

TWENTY FIVE YEARS OF THE COMMONWEALTH OMBUDSMAN

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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

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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 paper⁴ 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.