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**THE COMMONWEALTH OMBUDSMAN:  
PRESENT OPERATION AND FUTURE DEVELOPMENTS**

## Introduction

The modern institution of Ombudsman is taken to date from the establishment of the office in the Swedish Constitution of 1809.<sup>1</sup> There were earlier examples of such offices in countries such as China, Persia and Turkey but these were officers appointed by a ruler and were thus intended to assist the executive in carrying out its functions. The rise to power of the Parliament in Sweden after many years of internal struggle led the Parliament to appoint its own Ombudsman as an entity independent from both the Executive and the Parliament with regard to his functions and decisions. The appointee to the office was to ensure that laws and statutes were followed and that civil servants fulfilled their obligations. The word Ombudsman simply means agent or representative and the Swedish incumbent was, and still is, more accurately designated the Justice Ombudsman. The Swedish Ombudsman's jurisdiction extends not only to officers of public service agencies but also to the judiciary, which in Sweden is a career service.

Two important points emerge from this background to the office: first that the Ombudsman is the Parliament's officer whose reporting function is not to the government but to the elected representatives of the people. Second the office is intended to be an overseer of the agencies of government. While this is done through the receipt of complaints from members of the public which reveal deficiencies in the agencies, the remedying of those complaints is a side issue to the principal task. Indeed, as Sweden has a highly developed system of administrative review through the courts, the Ombudsman will only deal with individual cases that cannot be appropriately remedied by the use of that system. The Ombudsman is a bureaucratic auditor concerned with the delivery of services in accordance with the law much as the Auditor-General is concerned with the financial implications of service delivery.

Over 100 years later, the office of Ombudsman was replicated in Finland but, for our purposes, the more significant development was the appointment of a Danish Ombudsman in 1955. That officer was not given jurisdiction over the judiciary. In addition, the balance between general oversight of agencies and resolution of particular complaints shifted towards the latter. It is this Danish model that was followed in New Zealand in 1962, and the New Zealand legislation formed the basis for the various offices of Ombudsman in Australia. The Commonwealth Ombudsman's office commenced operation in 1977.

The most significant feature of this model in the context of the relationship between Ombudsman and the Parliament is its distinction from that adopted in the United Kingdom and France where matters can only be brought to the attention of the Ombudsman on behalf of a citizen by a member of Parliament. Refusing to follow the UK precedent but instead choosing the New Zealand model of allowing direct approach to the Ombudsman was a sensible recognition by Commonwealth parliamentarians of the limits of their powers, particularly their inability to go behind a response from a Minister to matters raised on behalf of a constituent. But an issue to which I shall return is whether parliamentarians have lost some part of their role of checking the executive by divesting themselves of this activity and whether they should take steps to follow up general issues that flow from the Ombudsman's investigation of individual grievances. It

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<sup>1</sup> For a full description of the development of the Ombudsman, see Ibrahim al-Wahib: *The Swedish Institution of Ombudsman* (1979).

is also appropriate to note at the outset that the legislation establishing the Commonwealth Ombudsman made it clear that the Ombudsman had power not only to deal with individual complaints but also to make recommendations in relation to government policy and practices and to suggest changes in the law. This action can follow from the investigation of a complaint or can be initiated by the Ombudsman of his own motion.

It is appropriate now to consider how the office of Commonwealth Ombudsman has functioned, in what way it might develop and what its relationship with the Parliament should be.

## **THE OFFICE OF COMMONWEALTH OMBUDSMAN**

### **Use of the Office by members of the public**

In the last financial year some 23,000 people approached the Commonwealth Ombudsman's office seeking assistance of various kinds. Around 12,000 of these approaches were either general inquiries or concerned actions that were outside the Ombudsman's jurisdiction. Many of these latter requests concerned State government agencies or actions of private bodies. The complaints were referred to the appropriate State Ombudsman or to consumer affairs organisations. It can be seen from these figures that nearly half the persons approaching the Ombudsman's office are simply in need of assistance of some kind and do not know where to turn. Members of the public do not know, indeed cannot be expected to know, which government department is responsible for a particular activity; nor can they be expected to understand the vagaries of State-Commonwealth responsibilities. In providing assistance to these people, the Ombudsman's office is fulfilling a significant function not only for members of the public but for government agencies as well. By directing people to the right point of inquiry, the Ombudsman saves various government agencies the task of having to ascertain a person's needs and direct them to the appropriate agency. It also overcomes that most insidious of accusations that can be made against the bureaucracy, namely giving people 'the run around'. Any action which improves the relationship between public servants, agencies and members of the community has a significant, albeit unquantifiable, impact on the effectiveness of government operations. A person who approaches an agency with a positive state of mind is much easier for the agency to deal with and is more likely to be able to explain his or her needs than a person who has become irritated or pessimistic about the likely response of the agency.

Most Ombudsmen's offices around the world, including those in the Australian States, require complaints to be made in or reduced to writing. The Commonwealth Ombudsman, however, accepts oral as well as written complaints and these comprise around two thirds of the total number of complaints within jurisdiction received. Most oral complaints are made by telephone, including by means of the reverse charge 008 system whereby a non-metropolitan caller can contact the Ombudsman's office for the cost of a local call. These methods make the Commonwealth Ombudsman's office very accessible and this is reflected in the number of complaints received annually. It is one of the highest, if not the highest, per head of population in the world. The effect of the impact of direct access rather than access through a Member of Parliament is dramatically illustrated by comparing the number of complaints received in 1986/87 by the Commonwealth Ombudsman — 15,457 — and the UK Parliamentary Commissioner

— 895. The Local Authority Commissioner in England who, at that time, was similarly constrained, received 4,059 complaints. When regard is had to the respective populations and the fact that many functions in Australia are performed at State and local government level with complaints being taken to State Ombudsmen, the figures demonstrate graphically that direct access to the Ombudsman leads to a vastly greater number of complaints being lodged.

### **Resolution of complaints**

Many complaints to the Ombudsman are about delays in decision making by agencies. It is most inappropriate that concerns of this kind be compounded by delays in the Ombudsman's office. The Commonwealth Ombudsman's record in this regard is very good. Most oral complaints are resolved within a few days, many within hours. Of the written complaints received in 1988/89, 32% were finalised within one month, a further 27% within three months and another 17% within six months. Only 8% took more than twelve months to resolve. In many cases delays in resolution flow from undue time being taken by agencies to respond to the Ombudsman's requests. In the main, however, the system of contact officers within agencies that has been established by arrangement between my office and agencies results in a rapid turnaround in the handling of matters raised. The contact officers are of a sufficiently senior level to be able to resolve many issues themselves and have sufficient experience to know where within an agency responsibility for the decision lies.

In 1988/89 a result favourable to a complainant occurrence in 45% of the oral complaints dealt with by the Ombudsman; for written complaints the figure was 35%. While there is a tendency to judge the success of an Ombudsman's office by the percentage of instances where the agency has changed its decision after intervention by the Ombudsman, this is to overlook the historical basis for the office. It was set up to ensure that agencies were performing their functions correctly. The Ombudsman carries out his role as much by determining that the decision in question is correct, or at least is reasonable in the circumstances, as by finding that the decision is wrong. The affirmation of a decision is an important part of the Ombudsman's role both from the point of view of the agency and the affected citizen. As far as the latter is concerned, there is a reassurance by an independent body that the person has not been improperly dealt with. From the agency's view point the Ombudsman's imprimatur on the decision elevates its status and reduces its vulnerability to attack.

### **Who complains to the Ombudsman**

There is a tendency to think that the Ombudsman provides a service to the less well off members of society while the well to do pursue their claims in tribunals and courts which have a power to overturn a decision. This is true only insofar as much Commonwealth decision making is concerned with social welfare and therefore impinges on persons in the lower socio-economic categories. But decisions involving taxation, customs, export grants, etc, affect the wealthier classes and the business community. These make considerable use of the Ombudsman.

The Ombudsman has a discretion to decline to investigate a matter where there are other avenues of review for the person involved. If there is a right of appeal, for example, to the Social Security Appeals Tribunal or to the Administrative Appeals Tribunal, the

Ombudsman will usually decline to investigate a complaint. However, the discretion is his and if it is thought appropriate for reasons of speed of decision, cost, or for personal reasons such as a person not being able to present their case properly before a tribunal or court, the Ombudsman will intervene. The amount involved will obviously be a significant factor when the alternative remedy is by means of the judicial process. Even then, however, the circumstances of the case may induce intervention despite there being a judicial remedy. A recent example of this concerned a case involving the refund of sales tax. The taxpayer had successfully challenged a refusal by the Commissioner of Taxation to refund around \$1,000,000 of tax paid. Following the successful court action, the Commissioner repaid \$700,000 but disputed the taxpayer's right to the balance relying on arguments not put before the Federal Court. I intervened in this matter on the basis that it would be unreasonable to expect the taxpayer to return to the court to challenge arguments, even though of a legal nature, that had not been raised by the Commissioner at the appropriate time. The amount in question was ultimately repaid to the taxpayer.

The wording of the discretion in the Commonwealth Ombudsman's Act is significant in that it is not stated in the fashion of many Ombudsman Acts which say that the Ombudsman should not pursue the matter where there is an alternative remedy unless there are special reasons.<sup>2</sup> Rather it provides that the Ombudsman may choose not to intervene if there is an alternative remedy and in the circumstances it would be reasonable for the complainant to exercise that right.

## **Publicity**

One of the problems encountered by all Ombudsmen is a lack of knowledge of the existence of the office by members of the public. With the passage of time and as more persons carrying out ombudsman type functions and being so designated are appointed in the private sector it can be expected that the knowledge that there is an office of this kind to which persons affected by government decisions may complain will become more widespread. At present the attention of the public to the existence of my office tends to be drawn haphazardly according to whether there has been some media publicity surrounding an investigation of a topical or sensational kind. An issue that arises is whether an Ombudsman's office should advertise its functions. A view is put that to do so is no more than touting for business to justify the existence of the office. I do not agree with this view. The public pays for the office through its taxes and they are entitled to know of the service that the Ombudsman can provide. Further, it is common place for agencies to publicise the existence of their programs and invite persons to participate in them. Regrettably it is not so common for the same agencies to indicate to persons their right to seek review of an unfavourable decision by the Ombudsman. Advice of this right would undoubtedly be the best form of publicity that the Ombudsman could obtain, and if departments would only recognise that in half the cases that come to the attention of the Ombudsman the departmental decision is affirmed, they might be more willing to invite dissatisfied members of the public to raise their grievances in the appropriate quarter. However, there is a reluctance to bring the review

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<sup>2</sup> See the position in the UK where the courts have taken a view of the effect of such a provision that markedly confines the Ombudsman's powers: *R v Commissioner for Local Administration, ex parte Croydon London Borough Council* [1989] All ER 1033.

mechanisms to the attention of those affected. This being so it is appropriate for the Ombudsman to remedy that deficiency.

### **Form of investigation**

The overwhelming majority of investigations conducted by the Commonwealth Ombudsman are done either by telephone to the agency concerned or in writing. I conduct few formal investigations although empowered to do so. The reason for this is quite simply that the large number of complaints received and the level of the resources provided to the office make formal investigations impracticable. This is one of the most notable contrasts with other Ombudsmen's offices where the conducting of formal inquiries with evidence being given on oath by summoned witnesses is a regular occurrence. Undoubtedly this means that, on occasions, the Commonwealth Ombudsman does not deal adequately with matters and possible deficiencies in decisions are overlooked. This is particularly the case where resolution of a complaint turns on an assessment of the credibility of competing assertions as to the facts. However, the number of cases in which a result favourable to a complainant is achieved by the Commonwealth Ombudsman's office is no lower than in those offices where formal inquiries are regularly undertaken.

The most significant aspect of the Ombudsman's powers which enables results favourable to a member of the public to be achieved is the ability to be able to obtain access to the relevant agency files. In contrast with some Ombudsmen who are entitled to access only to the correspondence which passes between the agency and the member of the public, the Commonwealth Ombudsman can obtain access to the full departmental file, including internal memoranda. This can have the effect of revealing that the agency's conduct in a matter is not to its credit. For example, an agency reproduced a short local history work written by a member of the public without obtaining permission and without paying compensation. The agency's legal officer advised that it had breached (copyright and should pay compensation. The internal memoranda on the file indicated that a senior officer had decided that no compensation would be paid on the basis that it was unlikely that the agency would be sued, the amount involved being too low to warrant the legal costs. Following my intervention, appropriate compensation was paid to the member of the public whose work had been plagiarised.

This capacity to be able to obtain the relevant departmental documentation distinguishes the Ombudsman from the Member of Parliament. A Member of Parliament is obliged to accept the Minister's response to an inquiry on behalf of a constituent — a response that may well be written by the officer who made the decision that is the subject of the complaint. The fact that the Member of Parliament must proceed through the Minister also stands in the way of a free exchange of correspondence between the Member and the agency that could identify the issues in dispute and lead to a greater understanding of the respective positions of the parties.

Another important feature of the Ombudsman's office is that investigations are conducted out of the public eye. An admission of error can therefore be made by an agency without publicity. This in turn avoids the loss of respect that can flow from a public recantation. It can also avoid exposing the agency or its Minister to accusations in the Parliament which can have unfortunate political consequences.

## Basis of Ombudsman review

A view seems to be held that review of administrative action and the accountability for conduct that is the concomitant of that review process concentrates on the procedures followed in reaching a decision rather than the substance of the decision in question. It is claimed that this approach obliges public servants to concentrate on the manner in which a decision is made to the detriment of the quality of the decision itself.<sup>3</sup> Whether appropriate procedures have been followed is a factor that the Commonwealth Ombudsman takes into account when reviewing a decision about which a complaint has been made. However, this will only be to the extent of determining whether the procedures have been sufficient to enable all relevant information to be obtained and to have given the affected member of the public adequate opportunity to present his or her concerns to the decision-maker. If a statutory procedure is required then again this will be looked at to see whether adherence has occurred. This is simply because a decision made other than in accordance with the prescribed procedure cannot be regarded as valid. Public servants have no right to disregard the law merely because it imposes some inconvenience.<sup>4</sup> Departures from departmental practices, guidelines, etc, on the other hand, will not lead to criticism if there is a basis for the departure and it has not disadvantaged the member of the public affected.

But the review powers of the Commonwealth Ombudsman extend well beyond issues of procedure to include also an examination of a decision for substantive errors and an overall consideration of the merits of the decision itself. Section 15 of the Ombudsman Act requires the Ombudsman to review a decision on very much the same bases as a court uses to determine the validity of a decision — mistake of law, taking account of relevant factors, excluding irrelevant factors, not acting for an improper purpose, etc. However, in addition, the Ombudsman is required to examine the decision to see whether it is unreasonable, unjust, oppressive or improperly discriminatory, based on a mistake of fact or, in all the circumstances, "wrong". These are wide ranging grounds to call into question a decision. However, the power is used with great care. The Ombudsman does not intervene solely on the basis that he would have come to another decision on the facts as presented. On numerous occasions a complainant is advised that, because the decision taken was arrived at fairly and is within the range of reasonable decisions that might be made on the particular facts, no action will be taken in relation to it. Because the Ombudsman's jurisdiction is recommendatory only, he does not substitute his own decision for that of the original decision-maker (of the AAT) and it will therefore only be in those cases where the Ombudsman is satisfied that the decision is unsupportable that he will so recommend. Definition of such circumstances is almost impossible. A J Callaghan has written<sup>5</sup>

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<sup>3</sup> Cf Michael Keating: *Quo Vadis? Challenges of Public Administration* (1989) 48 *Australian Journal of Public Administration* 123, particularly at 129.

<sup>4</sup> Cf (seemingly) David Shand, *Canberra Times* 23 July 1989, p6 and the responses by Robert Tickner MP, Chairman of `public Accounts Committee, *Canberra Times*, 2 August 1989, p9 and Jack Waterford, *Canberra Times*, 13 August 1989, p7.

<sup>5</sup> A J Callaghan, *Maladministration* (1988) 7 *The Ombudsman Journal* 1,30.

Attempts to define maladministration even in this restricted context fail because they are forced to rely on words of similar semantic obscurity. At best it can be said that there is an acceptable standard of administrative behaviour which professional administrators understand and attempt to deliver and which the public has come to expect. Although neither the administrator nor the citizen could define or describe that standard satisfactorily, either could detect a failure to achieve it. There would undoubtedly however be disagreement in marginal cases.

My predecessor Professor Richardson said in his Fourth Annual Report

The Ombudsman is concerned to ascertain whether the official action is in some way or other defective having regard to the standards to be expected in sound public administration in the particular country.

While this approach may seem to introduce an element of arbitrariness into the actions of the Ombudsman, it should be remembered that the Ombudsman's powers are recommendatory only and that ultimately it is for the Parliament to determine whether that recommendation is sound. The Ombudsman does not set unattainable standards nor does he ignore resource constraints on agencies. In the overwhelming number of cases, the Ombudsman's standards are the same as those of the agency. Indeed, it is a criticism levelled at Ombudsmen that they perpetuate the values of the bureaucratic class. The fact that an independent but experienced outsider suggests that a decision is in some way defective usually means that it is. This has been recognised by the Prime Minister who has indicated "that it is only in the most exceptional circumstances that a recommendation by the Ombudsman should be set aside".

### **Extent of Jurisdiction**

The Commonwealth Ombudsman has been fortunate in that there have been few occasions on which agencies have challenged his right to inquire into decisions that they have taken. While a number of bodies have queried the jurisdiction, they have almost all said that they are willing to cooperate with my office. This commendable attitude is a recognition that if persons have something to complain about, that complaint ought to be remedied. The fact that the Ombudsman does not take up a matter unless there is some basis for thinking that there is a ground for reviewing the decision is a further factor in bodies accepting the Ombudsman's intervention.

This is not always the case. The ABC, for example, rejects the Ombudsman's right to investigate complaints about programs. This issue has yet to be resolved.

The United Kingdom Parliamentary Commissioner summarised his approach to this question in a way that encapsulates the Commonwealth Ombudsman's approach also.<sup>6</sup>

I have been somewhat beset in my first year by questions of jurisdiction  
.... In grappling with them, I have throughout borne in mind that I exist to

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<sup>6</sup> *Report of the United Kingdom Parliamentary Commissioner 1979, p2.*



hear and determine the grievances of the citizen against an administration which may have been careless of that citizen's rights even oppressive — and that I should therefore strive rather to accept for investigation than to reject the apparently honest grievance which is brought to me. I have thus seen it as my duty to press the boundaries of my jurisdiction to the furthest limits which they can lawfully encompass, in favour of the citizen. A grievance investigated is a resentment relieved even if it be dismissed in the end.

## **THE OMBUDSMAN AND MANAGEMENT OF THE PUBLIC SERVICE**

As indicated in the Introduction to this paper, the Ombudsman found its source in the desire to have an office that would oversee the operation of public service agencies. This has been recognised in the power of the Commonwealth Ombudsman to initiate investigations of his own motion (s.5(1)(b)) and to make recommendations in relation to a rule of law, provision of an enactment or practice (s.15(2)(d)). The Commonwealth Ombudsman does not give priority to this wider role, resources being primarily devoted to the resolution of individual complaints. Nonetheless, there has not been sufficient recognition of the impact that the Ombudsman has on general public administration. Nor has there been an appreciation of the value for money the service provided by the Ombudsman gives to improvement in management of agencies. The following are areas in which the value of the Ombudsman as an aid to management can be discerned.

### **Improved decision making**

It is one of the paradoxes of the functioning of the Ombudsman's office that those agencies which cause the most complaints to be brought to the Ombudsman are frequently those with which the best relationships in terms of cooperation and acceptance of recommendations have been established. The Department of Social Security, the Australian Taxation Office and Telecom together generate nearly one third of all the complaints that come to the Commonwealth Ombudsman. The Defence Force comes close behind. With all these agencies, familiarity, rather than breeding contempt, has bred cooperation. The value of the office in providing a second look at decisions has been recognised as worthwhile. So also has its use as an indicator of deficiencies in the decision making process — a matter that is returned to below.

Agencies that prompt few complaints seem more suspicious of the Ombudsman's intervention and are much more defensive of the decisions that they have taken. Two principal reasons seem to explain this. One is that they seldom have an internal review mechanism within the agency; officers are thus unused to anyone challenging a decision once it has been made. No one likes to be reviewed but it is turning against the trend of recent history to decline to justify decisions or to claim that the agency is the repository of all relevant knowledge and that a decision once made should not be reversed. The Ombudsman's intervention frequently brings to light relevant information not previously disclosed to the decision maker. This may be because of a lack of understanding on the part of the member of the public of what is relevant or there may have been a breakdown in communication between the citizen and the agency. In either case, it is unusual for it not to be possible for the agency to reconsider the issue — and most do. Reopening of files is undoubtedly a nuisance but the public sector's success should not be judged

solely on throughput. Most agencies are established to provide a service to the public and measurement of efficiency in the carrying out of that task should encompass making the right decisions.

A second factor inhibiting recognition by some agencies of the value of the Ombudsman in improving decision making stems from a significant conflict in what is regarded as the appropriate approach to public sector decision making. This is likely to be most evident in relation to those agencies which have embraced the concepts of risk management most enthusiastically. The fundamental tenet of the institution or Ombudsman is that government decisions must adhere to due process and must result in individual equity. This view is not necessarily accepted by those who see the perceived good of the community as being determined primarily having regard to economic measures rather than in terms of harm to individuals. This conflict is the area in which the greatest tension between the office of Ombudsman and individual agencies occurs. However, as mentioned previously, the Ombudsman will not expect a standard of performance that is beyond the resources or the capacity of the agency or which is not required for carrying out its designated functions. On the other hand, where there has been a disregard of prescribed processes resulting in damage to a member of the public or a decision has been made that is not in accordance with the law even though it may be convenient for the department, the Ombudsman will not be swayed by arguments of effectiveness and efficiency. Nor will appeals to analogies with the private sector be persuasive in the absence of two significant accountability controls applicable there — responsibility to shareholders and the ease with which employees who make mistakes can be dismissed. (Indeed, the movement towards the creation of monopolistic government business enterprises will see the establishment of bodies that are subject to almost no accountability if the external review bodies such as the Ombudsman are not given jurisdiction over their actions).

### **Supervision of agency performance**

The Scandinavian model of Ombudsman pays much attention to the Ombudsman as a supervisor of public service agencies. The Danish Ombudsman, for example, has just completed a spot inspection of the performance of an agency based on a random selection of files.

Performance audit reaches its height in Sweden where the Ombudsman is empowered to prosecute public servants who are considered to have acted improperly. This role of the Ombudsman is reflected in section 8(10) of the *Ombudsman Act 1976* which empowers the Commonwealth Ombudsman to bring instances of breach of duty or of misconduct to the attention of the principal officer of the agency or the Minister if the person concerned is the principal officer. This formal power has been seldom used but some agencies do recognise the value of Ombudsman's review of decision making as a tool of management. If complaints are being received regularly about a particular office or a particular program there are obviously weaknesses in that area which should be remedied. An individual complaint to the Ombudsman may reveal management problems. For example, a claim by a customer to have received only half the tax stamps that she had bought from a post office prompted an Australia Post investigation following the Ombudsman's inquiries that revealed that "correct accounting procedures were not always followed at the office. ... discrepancies revealed by routine checks of advances were not adjusted, mistakes were made during reconciliations and stock was

not always brought to account when reconciliations were made.”<sup>7</sup> Steps were taken to remedy these deficiencies (and an act of grace payment was made to the complainant).

The value of the Ombudsman as an experienced but independent office capable of assisting the executive while not being part of it is recognised in some Australian States where the Ombudsman is empowered to review matters referred by a Minister. The Victorian Ombudsman, for example, is presently conducting an inquiry into aspects of the prison system following a ministerial reference. I have undertaken a somewhat similar role as Defence Force Ombudsman at the request of the Minister for Defence in relation to particular incidents where the party affected has not been prepared to accept the independence of a departmental or service investigation.

There may be room for greater use of my office to investigate and report on the performance of individual agencies, particularly in regard to the service that they provide to the public. Performance appraisals undertaken by the Auditor-General tend to look more towards the value for money aspects of an agency’s work. However, I encounter agencies where the number and pattern of complaints indicate that, for whatever reason, they are simply not servicing the public adequately. There seems no reason why my office should not have a role in identifying these deficiencies and within the limits of its expertise, suggesting remedies. This should not be seen as an attempt to take over the functions of those bodies concerned with oversight of the public service. It is but a suggestion for recognition of the value of the office as an organisation capable of performing a useful function in the improvement of public administration. Increased resource would, however, be needed if this were to become a regular role for my office.

### **Changes in law, policy or practice**

A significant power of the Ombudsman in the Australian context is the ability to recommend changes in practices, policies or legislation. Injustice revealed by a complaint to the Ombudsman’s office leads frequently to the Ombudsman recommending a change to an agency. Examples of such actions occurring in my office in 1988-89 include the following:

The Australian Trade Commission agreed to make it clear in any new literature it produced on the Export Marketing Development Grants scheme that the local content guidelines applicable under the scheme were quite distinct from the generally applicable Australian legal requirements regarding country of origin labelling for goods marketed in Australia. It also agreed to include in its promotional material a warning that the requirements of the Trade Practices Act must be satisfied before goods could lawfully be designated ‘Australian Made’.

The Superannuation Act is to be amended in relation to the power to issue retrospective (and post mortem) benefit classification certificates in line with my recommendations following a case that revealed the inequity flowing from the present law. (An act of grace payment was also made to the complainant to me whose case revealed the problem.)

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<sup>7</sup> Letter from Australia Post to Commonwealth Ombudsman.

The Department of Immigration, Local Government and Ethnic Affairs agreed to review its procedures for dealing with Australian citizens travelling overseas on foreign passports after I pointed out that its procedure was not in accordance with the law.

Two agencies agreed at my request to reconsider the form and content of certain documents to aid their understanding by those who have to complete them.

The Department of Employment, Education and Training changed its procedures and its standard form capital grant agreement after our investigation of a complaint.

More significantly, repeated complaints or multiplication of instances of inequity can point to a need to amend the law to overcome unexpected consequences. An example of this related to the imposition of income tax on lump sum payments of damages or compensation in lieu of lost salary. As this money was received in a particular tax year it was treated as income in that year and taxed at the appropriate rate. If it had been spread over the years in which it was notionally earned, the rate of taxation was likely to be much lower. Following representations by my office, the Income Tax Assessment Act was amended in 1988 to recognise this inequity and allow the income to be attributed to a number of years.

Most Ombudsmen are anxious to pursue this kind of issue as it is seen as an important part of their function and one that falls within their statutory obligations. Ombudsman's recommendations for changes of this kind are seldom rejected by the agencies concerned. A study undertaken by Professor Larry Hill of implementation of the Hawaiian Ombudsman's general recommendations and the attitude of the Executive to them led to the conclusion that such recommendations were frequently adopted and were viewed favourably by the agencies concerned. Answers to questionnaires revealed the agencies' perceptions to be that monetary and personnel costs of the recommendations were low; they did not significantly increase delay or red tape and they were likely to improve the administrative process. Furthermore, the changes recommended were viewed overwhelmingly as helping to increase administrative justice for citizens and as being desirable when an overall cost-benefit analysis was undertaken. Professor Hill made the point that much of this positive support arose because the changes proposed were achieved after a process of negotiation with the agency rather than being imposed.<sup>8</sup>

A further significant development at the Commonwealth level associated with recognition of the value of the Ombudsman in policy making has been for invitations to be given to the Ombudsman to comment on the policy to be adopted by an agency in relation to its carrying out of its statutory functions. For example, my office prepared a substantial paper on the policy to be applied in the imposition of penalties under income tax legislation — a paper which is set out in the 1987-88 Annual Report. More recently the Australian Tax Office has sought advice on the procedures to be adopted by the Taxation Relief Boards and comments have also been invited on sales tax penalty policy. The Department of Immigration, Local Government and Ethnic Affairs had discussions with my office on aspects of the revised points system for selection of migrants. As the implementation of policy in these areas is likely to result in complaints to the

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<sup>8</sup> Paper presented to the 1983 Annual Meeting of the American Political Science Association.

Ombudsman, there is advantage in seeking my views in advance of the adoption of the policy to avoid subsequent criticism of it.

I am fully aware that, when raising policy issues, it is possible to intrude into the political arena. The practice followed by my office and which I endorse is that where there has been recent consideration of a matter by the Parliament, it would only be in the most unusual circumstance that suggestions would be made that the law should be altered. Likewise, if a matter is one of present political or social controversy that is more appropriately dealt with by parliamentary intervention, the Ombudsman will not express an opinion on the issue. A recent example of this approach concerned the Australian Defence Force's policy that, subject to very limited exceptions, homosexuals should be dismissed from the Defence Force. I raised the question whether this policy accorded with present attitudes of society towards homosexuals and whether there was a justification for discriminating against such persons. The Chief of the Defence Force provided a lengthy statement of the Force's policy and its justification. I made this statement public (with the consent of the CDF) and indicated that I would not pursue the matter further as, if it were to be taken up, it was more appropriate that this be at the parliamentary/political level.

When indicating that the Ombudsman plays a part in the policy process, I am not suggesting that he is, or should be, a pivotal player. One leading United States commentator, Walter Gelhorn, has said:<sup>9</sup>

Administrative critics do not produce good government. They cannot themselves create sound social policies. They have no capacity to organise a competent civil service. They are at their best when calling attention to infrequent departures from norms already set by law or custom, at their weakest when seeking to choose among competing goals or to become general directors of governmental activity .. No ombudsman can renovate a decayed government or promulgate sound public policies or fill the gaps of a deficient civil service. He can tidy up a well-built house, but he cannot himself build one.

Nonetheless, as Donald Rowatt has responded,<sup>10</sup> 'It may be true .... that the office is not very well equipped for hunting lions. But it can certainly swot a lot of flies'.

The foregoing indicates that the Ombudsman has a role that extends beyond the receipt and resolution of complaints by citizens affected by government decisions. The Ombudsman is in a unique position to identify weaknesses in agencies' performance. The office is also singularly well placed to see where practices, policies and laws work injustice and to make suggestions for change.

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<sup>9</sup> Walter Glehorn: *When Americans Complain: Governmental Grievance Procedures (1966)*, pp53-54, 132.

<sup>10</sup> Donald C Rowatt: *The Ombudsman plan: Essays on the Worldwide Spread of an Idea*, p138.

## THE OMBUDSMAN AND THE PARLIAMENT

Many of the issues raised in this paper, particularly in the last part, should also be of concern to the Parliament. The Swedish parliament recognised this nearly 200 years ago and set up the Ombudsman to supply the information that would provide it with the raw material necessary for it to carry out its function of overseeing the executive. What has inevitably happened has been that the Ombudsman's office has assumed a life of its own and proceeds to perform part of the task of the Parliament in overseeing the executive — but in its own name and of its own initiative.

There does not seem to me to be anything wrong with this. The Ombudsman complements the work of the Parliament and enables parliamentarians to devote more attention to matters that have a high political policy content which, as I have said above, are unsuitable for the Ombudsman to pursue beyond the fact finding stage. Many Members of Parliament refer matters to the Ombudsman recognising that he may provide a more effective avenue of review for a constituent than can the Member pursuing traditional ministerial responsibility lines. In such cases, the Ombudsman deals with the Member of Parliament who is still able to communicate with and advise his or her constituent. The Member thus does not lose that politically important contact with the person whom he or she is chosen to represent. On occasions a matter referred to the Ombudsman by a Member of Parliament may raise political issues. In such a case, I will take the matter as far as I think appropriate but then leave it for the Member to pursue any changes in law or government policy. This occurred this year in relation to complaints about the Household Expenditure Survey. While most of my concerns were dealt with by the Australian Bureau of Statistics, a recommendation for amendment of the relevant legislation was rejected. I considered this was a matter that was ultimately the responsibility of the Parliament. I therefore did not pursue the rejection of my recommendation through the formal reporting mechanisms as the Parliament was aware both of my recommendation and its rejection and could intervene if it thought it appropriate to do so.

Two matters relating to the relationship between the Ombudsman and the Parliament warrant further consideration. The first is the extent to which Parliament, in carrying out its function of oversight of the executive, should draw on the Ombudsman for assistance. The second concerns the formal relationship that should exist between the Parliament and the Ombudsman.

On the first, I observe a recent increase in the interest of some Members of Parliament in the activities of the executive and the management of agencies. The Parliamentary Joint Committee of Public Accounts has clearly signalled an intention to be more active in its investigations. To assist it in this endeavour, it has made proposals to extend the role of the Auditor-General.<sup>11</sup> The Senate Estimates Committees also appear to have become more ready to question government officials on the administration of agencies. This interest is usually in issues of a general nature. The Ombudsman's investigation of individual grievances does not impact directly on the activities of the committees except

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<sup>11</sup> See Report No 296 *The Auditor-General: Ally of the People and the Parliament* (1989) and the response of the Auditor-General, 7 September 1989.

by diverting constituency matters away from the members. There is every reason for the Ombudsman to proceed as he is doing in this area without disturbing the Parliament.

However, parliamentarians interested in agency activity do not seem to have recognised the possibility of using the Ombudsman's office as a resource that might indicate deficiencies in particular agencies. The value of the office should not be overstated as resource constraints limit the extent to which it is presently able to pursue general issues as distinct from individual complaints. But it does have an awareness of deficiencies in level of performance by some agencies and it may be able to assist the Parliament in this respect. It would, however, need to be recognised that the provision of such assistance is itself consumptive of resource.

The second matter mentioned — the relationship between the Ombudsman and the Parliament — is related to the first. In many countries the Ombudsman is an officer of the Parliament. In those and in others, there is a committee of the Parliament that is concerned solely with the Ombudsman, particular regard being paid to the functioning of the office and the implementation of the Ombudsman's recommendations.

The Senate Legal and Constitutional Affairs Committee has agreed to conduct a hearing on the Ombudsman's Annual Report and to consider any Special Reports made to the Parliament pursuant to s.17 of the Ombudsman Act. The Committee conducted such a hearing and reported on my 1987-88 Annual Report. This is a welcome display of interest in the work of my office but it only goes a certain way. It deals with the general functioning of the office but the Committee does not either interest itself in my recommendations or use me as a resource. Part of the reason for this is that the nature of the Committee's inquiries tend not to be involved with topics on which I can provide assistance.

Where I do have information or views pertinent to a matter under consideration by a parliamentary committee, I furnish a submission to that committee. For example, submissions on the operation of the *Freedom of Information Act 1982* were made to the Legal and Constitutional Affairs Committee. I am expecting to make a submission shortly to the Select Committee established to review the new Migration Regulations.

The question arises whether this ad hoc arrangement of an office outside the Parliament performing functions that are akin to one aspect of the work of the Parliament and providing information to it as and when requested is the best available?

I attach as an Appendix a copy of a brief report from the New Zealand Chief Ombudsman to the 10th Conference of Australasian and Pacific Ombudsmen setting out some recent developments in that country. It will be seen that steps have been taken to ensure that the Ombudsman and the Auditor-General are truly officers of the Parliament with guaranteed independence from the executive in appointment, removal and funding.

Is this the direction in which the Commonwealth Ombudsman should proceed? There has been no question to date of the apolitical nature of appointees to the office of Commonwealth Ombudsman. Nor has there been any question of their removal from office — up till now! I have not been subjected to any pressure from any quarter in relation to decisions I have taken and I am not aware of any attempt to influence my predecessors. There would therefore appear to be no reason in practice to change the

present appointment and dismissal position<sup>12</sup> to increase the independence of the office. There would, however, be a greater appearance of independence and a clear alignment of the Ombudsman with the Parliament if that body were to make or recommend the appointment also.

The determining factor from the Ombudsman's viewpoint turns on the allocation of resource. I and my predecessors have protested the inadequacy of resource which at present is derived through the Department of the Prime Minister and Cabinet. The Ombudsman's office has not been more affected than other agencies in the recent programs of redirection of resources. This is not to say that it will not be affected in the future by a government bent upon curtailing the powers of the office. It would seem wiser therefore for the guaranteed independence of the Commonwealth Ombudsman for him to become an officer of the Parliament. However, such a step should only be taken if there were a clear indication from the Parliament that it acknowledged that the Ombudsman should be its officer as has been done in Sweden and other countries, including now New Zealand. Such an acknowledgment involves a commitment to funding the office at a level that will allow it to perform its functions fully and quarantining that resource from depredations for other parliamentary functions. So far at the Commonwealth level there is no indication that the Parliament regards the office of Ombudsman as of such significance that it would be prepared to give such an undertaking. The issue nonetheless warrants further exploration.

## CONCLUSION

The operation of the office of Ombudsman in relation to its primary function of complaint resolution has been eloquently summarised by Professor Gerald Caiden in the following terms, describing it as a 'democratic vision':<sup>13</sup>

The ombudsman office is a unique mechanism of democratic control over bureaucracy .... Its operations embody the concept of free choice and other democratic values. The public can take their grievances elsewhere; they are not compelled to go to the ombudsman. They do so presumably because they expect it to satisfy them. The ombudsman office can choose to align itself with the administration or the public; it is not compelled to take either side. It is independent of both, acting as an impartial intermediary even if both administration and public misunderstand its position. The administration can choose to aid or to stall investigations. With some exceptions and reservations, it usually cooperates. Public agencies are saved public embarrassment and can correct their own mistakes. Finally, the government and the administration can accept or reject the ombudsman's recommendations. A high proportion is accepted and quickly implemented because the proposals are based on concrete instances of malpractice, they emanate from a friendly critic experienced in the ways of public administration,

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<sup>12</sup> Appointment is by the Governor-General on the recommendation of the government. Dismissal is by the Governor-General for cause following an address from each House of the Parliament.

<sup>13</sup> *International Handbook of the Ombudsman: Evolution and Present Function*, ed Gerald Caiden (1983), p7.



and they have probably been worked out with the guilty party. If not, the ombudsman and administration negotiate further, and if that fails, they agree to disagree. All the participants try to reach unanimous agreement or at least acceptable compromise without resort to threats and power plays. They learn to appreciate each other's point of view and to confess error without losing self-respect.

The Commonwealth Ombudsman deals with a remarkably large number of complaints quickly and competently. A result favourable to a complainant is achieved in a proportion of cases that is comparable with, and in many cases higher than, other Ombudsmen's offices. The propriety of agency decisions is confirmed in over 50 per cent of the cases investigated by the Ombudsman. The Ombudsman's methods assure that it is by far the cheapest form of external review and it is certainly the least traumatic for citizen and decision-maker alike.

In this paper I have tried to indicate that it is possible to see a wider role for the Ombudsman in public service management and as an aid to the Parliament. In times of financial constraints, it seems wise to make use of existing mechanisms to achieve a desired goal, particularly where the mechanisms have proved to be efficient and effective. The Ombudsman's office provides an accountability mechanism that is not limited to compliance with procedures but looks to performance and results in a manner appropriate to a results-oriented management approach.<sup>14</sup> The performance and results examined are concerned not only with justice for the individual but also with the practices and policies of the decision-making agency and the law which it is applying. It is timely to consider ways of maximising the service provided by the Ombudsman. A possible approach to this may be for the Ombudsman to become more closely associated with the Parliament.

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Cf David Shand, *Canberra Times* 25 July 1989, p9.

## DISCUSSION

**Questioner** – My question concerns the number of complaints mentioned, roughly 23,000 of which about 12,000 are genuine complaints or ones that you deal with. I am just wondering what is the proportion of complaints you might get from capital cities, in particular from Canberra, as opposed to from rural areas within Australia.

**Professor Pearce** – I can not give you a hard figure Dan, we do not divide the states in that sort of way. We have got in place the 008 facility into each of our interstate offices to try to make it easier for people outside of the metropolitan area to get in touch with an office. I should have said that there is an office of the Commonwealth Ombudsman in each state capital, except in the Northern Territory and in Tasmania, where the State Ombudsman looks after the Commonwealth matters as well as State matters.

My impression would be that the metropolitan areas are better served, that they are more aware of the existence of the Ombudsman than the rural areas. Part of the reason for that is again an issue that flows from the amount of money that we have got. The State Ombudsmen regularly make visits to the major country centres. It is just simply part and parcel of the way in which they do their business. We used to do that but it has been cut out as an economy measure. There would be, I would have thought, an advantage in us being able to go to the major country centres. I would have thought that is a service that we ought to really be providing but it just simply isn't practicable in the present context and we try to make do with the 008 facility as an alternative.

The State ombudsman, when they are in particular towns, do pick up information on Commonwealth complaints and pass them on to us, so that we pick up someone on an agency basis or a State basis. In the main, there doesn't seem to be a wide ranging knowledge of the Ombudsman in our community.

Despite the very large number of complaints that we receive, I usually find that if you go and ask someone about the Ombudsman office, as I do with taxi drivers and people like that whenever I get the chance, they usually don't know terribly much about the office, if they know of its existence at all. One of the difficulties of course is its curious name. We do from time to time get inquiries about bus timetables and

people addressing us as the “omnibus man”. I got a nice one the other day that referred to me as the “ombudda”!, a role that I would quite like if I got fatter!

Oddly enough we have had a declining number from Canberra. Maybe the job is being better done, it predated self-government I might say, so it isn't because of that body that we are getting less complaints. I can't quite understand why but there has been a slow downturn over the last couple of years in the number from Canberra. But, viewed on a per head of population basis, we get very much more proportionately from Canberra people than we do from the other states. Part of the reason for that is that the State ombudsmen do a lot of the functions there that relate to local government and state matters, that we get as ACT Ombudsman. It is very difficult to make the comparison, other than to note that it's, going down and I don't really know why that is.

**Question** – I was just wondering as what you see as being the advantages of the Ombudsman being tied more to the Parliament?

**Professor Pearce** – I suppose they are really two fold. One is the appearance of independence and that is important. Not many people fully appreciate the fact that we are not another government department. You do get letters addressed to you that simply refer to you as “the department”. It's a notion that is hard to get across, as it were divide that grand thing called ‘the government’ or ‘the bureaucracy’ into compartments and here is another little corner over here with this funny label attached to it that stands out and is independent of the rest of the bureaucracy.

That is an advantage both in appearance or form and of course in reality. If it does become a Parliamentary appointment, if there is a tendency, if there is a possibility of appointing a person that is ill qualified for the job, who is either going to be a tame cat, and an Ombudsman can't afford to fall into that category or to be thus pilloried, or to be a time serving ex-politician — or something like that who is getting his reward for long and faithful service. It is desirable to have the publicity that is associated with and the dual party support that is going to be essential to a parliamentary appointment. So I think that that is one aspect, that notion of both appearance of independence and actuality of independence.

The other one is the resource Question. I am glad Harry mentioned it because I had some reluctance to do so. The Question arises whether the Ombudsman should join an organisation which itself is having to fight tooth and nail to get adequate resource. It is an issue one would have to address before having to go down that pathway.

Most overseas Ombudsmen have a parliamentary committee that is concerned with the affairs of the Ombudsman. It not only deals with the annual report but picks up other issues that from time to time basis where the Ombudsman either wants to raise them or the committee has become interested in the topic. To some extent that function is being met by the senate Legal and constitutional Affairs Committee. That body does now conduct a hearing and makes a report on my annual report and it, as it were, stands ready to have things referred to if there is need to do so. From that aspect the Commonwealth is providing the requisite support that the Ombudsman should have.

The other two matter really are the significant issues, the independence Question and resources not coming from the sector that is being examined. There must always be a

temptation for the Executive if it is being plagued to death by the Ombudsman, not to abolish the Office but to trim the resource to the point where the Office ceases to be effective as it might be. That is less likely to happen if your funding is coming through the Parliamentary vote.

**Questioner** – We all know how difficult it is to amend the Constitution in Australia, but it seems to me that possibly the ultimate way a long way down the track of securing the position of Ombudsman and his financing would be an amendment of the constitution, perhaps in the next century when the climate in regard to constitutional changes has undergone a transformation.

Would Professor Pearce know whether in Sweden for example, or Denmark, the office is entrenched in their constitutions? It seems to me that it would be interesting to know this.

**Professor Pearce** – What a splendid fellow you are. There is no doubt that to secure independence, the solution would be to do that, but look at the Interstate Commission.

You are not guaranteed thereafter where you are going to get your funding from provided that you are not a Constitutional office.

The precise Question you asked, yes the Swedish Ombudsman is enshrined in their Constitution. I do not think the Dane is, but I am not sure about that. The country that is most akin to us where the Ombudsman is indeed enshrined is Papua New Guinea. There the Ombudsman is given quite elaborate functions in relation to the enforcement of their leadership code, as well as the ordinary functions that I have outlined today. There is a tendency, as there often is, in the developing countries to enshrine the Ombudsman in the constitution but not so much in the developed countries.

## **APPENDIX**

### **10TH CONFERENCE OF AUSTRALASIAN AND PACIFIC OMBUDSMEN**

#### **Recent Developments in New Zealand relating to the Independence of Ombudsmen as Officers of Parliament**

1. At the request of the House of Representatives, an inquiry took place by a Select committee into the need for independence of the Officers of Parliament (Ombudsmen and Controller and Auditor-General). On reporting back, the House approved (among other things) the following recommendations:

#### **RECOMMENDATIONS**

##### **Creation of an Officer of Parliament**

1. An Officer of Parliament must only be created to provide a check on the arbitrary use of power by the Executive.
2. An Officer of Parliament must only be discharging functions which the House of Representatives itself, if it so wished, might carry out.
3. Parliament should consider creating an Officer of Parliament only rarely.
4. That Parliament review from time to time the appropriateness of each Officer of Parliament's status as an Officer of Parliament.
5. That each Officer of Parliament should be created in separate legislation principally devoted to the Office.

##### **Funding**

6. That Officers of Parliament be funded by an individual Annual Vote and be subject to Parliamentary approval by the Estimates process.

##### **Accountability**

7. That there be established a Parliamentary Officers Select Committee chaired by the Speaker and comprising three members from each side of the House, none of the Government members to be drawn from the Executive.

8. That the Parliamentary Officers Committee recommend the appointment of an Officer of parliament to the House, and appointment be made by the Governor-General on the recommendation of the House of Representatives.
  9. The Cabinet adopt an instruction requiring consultation with the Parliamentary Officers Committee before it will approve the drafting of legislation that includes the creation of an Officer of Parliament.
  10. That the Parliamentary Officers Committee have the roles of both requiring accountability for the performance of the Parliamentary Officers as well as scrutiny of the effectiveness of the way they discharge their functions. To carry out these roles the Committee should have the power to call for independent advice and expertise and be able to call for submissions from the public.
  11. That the Parliamentary Officers Committee should have allocated to it by the Finance and Expenditure Committee the Annual Votes of the Officers of parliament for examination as part of the Estimates procedure, and the Committee should also have the power to engage an independent auditor to audit the annual accounts of the Parliamentary Officers.
  12. That all reports of Parliamentary Officers to the House be referred to the Parliamentary Officers Committee for report back to the House as it thinks fit.
  13. That the Parliamentary Officer Committee should have the power to refer reports and other matters pertaining to Parliament Officers to relevant subject select committees.
  14. That the Parliamentary officers Committee develop a Code of Practice applicable to all Officers of Parliament.
2. The whole thrust of the inquiry was to eliminate any vestiges of participation by Executive Government in the process of appointment of Ombudsmen, their remuneration, their funding, their conditions of service, and their right to administer their budget and resources without controls. While a number of consequential amendments to the Ombudsmen Act are in the process of completion, the following amendment has been made to the Public Finance Act to provide for Parliamentary approval of funding:
- (1) Prior to the commencement of any financial year, the Chief Executive of each Office of Parliament shall prepare and submit to the House of Representatives —
    - (a) An estimate of the revenue and expenditure of the Office for the year; and

- (b) Estimated statements of financial position at the beginning and end of the financial year; and
  - (c) A description of the classes of outputs to be produced by the Office during the financial year.
- (2) The House of Representatives, after considering the information provided pursuant to subsection (1) of this section, shall for each Office commend to the Governor-General, by way of an address, an estimate of expenditure for classes of outputs and an estimate of the capital contribution to be made, and request that these estimates be included as a Vote in an Appropriation Bill for that year.
- (3) Notwithstanding section 2 of this Act, there may be a Vote which is the responsibility of the Speaker and is administered by an Office of Parliament. Where such a Vote is included in an Appropriation Bill the provisions of this Par shall apply:

Provided that —

- (a) Where there is a reference to a department it shall, where the context requires, also refer to the Offices of parliament; and
  - (b) the provision of section 13 of this Act shall operate on the basis of an agreement between the Minister and the Speaker.
- (4) Notwithstanding subsection (3) of this section, the estimates need not contain the information specified in section 8(2)(g) and (i) of this Act for Votes administered by Offices of Parliament.
- (5) Any alteration to a Vote administered by an Office of Parliament during the financial year shall be subject to the provisions of this section.

In addition to the above provisions, the amendment also provided for the Ombudsman to have a bank account in a local bank through which payments would be made, and into which Vote money would be deposited. Surplus money unused at the end of the year may be carried over.

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John F Robertson CBE  
Chief Ombudsman  
New Zealand  
27 July 1989