investigation undertaken in response to it.[90] The agencies designated for mandatory reporting are those that provide services to children, such as government schools, area health services, the Department of Community Services, other listed Departments[91] and any public authorities prescribed by regulation. Significantly, the Act also applies to some non-government agencies which provide services to children, specifically private schools, child care centres and residential substitute care services.[92] These agencies must refer to the Ombudsman any allegation of child abuse by an employee, even if there is no suggestion that it took place in the workplace. In addition, all other government agencies must notify the Ombudsman of any allegations or convictions of child abuse by employees if the abuse arises in the course of employment.[93]

The Ombudsman has power to monitor internal investigations of child abuse allegations against employees, including being present at interviews,[94] although he or she does not have to exercise this power. The Ombudsman must receive a copy of all completed reports of investigations, must be informed of what action is proposed following the conclusion of the agency's investigation, and is entitled to

request any additional documentation relating to investigations at any time.[95] The Ombudsman may even take over the conduct of investigations if he or she so decides. The Ombudsman is also tasked with investigating complaints about the way agencies have dealt with child abuse allegations, and additionally has the power to investigate agencies' complaint handling procedures on his or her own motion.[96]

In addition to monitoring the complaint handling and investigation of agencies, the Ombudsman has power to conduct direct investigations into allegations of child abuse. This applies both to those which have been compulsorily reported and to allegations of which the Ombudsman "otherwise becomes aware".[97] This is an exceedingly wide power to investigate directly whether or not child abuse occurred, as distinct from the disciplinary proceedings taken in response to child abuse allegations.

Significantly, the Ombudsman has power to disclose information received to police officers and other relevant investigative agencies.[98] Although generally the Ombudsman is constrained by secrecy obligations,[99] these do not apply to disclosures relating to child abuse.

The Ombudsman is also given the general function of scrutinizing the systems in place for preventing child abuse, and the systems for handling and responding to child abuse allegations or convictions against employees of designated government and non-government agencies.[100] Part of the Ombudsman's role is to assist agencies to develop standard procedures for responding to allegations of child abuse.

Challenge to the NSW legislation – K's case

This jurisdiction of the Ombudsman was challenged in the New South Wales Supreme Court in 2000. *K v NSW Ombudsman*[101] involved allegations of child abuse which had been made against "K", a female high school teacher in New South Wales. K denied the allegations, and the NSW Department of Education and Training brought disciplinary proceedings against her. After an inquiry, the charges were found to be "not proven" and were dropped by the Department. The following year, the Ombudsman announced that he was conducting an investigation into both the conduct of the Department in relation to its disciplinary proceedings, and the conduct of K in relation to her former pupil.

K instituted proceedings challenging the Ombudsman's jurisdiction to investigate both the Department and K's conduct. Whealy J held that the Ombudsman clearly had jurisdiction not only to investigate the systems in place in designated agencies for preventing child abuse and responding to allegations of child abuse, but also to investigate the substance of the child abuse allegations, as "the powers conferred on the Ombudsman under s 25G appear in a context of the widest import in relation to the question of child abuse."[102]

Commentary

While the Ombudsman is investigating the adequacy of internal investigations of child abuse allegations, the focus remains the agency and its administrative

procedures. The Ombudsman's function in scrutinizing agencies' systems for the prevention of and response to child abuse also arguably relates to matters of administration. It is analogous to the oversight roles given to some ombudsmen in recent years, such as in relation to telecommunications interception warrants, whistleblower protection in Victoria, and controlled operations.

However, the power given to the NSW Ombudsman to conduct his or her own independent investigation into whether child abuse did in fact occur represents a drastic departure from the traditional conception of the role of the ombudsman, in three respects. First, it permits the Ombudsman to oversee disciplinary proceedings conducted by agencies, whereas the majority of statutory ombudsmen are precluded from investigating employment-related action such as disciplinary proceedings, promotions and dismissals.[103] Secondly, the Ombudsman's jurisdiction breaks new ground in that it extends to allegations of child abuse made against employees of private sector bodies, such as private schools and child care centres, as well as to volunteers, not just paid employees. Thirdly, the Ombudsman's ability to directly investigate substantive complaints involving the commission of a serious criminal offence represents a rejection of one of the traditional limitations imposed on ombudsmen. In two early cases, one in Victoria and the other in Saskatchewan, courts held that unlawful assaults by prison officers were not able to be investigated by ombudsmen. This was because an assault is not a "matter of administration", since unlawful criminal conduct cannot be authorized, explicitly or impliedly, by an employer. However, the failure of senior prison officers to discipline the offending officer,[104] or the failure to take steps to investigate a complaint to prison authorities[105] would be administrative matters properly within an ombudsman's province of investigation.[106]

Although the NSW Ombudman's role is investigatory, and he or she has no determinative powers, hence no power to make "findings" of guilt, even the reporting of "opinions" touching individual guilt carries the risk of irreparably damaging individual reputation.[107] In the public mind, indeed even in law, the distinction between a "finding" and an "opinion" can be elusive.[108] Thus, even comments concerning individual culpability can be devastatingly damaging:

> Insinuations of personal culpability by a major public investigative body carry great stigma and have the potential to do serious harm to reputations. Given the nature of the claims and the forum in which they are being made here, such reputations may never have the opportunity of being vindicated at a trial. Additionally it is not at all unlikely that such conclusions could interfere with any disciplinary process.[109]

That this is so is underlined by the fact that a number of the cases involving ombudsmen have been brought in order to clear a person's reputation, whether by obtaining an effective acquittal by the ombudsman,[110] or by seeking to prevent the ombudsman from publishing damaging opinions.[111] In a recent case, an ombudsman's conclusion that there was a "reasonable likelihood" that a solicitor had engaged in "unsatisfactory conduct" upset the solicitor sufficiently to cause him to bring proceedings seeking to clear his name, even though the ombudsman decided to take no further action and dismissed the complaint against him.[112] An ombudsman's opinion that a person may have engaged in child abuse, even though not determinative of the issue, would carry even greater stigma and risk of harm.

An additional note of caution is that ombudsmen, unlike courts and tribunals, are not bound by principles of double jeopardy, but have the power to reopen investigations at any time, even after issuing a formal report, where new information comes to hand which suggests the possibility of error in the initial finding.[113] This lack of finality has the potential to have an extremely serious impact on the lives of individuals against whom allegations of child abuse have been made.

Finally, it must be observed that the jurisdiction represents a very significant additional burden on the NSW Ombudsman's office. In 2000-2001 the Ombudsman received a total of 1,379 written notifications and 56 complaints concerning child abuse, but monitored only six investigations.[114] To avoid the problems experienced with police complaints in many jurisdictions, where ombudsmen are given powers which they are unable to exercise in the majority of cases by reason of resource constraints, it is essential that the NSW Ombudsman is granted sufficient additional resources to perform these functions satisfactorily.

Avenues of Accountability for Ombudsmen

Given the additional responsibilities which are being vested in ombudsmen, and their ability to affect individual reputation, the question arises as to what avenues exist to ensure accountability. Although ombudsmen themselves are a means of ensuring accountability of government, they are not immune from such processes. Some mechanisms are freedom of information legislation, judicial review and accountability to Parliament. The application of such accountability processes to ombudsmen has been and continues to be contentious.

Freedom of information

There is an ongoing tension between the privacy of investigations by ombudsmen and freedom of information (FOI) legislation. This has been resolved in some jurisdictions, most recently Victoria, by exempting ombudsmen from the requirement to comply with FOI legislation altogether. In other jurisdictions, despite being subject to FOI legislation, many documents prepared by ombudsmen's offices fall within one or more of the specific exemptions to disclosure.

Recent cases – no secrecy exemption

All jurisdictions provide that an ombudsman's investigations are to be in private,[115] and prohibit the ombudsman and his or her staff disclosing any information obtained in the course of their duties except in certain narrowly defined circumstances.[116] Despite this, in the seminal case of *Kavvadias v Commonwealth Ombudsman* the Federal Court held that a secrecy provision which is expressed in general terms is not effective to exclude the operation of freedom of information legislation.[117] Thus, in the absence of a specific exemption, ombudsmen are subject to FOI legislation despite their secrecy obligations.

This principle has been reaffirmed in four recent tribunal cases, two in the Commonwealth Administrative Appeals Tribunal,[118] and two in the Victorian Civil and Administrative Tribunal.[119] In the Victorian cases, the Tribunal drew the distinction drawn in *Kavvadias* between the nature of the information to be protected from

disclosure, and the person or office-holder who is prohibited from disclosing information. It affirmed that the secrecy exemption under FOI legislation applies to provisions directed to particular information, rather than to a blanket prohibition on disclosure of information by particular office-holders. Thus, the Ombudsman's secrecy obligations did not exempt him or his staff from their FOI obligations.[120]

Brown *and* Woodford– *internal working documents exemption*

In *Brown v Commonwealth Ombudsman*, the Commonwealth Ombudsman was successful in having his draft report (which had been sent to the agency with opportunity to comment) and written submissions in response by the agency's solicitors declared to be exempt from disclosure to the complainant under FOI legislation under the provision exempting "internal working documents".[121] This exemption requires weighing "the public interest in citizens being informed of the processes of their government and its agencies" against "the public interest in the proper working of government".[122]

The Ombudsman submitted:[123]

> The fact that investigations are conducted in private enables them to proceed as fairly and efficiently as possible with the Ombudsman forming tentative views about an action subject to investigation and maintaining, revising or discarding those views as further information comes to light. ….
>
> It would defeat the object of this legislative scheme if the Applicant were to gain access to material containing tentative opinions about the investigation up to the point where the draft reports were issued when, on further investigation, those opinions were altered.

The Tribunal concluded that the "proper working of government" required that the Ombudsman be able to reach tentative conclusions in draft reports, then forward them to the agency concerned to give it an opportunity to comment, without fear that such provisional opinions would be disclosed to the complainant or the public. The Tribunal concluded that it would be contrary to the public interest for such tentative criticisms to be disclosed, as "their publication could create a misleading or perhaps unfair impression in the public mind".[124]

In *Woodford*, the VCAT independently concluded that draft letters and interview preparation notes fell within the exemption for internal working documents.[125]

Woodford *– confidentiality exemption*

In *Woodford*, despite affirming that the Victorian Ombudsman could not claim a general exemption from FOI legislation on account of his or her secrecy obligations, Senior Member Preuss accepted that certain categories of documents were exempt from disclosure. She held that tapes of interviews, notes of interviews and file notes of discussions with interviewees were exempt, on the basis that the information was obtained in confidence.[126] She referred to the combined effect of various statutory provisions as indicating a confidential process,[127] and concluded that "the hallmark of documents relating to investigations conducted by the Ombudsman is confidentiality".[128] She accepted the Ombudsman's argument that the office has always acted on the basis that interviews are conducted in confidence, and that it

would make it extremely difficult for the Ombudsman to obtain full and frank information (without resorting to use of its coercive powers) in the absence of such assurances of confidentiality.[129]

Victorian legislation – Ombudsman exempt from FOI

Since 19 June 2001, when the *Whistleblowers Protection Act 2001* (Vic) was passed and commenced, the Victorian Ombudsman's office has enjoyed exemption from FOI disclosure for documents which contain information relating to complaints, preliminary enquiries, investigations, reports or recommendations.[130] The exemption is not a reaction to the cases of *Woodford* and *Al Hakim*, as the Tribunal members in both cases noted that the Bill was already before Parliament. Rather, it restores the general exemption from freedom of information legislation that the Victorian Ombudsman had enjoyed from 1987 to 1993, and which, it has been argued, was unintentionally removed by changes to the definition of "agency" in 1993.[131]

A general immunity from freedom of information legislation is not without precedent in Australia. The South Australian Ombudsman enjoys exemption from freedom of information requirements[132] and the NSW Ombudsman in 1990 obtained an exemption for the office's complaint handling, investigative and reporting functions.[133]

Commentary

These cases highlight the tension between the public interest in openness and accountability of government (which is protected through FOI legislation) and the need for openness and frankness in communications with ombudsmen (which is safeguarded through the secrecy and confidentiality provisions in ombudsman legislation).

The solicitors for Mrs Woodford argued that the public interest demands "the public accountability of the Ombudsman and his processes", as the Ombudsman is a part of government. They argued that "if the Ombudsman was not subject to the provisions of the FOI Act, the whole system of accountability of government was undermined."[134] Similarly, Allars queries whether "ombudsmen deserve the non-negotiable trust of complainants and public servants" or whether there is something anomalous in ombudsmen being exempt "from a mechanism for achieving open government and hence administrative accountability".[135]

The exemptions granted over individual documents in cases such as *Woodford* would exclude a considerable portion of the Ombudsman's file from disclosure, leaving little more than internal file notes, correspondence sent and received and published reports If the private and confidential nature of the ombudsman process and the need for secrecy to obtain full and frank disclosure of information are more important than accountability to the public, it may be preferable for Parliament to confer on ombudsmen a blanket exemption from FOI legislation, as has been granted in Victoria, New South Wales and South Australia, rather than undermine the philosophy by granting ad hoc exemptions for specific classes of document.

Availability of judicial review

If ombudsmen are exempt, or partially exempt, from public accountability through FOI legislation, greater weight falls upon other accountability mechanisms such as judicial review and parliamentary oversight. In all jurisdictions, ombudsmen are immune from civil liability for their actions unless they are done in bad faith.[136] In addition, privative clauses purporting to oust the jurisdiction of superior courts to review decisions of ombudsmen exist in a number of jurisdictions.[137] Contrary to the general tendency to interpret such provisions narrowly so as not to remove significant decisions from the jurisdiction of the courts,[138] privative clauses relating to ombudsmen have been literally interpreted as excluding any proceedings for judicial review, including on the ground of excess of jurisdiction.[139] A very recent Tasmanian case reaffirms that where a privative clause exists, the courts will not review the findings of ombudsmen, except pursuant to the specific statutory procedure which in all jurisdictions allows a superior court to determine questions concerning an ombudsman's jurisdiction.[140] Questions concerning judicial review of determinations also arise in relation to industry ombudsmen, as is illustrated by the *Citipower* case. Queensland has recently made major changes to the Ombudsman's liability, including removing the privative clause and immunity from criminal and some forms of civil liability.

Queensland legislation – removal of privative clause

The *Parliamentary Commissioner Act 1974* (Qld) contained a fairly comprehensive privative clause.[141] It provided the Parliamentary Commissioner and his or her staff with immunity from all civil and criminal proceedings, save for acts done in bad faith, and then proceedings could be brought only with leave of the Supreme Court. It further provided that no prerogative writ of any sort would lie against the Parliamentary Commissioner, and gave the Commissioner immunity from giving evidence or producing documents in judicial proceedings.

When in 2001 this legislation was repealed and replaced with the *Ombudsman Act 2001* (Qld), these significant protections were not reenacted. Instead, the new legislation contains a simple clause protecting the Ombudsman and his or her staff from civil liability for acts done "honestly and without negligence."[142]

This alteration was not remarked on by Premier Beattie in delivering the second reading speech, where he emphasized that the new legislation "does not represent substantial changes."[143] However, the Explanatory Notes explain that "the immunity of the Ombudsman and staff from proceedings is less extensive than the current provision and meets concerns expressed by the Scrutiny of Legislation Committee about similar provisions."[144] This new provision is extremely significant, because it renders the Queensland Ombudsman and his or her staff liable to criminal proceedings, civil suit where negligence is alleged, and the full range of judicial review actions for administrative error.

Scutt *case – statutory ombudsmen*

The Tasmanian case of *Anti-Discrimination Commissioner v Acting Ombudsman*[145] is an instructive and unusual example of the need for ombudsmen not only to resolve

grievances brought by members of the public, but also to mediate between government officials at loggerheads. Dr Jocelynne Scutt, the Tasmanian Anti-Discrimination Commissioner, brought proceedings in the Supreme Court challenging the Ombudsman's jurisdiction to investigate and report on complaints made against her. She was investigating two serious matters involving sexual abuse and wrongful dismissal.[146] The government bodies under investigation[147] requested the Director of Public Prosecutions (DPP) to act for them, but Dr Scutt refused to correspond with the DPP, instead addressing all correspondence to the bodies themselves and complaining of no response to her letters (since she did not acknowledge responses from the DPP). The DPP lodged a number of complaints with the Ombudsman about Dr Scutt's conduct.

The Ombudsman reported, finding that some of the DPP's complaints were substantiated but others were not. She found Dr Scutt's refusal to reply to the DPP's correspondence "amounted to a lack of basic manners and observance of basic communication rules" and was discourteous and not good administrative practice.[148] The investigation had concerned the Ombudsman in that "it had revealed a degree of apparent animosity between two very senior officers which she considered to be unproductive and unbecoming".[149]

After the Ombudsman had reported, the Anti-Discrimination Commissioner brought proceedings in the Supreme Court seeking declarations that the Ombudsman did not have jurisdiction to investigate or to report on either matter. The Tasmanian legislation conferred immunity on the Ombudsman and her staff from any civil or criminal proceedings on the ground of want of jurisdiction or any other ground, in the absence of bad faith.[150] It provided a statutory cause of action in the Supreme Court to determine whether "in the course of, or in contemplation of, an investigation, … the Ombudsman has jurisdiction to conduct the investigation".[151]

Justice Crawford held that, because of the privative clause, he had no power to engage in a general review of the Ombudsman's opinions on administrative law grounds. He had power under the specific statutory procedure to determine only the threshold question of whether the Ombudsman had jurisdiction to conduct the investigation.[152] However, he did accept that the statutory procedure was not, as earlier decisions in other jurisdictions[153] had held, limited to the time when an investigation by the Ombudsman is being contemplated or is currently underway. He accepted that an application may be made to the Court for determination of the Ombudsman's jurisdiction even once the Ombudsman has completed the investigation.[154]

Citipower *case – industry ombudsmen*

Industry ombudsmen may also be immune from judicial review actions, even where no immunity is provided for in legislation. In 1999, the Victorian Supreme Court considered a case brought against the Electricity Industry Ombudsman (Vic) Ltd (EIOV) by Citipower, a supplier of electricity against whom the EIOV had awarded compensation to three consumers in respect of damage suffered as a result of an interruption to power supply.[155] Citipower argued that the EIOV had made orders which were beyond power, or, alternatively, were in breach of the EIOV constitution.

The case turned on the construction of the provisions of the EIOV constitution, which formed a contract between the EIOV and its members, electricity suppliers.

Justice Warren held that Citipower was contractually bound to accept a determination of the EIOV and the court should not interfere with the Ombudsman's determination, as the EIOV's jurisdiction to determine complaints arises from the contract constituted by the constitution and voluntarily entered into by the parties. She accepted that some disputes are better decided by non-lawyers or by people with specialist expertise in the particular industry, and "sometimes, it is appropriate that State-appointed judges stay outside disputes of certain kinds which a private domestic tribunal has been appointed to decide."[156] This does not mean that such tribunals are above the law, merely that "the courts will not discourage private organisations from ordering their own affairs within acceptable limits".[157]

However, courts can examine whether private adjudicative bodies such as industry ombudsmen have complied with the terms of their contract. Justice Warren construed the terms of the EIOV constitution and concluded that the EIOV was entitled to proceed to the determinations she made.[158] She emphasized that it was not open to her to substitute his own finding on the facts unless the EIOV's determination was "so aberrant as to be irrational."[159]

Commentary

Ombudsmen were traditionally seen as an adjunct to Parliament, supplementing citizens' ability to complain to their member of Parliament. Now, increasingly they are becoming a real alternative to courts and tribunals, providing accessible, speedy and low-cost remedies.[160] This is particularly so with private industry ombudsmen, which commonly have the power to make binding determinations of monetary compensation up to a certain amount. Public ombudsmen have no power to enforce their recommendations, to overrule the decisions of government officials, or to compel any action on the part of the relevant individual, department or authority. Nevertheless, they have a number of powers, including report to the Premier or Prime Minister, report to Parliament and publicizing their reports, which are powerful in persuading agencies to act on their recommendations and thus provide an effective remedy to aggrieved individuals.[161] Indeed, a South Australian judge has commented that "it may be expected that those officials and agencies which are subject to [the Ombudsman's] jurisdiction will comply with his recommendations."[162] The ability of reports by ombudsmen to have a dramatic impact on individuals' reputations has already been noted.

In view of the fact that ombudsmen now represent an effective alternative to the courts in the resolution of disputes, it is questionable whether courts should exercise a greater degree of restraint in reviewing the decisions of ombudsmen than they do in relation to other administrators, or indeed whether the ability to appeal to the courts as a last resort can justifiably be excluded, as it has been in some jurisdictions.

In relation to private ombudsmen, the justification appears to be non-intervention with the terms of the contract by which the parties have agreed that dispute resolution by the ombudsman will be final and binding. However, the contract

analysis is flawed in that the individual consumers, who are not parties to the contract and did not choose the terms of the ombudsman scheme, will also be excluded from seeking judicial review of the ombudsman's decisions which directly affect them. Further, the service providers, although they may be parties to the contract establishing an industry ombudsman scheme, are often not in the position of equal parties who have freely chosen to be bound by ombudsmen determinations. This is particularly the case where legislation compels participation in an ombudsman scheme, as it does for example with the EIOV and the Telecommunications Industry Ombudsman. This problem could be ameliorated if the contract establishing a private ombudsman, or legislation requiring the implementation of an ombudsman scheme, gave consumers remedies, for example by providing for arbitration or tribunal or judicial review in the event of a dispute between the ombudsman and a consumer or scheme member.[163]

In relation to public ombudsmen, the justification for the non-availability of judicial review of the ombudsmen's decisions seems to be that judicial review is already available in respect of the decisions of the agency in question, so does not need to be applied a second time to the ombudsman's investigation. Further, ombudsmen are accountable to Parliament, and "this creates at least one avenue whereby any disquiet on any issue within the jurisdiction of the Ombudsman can be properly looked at."[164] Finally, the fact the Ombudsman's power is recommendatory only and has no binding effect is significant in the non-availability of judicial review,[165] despite the authoritative nature of the recommendations. However, the importance ascribed to this last matter may be queried given the potential of ombudsmen's recommendations (particularly in investigating serious matters such as child abuse) to dramatically damage individuals' reputations, a factor which was highlighted by the High Court's decision to review preliminary decisions of the Criminal Justice Commission.[166]

Despite the continuing reticence of the courts to become involved in reviewing ombudsmen's decisions, as demonstrated in the *Scutt* case and the *Citipower* case, some steps are beginning to be taken towards ensuring accountability of ombudsmen for their decisions. One such step has been the removal of the privative clause from Queensland's legislation.

Accountability to Parliament

Given the ongoing tension in the relationship between ombudsmen and freedom of information, and the cautious steps being taken in a few jurisdictions towards judicial review of ombudsmen, ombudsmen's accountability to Parliament assumes great importance. However, as Snell has observed, "[t]he Ombudsman-Parliament relationship has been riddled with tension and countervailing bouts of attraction and separation".[167] Over the past decade there have been numerous calls both from Ombudsmen and within Parliament for stronger links between ombudsmen and Parliament to ensure the effective performance of their role. Much discussion of the relationship between ombudsmen and the legislature has focused on ensuring the independence and impartiality of ombudsmen by distancing the institution from the executive branch of government, and hence decreasing its dependence on the executive for funding and staff. However, another key facet of the debate is increasing parliamentary oversight and scrutiny of the performance of their functions.

This was a major theme in the recent overhaul of the Queensland Ombudsman legislation.

Queensland legislation – agent of Parliament subject to oversight by a Parliamentary committee

Although both Western Australia and Queensland formerly had an ombudsman known by the title "Parliamentary Commissioner for Administrative Investigations", Queensland was and is unique in Australia in designating the Commissioner an officer of the Parliament.[168] This has carried through into the new legislation. Although the Queensland office is now known by the more familiar title "Ombudsman", the status as officer of the Parliament has been retained.

In some respects, this is of little more than symbolic significance, as "the Ombudsman's investigations are not 'parliamentary investigations', do not attract parliamentary privilege and are subject to judicial review".[169] However, the designation as a parliamentary officer has some important corollaries: the Ombudsman is not subject to direction as to the manner of the exercise of his or her functions or the priority given to any investigation;[170] and the Ombudsman has power to investigate matters referred to the office by a member of Parliament or a statutory committee of the Parliament.[171] This underscores the status of the Queensland Ombudsman as a member of the legislative branch of government, separate from the executive.

The Legal Constitutional and Administrative Review Committee of the Queensland Legislative Assembly (LCARC) already had, and will retain, a considerable role in safeguarding the Ombudsman's independence from the executive. LCARC must be consulted by the executive about the selection and appointment of the Ombudsman,[172] the development of the Ombudsman's budget,[173] the appointment of a person to conduct a strategic review of the Ombudsman,[174] and on motions to suspend or remove the Ombudsman.[175]

Thus, the Queensland Ombudsman already had considerable independence as an officer of the Parliament, both through the legislative provisions and the scrutiny of LCARC on executive decisions affecting the office. The new legislation balances this independence with measures to increase the accountability of the Ombudsman to the Parliament. It confers on LCARC the roles of monitoring and reviewing the Ombudsman's performance of his or her functions, examining the Ombudsman's annual reports and reporting to Parliament on any matter concerning the Ombudsman or any changes to the functions, structures and procedures of the office of Ombudsman the committee considers desirable.[176] This provision had no counterpart in the repealed *Parliamentary Commissioner Act 1974* (Qld). It is directly modelled on the functions the New South Wales Joint Committee on the Office of the Ombudsman has exercised under legislation since 1990.[177]

Commentary

Although the symbolic change of making ombudsmen officers of Parliament may or may not be necessary,[178] it seems clear that additional parliamentary involvement with ombudsmen is desirable, whether through scrutiny of appointments,

involvement in the budget, reviewing ombudsmen's reports and exercise of their powers, or a combination of these.

Some form of parliamentary oversight of appointments to the office of ombudsman exists in two jurisdictions apart from Queensland. In South Australia, the parliamentary Statutory Officers Committee has the responsibility to inquire into and report on a suitable person for appointment to the office of Ombudsman.[179] The NSW Joint Committee on the Office of the Ombudsman has a power of veto over appointments.[180] In Western Australia and at Commonwealth level Parliamentary committees have recommended that they be given an advisory role in relation to appointments to the office of Ombudsman, but these recommendations remain outstanding several years later.[181] Parliamentary involvement in, or oversight of, the process of appointments would enhance the perception of independence of ombudsmen from the executive.

It is only in Queensland that a parliamentary committee has a formal statutory role in relation to the development of the ombudsman's budget, despite perennial problems faced by ombudsmen in securing sufficient resources and despite the obvious advantages financial independence from the executive would bring. Budgetary independence has been considered, but not obtained, in other jurisdictions. A Tasmanian parliamentary inquiry is currently considering whether a separate Appropriation Act for, among others, the State Ombudsman's Office is desirable.[182] A recommendation that a parliamentary committee determine the Western Australian Ombudsman's budget remains unimplemented,[183] and a private member's bill introduced by Roger Price MP which would have empowered a parliamentary committee to examine and report on the Commonwealth Ombudsman's budget was not passed.[184]

New South Wales and now also Queensland are the only jurisdictions to confer on a parliamentary committee mandatory functions of monitoring and reviewing the Ombudsman's exercise of his or her duties, including reviewing the annual reports. The Commonwealth's Senate Finance and Public Administration Legislation Committee is responsible for overseeing the performance of the Commonwealth Ombudsman, including reviewing the Ombudsman's reports, but this has no legislative basis and is accorded no special priority, being only one of the Committee's many functions.[185] This function would have become statutorily mandatory had Roger Price's private member's bill passed.[186] The establishment of a committee substantially dedicated to the Ombudsman, as exists in NSW, has no parallel elsewhere in Australia, although the Tasmanian Ombudsman has recently requested the establishment of a separate Ombudsman parliamentary committee,[187] and Roger Price's bill proposed the establishment of a Commonwealth Joint Committee on the Ombudsman in 1996.[188]

Historically, Parliaments have shown little interest in ombudsmen's reports or holding them accountable for the exercise of their functions.[189] The express legislative conferral on LCARC of functions concerning monitoring and review of the Ombudsman's activities is a step towards greater accountability for the Queensland Ombudsman and greater responsibility of Parliament for the institution. This is to be expected to foster heightened interest in the office and its recommendations, and to

enhance the Ombudsman's independence from the executive. As such, it serves as a model for other jurisdictions to consider.

Conclusion

Despite being described by judges as "a unique institution"[190] and "an idea which had no precise demarcation"[191] and by former Ombudsmen as a "hybrid"[192] or even a "constitutional misfit",[193] public ombudsmen have, over the 25 or 30 years of their existence, acquired a prestigious reputation.[194] At the time of their inception, as Richardson observed, "most Australians had never heard of an Ombudsman, and the few that had were not sure what an Ombudsman was supposed to do."[195] In the intervening period, the institution has grown from obscurity to occupying an essential place in modern society.

This is symbolised by the fact that last year Queensland changed the title of its 28 year old institution from "Parliamentary Commissioner for Administrative Investigations" to "Ombudsman", being "the name by which the office is popularly known in Queensland and the name used in most other comparable jurisdictions."[196] The more recent proliferation of ombudsmen in the private sphere is also testimony to the success of public ombudsmen, and to the attractiveness of the ombudsman style of review to both complainants and the organizations under review.[197] Creyke and McMillan assert that the emulation of public sector ombudsmen's procedures and practices by industry is recognition of the fact that the government standards and public sector models are "best practice".[198]

A final indication of the value accorded to ombudsmen today is the conferral of additional functions and powers on public ombudsmen. Although traditionally ombudsmen were confined to investigating matters of administrative injustice,[199] recent developments have seen ombudsmen acquiring jurisdiction over matters unrelated to administration (such as the NSW Ombudsman's power to investigate allegations of child abuse); and acquiring jurisdiction over private sector bodies (such as private schools, child care centres and foster carers in New South Wales). Ombudsmen are increasingly also being given jurisdiction to monitor or scrutinize the performance of public functions by other agencies (including the handling of complaints by whistleblowers in Victoria), sometimes without having power to investigate complaints in those areas (such as in relation to controlled operations by police and the National Crime Authority).

Although the growth of industry ombudsmen and the expansion of the jurisdiction of statutory ombudsmen are an expression of the confidence parliaments and business have in the institution, greater attention needs to be paid to the accountability mechanisms in place to scrutinise the performance by ombudsmen of these functions. Otherwise, there is a real risk that the very existence of ombudsmen will legitimize public decision-making without providing either accountability or administrative justice for the individual. There may be policy reasons for exempting ombudsmen from FOI requirements, to encourage disclosure of information necessary to conduct investigations. Similarly, the lack of judicial review of ombudsmen's decisions in many jurisdictions may be justifiable on the ground that ombudsmen do not have the power to make final and binding decisions, although their power to damage individuals' reputations is considerable and it is noteworthy

that Queensland has recently moved to increase the accountability of its Ombudsman through the courts by removal of the privative clause. However, if accountability to the public and to the courts is not available, then it is imperative that ombudsmen are made more accountable to parliament, through increased legislative scrutiny of ombudsmen's performance of their duties and greater involvement of parliamentary committees. Finally, unless present resource and operational constraints are remedied, when additional functions are granted to ombudsmen there is a danger of damaging ombudsmen's present enviable reputation by conferring on them functions which they are not able to adequately perform and which will detract from their performance in other areas.

Endnotes

1 A speech of Mr John Milton for the Liberty of Unlicensed Printing, to the Parliament of England, 1644.
2 Kevin Cho, *The Commonwealth Ombudsman* (1980) at i.
3 The word ombudsman is not gender-specific in Swedish: Margaret Allars, *Australian Administrative Law: Cases and Materials* (1997) at 307. The Senate Committee also considered that "ombudsman has become a generic, gender-neutral term in English": Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman* (December 1991) ("Senate Report") at [2.24]. I use the word "ombudsmen" as the plural (although it sounds gender-specific) rather than use the singular "ombudsman" as the plural.
4 *Ombudsman Act 1976* (Cth); *Ombudsman Act 1974* (NSW); *Ombudsman (Northern Territory) Act 1978* (NT); *Parliamentary Commissioner Act 1974* (Qld) (now the *Ombudsman Act 2001* (Qld)); *Ombudsman Act 1972* (SA); *Ombudsman Act 1978* (Tas); *Ombudsman Act 1973* (Vic); *Parliamentary Commissioner Act 1971* (WA). Since self-government, the ACT also has a statutory Ombudsman: *Ombudsman Act 1989* (ACT).
5 This evocative phrase belongs to Rhoda James, *Private Ombudsmen and Public Law* (1997) at 1.
6 Prime examples are the Telecommunications Industry Ombudsman www.tio.com.au, and ombudsmen for privatized public utilities such as the Energy and Water Ombudsman Limited (Vic) www.eiov.com.au, the Electricity Ombudsman of South Australia www.eiosa.com.au , the Energy and Water Ombudsman NSW www.ewon.com.au and the Tasmanian Energy Regulator www.energyregulator.tas.gov.au (all sites last accessed 12 October 2002).
7 These include the Australian Banking Industry Ombudsman Ltd www.abio.gov.au, the Private Health Insurance Ombudsman www.phio.org.au, the Mortgage Industry Ombudsman Scheme www.miaa.com.au/Ombudsman_rules.pdf, the Legal Ombudsman in Queensland, in Victoria www.legalombudsman.vic.gov.au, in Tasmania www.justice.tas.gov.au/legal_ombu/intro.htm, and the recently created Retail Grocery Industry Ombudsman www.mediate.com.au/rgio (all sites last accessed 12 October 2002).
8 This is a limited Commonwealth, State and Territory cooperative scheme which, if established, will have jurisdiction only over complaints made relating to the operation of the ARIA *Code of Practice for Labelling Product with Explicit and Potentially Offensive Lyrics*. See State, Territory and Commonwealth Censorship Ministers, "Music Industry to Appoint Ombudsman", *Communique*, 8 March 2002, http://www.ag.gov.au/aghome/agnews/2002newsag/Communique_aria.htm (last accessed 25 August 2002).
9 *K v NSW Ombudsman* [2000] NSWSC 771 (1 August 2000).
10 *Hannebery v Legal Ombudsman* [1998] VSCA 142 (17 December 1998); *Styant-Browne v The Legal Ombudsman* [2001] 3 VR 132.
11 *Boyce v Owen* (2000) 156 FLR 321.
12 *Whistleblowers Protection Act 2001* (Vic); *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001); *Al Hakim v Ombudsman* [2001] VCAT 1972 (6 July 2001); *Brown v Commonwealth Ombudsman* [1999] AATA 559.
13 *Anti-Discrimination Commissioner v Acting Ombudsman* [2002] TASSC 24 (9 May 2002); *Citipower Pty Ltd v Electricity Industry Ombudsman (Vic) Ltd* [1999] VSC 275 (5 August 1999); *Ombudsman Act 2001* (Qld).

14 Prof Kenneth Wiltshire, *Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations)* (April 1998).
15 Legal Constitutional and Administrative Review Committee Report No 14, Review of the *Report of the Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations)* (July 1999).
16 Sackville J held that section 128 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) amounts to neither an exercise of judicial power in contravention of Chapter III of the Constitution, nor imposition of taxation by the Commonwealth in contravention of section 55 of the Constitution: *Australian Communications Authority v Viper Communications Pty Limited* (2001) 108 FCR 173.
17 Ombudsman (Honesty and Accountability in Government) Amendment Act 2002 (SA).
18 See Philippa Smith, *Red Tape and the Ombudsman*, Senate Occasional Lecture, 17 April 1998; Phil McAloon "When the Business of Business is Government: The Role of the Commonwealth Ombudsman and Administrative Law in a Corporatised and Privatised Environment" (December 1999) 23 *AIAL Forum* 31; Stephen Free, "Across the Public/Private Divide: Accountability and Administrative Justice in the Telecommunications Industry" (2000) 21 *AIAL Forum* 1; Margaret Allars, "Private Law But Public Power: Removing Administrative Law Review From Government Business Enterprises" (1995) 6 *Public Law Review* 44; Anita Stuhmcke, "Privatising Administrative Law: The Telecommunications Industry Ombudsman Scheme" (1998) 6 *Australian Journal of Administrative Law* 15; Alastair Cameron, "The Ombudsmen: Time for a Jurisdictional Expansion. The Case for Extending the Jurisdiction of the Statutory Ombudsmen to Cover the Exercise of Public Power in the Private Sector" (2001) 32(2) *Victoria University of Wellington Law Review* 549. See also Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, (December 1991) at [4.33]; Senate Standing Committee on Finance and Public Administration, *Contracting Out of Government Services Second Report* (May 1998), Chapter 4.
19 *Botany Council v The Ombudsman* (1995) 37 NSWLR 357 at 368 per Kirby P (Sheller and Powell JJA agreeing).
20 See Dennis Pearce, "The Commonwealth Ombudsman: The Right Office in the Wrong Place" in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law at the Twenty-Five Year Mark* (1998) 54 at 62.
21 Rick Snell, "Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma" in Chris Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (2000), 188 at 192.
22 Dennis Pearce, op cit, n 20, at 62.
23 In Queensland and in South Australia, Ombudsmen have no role in relation to complaints against police, as these are dealt with by other bodies: subsection 7(2) and paragraphs 12(2)(c) and (d) of the *Ombudsman Act 2001* (Qld);subsection 5(2) of the *Ombudsman Act 1972* (SA).
24 Section 5 of the *Complaints (Australian Federal Police) Act 1981* (Cth); section 14 of the *Ombudsman (Northern Territory) Act 1978* (NT); section 86L of the *Police Regulation Act 1958* (Vic).
25 See section 23 of the *Complaints (Australian Federal Police) Act 1981* (Cth); section 132 and Division 6 of Part 8A of the *Police Act 1990* (NSW); subsection 86N(2) of the *Police Regulation Act 1958* (Vic); subsections 14(1a), (1b), (1c) of the *Parliamentary Commissioner Act 1971* (WA). Under subsection 4(1) and item 45 of Schedule 1 of the *Ombudsman Act 1978* (Tas), the Ombudsman has primary jurisdiction in relation to complaints against police, but the Ombudsman generally requires the complainant to have first exhausted the internal police investigation avenue.
26 Although under section 132 of the *Police Act 1990* (NSW) the NSW Ombudsman must refer complaints to the Chief Commissioner of Police for investigation, he or she also has power, if he or she thinks it is in the public interest, to commence an independent investigation, in which case the Commissioner must discontinue his or her investigation: section 156 of the *Police Act 1990* (NSW).
27 (2000) 156 FLR 321.
28 (2000) 156 FLR 321 at 325.
29 Subsection 14(2) of the *Ombudsman (Northern Territory) Act 1978* (NT). Complaints made direct to the Ombudsman must be referred to the Commissioner of Police, presumably so that the initial investigation can be carried out by police, subsection 14(3A) of the *Ombudsman (Northern Territory) Act* 1978 (NT).
30 (2000) 156 FLR 321 at 328.

31 Item 3 of Schedule 3 of the *National Crime Authority Legislation Amendment Act 2001* (Cth) inserted subsection 3(13A) into the *Ombudsman Act 1976* (Cth), which makes the National Crime Authority a prescribed authority for the purposes of section 5 of the *Ombudsman Act 1976* (Cth).
32 Section 6A of the *Ombudsman Act 1976* (Cth).
33 Section 6 of the *Ombudsman Act 1976* (Cth). Other bodies include the Australian Broadcasting Authority, the Australian Communications Authority, and the Employment Services Regulatory Authority.
34 Section 8B of the *Ombudsman Act 1976* (Cth).
35 Subsection 9(3) of the *Ombudsman Act 1976* (Cth).
36 Section 35B of the *Ombudsman Act 1976* (Cth).
37 Controlled operations legislation was introduced in some Australian jurisdictions following the decision in *Ridgeway v The Queen* (1995) 184 CLR 19. It indemnifies law enforcement officers from criminal liability when they are involved in an authorised controlled operation relating to the importation and exportation of narcotics and in doing so would otherwise have committed a criminal offence. The Commonwealth provisions are contained in Part 1AB of the *Crimes Act 1914* (Cth).
38 Section 15H of the *Crimes Act 1914* (Cth). "Serious Commonwealth offence" is defined in section 15HB as an offence punishable by imprisonment for a period of 3 years or more and which involves "theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, obtaining financial benefit by vice engaged in by others, extortion, money laundering, perverting the course of justice, bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory, bankruptcy and company violations, harbouring of criminals, forgery including forging of passports, armament dealings, illegal importation or exportation of fauna into or out of Australia, espionage, sabotage or threats to national security, misuse of a computer or electronic communications, people smuggling, slavery, piracy, the organisation, financing or perpetration of sexual servitude or child sex tourism, dealings in child pornography or material depicting child abuse, importation of prohibited imports or exportation of prohibited exports" or similar matters.
39 Section 15IA of the *Crimes Act 1914* (Cth).
40 Subsections 15I(2) and 15IA(2) of the *Crimes Act 1914* (Cth).
41 Subsection 15N(4) of the *Crimes Act 1914* (Cth). However, a certificate must be reviewed by the AAT to remain in force for longer than 3 months, section 15OB.
42 Under the *Law Enforcement (Controlled Operations) Act 1997* (NSW).
43 See sections 15R and 15S of the *Crimes Act 1914* (Cth).
44 Section 15UA of the *Crimes Act 1914* (Cth). See also section 21 of the *Law Enforcement (Controlled Operations) Act 1997* (NSW), which requires the NSW Ombudsman to be notified of each controlled operation or variation thereto, not merely to receive quarterly reports.
45 Section 15UB of the *Crimes Act 1914* (Cth). See also section 22 of the *Law Enforcement (Controlled Operations) Act 1997* (NSW).
46 Section 15T of the *Crimes Act 1914* (Cth).
47 Section 15UC of the *Crimes Act 1914* (Cth). See also section 23 of the *Law Enforcement (Controlled Operations) Act 1997* (NSW). The NSW Ombudsman may also make special reports to Parliament in relation to the inspection of records of law enforcement agencies at any time, section 22 of the *Law Enforcement (Controlled Operations) Act 1997* (NSW).
48 Under the *Telecommunications (Interception) Act 1979* (Cth). The NSW Ombudsman performs a similar function under the *Telecommunications (Interception) (New South Wales) Act 1987* (NSW).
49 Dennis Pearce, op cit, n 20 at 63.
50 Senate Report at [5.54].
51 Lack of funding has been a recurring complaint of successive Commonwealth Ombudsmen. In 1991, the Senate Standing Committee on Finance and Public Administration observed that the first four Commonwealth Ombudsmen "were agreed that the resources available to the Office have been and are inadequate": Senate Report at [6.5]. See also Jack Richardson, "The Ombudsman's Place among the Institutions of Government – Past, Present and Future" (2001) 8(4) *Australian Journal of Administrative Law* 183 at 190; Alan Cameron, "Future Directions in Administrative Law: The Ombudsman" in John McMillan (ed), *Administrative Law: Does the Public Benefit?* (1992) at 206-207; Philippa Smith, *Red Tape and the Ombudsman*, Senate Occasional Lecture, 17 April 1998.
52 See Dennis Pearce, op cit n 20, at 63-64; Senate Report at [5.54]-[5.66].

53 Alan Cameron, op cit, n 51, at 206.
54 Senate Report at [5.66]. The Australian Law Reform Commission recommended vesting of complaints jurisdiction in a new body, to be called the National Integrity and Investigations Commission: Australian Law Reform Commission, *Integrity: but not by trust alone. AFP and NCA Complaints and Disciplinary Systems* (Report No 82, 1996).
55 See Dennis Pearce, op cit, n 20, at 64.
56 Parliamentary Joint Committee on the National Crime Authority, *Street Legal. The Involvement of the National Crime Authority in Controlled Operations*, (December 1999) at [5.51].
57 Senate Report at [4.73]. The Committee recommended that the function be given alternatively to the Privacy Commissioner or the Inspector-General of Intelligence and Security.
58 Australian Law Reform Commission, op cit, n 54.
59 Dennis Pearce, op cit, n 20, at 64.
60 Section 170 of the *Police Powers and Responsibilities Act 2000* (Qld).
61 Sections 167 and 168 of the *Police Powers and Responsibilities Act 2000* (Qld).
62 Section 172A of the *Police Powers and Responsibilities Act 2000* (Qld). In South Australia, the method of accountability chosen is the traditional one of ministerial accountability to Parliament: senior police officers must provide copies of approvals or renewals for controlled operations to the Attorney-General within 14 days, subsection 3(6) of the *Criminal Law (Undercover Operations) Act 1995* (SA). The Attorney-General must report annually to Parliament, section 5 of the *Criminal Law (Undercover Operations) Act 1995* (SA).
63 Dennis Pearce, op cit, n 20, at 64.
64 Dennis Pearce, op cit, n 20, at 64.
65 Op cit, n 51 at 190.
66 The other four are: *Whistleblowers Protection Act 1993* (SA), *Protected Disclosures Act 1994* (NSW), *Whistleblowers Protection Act 1994* (Qld) and *Public Interest Disclosure Act 1994* (ACT).
67 Definition of "improper conduct" in subsection 3(1) of the *Whistleblowers Protection Act 2001* (Vic).
68 Disclosures concerning certain officials, including local councillors and the Chief Commissioner of Police, may only be made to the Ombudsman. Disclosures relating to Members of Parliament may not be made in the first instance to the Ombudsman, but must be made to the presiding officer of the relevant House of Parliament: section 6 of the *Whistleblowers Protection Act 2001* (Vic). The presiding officer may, however, refer the matter to the Ombudsman for investigation: section 96.
69 Under section 24 of the *Whistleblowers Protection Act 2001* (Vic), the Ombudsman determines whether a disclosure constitutes a "public interest disclosure" or not. If disclosure is made to a public body, that body determines whether or not it constitutes a "public interest disclosure", but if it determines that it does not, the whistleblower may request a redetermination of the issue by the Ombudsman: sections 30, 31 and 32 of the *Whistleblowers Protection Act 2001* (Vic) (disclosures made to public bodies) and sections 35, 36 and 37 (disclosures made to the Chief Commissioner of Police).
70 Sections 39 and 40.
71 Sections 41, 42 and 44.
72 Sections 48 and 49.
73 Section 63.
74 Section 66.
75 Sections 80 and 91.
76 Section 73.
77 Sections 74 and 85.
78 Sections 75 and 86.
79 Sections 82 and 93.
80 Section 69.
81 Under paragraphs 5(4)(a) and (g) of the *Whistleblowers Protection Act 1993* (SA), the Ombudsman may receive complaints relating to a public officer (other than a member of the police force , the judiciary , a Member of Parliament or of a local government body) although complaints alleging illegal activities must be made to police; section 11 of the *Protected Disclosures Act 1994* (NSW).
82 Paragraph 5(4)(c) of the *Whistleblowers Protection Act 1993* (SA); section 12 of the *Protected Disclosures Act 1994* (NSW), although disclosures of waste of public money by a police officer are made to the Police Integrity Commission, section 12A, and disclosures of waste of local government money to the Director-General of the Department of Local Government, section 12B.

83 Complaints against police may be made in South Australia to the Police Complaints Authority, paragraph 5(4)(b) of the *Whistleblowers Protection Act 1993* (SA); and in New South Wales to the Police Integrity Commission, section 12A of the *Protected Disclosures Act 1994* (NSW).

84 Section 10 of the *Whistleblowers Protection Act 1994* (Qld) provides generally that disclosure is to be made to a "public sector entity", that is, a body with appropriate power to take action on the information disclosed or to provide an appropriate remedy. This would include the Ombudsman in relation to disclosures of maladministration, section 16 of the *Whistleblowers Protection Act 1994* (Qld). Schedule 3 of the Act contains 13 specific examples of the "appropriate entity to receive disclosure ", but does not mention the Ombudsman.

85 Section 14 of the *Public Interest Disclosure Act 1994* (ACT).

86 The *Ombudsman Amendment (Child Protection and Community Services) Act 1998* (NSW), which was proclaimed to commence on 7 May 1999, inserted a new Part 3A into the *Ombudsman Act 1974* (NSW), entitled "Child protection". For a more detailed description of the new Part, and a discussion of how the legislation differs from the Wood Royal Commission's recommendations, see Gareth Griffith, *Child Protection in NSW: A Review of Oversight and Supervisory Agencies*, NSW Parliamentary Library, Briefing Paper 16/2001 at sections 9.5 and 2.3.

87 Definition of "child abuse" in subsection 25A(1) of the *Ombudsman Act 1974* (NSW).

88 The Hon Mrs Lo Po, Second reading speech on the Ombudsman Amendment (Child Protection and Community Services) Bill (No. 3), *Hansard*, NSW Legislative Assembly, 21 October 1998, p 8742.

89 *K v NSW Ombudsman* [2000] NSWSC 771 (1 August 2000) at [67].

90 The agency head must inform the Ombudsman within 30 days of becoming aware of the allegation or conviction, subsection 25C(2) of the *Ombudsman Act 1974* (NSW). There is also provision for voluntary reporting by the head of a designated government or non-government agency of information leading to a reasonable suspicion of child abuse by an employee, subsection 25D(1) of the *Ombudsman Act 1974* (NSW).

91 The Department of Education and Training, the Department of Health, the Department of Sport and Recreation, the Department of Juvenile Justice and the Department of Corrective Services.

92 Definitions of "designated government agency" and "designated non-government agency" in subsection 25A(1) of the *Ombudsman Act 1974* (NSW).

93 Section 25I.

94 Section 25E.

95 Section 25F.

96 Subsection 25G(2). In April 2000 the Ombudsman released his first special report relevant to the new child protection jurisdiction, *Handling of Child Abuse Allegations Against Employees: An Investigation into the System Used by the NSW Department of Education and Training*.

97 Subsection 25G(1).

98 Subsection 25D(2). This subsection also empowers the Ombudsman to disclose information to the Commission for Children and Young People, which, among other things, has established the Child Sex Offender Counsellors Accreditation Scheme which identifies counsellors who can work with people who sexually offend against children.

99 Section 34. Section 25H also provides that any laws which restrict the disclosure of information do not apply to this Part.

100 Subsection 25B(1).

101 [2000] NSWSC 771 (1 August 2000).

102 *K v NSW Ombudsman* [2000] NSWSC 771 (1 August 2000) at [80].

103 Paragraph 5(2)(d) of the *Ombudsman Act 1976* (Cth); paragraph 5(2)(j) of the *Ombudsman Act 1989* (ACT); item 12 of Schedule 1 of the *Ombudsman Act 1974* (NSW); paragraph (g) of the definition of "administrative action" in subsection 3(1) of the *Ombudsman (Northern Territory) Act 1978* (NT); subsection 13(5) of the *Ombudsman Act 1973* (Vic); item 4 of Schedule 2 of the *Ombudsman Act 1978* (Tas) in relation to actions taken by the Tasmanian Industrial Commission. There are no restrictions on the Ombudsman's jurisdiction over disciplinary proceedings and other personnel decisions in Queensland, South Australia and Western Australia.

104 In *Booth v Dillon (No 1)* [1976] VR 291 Lush J held that an unlawful assault by a prison officer on a prisoner was outside the Ombudsman's jurisdiction. But because the assault occurred in the presence of senior prison officers, including the prison governor, and nothing was done to discipline the prison officer, the failure to enforce discipline was characterized as a "matter of administration" and hence reviewable by the Ombudsman.

105 In *Re Ombudsman for Saskatchewan and Minister of Social Services* (1979) 103 DLR (3d) 695 Noble J held that the Ombudsman had no power to investigate complaints relating to the conduct of a male prison officer towards female prisoners. However, he observed that if the female prisoners had first complained to the prison warden, and no steps were taken by the warden to deal with the complaint, that may be a matter within the province of the Ombudsman.
106 Currently, Ombudsmen in only three jurisdictions have power to investigate complaints against police which raise allegations of the commission of a criminal offence: paragraph 14(1)(b) of the *Ombudsman (Northern Territory) Act 1978* (NT); subsection 14(1a) of the *Parliamentary Commissioner Act 1971* (WA); subsection 122(1) of the *Police Act 1990* (NSW).
107 *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163 at 174-175 per Einfeld J.
108 Ibid, at 180-181 per Einfeld J.
109 Ibid, 171-172 per Einfeld J [31].
110 *The Ombudsman v Moroney* [1983] 1 NSWLR 317 at 331 per Moffitt P.
111 See *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163 (seeking to restrain publication of an Ombudsman's report which recommended that charges be laid against two ATSIC officers under the *Public Service Act 1922* for misconduct).
112 *Styant-Browne & Anor v The Legal Ombudsman* [2001] 3 VR 132.
113 In *Boyd v The Ombudsman* [1983] 1 NSWLR 620, the NSW Ombudsman reopened a complaint against a police officer, after having made a formal report finding the complaint was not sustained, after the complainant raised a further consideration which strongly indicated that the police officer had been at fault. The NSW Court of Appeal held that the Ombudsman has power to reopen a complaint, as "[t]he principles regarding finality, in particular those of issue estoppel and res judicata, have no place in investigations [by the Ombudsman]": at 629 per Moffitt P.
114 NSW Ombudsman, *Annual Report 2000-2001*, p 41.
115 See subsection 8(2) of the *Ombudsman Act 1976* (Cth); subsection 9(3) of the *Ombudsman Act 1989* (ACT); section 17 of the *Ombudsman Act 1974* (NSW); subsection 19(2) of the *Ombudsman (Northern Territory) Act 1978* (NT); paragraph 25(2)(a) of the *Ombudsman Act 2001* (Qld); subsection 18(2) of the *Ombudsman Act 1972* (SA); subsection 23(3) of the *Ombudsman Act 1978* (Tas); subsection 17(2) of the *Ombudsman Act 1973* (Vic); subsection 19(2) of the *Parliamentary Commissioner Act 1971* (WA).
116 See section 35 of the *Ombudsman Act 1976* (Cth); section 33 of the *Ombudsman Act 1989* (ACT); section 34 of the *Ombudsman Act 1974* (NSW); section 23 of the *Ombudsman (Northern Territory) Act 1978* (NT); section 92 of the *Ombudsman Act 2001* (Qld)); section 22 of the *Ombudsman Act 1972* (SA); section 26 of the *Ombudsman Act 1978* (Tas); section 20 of the *Ombudsman Act 1973* (Vic); section 23 of the *Parliamentary Commissioner Act 1971* (WA).
117 *Kavvadias v Commonwealth Ombudsman* (1984) 2 FCR 64.
118 *Brown v Commonwealth Ombudsman* [1999] AATA 559 (30 July 1999); *WAJ and Commonwealth Ombudsman and Brown* [1998] AATA 442 (22 June 1998).
119 *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) and *Al Hakim v Ombudsman* [2001] VCAT 1972 (6 July 2001).
120 Senior Member Preuss noted that this interpretation was consistent with earlier Victorian authority of *Lapidos v Ombudsman (No 1)* (1987) 2 VAR 82 and *Re Horesh and Ombudsman* (1986) 1 VAR 149: *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) at [54]-[56]. See also *Al Hakim v Ombudsman* [2001] VCAT 1972 (6 July 2001) at [37]. See *Kavvadias v Commonwealth Ombudsman* (1984) 1 FCR 80 at 84-85. Similarly, in a recent Queensland case, the Legal Ombudsman, a statutory office-holder whose function is to review complaints against lawyers, has been held to be subject to the *Freedom of Information Act 1992* (Qld): *JLC and Legal Ombudsman; Queensland Law Society and A solicitor (third parties)* (1999) 5 QAR 33.
121 Subsection 36(1) of the *Freedom of Information Act 1982* (Cth).
122 *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551 at 561 per Beaumont J. See also *Re Kamminga and Australian National University* (1992) 26 ALD 585 at 588.
123 *Brown v Commonwealth Ombudsman* [1999] AATA 559 (30 July 1999) at [19].
124 Ibid, at [26]. In reaching this conclusion, it affirmed the reasoning of Sheppard J in *Kavvadias v Commonwealth Ombudsman* (1984) 2 FCR 64 at 80.
125 *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) at [69], [107].
126 Ibid, at [93], [112], [133].
127 "Those provisions include s.10 (requiring the Ombudsman and his officers to take an oath of confidentiality), s17(2) (requiring that investigations be conducted in private), s20 (prohibiting the

disclosure of information received in the course of investigation), section 29(4) rendering the Ombudsman and his officers not compellable 'in any court or in any judicial proceedings' in respect of any matter coming to his knowledge in the exercise of his functions and s18(3) and (4) enabling the Ombudsman to obtain documents which would be protected in litigation": ibid, at [93].

128 *Deasey v Geschke* (unreported, 11 November 1984, Hassett J) at 32, quoted in *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) at [94].

129 Ibid, at [81]-[84], [93].

130 Section 114 of the *Whistleblowers Protection Act 2001* (Vic) inserted new section 29A into the *Ombudsman Act 1973* (Vic). Section 119 of the *Whistleblowers Protection Act 2001* (Vic) inserted an identical exemption for the Ombudsman in relation to investigation of complaints against police (new section 86TA of the *Police Regulation Act 1958* (Vic)).

131 From 1987, pursuant to Regulation 5(d) of the *Freedom of Information (Exempt Offices) Regulations 1987* (Vic), the Ombudsman was exempt from the *Freedom of Information Act 1982* (Vic). Since the enactment of the *Freedom of Information (Amendment) Act 1993* (Vic) and the former section 17 of the *Public Sector Management Act 1992* (Vic) (later subsection 16(1) of the *Public Sector Management and Employment Act 1998* (Vic)), the Ombudsman came within the definition of "department" and was subject to freedom of information requirements.

132 Schedule 2 item l of the *Freedom of Information Act 1991* (SA).

133 Section 9 and Schedule 2 of the *Freedom of Information Act 1989* (NSW).

134 *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) at [140].

135 Margaret Allars, *Australian Administrative Law: Cases and Materials* (1997) at 338-339.

136 Section 33 of the *Ombudsman Act 1976* (Cth); section 31 of the *Ombudsman Act 1989* (ACT); section 35A of the *Ombudsman Act 1974* (NSW); subsections 31(1) and (2) of the *Ombudsman (Northern Territory) Act 1978* (NT); section 93 of the *Ombudsman Act 2001* (Qld); subsection 30(1) of the *Ombudsman Act 1972* (SA); subsections 33(1) and (2) of the *Ombudsman Act 1978* (Tas); subsections 29(1) and (2) of the *Ombudsman Act 1973* (Vic); subsections 30(1) and (2) of the *Parliamentary Commissioner Act 1971* (WA).

137 Subsection 31(3) of the *Ombudsman (Northern Territory) Act 1978* (NT); subsection 33(3) of the *Ombudsman Act 1978* (Tas); subsection 29(3) of the *Ombudsman Act 1973* (Vic); subsection 30(3) of the *Parliamentary Commissioner Act 1971* (WA).

138 Robin Creyke and John McMillan, "Administrative Law Assumptions … Then and Now" in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law at the Twenty-Five Year Mark* (1998) 1 at 33.

139 *Alice Springs Town Council v Watts* (1982) 18 NTR 1. In New South Wales, two decisions have held that a provision which excluded liability for civil or criminal proceedings should be interpreted as also excluding judicial review proceedings: *Ainsworth v The Ombudsman* (1988) 17 NSWLR 276 at 288 per Enderby J; *Commissioner of Police v Ombudsman* (unreported, NSWSC, Sackville AJ, 9 September 1994). This approach is in direct conflict with the weight of authority on ouster clauses.

140 Section 35B of the *Ombudsman Act 1974* (NSW); section 30 of the *Ombudsman (Northern Territory) Act 1978* (NT); section 17 of the *Ombudsman Act 2001* (Qld); section 28 of the *Ombudsman Act 1972* (SA); section 32 of the *Ombudsman Act 1978* (Tas); section 27 of the *Ombudsman Act 1973* (Vic); section 29 of the *Parliamentary Commissioner Act 1971* (WA). The procedure in the Commonwealth and ACT legislation is broader, allowing the court to determine any question relating to the exercise of a power or performance of a function by the Ombudsman: section 11A of the *Ombudsman Act 1976* (Cth); section 14 of the *Ombudsman Act 1989* (ACT).

141 Subsection 29(3) of the *Parliamentary Commissioner Act 1974* (Qld).

142 Section 93 of the *Ombudsman Act 2001* (Qld).

143 Hon Peter Beattie, Second reading speech on the Ombudsman Bill, Queensland Legislative Assembly, *Hansard*, 16 October 2001, p 2823.

144 Explanatory Notes to the Ombudsman Bill 2001, p 3.

145 [2002] TASSC 24 (9 May 2002) .

146 The first, A 's case, alleged discrimination by the Director of Public Prosecutions and the Department of Justice and Industrial Relations and failings in the criminal justice system in deciding not to prosecute in a case involving sexual abuse of a disabled child. The second, B's case, involved a trade union secretary who alleged he was fired after giving evidence to a parliamentary committee in his private capacity.

147 The Department of Justice and Industrial Relations in the first case, and the Speaker of the House of Assembly and the President of the Legislative Council in the second case.
148 *Anti-Discrimination Commissioner v Acting Ombudsman* [2002] TASSC 24 (9 May 2002) at [35]. See also at [40], [59].
149 Ibid, at [56].
150 Section 33 of the *Ombudsman Act 1978* (Tas).
151 Section 32.
152 *Anti-Discrimination Commissioner v Acting Ombudsman* [2002] TASSC 24 (9 May 2002) at [85].
153 *Alice Springs Town Council v Watts* (1982) 18 NTR 1 at 6; *Commissioner of Police v The Ombudsman* (unreported, Sackville AJ, 9 September 1994). It is worth noting that in *Booth v Dillon (No 2)* [1976] VR 434 the Victorian statutory procedure was used after the Ombudsman had completed the investigations.
154 *Anti-Discrimination Commissioner v Acting Ombudsman* [2002] TASSC 24 (9 May 2002) at [68].
155 *Citipower Pty Ltd v Electricity Industry Ombudsman (Vic) Ltd* [1999] VSC 275 (5 August 1999).
156 Ibid, at [24], citing *AFL v Carlton Football Club Pty Ltd* (1998) 2 VR 546 at 549 per Tadgell JA.
157 *AFL v Carlton Football Club Ltd* (1998) 2 VR 546 at 549 per Tadgell JA.
158 Ibid, at [29].
159 Ibid, at [30], citing *Australian Workers' Union v Bowen (No. 2)* (1948) 77 CLR 601 at 630; *AFL v Carlton Football Club Ltd* (1998) 2 VR 546 at 559.
160 See Rhoda James, *Private Ombudsmen and Public Law* (1997) Dartmouth, Aldershot at 3-4; Anita Stuhmcke, "The relevance of Industry Ombudsmen" (March 2002) *Law Society Journal* 73 at 74.
161 This was emphasized by Einfeld J in *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163 at 168.
162 *Salisbury City Council v Biganovsky* (1990) 54 SASR 117 at 120 per Mullighan J.
163 In relation to the EIOV, clause 6.4 of the EIOV constitution provides in part "Where there is a dispute between the Ombudsman and a member about the effect of the law or of regulatory instruments, the Ombudsman may refer the matter to the Office of the Regulator-General, Senior Counsel or the courts for determination or authoritative advice, as the case may be, at the member's expense." However, this is a narrow provision, limited to disputes over questions of law, and would not apply to many disputes.
164 *Lapidos v Ombudsman (No 1)* (1987) 2 VAR 82 at 91, quoted in *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) at [148].
165 *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) at [148]; *Botany Council v Ombudsman* (1995) 37 NSWLR 357 at 368-369 per Kirby P (Sheller and Powell JJA agreeing).
166 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.
167 Rick Snell, "Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma" in Chris Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (2000), 188 at 197.
168 Subsection 5(1) of the *Parliamentary Commissioner Act 1974* (Qld).
169 Legal Constitutional and Administrative Review Committee Report No 14, Review of the *Report of the Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations)* (July 1999) at 1 (footnote 6).
170 Section 13 of the *Ombudsman Act 2001* (Qld).
171 Paragraph 12(a)(i) of the *Ombudsman Act 2001* (Qld). Other Ombudsmen, who are not technically "officers of Parliament", also have this power: see section 14 of the *Ombudsman Act 1972* (SA); section 16 of the *Ombudsman Act 1978* (Tas); section 16 of the *Ombudsman Act 1973* (Vic); section 15 of the *Parliamentary Commissioner Act 1971* (WA).
172 Paragraph 59(1)(b) (formerly subsection 5(6) of the *Parliamentary Commissioner Act 1974* (Qld)).
173 Subsection 88(3) (formerly subsection 31(3)).
174 Subsection 83(6) (formerly subsection 32(5)).
175 Under the new legislation, LCARC's consultative role in relation to suspension of an Ombudsman is strengthened slightly. Formerly, LCARC had to be consulted only if the Premier wished to suspend the Ombudsman when the Legislative Assembly was in session, otherwise the Governor in Council had power to suspend him or her provided the Premier had accorded the Ombudsman an opportunity to respond to a statement setting out the reasons for the proposed suspension: section 6 of the *Parliamentary Commissioner Act 1974* (Qld). Under the new legislation, a majority of non-Government members of LCARC must agree to a removal or

suspension whether or not the Legislative Assembly is in session: paragraphs 67(3)(d) and 68(3)(d).

176 Section 89.

177 Section 31B of the *Ombudsman Act 1974* (NSW).

178 In 1991, the Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, (December 1991) at [8.15] rejected the need to make the Ombudsman an officer of the Parliament. In 1997, a different parliamentary committee recommended a Parliamentary review to consider the issue, as well as other ways of strengthening the office of Ombudsman: Joint Standing Committee on Foreign Affairs, Defence and Trade, *The Human Rights and Equal Opportunity Commissioner and the Commonwealth Ombudsman: Report on Public Seminars 20 and 25 September 1996* (March 1997) at [2.15]. Some Commonwealth Ombudsmen have urged making the Ombudsman an officer of the Parliament: Philippa Smith's evidence to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *The Human Rights and Equal Opportunity Commissioner and the Commonwealth Ombudsman: Report on Public Seminars 20 and 25 September 1996* (March 1997) at [2.8]; Dennis Pearce, op cit, n 20 at 68; Jack Richardson op cit, n 51 at 190.

179 See Legal Constitutional and Administrative Review Committee Report No 14, Review of the *Report of the Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations)* (July 1999) at 14.

180 Section 31BA of the *Ombudsman Act 1974* (NSW).

181 Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, (December 1991) at [8.32]; Western Australia, *Commission on Government: Report no 3*, Perth, April 1996, pp 132-133.

182 The inquiry is being conducted by the Joint Select Committee on Working Arrangements of the Parliament, but has yet to report. The Committee's terms of reference are available at: www.parliament.tas.gov.au/ctee/wparl.htm (last accessed 1 October 2002).

183 The Western Australia Commission on Government recommended in April 1996 that the then proposed Legislative Council Public Administration Committee determine the budget for the Office annually with "due consideration of any advice from the Treasurer": Western Australia, *Commission on Government: Report no 3*, (April 1996), pp 132-133.

184 Proposed new paragraph 29C(1)(c) of the *Ombudsman Act 1976* (Cth), which was to be inserted by clause 4 of the Ombudsman Amendment Bill 1996.

185 Dennis Pearce, op cit, n 20, at 67.

186 Proposed new subsection 29C(1) of the *Ombudsman Act 1976* (Cth), which was to be inserted by clause 4 of the Ombudsman Amendment Bill 1996.

187 Submission to the Joint Select Committee on Working Arrangements of the Parliament, cited in Legal Constitutional and Administrative Review Committee Report No 14, Review of the *Report of the Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations)* (July 1999) at 14.

188 Proposed new section 29A of the *Ombudsman Act 1976* (Cth), which was to be inserted by clause 4 of the Ombudsman Amendment Bill 1996.

189 See Jack Richardson, op cit, n 51, at 188.

190 *Ainsworth v The Ombudsman* (1988) 17 NSWLR 276 at 283 per Enderby J.

191 *Booth v Dillon (No 1)* [1976] VR 291 at 295 per Lush J.

192 Jack Richardson, op cit, n 51, at 186.

193 Dennis Pearce, op cit, n 20, at 72.

194 *Ainsworth v The Ombudsman* (1988) 17 NSWLR 276 at 284.

195 Jack Richardson, op cit, n 51, at 184.

196 Explanatory Notes to the Ombudsman Bill 2001, p 7.

197 See Dennis Pearce, op cit, n 20, at 59.

198 Robin Creyke and John McMillan, "Administrative Law Assumptions … Then and Now" in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law at the Twenty-Five Year Mark* (1998) 1 at 25-26. See also Anita Stuhmcke, "Privatising Administrative Law: The Telecommunications Industry Ombudsman Scheme" (1998) 6 *Australian Journal of Administrative Law* 15 at 25.

199 See *Glenister v Dillon* [1976] VR 550 at 551 per Gillard J; International Ombudsman Institute website: http://www.law.ualberta.ca/centres/ioi/brochure.htm (last accessed 20 August 2002).

THE COMMONWEALTH OMBUDSMAN: TWENTY FIVE YEARS ON AND NO LONGER ALONE

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Introduction

In 1977[1] the office of the Commonwealth Ombudsman was introduced, its primary aim being to investigate complaints against defective administration by the federal government. Today, 25 years on, the framework of government which the Commonwealth Ombudsman investigates has radically altered. In 1977 the role of government was to provide both policy and services. Today, following the privatisation and corporatisation of many government services, government largely manages and makes policy only.[2]

Government withdrawal from public service provision results in the stripping away of public administrative law. Privatisation and corporatisation of formerly government owned services means that the terms of contracts with private providers are no longer accessible under freedom of information legislation and service recipients may lose the right to seek judicial review of decisions which affect them or lose their right to complain to the Ombudsman.[3] If accountability of non-government service providers is to be maintained in a privatised regulatory environment, new private mechanisms of self review must be established.

One such mechanism is private ombudsman. Privatisation and corporatisation of formerly government owned industries has resulted in the Commonwealth Ombudsman no longer being the only national ombudsman.[4] Today this office shares the title ombudsman with other national private industry ombudsman such as the Telecommunications Industry Ombudsman (TIO), the Australian Banking Industry Ombudsman (ABIO) and the Mortgage Industry Ombudsman Scheme (MIOS).

Given the shared title of "ombudsman" and the fact that the Australian public law ombudsman offices were established in the 1970s,[5] well prior to the introduction of the first national private industry ombudsman in 1989, it is unsurprising that comparisons are drawn between public and private ombudsman. Such comparison has drawn a diversity of responses, including:

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- *unequivocal acceptance* – reflected in the 1991 Annual Report of the South Australian Ombudsman which stated that the four key criteria to use the term "Ombudsman" are independence; effectiveness; fairness and public accountability.[6] The South Australian Ombudsman considered that the industry ombudsman met these standards.

- *cautious welcoming* – in 1997 Philippa Smith, a former Commonwealth Ombudsman, stated[7] "the recognition of specific industry Ombudsman schemes points to both the desirability of the ombudsman concept in more commercial activities, but also the care that is needed to ensure that standards of independence and integrity are maintained before that title can be ascribed."

- *possible threat* - Sir John Robertson, the Chief Ombudsman of New Zealand, speaking in 1993[8] expressed concern that parliamentary ombudsman run the risk of becoming "staid institutions left with the unwanted pickings of the new specialist ombudsman." Sir John felt that some public ombudsman in Australia may have been marginalised by the trend towards specialist ombudsman, finding it hard to command resources and respect for the quality of their recommendations.

It seems inevitable that comparison of public law and private law ombudsman will result in such equivocal outcomes. The reason for this is twofold. Firstly, even though the term "ombudsman" is used internationally, it is difficult to define. There is no one universally accepted definition or format for the office of the ombudsman.[9] Secondly, it is adverse to those of us schooled in liberal democratic theory to accept that there can be anything but a level of differentiation between the public and private sector.

This paper suggests that the starting point for any comparison of public law and private industry ombudsman should begin from the perspective that both ombudsman are true ombudsman. This allows us to view private industry ombudsman as supplementing and enhancing the office of ombudsman rather than detracting from it. This paper presents this argument for the following reasons:

1. The Australia framework of government has changed. It is therefore desirable that mutated government mechanisms of accountability such as industry ombudsman apply to newly privatised industries such as water, electricity, telecommunications, banking and gas, all of which display characteristics of a public nature such as monopolistic tendencies and which provide essential services.

2. Industry ombudsman are similar to public ombudsman. Industry ombudsman clearly use the public model and apply it to the private sphere. Of course apart from having the essential characteristics of ombudsman there is a broader argument beyond the reach of this paper that the traditional distinction between public and private is difficult to define[10] and/or no longer exists. [11]

3. The courts themselves have treated industry ombudsman as subject to judicial review and as having many of the same characteristics as public ombudsman.

1. A "new" framework of government and a plethora of ombudsman

In Australia, as in most developed countries, the post-World War II expansion of the public sphere was halted and reversed in the 1980s.[12] Publicly owned goods and services have been replaced by private ownership reflecting a movement away from a rights based legislative government interventionist approach towards a belief that market based means of intervention such as guidelines and codes of conduct will provide consumers with a better means of redress.[13]

Under this new framework of government, private dispute resolution schemes such as industry ombudsman have come to play an increasingly central role in resolving disputes. This increased role has occurred both in sheer numbers of schemes available, and in the increase in consumer use of these schemes which has been described as "exponential".[14] For example, it was estimated that in 1997 more than 130,000 consumers relied upon these schemes to resolve disputes; only 4 years later in 2001 just 2 of these schemes – the ABIO and the TIO – were responsible for resolving the same number of disputes.

The key to the introduction and evident success of industry ombudsman lies in the fact that the industries which have been privatised and corporatised lend themselves to the ombudsman model. The uniqueness of the ombudsman concept, of having an institution where a neutral grievance handler is used as a last resort to assist resolution of a dispute, is that it is suited to any situation where administrators make decisions concerning an individual's welfare.[15] Telecommunications and banking are both essential services because they are industries where the interests of the public are capable of being adversely affected by decisions of large corporations.[16] The ombudsman model translates easily into the protection of the consumer against decisions of a powerful industry. Unless there are government requirements placed upon the issuing of the title ombudsman (such as in New Zealand[17]) the key characteristics[18] of the ombudsman institution may be moulded by each country or organisation to suit its unique constitutional, political and social characteristics.[19]

2. Transplantation of public ombudsman to private industry

Given the fact that power is exercised by government over citizens and power is exercised by industry over consumers it is unsurprising that public and private ombudsman are similar. Looked at through a complainant's eyes, the offices bear many common features. They are[20] free; informal; involve little work for the complainant; easily accessible in that complaints can be made for free over the telephone; free of any requirements of pleadings; a good way of finding more out about the decision complained of; faster than other forms of review and may be the only available action for the complainant; not a substitute for the enforcement of rights through the courts.

The similarities extend beyond the complainant's view. Firstly, there is a transplantation of personnel. Former public ombudsman staff the offices of private industry - for example John Pinnock, the current TIO was a former deputy NSW Ombudsman. Deidre O'Donnell, the former Deputy Ombudsman of the TIO is now the Western Australian Ombudsman. Secondly, both public and private ombudsman have a standard setting role. They operate not only to investigate and resolve the

immediate dispute before them but also to improve practices across industry and/or government. Thirdly, ombudsman in both sectors can be seen as acting to legitimate decision-making procedures. The public needs to perceive the decision of government and of industry as legitimate - public ombudsman legitimate government decisions;[21] private industry ombudsman legitimate industry decisions. Additionally, apart from the cross-over of staff and personnel, industry ombudsman share the aims of ombudsman generally - independence, effectiveness, fairness and accountability.[22]

Naturally, the transplantation of public ombudsman to private industry has not occurred without mutation.[23] The most obvious differences are: (1) the limited jurisdiction of the private industry ombudsman; (2) their powers; and (3) the way they are established. With respect to jurisdiction, industry ombudsman have specific jurisdiction over specified areas[24] whereas public law ombudsman are established under an Act that is interpreted broadly by the courts.[25] With respect to powers, the TIO and the ABIO may make binding determinations for payment of monetary amounts upon members[26] whereas the powers of the Commonwealth ombudsman are to report to Parliament. In terms of establishment, industry ombudsman are generally established through a company. The TIO and the ABIO are established through a company limited by guarantee with no share capital. The Memorandum and Articles of Association of the TIO establishes a 3 tier structure - a Council, a Board of Directors and the Telecommunications Industry Ombudsman.[27] The aim is to ensure the Ombudsman is independent from both government and industry interests. It envisages an ombudsman scheme which is an industry funded, non-government and non-profit organization, funded by the industry itself.

3. Judicial review and private ombudsman

Two recent judicial decisions demonstrate the treatment of private ombudsman by courts.

Citipower Pty Ltd v Electricity Industry Ombudsman (Victoria) Ltd[28]

This case concerns a State industry ombudsman. The Supreme Court of Victoria was asked whether determinations made by the Electricity Industry Ombudsman were beyond the contractual power of the Ombudsman under its own Constitution and therefore not binding on the plaintiff. The court in this case found that the plaintiffs had bound themselves voluntarily to the contract constituted by the Constitution and thereby vested jurisdiction of complaints in the Ombudsman.

The court in answering this question likened the Electricity Industry Ombudsman to a tribunal,[29] acknowledging that tribunals are not above the law and stating that it would impose a conclusion which was alternative to the Ombudsman "..only if the determination of the Ombudsman was so aberrant as to be irrational". The court determined that in this case, as the Ombudsman had taken into account the facts, the current law, the legal obligations of the parties and industry practice, the decision she arrived at was not "…so aberrant as to be irrational".

***Australian Communications Authority v Viper Communications Pty Ltd*[30] (Includes Corrigenda dated 1 June 2001)**

This most recent judicial decision concerning a national industry ombudsman resolved constitutional questions concerning the nature of the private industry ombudsman's powers. Sackville J was asked to determine whether s128 and s 246 of the *Telecommunications Act 1997* (Cth) were invalid on constitutional grounds.[31] The primary ground of relevance was whether these sections which required "eligible carriage service providers" to enter into the Telecommunications Industry Ombudsman Scheme were invalid as they purported to confer the judicial power of the Commonwealth on a non-judicial body, the TIO, in contravention of Chapter III of the Constitution.

The respondents, relying upon *Brandy v Human Rights and Equal Opportunity Commission*,[32] argued that, as the TIO scheme was (1) compulsory to join; and (2) could impose binding determinations upon members, it exercised the judicial power of the Commonwealth. The court rejected this argument,[33] determining that there was no judicial power exercised by the TIO as:

1. the determinations of the TIO are not binding in the judicial sense[34] - agreeing with the Australian Communications Authority argument that: [35]

    - the TIO has no power to enforce its determinations. The courts have an opportunity to review the determination, therefore the TIO's determinations are not immediately enforceable nor enforceable in the same sense as those of the Commissioner in *Brandy*. Indeed the discretion of the TIO to refuse to investigate a complaint and the fact that legal proceedings may be instituted by a member to pre-empt the determinations of the TIO and exclude the TIO from hearing the complaint means that the TIO does not exercise judicial power.

    - As service providers are compelled to join the TIO under private not public law instruments (the Memorandum and Articles of TIO Ltd and the TIO Constitution), a determination of the TIO is not the exercise of sovereign power which is a hallmark of judicial power.

2. the TIO is free to create norms to resolve disputes rather than necessarily applying settled legal principles.[36]

Implications and conclusion

Administrative law still applies to private ombudsman

These decisions demonstrate that industry ombudsman come under the supervision of public law and more particularly, administrative law. The legality of the decisions of private ombudsman, like public ombudsman, are subject to review by the courts. Generally, the ramifications of this are on two levels. Narrowly, in terms of the functions of administrative law, the two cases above illustrate that the courts will treat private and public ombudsman as similar for the purposes of ensuring public accountability. Indeed the decisions reflect a movement for industry ombudsman to

increasingly emulate public ombudsman. For example, *ACA v Viper* establishes that the "binding" determinations of the TIO are now identical to powers of the Commonwealth Ombudsman who "…has no power to put her recommendations into action, or compel any action on the part of the relevant individual, department or authority."[37] More broadly, the application of judicial review to private industry ombudsman may be conceptualised as redefining government power. The courts are clearly prepared to acknowledge that private industry ombudsman, while regulated by private law, belong to a class of private bodies which need to have the legality of their decisions reviewed in the public arena. This tends to lend public law legitimacy to these private dispute resolution schemes, extending the reach of government.

Public and private ombudsman are not identical

Significant differences remain between public and private ombudsman. For example, one is publicity. With respect to public ombudsman an ultimate sanction is to make offenders publicly known. As Phillipa Smith, a former Commonwealth Ombudsman, has said "…the power of an Ombudsman in reality comes from the potential power of embarrassment and the credibility and thoroughness of the work done"[38] and "[A]ll an ombudsman can do then is report the situation and hope the resultant publicity shames the agency into action. Ombudsman have had mixed success with their recommendations - some agencies seem to have no shame."[39] According to Everett this same level of publicity does not happen with the industry ombudsman.[40] Indeed, the annual reports of industry ombudsman are non-identifying in terms of both the complainant and the industry member, whereas the Commonwealth Ombudsman annual report identifies the departments complained about in statistical and descriptive fashion. Clearly, the similarities between private and public ombudsman are finite. Creatures of government policies of privatisation and corporatisation, industry ombudsman must redefine the concept of what an ombudsman means. They are not identical to public ombudsman – however this does not make them something "other" than true ombudsman.

Challenges for the Commonwealth Ombudsman

There is no doubt that the Commonwealth Ombudsman has been affected by the transformation of government and the consequent changes to the public sector. For example, in relation to jurisdiction, the contracting out of government services has raised questions for the office over lack of investigatory powers. While it must be acknowledged that the overall jurisdiction of the Commonwealth Ombudsman has decreased since the introduction of industry ombudsman, this decrease is due to the changing nature of government rather than industry ombudsman themselves. Arguably, the challenges confronting the Commonwealth Ombudsman are not due to industry ombudsman nor the sharing of the title "ombudsman" across a variety of sectors including universities and local councils. Instead, they are the result of larger factors such as government transformation; the lack of funding for the public ombudsman; and the failure of government to act on ombudsman reports.[41]

Traditionally, it has been suggested that classifying industry ombudsman as "ombudsman" will lead to an erosion of the public model. However, there is no reason why the opposite cannot also be true, with the plethora of industry and other ombudsman assisting to raise the profile and public understanding of the

ombudsman office. From this perspective it is possible to conceptualise the private industry ombudsman as reinforcing the success of the Commonwealth Ombudsman through making the concept of ombudsman more widely available and hopefully better understood.

Conclusion

Most public institutions have now been supplemented by non-traditional versions of themselves. For example, in relation to the arms of government, courts are supplemented by tribunals and the legislature is increasingly supplemented by grey letter law,[42] such as codes of conduct. The Commonwealth Ombudsman has proven no exception to this practice.

As Sir Guy Powles, the first New Zealand Ombudsman warned, we should not "…seek too much to measure all Ombudsman by the same yardstick, to form all into the same mould". [43] The last decade in Australia has confirmed that the title and nature of the office of Ombudsman does not fall into one mould. Today in Australia ombudsman exist not only to protect citizens against a government bureaucracy but also to protect consumers against a corporate bureaucracy. This mutation of ombudsman has not always been welcome. However, such an attitude may be largely misplaced as the alternative to private industry ombudsman review of a dispute is usually no review at all. This paper in suggesting that public and private ombudsman be considered true ombudsman is based upon the interests of the individual. In making this suggestion the hope is to promote effective oversight of exercises of bureaucratic discretion (whether it be public government or private industry) for the individual whether they be classified as citizen or consumer. After all this surely is the overriding aim of administrative law irrespective of the existence of a public or private distinction.

Endnotes

1 Created under the *Ombudsman Act* 1976 (Cth).
2 R Creyke & J McMillan (eds), "Introduction: Administrative Law Assumptions…Then and Now" in *The Kerr Visions of Australian Administrative Law - At the Twenty-Five Year Mark* at 22.
3 B Naylor, "Privatisation: a sell-off of public accountability?" <www-pso.adm.monash.edu.au/news/story> (16 April 2002).
4 "Ombudsman have spawned like the frogs in ancient Egypt.": P Birkinshaw, *Grievances, Remedies and the State*, 2nd ed, Sweet & Maxwell, 1994 at 1. This is echoed in Australia see Media release, Commonwealth Attorney-General, 13 June 2001, "Standards for Alternative Dispute Resolution Launched" stating the government's commitment to "…providing alternatives to the Courts, and to providing faster, cheaper, and simpler access to justice".
5 Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, AGPS, Canberra, December 1991 at 6. This report points out that in the mid 1960s three Australian newspapers had each appointed an ombudsman to review readers' complaints about government agencies, and the Shire of Albert in south-east Queensland also appointed an ombudsman in 1965 (at 7).
6 South Australian Ombudsman (1997) *Twenty-Fifth Annual Report*, Government Printers Adelaide, stating that industry ombudsman meet these criteria at 8; cited in R Douglas, *Douglas and Jones's Administrative Law*, Federation Press, 2002 at 201 fn 19.
7 P Smith "Twenty years of the Ombudsman" in *Twenty years of the Commonwealth Ombudsman 1977-1997*, Commonwealth Ombudsman's Office, Canberra, June 1997 at 1.
8 J Andersen (1995) *The Ombudsman - Some Nuts and Bolts* in RN Douglas and M Jones (1996) *Administrative Law*, 2nd ed, Federation Press, Sydney 146-157 citing D Landa (1994) "The Ombudsman Surviving and Thriving into the 2000's - The Challenge" *Administrative Law: Are the*

States Overtaking the Commonwealth, 1994 Administrative Law Forum, ed Stephen Argument, 91.

9 Internationally there do however exist Codes of Ethics for various Ombudsman organisations, see for example <http://www.ombuds-toa.org/toa _codestd.html>.

10 J Moon, "The Australian Public Sector and New Governance" (1999) 58(2) *Australian Journal of Public Administration* 112.

11 C Sampford, "Law, Institutions and the Public/Private Divide" (1991) 20 *Fed L Rev* 185 at 187. Sampford "laments" the division between public and private institutions in legal thought.

12 S Edgell, S Walklate, G Williams, *Debating the Future of the Public Sphere*, Avebury, England, 1995 at xvi. For a history of the development of the public/private sphere see MJ Horwitz "The History of the Public/Private Distinction" (1982) 130 *University of Pennsylvania L Rev* 1423 (stating it can be dated to the natural rights liberalism of Locke. However, it is the emergence of the market in the 19th century which brings the public/private distinction into legal discourse).

13 "Going Global: A New Paradigm for Consumer Protection" <www.accc.gov.su/contact/warne/warne0001.htm> accessed 28 March 2002.

14 B Slade & C Mikula, "How to use industry based consumer dispute resolution schemes…and why" *NSW Law Society Journal*, Feb. 1998 at 58.

15 HS Doi (1974). Reply. *Conference of Australian and Pacific Ombudsmen*, Wellington New Zealand, 19-22 November 1974, Office of Ombudsman, Wellington New Zealand, 10.

16 These powers have been described as governmental see PE Morris "The Banking Ombudsman-1" (1987) *Jo of Business Law* 131 at 132. For a useful United Kingdom study of private ombudsman see Rhonda James (1997) *Private Ombudsmen and Public Law*, Dartmouth, Aldershot.

17 In New Zealand since 1991 it is necessary to have the consent of the Chief Ombudsman or to have statutory appointment before using the name.

18 These characteristics may vary, see for example <http://www.bioa.org.uk> (4 key conditions are: independence of the Ombudsman from the organisation the Ombudsman has the power to investigate; effectiveness; fairness; and public accountability) or see P Smith "Twenty years of the Ombudsman" *Twenty years of the Commonwealth Ombudsman 1977-1997*, Canberra, 4-5 (independence, jurisdictional criteria, powers, accountability, statements in the public interest, accessibility).

19 J Robertson (1997) "The Ombudsman and the world" in Commonwealth Ombudsman's Office, *Twenty years of the Commonwealth Ombudsman 1977-1997*, Canberra, 66.

20 J Andersen (1995) *The Ombudsman - Some Nuts and Bolts* in RN Douglas & M Jones (1996) *Administrative Law*, 2nd ed, Federation Press, Sydney 146-157.

21 R Tomasic, "Administrative law reform: Who benefits?" (1987) 12(6) *Administrative Law* 262 at 263.

22 In 1999 the Federal Government funded 437 interviews with consumers covering 11 schemes - 5 State and Territory Consumer and Small Claims Tribunals as well as 6 industry-based customer dispute resolution schemes. This survey was based upon 4 of the key principles (2 could not be measured - independence and accountability) from the Benchmarks - access; fairness; efficiency; effectiveness. The report concluded "…that the industry-based customer dispute resolution schemes are working well. A similar conclusion can also be drawn for the Courts and Tribunals." Report by the Commonwealth Department of the Treasury consumer redress study, June 1999 at 26.

23 Each scheme has its own particular, although not unique, style of operation see PAD Bean "A guide to the Private Alternative Dispute Resolution Scheme" (1994) 5(3) *ADJR* 200-203 at 200.

24 For example the TIO receives, investigates and facilitates the resolution of complaints regarding standard telephone and mobile services, directory assistance, billing inconsistent with tariff, (this is consistently the largest area of complaint, in 1999-2000 26.4% of all telephone complaints concerned billing) privacy, fault reporting. There are some aspects of telecommunications that the TIO is not given jurisdiction to deal with, including: content of telecommunications services; systemic issues or telecommunications policy; emergency services; tariff setting; cabling beyond network termination point; complaints between industry members; requests for Freedom of Information; anti-competitive behaviour.

25 *Botany Council v Ombudsman* (1995) 37 NSWLR 357 at 367-8 (Kirby P with Sheller and Powell JJA agreeing).

26 The TIO may make binding determinations of up to $10,000 upon members to pay compensation or to take corrective action and may also make recommendations of up to $50,000.

27
- The Ombudsman maintains independence from government and industry interests through the structure of its board and council. The Ombudsman is responsible for complaint handling and the day to day administration of the scheme. The Ombudsman may only deal with complaints that are within its jurisdiction as set out in the Constitution of the TIO and the Terms of Reference of the ABIO.
- The TIO Board is comprised of up to 8 representatives from companies that contribute funding to the TIO in the form of complaint handling fees. The Board is responsible for the financial management of the TIO but has no influence over TIO complaint handling policies or investigations.
- The reason for the Board's lack of influence is the Council. The Council sits between the Board and the Ombudsman. It is made up of an equal number of representatives from the industry and consumer groups (4 from each group for the TIO and 3 from each group for the ABIO) and one independent chairperson. The Council is responsible for forming TIO complaint handling policy. The equal representation of industry and consumer interests attempts to ensure the ABIO and TIO adopt a fair, balanced and reasonable approach to complaint investigations.

28 [1999] VSC 275.

29 Citing Tadgell JA in *AFL v Carlton Football Club* [1998] 2 VR 546 at 549 stating…"the courts will not discourage private organizations from ordering their own affairs within acceptable limits" .

30 [2001] FCA 637.

31 The respondents argued that they were not obliged to join the TIO Scheme because the sections were invalid as they:
- conferred judicial power of the Commonwealth on a non-judicial body - the TIO
- imposed taxation otherwise than in conformity with s 55 of the Constitution
- acquired property otherwise than on just terms contrary to s51(xxxi) of the Constitution.

32 (1995) VSC 275.

33 The ACA conceded that the "…determinations made by the TIO fell into the 'grey area' of powers that are judicial if entrusted to a court but non-judicial if entrusted to a non-judicial body, such as the TIO". *Australian Communications Authority v Viper Communications Pty Ltd* [2001] FCA 637 at [101].

34 [2001] FCA 637 at [101].

35 The court rejected the ACA argument that the power of the TIO to decline to make a decision indicated non-judicial power. [2001] FCA 637 at [104-105].

36 [2001] FCA 637 at [102].

37 *Chairperson, Aboriginal and Torres Strait Island Commission v Commonwealth Ombudsman* (1995) 134 ALR 238 at 243 (Einfeld J).

38 P Smith, "Red tape and the Ombudsman" (1998) 88 *Canberra Bulletin of Public Administration*, 18 at 21.

39 A Smith, "Why Ombudsman are better than lawyers" (1999) 26(11) *Brief* 42 at 43.

40 D Everett, "Editorial" (1990) 5(10) *Banking Law Bulletin* 213.

41 R Tomasic, "Administrative law reform: Who benefits?" (1987) 12(6) *Administrative Law* 262 at 264.

42 Report of the Commonwealth Interdepartmental Committee on Quasi-regulation *Grey-Letter Law*, 9 September 1999 at xiii-xiv.

43 *Proceedings of the Second International Ombudsman Conference*, Jerusalem, October 1980 p 21 cited in W Haller, "The Place of the Ombudsman in the world community", Fourth International Ombudsman Conference, Canberra 1988, Papers, Commonwealth Ombudsman, Canberra, Australia at 32.

THE FUTURE OF THE RELATIONSHIP BETWEEN PARLIAMENTARY OMBUDSMEN AND INDUSTRY OMBUDSMEN

*Clare Petre**

Paper presented at the 20th Anniversary Australasian and Pacific Ombudsman Conference, 6 November 2002.

I have been asked to talk about the future of the relationship between Parliamentary Ombudsmen and Industry Ombudsmen. The topic suggests, I think quite accurately, that the relationship is at a crossroads. Cold war, an uneasy truce, or very positive relationship. Where do we go from here?

I am pleased to say in New South Wales, the relationship between Parliamentary and Industry Ombudsmen falls into the very positive relationship category. I am a member of the NSW Ombudsman network, an informal group which meets periodically, and consists of the heads of complaints bodies, including the NSW Ombudsman, Health Care Complaints Commissioner, Legal Services Commissioner, the Heads of the Anti-Discrimination Board and the ICAC. Statutory officer or Industry Ombudsman – we have a great deal in common, and find these high level meetings very useful for discussing common operational and policy issues.

This Ombudsman network led to the establishment of the Joint Initiatives Group (JIG). This group is made up of senior staff of all our organizations, who meet periodically on specific projects and issues, particularly training, professional development, public information and outreach activities. Through JIG, our staff have shared training courses, and information stalls at community events.

The issue of statutory or industry status has been of less relevance than the similarities. In practice, industry ombudsman schemes have added another dimension to the spectrum where statutory offices already demonstrate differences from each other.

At one end of the spectrum are **statutory** offices with jurisdiction over **government** authorities, eg the Commonwealth Ombudsman At the other end are **private** ombudsman schemes with jurisdiction over **private** companies, eg Banking Industry Ombudsman. You could see these as the most pure examples of statutory and industry schemes.

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* *Energy & Water Ombudsman, NSW.*

However, the real picture is more complicated. In between these extremes we have:

- **A statutory** office with jurisdiction over **private** companies, the Private Health Insurance Ombudsman

- **A statutory** office with jurisdiction over **government and private** bodies, the NSW Health Care Complaints Commission.

- **A private** industry ombudsman scheme with jurisdiction over both **government** authorities and **private** bodies, the Energy & Water Ombudsman, NSW.

I note that the NSW Ombudsman used to be at the same end of the spectrum as the Commonwealth Ombudsman. But it has moved away from the pure model, since in its child protection and disability responsibilities, the Ombudsman now has jurisdiction in relation to non government child and disability services, in addition to its traditional jurisdiction over NSW government authorities.

The Parliamentary Ombudsman for Tasmania is also the Electricity Ombudsman and the Health Care Complaints Commissioner for the state, so Jan O'Grady covers pretty much everything that moves, public or private.

The NSW Ombudsman had jurisdiction over the public sector electricity and water utilities, and under a Memorandum of Understanding between us, retains the right to intervene in a matter if necessary. In practice this does not happen, and utility complaints are regularly, and I suspect happily, referred to the Electricity and Water Ombudsman by the NSW Ombudsman's office.

So what is the point of all this? I am suggesting that the division between parliamentary and industry ombudsmen has become fairly blurry in places, and that a discussion about the future of our relationship is very timely.

I suggest that if a parliamentary ombudsman walked into the office of the Energy & Water Ombudsman, NSW or the other energy ombudsman schemes, they would feel pretty much at home. Industry Ombudsman schemes subscribe to the *Benchmarks for Industry Based Customer Dispute Resolution Schemes* released in 1997 by the Federal Minister for Customs and Consumer Affairs. In his foreword, the Minister, Chris Ellison, said that Australia was fortunate that many industries have taken the initiative to develop dispute schemes. It is not surprising that schemes have developed in significant consumer areas like banking, telecommunications, utilities, insurance and financial services.

There are six benchmarks:

- **accessibility:** the scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use, and having no cost barriers;

- **independence**: the decision making process and administration of the scheme are independent from scheme members;

- **fairness**: the scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it, and by having specific criteria upon which its decisions are based;

- **accountability**: the scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems;

- **efficiency**: the scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance;

- **effectiveness**: the scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

I believe these benchmarks apply pretty much across the board to both parliamentary and industry ombudsmen.

So where do we go from here? Parliamentary Ombudsmen have long acknowledged the importance of meeting with each other to discuss issues in common, to provide mutual support, and to encourage the exchange and development of ideas.

The utility Ombudsmen from Australia and New Zealand meet quarterly as ANZEWON, the Australia and New Zealand Energy & Water Ombudsman Network, and we have recently completed a comprehensive and extremely valuable benchmarking exercise between our organisations.

Do we have things to learn from each other? We are all very small organisations compared to the organisations within our jurisdiction. We also stand apart from those organisations, raising the question about where we obtain support if it is not from each other.

Some possible scenarios:

- parliamentary ombudsmen expand their association to include non statutory ombudsmen;

- industry ombudsmen set up their own association, and there is contact between the two associations;

- there is little or no contact between parliamentary and industry ombudsmen and they go off on quite separate paths.

I would like to pre-empt discussion by suggesting that the last scenario should be eliminated immediately, as I think this would be a huge loss to both groups. I am also not a great fan of re-inventing the wheel, and the idea of one association has a lot of merit. However, the idea of a partnership has not achieved much momentum, with

the result that industry ombudsmen have recently commenced discussion about the formation of a separate association.

Any partnership must be a real one. Industry ombudsmen are not interested in being poor relations in any combined association. Industry ombudsmen have established their schemes as significant ADR bodies which strongly uphold the principles of administrative law, fairness, and good decision making.

Unlike parliamentary ombudsman who are clearly defined in law, I acknowledge that there is an issue about definition for industry ombudsmen. For example, a local Council in Sydney has established an "internal Ombudsman" for ratepayer complaints. This one is easy – as an internal complaints mechanism within the Council administration, this mechanism lacks the fundamental principle of an ombudsman's office – independence, and is therefore not only a significant oxymoron, but a very misleading representation of ombudsman schemes.

But Australia does not have to design the template. There are existing models which have already tackled these kinds of issues with apparent success.

For example, in 1991 a conference of United Kingdom ombudsmen from both the public and private sectors was held, at which it was agreed to set up an association for ombudsmen, their staff, and other organisations and individuals, such as voluntary bodies and academics interested in the work of ombudsmen. The Association came into being in 1993 as the United Kingdom Ombudsman Association and became the British and Irish Ombudsman Association when membership was extended to include ombudsmen from the Republic of Ireland in 1994.

So I will leave you with a very respectable model to assist in our discussions.

As Ombudsmen, we are all involved in highly sensitive negotiation and dispute resolution – it is our core business. It cannot be beyond us to sort out the future relationship between parliamentary and industry ombudsmen.

ECCLESIASTICAL TRIBUNALS — THE ANGLICAN CONTEXT

*The Hon Justice D J Bleby**

An edited version of a paper presented to a seminar held by the South Australian Chapter of the AIAL on 4 December 2002.

In order to understand the nature and operation of Tribunals in the Anglican Church of Australia, it is necessary to have some understanding of the background and history of that church, and of the nature of its government. What I am about to say is a very much potted and pressure cooked version of that history and government.

Origins of the Anglican Church of Australia

I am not here concerned with the scriptural origins of the church, based on the commands of Christ and the empowerment of the original eleven Apostles by the Holy Spirit. Nor do I want to become involved in the debate about the great schism between east and west nor, especially in present company, the nature and effect of the English reformation, save to note that, by that process, the English church became, by law of the United Kingdom, established as a national church.

That meant that the law of the church was inextricably bound up with the civil law, much of which was administered by the ecclesiastical courts, e.g. marriage and probate, along with the traditional common law.

The 17th and 18th centuries saw enormous colonial expansion throughout the world by Britain. The immigrating settlors took the law with them as their "birthright" [1]. "Better an Englishman go where he will", said Richard West in his advice to the Board of Trade and Plantations in 1720, "he carries as much of the law and liberty with him as the nature of things will allow". [2] In 1808 Lord Ellenborough CJ remarked that the ecclesiastical and civil law of England "was recognised by subjects of England in a place occupied by the King's troops, who would impliedly carry that law with them".[3]

That was all very well with direct colonial rule from London. But self government created a real dilemma for the church. The various acts of self government did not establish the church in the colonies. Bishops had previously been appointed by letters patent from the Crown. Clergy were subject to the jurisdiction of English

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* *A Judge of the Supreme Court of South Australia. The author acknowledges with gratitude a paper prepared in 1997 by the Hon Mr Justice B H McPherson CBE as the author of some of the material in this paper.*

ecclesiastical courts. Suddenly there was a legal vacuum in these and many other matters which had to be filled. The Crown prerogative to create new courts was limited to courts of common law and not to courts of equity, admiralty or ecclesiastical law.[4] With representative government the powers of the Crown to make laws in the exercise of the prerogative came to an end.[5] That outcome was confirmed by Privy Council in *Long v Bishop of Capetown.*[6] In that case it was held that in the Colony of South Africa a Bishop had no coercive powers of discipline. Thus, representative government left the Church of England and English canon law with no more force or authority in the colony than the rules of any other church or voluntary association.

However, the church had inherited a whole system of law and practice to which no legal effect could now be given. The Church of England in the colonies had to reinvent its forms of government and church discipline - with not a little encouragement from W E Gladstone in the 1840's and 1850's.[7] But what they reinvented reflected very much the legal structures and, to a certain extent, the legalism to which they were accustomed.

What emerged was the notion of a voluntary consensual compact and the use of the law of trusts for the holding of church trust property and for the enforcement of discipline and the canon law generally.

Nevertheless, it was not long before problems emerged. In *Long v Bishop of Capetown*[8] the Privy Council held that a sentence of suspension and deprivation pronounced by Bishop Gray of Capetown against the Reverend Mr Long as incumbent of a parish in the diocese was ineffective to remove him from his living. The Privy Council decided that any authority of the Bishop to displace Mr Long derived solely from his voluntary submission to the authority of the Bishop by taking the oath of canonical obedience, by accepting from him a licence to officiate and to have the cure of souls in the parish concerned, and by accepting appointment to the living of the parish under a deed providing for his removal, but only "for lawful cause". Lawful cause was such as would authorise the deprivation of a clergyman by his bishop in England.

Long's case revealed the difficulties in engrafting the consensual compact onto an already existing colonial church organization where clergy declined to accede to the new regime.

Church government and diocesan tribunals in Australia

Nevertheless, the notion of consensual compact has survived, in some States with statutory backing, and in others without. That has given rise to modern forms of synodical government, with the assimilation of certain aspects of English canon law into that compact, and with the various dioceses and synods acting as church "parliaments" by enacting canons of their own. Thus there evolved in each diocese of the Anglican Church in Australia, legislation on a variety of topics, including disciplinary tribunals in respect of clergy misbehaviour. These differed quite substantially in their form and method of operation, but they were essentially the court of the bishop in which charges could be brought of ecclesiastical offences against members of clergy. Sometimes the Bishop himself presided or he appointed

a deputy. The tribunal would find a charge "proved" or not, as the case may be, and if proved, would recommend a "sentence" to the Bishop, which he then had the power to implement, suspend or remit.

These tribunals, in theory, had two areas of jurisdiction. They could hear charges against priests or deacons for alleged heresy or breaches of faith, ritual or ceremonial. They could also hear charges for alleged breaches of moral conduct or discipline. The sentences that could be imposed generally included monition, suspension from office, expulsion from office, deprivation of rights and emoluments pertaining to office, perhaps a monetary fine, or deposition from holy orders. The emphasis always has been that on proof of some named offence, a sentence might be imposed by way of retribution. Little attention was given to a person's fitness to hold office other than by the seriousness of the offence with which he might be charged, reflected in the penalty imposed.

So those diocesan tribunals continued until 1962. There was no equivalent tribunal that could deal with similar charges against a Bishop. That may explain such cases as *Wylde v Attorney-General for New South Wales*[9] where proceedings were brought against the Bishop of Bathurst for alleged doctrinal offences in alleged breach of the charitable trust upon which the relevant church property was held.

The formation of a National Church

In 1962, the enactment of almost identical legislation in each of the States and Territories, saw the creation of the Church of England in Australia. By those Acts a new Constitution came into being. Among other things, it provided not only for the continuation of the diocesan tribunals of the types which I have described, but for the creation of a Special Tribunal for the trial of bishops, and a single national Appellate Tribunal which was to act as a final tribunal of appeal from diocesan tribunals, provincial tribunals where they existed, and the Special Tribunal.

Nature and purpose of the existing tribunal

Diocesan tribunals have continued in form and jurisdiction much as they have for the past 150 years or more. Under the Constitution they remain the court of the bishop, and have jurisdiction to hear and determine "charges of breaches of faith ritual ceremonial or discipline and of such offences as may be specified by any canon (of General Synod) Ordinance (of a diocese) or rule (in effect, a resolution of the General Synod)".[10] There are 23 dioceses, each with their own tribunal.

The special tribunal has power to hear charges against a member of the House of Bishops (ie Diocesan Bishops) of breaches of faith, ritual ceremonial or discipline and such offences as may be specified by canon (of General Synod).[11] That tribunal presently comprises the Primate, as president, and two other diocesan bishops. That, in itself produces problems. There is no lawyer involved, and each member will know well any colleague who is charged before them.

The sort of offences prescribed are unchastity, drunkenness, wilful failure to pay just debts, conduct disgraceful in a clergyman and productive or likely to be productive of scandal or evil report and wilful violation of the Constitution, canons or diocesan

ordinances. The sentences that may be prescribed are similar to those I have previously mentioned.

The Appellate Tribunal comprises four lawyers, who have always been Supreme Court Judges or senior barristers, and three diocesan bishops. One of the lawyers presides. It has a threefold function. It sits as an appellate tribunal from a diocesan or the Special Tribunal. As far as I am aware it has never exercised any such function. Secondly, it has a power to declare invalid a canon or a bill for a canon of the General Synod as being inconsistent with the fundamental declarations or ruling principles contained in the Constitution. It has exercised that power once.

Thirdly, it has an advisory jurisdiction, which has occupied most of its time. Its opinions in the exercise of this jurisdiction are not binding, but they have, in the past, carried substantial weight. It has, with the aid of a panel of theological assessors, answered various questions brought before it involving such diverse matters as questions relating to the remarriage of divorced persons, the ordination of women as deacons and priests and lay presidency at the eucharist.

Recent experience

The present role and function of these various tribunals within the church is now being questioned and is the subject of quite serious review. The advisory opinions of the Appellate Tribunal have been criticised as having no proper standing at all. Ultimately, the issues which have engaged that jurisdiction of the Appellate Tribunal have been resolved through the process of the General Synod and its interaction with diocesan synods. The Special Tribunal and the diocesan tribunals are still seen as tribunals where trials take place for offences against church law, resulting, if found proved, in some form of penalty against the bishop or priest concerned. Fortunately, the engagement of diocesan tribunals has been relatively rare, but where they have been engaged, they have been cumbersome and extraordinarily expensive, and ultimately of little benefit to the mission of the church. They are run on adversarial lines as expensive forensic contests, more often than not creating greater divisions than they were intended to solve.

The Special Tribunal was required to convene for the first time within the last two years. That concerned an alleged offence of moral turpitude, not a doctrinal offence. It revealed many problems. There was no lawyer on the tribunal. There was a confusion of roles between the bishop nominated to prosecute the charges and the original complainant or victim of the alleged offences. There was even a confusion as to what the role and purpose of the tribunal was. The president of the Tribunal, being the Primate of the Anglican Church, was unable to provide or to direct any pastoral care to the diocesan bishop concerned. On what was a complaint of sexual misconduct, the Constitution required that the matter be referred to a board of assessors comprising theologians whose principal function is to give advice on theological questions. Such a reference was quite inappropriate to the case in questions.

Similar problems have been encountered in some diocesan tribunals. They were set up and their role was defined principally to deal with heresy or doctrinal offences. They had various items of misconduct added to their jurisdiction, but always on the

implied assumption that a priest or deacon who was charged and who was guilty of immoral conduct would confess his misdeeds, resign his position and go quietly, causing less than a ripple. If that led to his secular employment, he was seldom seen again. However, sometimes he would turn up in another diocese with a less than complete reference from his previous bishop from whom no inquiry would be made and be licensed by another bishop who had no knowledge of his past.

Bishops became fearful of a black list because of the possibility of defamation actions. In some cases, those fears might be well founded if the sources of information which caused the resignation were doubtful. In others, they would most likely be protected by qualified privilege. The fear of defamation itself was sufficient to prevent full communication within the church.

As I said, most of these tribunals were designed principally to deal with doctrinal offences. With the growing community awareness of the great personal devastation that can be caused by child molestation and other sexual offences particularly, the emphasis on the role of tribunals now has changed substantially, and has caused the church to engage in a substantial reassessment of their nature and function.

A New Direction

At risk again of compression of what is a subject of vast complexity, and emphasising the fact that the inquiry and assessment is still continuing, what seems likely to emerge is a very different sort of tribunal with different functions and purposes. As I see it, this is likely to be the position:

1. The notion of ecclesiastical offences will disappear except, perhaps, in the very rare cases of alleged breaches of faith, ritual and ceremonial, or doctrinal offences.

2. The sole criterion governing whether a tribunal should make any recommendation for action will be the fitness of the bishop, priest or deacon to hold office. It is that inquiry with which the tribunals will be primarily concerned.

3. There must, of necessity, be a trigger or an allegation of some conduct which calls into question the fitness to hold office. In order to take some of the sting out of the notion of blame and punishment, such conduct might be included in a definition of “examinable conduct”.

4. Complaints will usually be initiated by another member of the church, although in the case of an allegedly false accusation, a member of the clergy may wish to initiate an inquiry in order to clear his or her name.

5. Unlike the present method of conducting proceedings at the instance of nominated persons or a certain number of members of the church who obviously feel aggrieved by the conduct, there will need to be an “independent” prosecutor. By independent I mean an independent canonical authority not including the alleged victim or persons immediately affected by the conduct. That authority would be required to investigate allegations, to decide whether proceedings in

the tribunal should be initiated and to place evidence before the tribunal in much the same way as counsel assisting a Royal Commission.

6. The procedures of the tribunal would need to have a greater inquisitorial emphasis rather than adversarial, while still protecting the rights of clergy to challenge disputed facts. In fact it might not even be called a tribunal.

7. Bishops would be banned from any participation in the proceedings of a tribunal or of an investigating/prosecution body. They would obviously need to be kept informed, however, of developments at every stage. This would enable proper pastoral and counselling support for the priest or deacon who is the subject of an inquiry. They would still need to implement any ultimate recommendation of the tribunal.

8. Associated with some rather radically different procedures in tribunals would be canonical legislation enabling a member of clergy to surrender the exercise of orders or to consent to an order for deposition from holy orders such that, for all purposes connected with church government and the person's role in that church, he or she would be treated as a lay person only.

These features are of by no means cast in tablets of stone. They will require considerably more working out. But they are necessary for a new era where we are seeing a great upsurge in complaints of and acknowledgement of past sexual misconduct. The church can no longer sweep these matters under the carpet and hope they will disappear. They have to be faced, and the community and church membership is entitled to transparency of action and process. The churches will have to be much more careful about who they engage in ministry, and must devise adequate processes to ensure that those at risk, particularly of sexual offending, are no longer able to hold themselves out as ministers of the church. The difficulty in all this is to devise a process which is not an absolute drain on the resources of the church, which produces a clear and transparent result, but which at the same time ensures the appropriate degree of natural justice to the person whose livelihood and reputation may be at stake.

Endnotes

1 *Anonymous* (1722) 2 P Wms 75; 24 ER 646.
2 G Chalmers, *Opinions of Eminent Lawyers* at 194 – 195 (Burlington 1858); W Forsyth, *Cases and Opinions on Constitutional Law*, London 1869, at 1.
3 *R v Inhabitants of Brampton* (1808) 10 East 282 at 288; 103 ER 782 at 784. See also *Beard v Baulkham Hills Shire Council* (1986) 7 NSWLR 273 at 277.
4 *Re Colenso, Bishop of Natal* (1865) 3 Moo PC (NS) 114 at 148; 16 ER 43 at 56.
5 *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045
6 (1862) 1 Moo PC (NS) 411; 15 ER 756
7 A useful historical summary of developments in the Australian Anglican Church at this time is to be found in the judgment of Priestly JA in *Scandrett v Dowling* (1992) 27 NSWLR 483 at 522-546
8 (1863) 1 Moo PC (NS) 411; 15 ER 756
9 (1948) 78 CLR 224
10 Constitution s 54(2)
11 Constitution s 56(2)