

Red Tape and the Ombudsman*

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The Ombudsman Office celebrated its 21st birthday last March. It is timely, therefore, to reflect on the Office's role and its ongoing viability. Is there a need for the Office? Does it have the appropriate powers and teeth? Is it effective?

The Office of the Commonwealth Ombudsman was established in the 1970s. It was introduced at a time of expansion of government regulation and intervention in ordinary lives. The Ombudsman was part of a package of reforms (and administrative review mechanisms) to help promote and ensure the fairness and transparency in the way the bureaucracy went about its business and treated individuals.

At the time of the Ombudsman's establishment the Prime Minister of the day, Malcolm Fraser, said: 'The establishment of the Office is directed towards ensuring that departments and authorities are responsive, adaptive and sensitive to the needs of citizens.'

That same 'sensitivity' and watch is needed today. The new and complicated ways in which government is structuring its relations with citizens mean that the Ombudsman's role and the checks and balances it provides on the use of statutory and other powers is essential. Parliament also needs independent feedback as to what is happening to service standards on the ground.

The role of the Ombudsman

During the last four or so years the number of complaints to the Ombudsman's Office escalated by some sixty percent. Last financial year the office received about 25,000 complaints and another 25,000 inquiries. That's a huge volume of complaints, and it makes

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the Australian Ombudsman the second busiest in the world. The only office that has a bigger number of complaints is the Pakistan Ombudsman.

Many complaints reflected a feeling of powerlessness. They also reflected the expectation for reasons or an explanation as to how and why certain decisions were made. This confusion was exacerbated where a number of agencies were responsible and/or third parties became involved. People were sometimes faced with conflicting messages, excessive red tape and administrative processes where they found it was up to them to ask the right questions and to know the rules even in situations that were very complex even to the experts. From the citizen's perspective the Ombudsman is often needed to cut through this red tape and officiation.

Against this has been the mantra by some in government to reduce red tape and what is seen to be unnecessary scrutiny. Administrative review and the Ombudsman have on occasions been the target of such comment. It is true that the Ombudsman sometimes focuses on the reasonableness, transparency and ethics of *the process*. Some find this irritating.

In my view commonsense needs to prevail. Public service functions cannot be equated with selling another hamburger. We need to articulate why transparency and the maintenance of certain steps and procedures are important when we are dealing with the use of statutory powers and/or the allocation of government monies, tenders or licences.

It is easy for a culture to develop where doing things the easy or quick way can create an unfair or discriminatory allocation of resources, the inconsistent application of rules, conflicts of interest—or worse. Being called into account can be irritating but a re-enforcement of values is—I believe—critical.

Take for example the increased use of contractors and the associated allocation of tenders. I found that the combination of naivety and trying to cut corners could create the real risk of government paying *more for less* or in a dubious context. One tender process we investigated was worth over a million dollars per annum and related to courier services. It was for a three year term. The department concerned decided that for expediency they would not go to open tender but would invite four selected companies to tender. We received a complaint from one company that had been excluded from the process. We investigated the matter. I should make it clear I am not against selective tenders in situations where smaller amounts or specialist expertise are required. This was not the case here. Further we found that the so-called expert group organising the tender had not been aware that the Australian Competition and Consumer Commission had the previous week named the very same four invited groups as being involved in a collusive tendering arrangement.

The agency involved at the time complained about the inconvenience caused by the Ombudsman's investigation. I should add however that the managing director later thanked us for our assistance and noted that their tender procedures had improved, that they had become more efficient and that they had even made significant savings in the particular contract at hand. That example, I believe, highlights the fact that transparency and good practices can go hand in hand with public interest and value for money.

Justice Wood, in the final report of the Royal Commission into the New South Wales Police Service talked about 'process corruption' and how changes in culture which overlook due process can become corrosive over time. The importance of checks and balances can range

from probity issues of misallocation and the possibility of corruption, to the more day-to-day issues directly affecting individuals, such as their responsibilities and entitlements in their dealings with the Australian Taxation Office, the Department of Social Security, or the Child Support Agency.

From a citizen's perspective this is *good* red tape. *Bad* red tape is that which has been born out of habit, or is designed for the convenience or protection of an agency. Examples of bad red tape in my mind include recorded messages where humans never seem to be available. Another example was the Austudy Actual Means Test Review, which required 280–320 questions on its application form.

I would argue that it is an important part of our democratic society that citizens can 'challenge' the state by asking questions about the standards of service review and demand transparency in how the bureaucracy treats them or how decisions are made. The Ombudsman's Office has the necessary powers and becomes a mechanism by which they can do this.

A repeated criticism of this process is that administrative review has become too expensive.

I compared total Commonwealth outlays for 1995/96 to outlays on the quality control agencies such as the Administrative Appeals Tribunal, the Social Security Appeals Tribunal, the Industrial Relations Tribunal, the Refugee Review Tribunal and the Australian National Audit Office. The bottom line was that about one tenth of one percent of total outlays is spent on such watchdog and review agencies. A small investment, I would argue, for quality control.

It is also in this context that I expressed concern that the budget of the Ombudsman was cut back by some nineteen percent. This was at a time when the office faced a sixty percent increase in demand. As already noted, it is at times of great change in administrative policy and service delivery that the citizen needs a strong ombudsman.

Priorities of an Ombudsman

I would like now to turn to some of the priorities and practical features of the Ombudsman's Office.

The *primary focus* of the office relates to individual complaints. The office acts as 'agency of last resort'. This has always been the case. That is, the office expects people and agencies to try to fix problems directly in the first instance. It provides advice to all complainants but only actively become involved in matters that can't be resolved through internal complaint procedures.

However, the increased volume of complaints meant that the Office's discretion rate to *not* investigate increased from forty to sixty percent while I was Ombudsman. Said another way—the office could only actively investigate forty percent of the complaints coming to it. Our client satisfaction surveys showed that this high discretion rate was starting to undermine the confidence of people coming to the office. If the Ombudsman can't deal with a significant range of matters and is seen to be just part of the system, this reduces the credibility of the Ombudsman's Office. They wanted an *independent* investigation, not just advice and assistance and referral back to say the Australian Taxation Office's internal complaint

mechanisms. Further, our preliminary research indicated that despite our encouragement probably only about fifty percent of people actually did go back to internal complaint structures.

That is of great concern. Internal complaint procedures have a role but they also have the potential of hiding the level of citizen concerns. The standards of such internal complaint procedures are also vital here. In a survey of internal complaints procedures, only twenty percent of agencies had internal complaint handling arrangements which met the Australian standard, and the Ombudsman's Office has been working with agencies to improve complaint handling.

Systemic issues

Apart from the realities of dealing with specific complaints, as Ombudsman I always took the view that complaint prevention should be the priority.

By looking beyond individual complaints, to the pattern of complaints, it is possible to identify the systemic problems causing many complaints. It is also a pragmatic way of dealing with the increasing volume of complaints and the particular access and equity issues raised. Research indicates that for every complaint made perhaps as many as twelve to twenty other people experienced the same problem. The ratio is worse for the disadvantaged or inarticulate who tend not to lodge complaints.

I was particularly proud of our achievements through these systemic investigations and reporting. It was through this work that we made the greatest changes and were able to trigger debate about service standards and administrative procedures. Such debate about what standards should apply is constructive for agencies and citizens alike. Just some of our own motion investigations reports have included:

- *Treatment of whistleblowers in the Australian Federal Police*—Complaints from Australian Federal Police whistleblowers prompted an investigation which recommended a series of improvements to the management and treatment of whistleblowers.
- *Department of Social Security service to Alice Springs Town Camps*—After learning that a large proportion of Aborigines in and around Alice Springs were not receiving benefits, the Ombudsman investigated and recommended a series of changes to DSS procedures.
- *Oral advice*—The Ombudsman investigated a series of complaints from people who received incorrect advice and recommended changes to procedures for delivering and recording advice and new compensation measures for disadvantaged clients.
- *How the Australian Defence Force responds to allegations of serious incidents*—The Chief of the Defence Force asked the Ombudsman to investigate and recommend improvements to Defence investigations.
- *Contracting out in the public sector*—The Ombudsman initiated debate and investigated the public accountability aspects of government services contracted out to the private sector. The debate is still continuing.

The Ombudsman's own motion work is critical if the office is to have more than a bandaid role in complaint resolution, because this work can actually prevent further problems. To my mind, attention to these systemic issues is an important—and cost effective—feature of the Ombudsman's Office.

This major project and policy work represented between ten and twenty percent of the Ombudsman's overall activity. I estimate that through major projects and policy work alone, the Ombudsman's Office has delivered around \$35 million worth of investigations to the Government—this has happened with a current appropriation of only \$7.5 million.

Other accountability structures

As previously mentioned the Ombudsman's Office was established as part of a package including the *Administrative Appeals Tribunal Act 1975*, the *Freedom of Information Act 1982* and the *Administrative Decisions (Judicial Review) Act 1976*. Its role supplemented each of these.

The Administrative Appeals Tribunal (AAT) is a merits review tribunal with determinative powers. Its brief is to look at what is lawful. The Ombudsman does not have determinative powers but has a broader brief to make recommendations as to what is 'fair and reasonable' in all circumstances and to look at broader practices and procedures. A synergy or working relationship between the two can be useful, for example in the matter of departure certificates and the 'own motion' investigation we undertook after a repeated number of cases before the AAT where the AAT found the administration relating to these 'departure certificates' (and eligibility for the age pension) was 'legal' but harsh and unfair in its application. They referred the issues to the Ombudsman's office for a broader review. Our 'own motion' investigation resulted in policy and administrative changes that will help about 1,000 citizens a year, plus exgratia/compensation for some seventy individuals.

The Auditor-General and Parliamentary Ombudsman can also supplement each other. The Ombudsman starts with individual cases and personal experiences and then looks more broadly at the underlying practices and procedures. The Auditor-General starts with broader probity and efficiency issues and more recently has tested these against issues of service quality. On some issues, such as oral advice, the two agencies usefully exchange information and work together.

Independence

For the Ombudsman, independence as to what issues to pursue is critical.

Some tension between the external review body such as the Ombudsman, and the agency, and the government of the day needs to be expected. It is the Ombudsman's job to throw light onto defective administration and the problems it can cause for citizens. However, an Ombudsman investigation is often not welcomed by an agency or the government of the day. This is precisely why the independence of the Ombudsman's Office must be assured. This relates to both the Ombudsman's funding and reporting arrangements and the appointment procedures for the Ombudsman.

The Ombudsman must be independent of those being investigated. The Ombudsman needs to be able to withstand the 'hurt feelings' of department heads, or responses that, by reporting on

an issue, you are somehow a traitor to the tribe. The pressures can be very real. The importance of independence cannot be stressed enough. It also needs to be put into context.

I've already talked about the volume of complaints; 25,000 in the last financial year. Most of these could be resolved quickly and cooperatively with the agency behind closed doors. But it is the threat of embarrassment, and willingness to expose that often facilitates this process. It is also the public reports and demonstration cases that generate a public debate and discussion about appropriate standards and that alerts the citizen to what they can do, and what they *should* expect.

In my last year as Ombudsman I think I released something like twenty-five reports. That is against 25,000 complaints. Yet I was branded by some department heads as being aggressive in my disclosure and reporting habits! As I said, the power of an Ombudsman in reality comes from the potential power of embarrassment and the credibility and thoroughness of the work done.

These tensions as to how independent and what sort of profile an Ombudsman should have are not new. Jack Richardson, the first Ombudsman, made shock waves within the bureaucracy by his milk carton campaign which asked 'Bamboozled by the bureaucracy? Call the Ombudsman.' Apparently the campaign put more than one senior official off his Weetbix. Indeed, so strongly was this 'rampant promotion' remembered that it was a key question at my own interview some ten years later. Could I assure them that I wouldn't use a milk carton campaign?

Reforms to ensure the effectiveness of the Ombudsman

I would like now to turn to some of the reforms I see as being necessary to ensure that the Ombudsman is effective into the future.

1. Funding

I have already mentioned the question of adequate funding.

2. Jurisdiction

When the Ombudsman and Freedom of Information Acts were introduced, contracting out and the use of third parties was not considered.

From where I sit, logic dictates that the Ombudsman should be able to cover government services, even where these services are provided by third parties. It is merely a new mechanism of service delivery. The government department or agency is still the principal. They are responsible for the service standards, the choice of contractor and monitoring of standards.

A range of examples, however, indicates that this is not always clear cut and the clients of the services have sometimes been sent from the department, contractor, insurer and back again in a vain hope of determining who is responsible. These issues need to be put beyond doubt and the Ombudsman's jurisdiction needs to be expressly widened to cover core government services and functions provided through third parties.

3. Privatisation of Accountability

There are some other important features and points to be maintained if the government is to effectively use contractors and retain accountability to its citizens:

- Contracts should include provision for the Department to reclaim/negotiate compensation if contractors have caused damage or been negligent in their performance (eg. Australia Post).
- Contracts should require that departments are able to gain and use information gathered by such third parties on their behalf.
- Details of the contract, such as service standards, should become publicly available once the tender process has been concluded.
- The contract may *also* require the third party to provide its own internal complaint procedures. A word of warning is however required in how far we want to go down the path of privatisation of complaint procedures and oversight of citizen concerns. First, a small business will not have the experience or infrastructure. It will add considerably to costs. Second, the proliferation of complaint procedures is confusing to the individual consumers. Third, and probably most importantly, the proliferation of complaint structures or arbitration arrangements means that government loses the oversight and intelligence as to what is happening on the ground in its services delivery.

In summary I recommended the following changes to ensure that the Ombudsman's Office could be effective in the new environment:

- affirmation of legislative powers for the Ombudsman to cover government services provided by third parties.
- establishment of a specialist team within the Ombudsman's Office to deal with tenders and contract issues.
- the Ombudsman be given determinative powers in contract disputes commensurate with industry Ombudsman schemes.

This is more cost effective than establishing a range of new complaint bodies; such an approach is not cost effective, creates gaps and anomalies and is confusing to the punter.

4. Powers

Most industry Ombudsman schemes do have determinative schemes up to certain limits. These are agreed to as part of the accreditation or contract arrangements with members. This is one power or enhancement that may be a useful addition to the Ombudsman in a particular range of matters, say where property compensation is involved (for example, the Australia Post case).

In most other matters however the combination of the Ombudsman's strong investigatory powers (including the power to subpoena and interview on oath), coupled with the power to *recommend*, are, I believe, generally effective and appropriate in most cases.

The Ombudsman's brief is also to look beyond the law and discuss what is morally right in 'all the circumstances' and what service standards should be met. These are not easy issues and are not as black and white as the law. If they can't be resolved co-operatively, I believe that they *should* be discussed by Parliament and/or the public to determine what standards should apply.

5. Time limits

Timing and cost have become impediments to the Ombudsman's effectiveness.

To overcome these impediments I would suggest that a three month time limit should be placed on the Prime Minister and Parliament to respond to an Ombudsman's recommendation. Shorter time limits should be placed on departments to respond to section 15 reports.

The reporting process of the Ombudsman is somewhat elaborate, as set out in sections 15–17 and 19 of the Ombudsman Act. For example, the Departure Certificate report was given in 1995 and legislative change was achieved. However, act of grace compensation for about 100 individuals was still outstanding. A section 16 report on this was provided to the Prime Minister in March 1997, with recommendations relating to compensation. The final decision was only handed down on the day I retired as Ombudsman in February 1998—some ten months later. The introduction of a three months disallowable instrument would probably concentrate the minds immeasurably.

Another barrier for the Ombudsman relates to the cost of publishing reports. Section 17 or section 19 reports require the Ombudsman to distribute reports to every member of Parliament. I contemplated this for at least one report, but realised it was not possible, given the cost involved (\$1,300). The issue of budgets and resources therefore raises its ugly head again. An alternative would be for Parliament to take over the publishing of these special reports and, as in New South Wales, table the report within forty-eight hours of the Ombudsman giving the report to Parliament.

6. The reporting relationship of the Ombudsman to Parliament.

The Ombudsman is an independent statutory officer. The role is separate and different from the executive and the reporting role to Parliament needs to be reinforced.

Currently, although the Ombudsman is a statutory officer, the Office's budget is regarded as an 'outrider' division of the Department of the Prime Minister and Cabinet.

This in practice controls or compromises the ability of the Office to be as independent as it should. The Department of the Prime Minister and Cabinet, as an executive department has not always been an enthusiastic advocate for increased resources and increased scrutiny by the Ombudsman. The Ombudsman's situation is often lost or overlooked as a single line item amongst many within the Prime Minister and Cabinet portfolio.

The New Zealand model stands as a useful precedent. There the Ombudsman reports to a Parliamentary Committee. That Committee makes recommendations as to the annual budget required by the Ombudsman. The executive departments of Finance and Prime Minister and Cabinet can still comment on the appropriateness of this compared to other allocations but the government of the day would need to respond to the parliamentary committee as to whether its recommendations would or would not be followed. The process and procedure provides a transparency that is not currently in the Australian system.

The independence and the special reporting responsibility of the Ombudsman and Auditor-General to Parliament and the citizen needs to be re-enforced and supported.

Work in progress

Since the Ombudsman's establishment in 1977 the Ombudsman's Office has dealt with over 300,000 citizen complaints. These have ranged from issues of major impropriety to smaller issues that are nevertheless of critical importance to the individual.

During my term I felt particularly proud of our work in identifying the causes of complaints. My experiences have deepened my commitment to and belief in the importance of the Ombudsman's role.

It was a privilege to have been Ombudsman for almost five years.



Question — Have you heard about the new proposals for combining the Administrative Appeals Tribunal and all the specialist tribunals like the Social Security Appeals Tribunal etcetera into one mega tribunal?

Philippa Smith — Yes. I guess it depends on how it is done and I think there are some merits, from a consumer perspective, in having a one-stop shop. I am, though, very nervous about some of the proposals that I have seen floating around which would severely limit the capacity and thoroughness by which those complaints are dealt with. Some of the proposals, for example, would really limit the appeal rights for people going to the Administrative Appeals Tribunal to just questions of law. So what then is left is a lower level thing, as I understand it, generally reviewed by just one person without written decisions being made. Now that is a real ‘no frills’ form of review. It is a quick throughput, but the difficulty is, there is no chance of checks and balances in the way it is done, no written decisions also, so that things could be referred to the Ombudsman’s Office, for example, if there were other broader practices. So, in principal, yes, I think there is some merit in the proposals, if done properly, but I am very nervous about some of the practical bits and pieces that I have seen being discussed. I think that synergy that I was talking about between the Administrative Appeals Tribunal and the other parts, like the Ombudsman, should be thought through very carefully. If I was the current Ombudsman, I would be very worried about the overflow of increased complaints to the Ombudsman’s Office.

Question — Particularly at the present time I see a need for much more public awareness for the Ombudsman and its role. Is it on the web? I never hear much about the Ombudsman on the parliamentary radio or very much on the ABC or SBS and so on.

Philippa Smith — The Ombudsman’s office is on the web. There was a survey done once about how many people in the community knew about the Ombudsman’s Office. About fifty percent of the community knew about the Office. That is pretty good, actually. But that being said, that same survey showed that the people who needed it most, knew about it least. So when I first became Ombudsman I did in fact start up a targeted outreach program to the groups which we knew were under-represented. Non-English speaking people, indigenous people, students and some groupings of profile women’s groups. Sad to say, in the cuts that occurred, that was one of the things that went. And I think it is a real problem, because I am with you, there is not much point in having an Ombudsman unless people know about it.

Question — Can you comment on the role of the Ombudsman in relation to complaint procedures in non-government organisations?

Philippa Smith — Well I think it is a networking role and the role I tried to develop when I was Ombudsman was talking to as many of those non-government organisations as possible and saying, ‘Our role is not to take over your role, you deal with as many as possible, but please tell us what the underlying issues are affecting the groups that you deal with and give us your too hard basket ones.’ And I think that sort of outreach can be very effective if it is maintained. It takes a lot of work, though.

Question — Have there been many instances of people trying to pressure you to not report your investigations?

Philippa Smith — There are a couple of occasions where the investigation was finalised and there were not too subtle pressures in saying it would not be good for you or the Ombudsman’s Office if you release this. The most public example obviously was the investigation we did of New Burnt Bridge community and the Aboriginal and Torres Strait Islander Commission. It was actually a complaint which came to us from a very remote

Aboriginal community and dealt with conflicts of interest, or apparent conflicts of interest by the white bureaucrats in the Commission. We were taken to the High Court on that, about our ability to release a report.

Question — To whom does one complain if one is not satisfied about the way the Ombudsman's Office executes its role. Particularly in its discretionary functions, but in other parts as well?

Philippa Smith — It is Parliament and the Prime Minister. If it was specific breaches of due process, then we are accountable under the Administrative Decisions (Judicial Review) Act like other review bodies.

Question — Can you tell me about outcomes you were able to achieve and what proportion received some form of satisfaction/redress?

Philippa Smith — Of those we investigated—there is a certain level of subjective interpretation in this—we estimated that about seventy percent received a positive outcome. Those outcomes varied from a change in the decision, to getting a reason or information, or a small level of compensation, or sometimes an apology. Using that broad brief of those we investigated, about seventy percent received some level of outcome.

Question — I would like to ask a question about your views on the current state of use of the Commonwealth Freedom of Information Act and departmental responses to that; in particular, just how you see the status of it at the moment, in relation to access fees, and also the application of exemptions.

Philippa Smith — Since the Freedom of Information Act was introduced, we are now operating at a different value base than would have been the case prior to the introduction of that Act. I regard it as having been a very useful mechanism in changing culture, and indeed changing the expectations of citizens that they should be able to ask for information. In practice, what has happened is it has become a tool largely for individuals asking about their individual files, rather than for the broader information about the operation of government. In the last couple of annual reports of the Ombudsman, we also reported on what we saw as a slackening of departments' knowledge, and having fewer skilled people in departments to operate them. Mistakes were being made where the awareness of freedom of information was going down, and the propensity to try to use exemptions like commercial-in-confidence or cabinet-in-confidence were increasing. So in summary it has changed the fabric that we are living in, but it really is time for a catalyst in terms of the use and knowledge about freedom of information, and the value of it.

Question — One topic you did not mention was that of trivial and vexatious complaints. Is there a threshold test? If so, and 300,000 got through it, how many were stopped at it? If there isn't, what proportion of the 300,000 were vexatious?

Philippa Smith — The Ombudsman has a discretion not to investigate. We had our share of repeat complainers. Actually, the percentage of people who I would call nuisance or vexatious, is extraordinarily small. There are a small number that can eat up enormous amounts of your time, but I would say that it is less than three percent.

Question — Do you believe the bulk of them are dismissed by the inquiries in the initial stages?

Philippa Smith — Yes. A lot of things can be resolved by explanation, putting things in a frame, getting information, or putting people on the right path for themselves. But I would not call them vexatious; that is confused.

Question — This whole administrative structure, as you said, came about under Malcolm Fraser, when small-l liberalism and the fear of big government seemed to be at its apex. In the current ideology, it seems there is a retreat from that by the Liberal Party, and as you said, a sense that this is all impeding efficiency. What is your view about the current trend in this philosophy and what impact, if any, globalisation is having on it? Secondly, do you fear that the current climate could develop to an extent where the Ombudsman faces being abolished?

Philippa Smith — It would be hard to abolish. It can be starved, but it would be hard to abolish. I was trying to make the distinction between good red tape and bad red tape because I think that as a consequence of the philosophy of the current government it should be shoring up mechanisms which help individuals resolve their dealings with large bureaucracies, so I do not understand why they think mechanisms like the Ombudsman are somehow old-fashioned. The other thing I find curious is that if you look to the private sector, it has in fact adopted many of the administrative review mechanisms in private settings—like industry ombudsman schemes. They can see the worth of putting into play accountability mechanisms and they see the connection between accountability and credibility. So in many ways the private sector is now adopting those standards that were put in place in the 1970s by the government. It would be a real irony, I think, if the private sector was shoring it up and the public sector was letting it drift. If you look at the nature of services being provided by the public sector, there are good reasons why it always needs to be the leader in terms of ensuring standards and mechanisms to ensure accountability, sensitivity, probity, whatever you like to call it, in the way that administration operates or the government operates and the way it treats individuals.