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March 1990

Unchaining the Watch-Dogs

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This issue of *Papers on Parliament* brings together in published form three lectures given during the period from August 1989 to March 1990 in the Senate Department's *Occasional Lecture* series.

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*The views expressed in this paper are mine, and do not necessarily represent the views of the Administrative Review Council or any other members of it.

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FOREWORD

The papers in this issue were presented at three seminars conducted as part of the Senate Department's series of seminars on parliamentary matters. They were presented by the Auditor-General, the Ombudsman and the President of the Administrative Review Council, and relate to the work of those officers.

Their relevance to Parliament is clear. The Auditor-General, whose office has existed since 1901, and the Ombudsman are appointed under statute to perform tasks which, on an idealistic view, Parliament itself should perform, but which, on any practical view, Parliament cannot effectively perform, namely the scrutiny of the public accounts and the financial effectiveness of government, and of the fairness of government decisions in respect of individuals. In performing those tasks they are regarded as agents and auxiliaries of the two Houses. The President of the Administrative Review Council presides over a body which supervises the workings of the administrative review system established in 1975 to provide for the review of government decisions, a task of great parliamentary significance, and one to which Parliament has devoted a good deal of attention, as vitally affecting the relationship between government and the governed.

The observations of these officers are of great interest in assessing the soundness of the system of government and also in assessing how well Parliament does its work.

Harry Evans
Clerk of the Senate

Welcome & Opening Remarks:

Harry Evans, Clerk of the Senate:

The seekers of knowledge and wisdom are always in a minority, as you can see. I think the air strike might have cut into our numbers a little bit.

In this series of Senate Seminars, we are going to look beyond the Parliament and look at that category of people who might be called the independent servants of the public interest, or as we have called them in the advertisements for this series, 'the statutory watchdogs'.

Parliament as you know is supposed to be the grand inquest of the nation and the guardian of the public interest, but it has long admitted that in fact it is not capable of itself performing that task to the extent that it should be performed. Parliament has long resorted to the device of appointing statutory office holders and statutory bodies to assist it in that task, and one of the statutory offices that has long been regarded as an indispensable aid to accountability, an indispensable aid to Parliament in performing that function, is an Auditor-General. As you probably know, the Audit Act is almost as old as the Parliament itself, and was one of the first Acts passed, Act No. 4 of 1901 in fact. So Auditors-General have been with us for a long time indeed.

In talking about these statutory watchdogs, the key concept and the key word which keeps turning up is independence. It has always made me somewhat nervous to see the Auditor-General, for example, listed in the Commonwealth directory under the Department of Prime Minister and Cabinet, on about the tenth page of entries under that Department. I expect that in this series the concept of independence and the relationship with Parliament will bulk rather large.

Today we are very honoured to have with us the Auditor-General, John Taylor. It is very fitting that we commence with the Auditor-General, as I have said, because of the antiquity of the office. John Taylor is a Bachelor of Commerce of the University of Melbourne and the ANU and amongst other posts has been Consul-General in New York very recently, has served in the Prime Minister's Department, was a Commissioner of the old Public Service Board, and has been the Secretary to a Commonwealth Department, the Department of Aboriginal Affairs. We are extremely honoured to have him here today to talk to us about his role as Auditor-General and I will now ask him to address us.

The Auditor-General: Ally of the People, The parliament and the Executive

Mr John Taylor

Thanks very much. My motto has long been 'Have independent pen will travel' and therefore I do not have any particular worries about having been in the Prime Minister's Department. Some people seem to think that the Prime Minister's is the source of a lot of people round the bureaucracy. That may not be a good thing — I think it is a good thing. But then I am able to say that. The New Yorkers told me the first time I got up to address them that there are no souls saved after 20 minutes. I have at least 65 minutes of speech here.

INTRODUCTION

Note the addition to the title of JCPA Report No. 296 in the heading of this address. I have added the Executive. It symbolises our approach to our job. We believe we have something good for all three parties mentioned but recognise there may be doubt in some minds!

The tabling of the 296th Report of the Joint Parliamentary Committee of Public Accounts on its inquiry into the Australian Audit Office (AAO) is timely. It provides us all with the opportunity to review, on the basis of a unanimous bipartisan view from that important committee, what we want from governments and their servants (now and in the future) by way of accountability. The 78 recommendations made by the Committee comprehensively address the central issues of audit mandate, independence and the Auditor-General's relation to the Parliament.

THE ORIGINS OF THE AUDITOR-GENERAL'S RELATIONS WITH THE PARLIAMENT

Disclosure and accountability to the Parliament are the cornerstone of the Westminster system. They bring an added discipline to the management processes of executive government.

The Auditor-General, independent of both the executive government and the Parliament, is an essential part of the Westminster system of public accountability. The holder of that Office has the statutory responsibility to report to the Parliament on the integrity, economy and efficiency of the financial operations of executive government. This responsibility supports the Parliament's role as representative of the people and as the forum within and from which the concepts of public interest and of public scrutiny are turned into effective action.

The Auditor-General's accountability role has existed since Federation when the Audit Act was passed in 1901. The legislation was given high priority and it was the fourth Act to be passed by the first Federal Parliament.

Since then the Australian Audit Office, as it became known in 1984, has played a politically neutral and important role as one of the factors intended to ensure that the Commonwealth sector is running as it should. The role was strengthened in 1979 with the introduction to the Audit Act of specific powers to undertake efficiency audits.

With nearly 90 years experience, the Audit Office has developed enormous expertise in public sector auditing. It has also developed and sustained over a long period its reputation for integrity, a key factor in maintaining community confidence in the system of Government.

The consideration given to reports of the Auditor-General by the committees of the Parliament is an important mechanism for reviewing the proper exercise of powers and the effective, efficient and economical use of public resources by Ministers and relevant officers (although, really, however central and important, but one of the sources of information, analysis and review available to the committees). This mechanism is also a way of reviewing our work, as what we have to say is by no means accepted without question by either members of the Committees or others involved.

THE TASK AND THE NEED FOR REVIEW

The AAO has around 350 clients, including Australian Government Departments, statutory authorities, government owned or controlled companies and departmental commercial undertakings.

These clients employ more than half a million people and have a combined revenue and expenditure in excess of \$230 billion annually.

Considering the AAO's comprehensive audit mandate, which includes both financial statement and performance auditing responsibilities, it is a complicated task which each year grows bigger. Rapid technological developments, stricter accounting standards and reporting requirements, changes in bureaucratic procedures and an increase in legislative requirements have added to the complexity. The changes in Government policies relating to the introduction of departmental financial statements, government business enterprises and a more commercial and competitive environment have had a particularly dramatic impact on the environment facing the AAO.

Resources clearly are a problem. We have had increases to deal with additional financial statement work and a significant addition for our information technology project. I have not worried the Government about the need to increase our effort on the efficiency audit side pending our own attempts to increase further our productivity and pending the JCPA Report. I am now convinced that the resource mandate for the AAO to carry out mandatory financial statement audits and the necessary technological developments is barely adequate and is insufficient to perform an effective performance audit coverage. Opportunities elsewhere made irresistible by higher remuneration and better conditions result in a heavy and continuing loss of experienced staff and leave us managing an

overall resource shortage which limits the AAO's effectiveness. This is an aspect not lost on the remaining core of highly competent and loyal staff.

The problem did not, however, emerge overnight. In a report tabled in the Parliament in October 1984 the then Auditor-General, Mr Keith Brigden, stated:

It is timely to question whether the independence of the Auditor-General and the Australian Audit Office from the executive arm of government is not more apparent than real.

This comment was a response to decisions lowering the approved staff ceiling of the Office and rejecting proposals (he assumed on the recommendations of co-ordinating agencies) for upgrading the top structure of the Office to reflect the heightened responsibilities of senior management.

My immediate predecessor, Mr J.V. Monaghan, raised similar concerns in the Annual Reports of the AAO for 1984/85, 1985/86 and 1986/87. Of particular note was his comment in the 1986/87 report in reference to the performance auditing function:

There is, accordingly, a continuing concern lest resource constraints imposed by government through the agency of the Department of Finance jeopardise the continued development of this important element of the public sector audit function.

and in addressing the problems of senior structure and staff remuneration:

The AAO here appears in the same case as some public enterprises, competing to employ staff in a sellers' market with, as it were, a hole in our purse. It is critical for us to find a way of stopping the haemorrhage.

In an environment where resourcing arrangements were seen by him as prejudicing the AAO's independence and without sight of support from the executive, Mr Monaghan retired from the position of Auditor-General and the JCPA took up the task of looking into the AAO. We now have that Committee's report — *The Auditor-General: Ally of the people and the Parliament* — and await the Government's consideration of it.

REPORT 296 AND RELATIONS WITH PARLIAMENT

The Joint Committee of Public Accounts Report 296 recommends the strengthening of the link between the Parliament and the Auditor-General by creating a parliamentary audit committee to advise me on Parliament's audit priorities and the Parliament on the necessary finances for the running of the Audit Office. The Committee also recommended that future audit legislation state unequivocally that the Auditor-General is an officer of the Parliament, in order to emphasise the importance of the relationship with the Parliament.

In making the recommendation for the creation of a Parliamentary audit committee, the Public Accounts Committee was very quick to recognise that the question of

independence was crucial to the effectiveness of the audit function. The relationship between resources and independence is a question to which other countries have devoted a deal of care in ensuring that the Auditor-General has the finances necessary to effectively carry out the audit mandate. For those who are interested, I have attached to this paper details of the practices followed in the UK, Canada and New Zealand .

I want to make it clear that I am certainly not of the view that the Auditor-General can only be independent if he or she has a blank cheque. What is needed is for audit resources to be determined in a more open arena than at present and with some appearance and reality of a more arm's length relationship with the Executive—which, however, has to continue to be comfortable with the result.

As I indicated previously, in Australia the Department of Finance advises the Minister for Finance on the Australian Audit Office's proposed budget. That is its job and that would continue. While there is a realisation that Finance should recognise the special position of the Auditor-General, the Department of Finance is essentially an arm of executive government (however professional it might be in its approach) and an auditee of the AAO. The involvement in the determination of annual budgets by a Parliamentary audit committee would however, bring Australia into line with other countries (such as Canada and the United Kingdom) who have realised:

- conflict can arise (or appear to arise) when an arm of the executive is involved in the question of audit resources; and
- the importance to effective accountability of maintaining the Auditor-General's independent position.

In similar countries overseas, there seems to be an agreement between the Executive and the Parliament as to the amount of resources appropriate to audit function through appropriate mechanisms as the budget is developed. Reasonable men should be able to come to a similar accommodation here.

The Parliament is the Auditor-General's ultimate (some would say only) client. It would not be true to believe, therefore, that the AAO owes the executive government and auditees nothing. As I have said elsewhere, it owes them sound and efficient auditing services, competitive and expert, commercial in attitude, responsible, sensitive, helpful and professional in approach. Indeed, so highly do I place this relationship with the Executive that I have instilled in officers of the AAO that while there can (and should) be no doubt that Parliament is our ultimate and undisputed client, each auditee should be treated in fact as our immediate client with whom we want a good relationship in which we are seen to add value to their operations and reassurance to their managements.

ACCOUNTABILITY AND MANDATE

The Auditor-General's independence and relation to the Parliament are simple and effective concepts which have withstood the test of time, almost unscathed, over the years since the Audit Act was passed in 1901. This is despite—or perhaps because of—the evolution of the public sector that is now evidenced by the complex and diverse activities of government departments and business enterprises as they are today. Audit

techniques and interests have also changed and developed, but the accountability role is now perhaps even more important and valid than it was in 1901.

The Australian people are more aware of and sensitive to the influence of economic management, including management of public-sector expenditure, on their day-to-day lives. They place greater demands on the Parliament, public-sector managers and the Auditor-General to provide accountability of government activity. Recent events in some State administrations underline this and the dangers of too freewheeling an approach to the public purse.

Significant change in recent times has been the devolution of public-sector management, sometimes called 'letting the managers manage'. This is a confusing area, seemingly fraught with subjective judgments about what is risky and what is not, and where even some pundits seem to believe the law might be ignored in the interests of the result.

Our position is clear. Where the cost of a control is higher than the loss likely in the absence of that control, it does not make sense to apply it. But you have to watch the evolving situation to test whether removing the control does not cause an unexpected increase in loss. Results are what we are most interested in, but we cannot ignore inputs. Sensible judgments on the facts are the important thing—not slavish following of the rules. But rules and laws should be changed rather than flouted if they do not make sense. In this environment mistakes will occur and are not necessarily a hanging offence. Not correcting one's mistakes may be. Proper risk management is based on an assessment of risk and regular review of what is actually happening—it is not just having a go!

In the environment of heightened public awareness and devolution (and events elsewhere), it is somewhat surprising that the Auditor-General's accountability link with the Parliament is under strain and has in some cases been broken. With the corporatisation of government activities and business enterprises has come the concept of choice of auditor. The board of some government business enterprises (GBEs) can now appoint a private-sector auditor who reports to the board and the relevant Minister but not to the Parliament.

Parliament's assurance on the operations and results of GBEs would be limited to the short audit report on GBEs' financial statements published with annual reports. Private auditors would not have a mandate to report directly to the Parliament, report in detail on the operation, of GBEs or conduct efficiency audits (there are constraints on my ability to do so as well—both because of resource constraints but also because of a need to receive Ministerial approval before an efficiency audit can be undertaken within a Commonwealth owned or controlled company). The work of Parliament's Committees cannot be supported properly by an auditor whose responsibility is not to them (which is not, of course, a criticism of private auditors but rather a reflection of their proper role). The AAO (rather than the private sector) has these responsibilities.

The reform package for the Transport and Communications portfolio, other changes, and earlier decisions in the auditing arrangements for statutory marketing authorities (SMAs) have affected the mandate of the AAO. In the case of the SMAs, private auditors can be obtained, although the AAO continues to have a detached supervisory role. This is 'ineffectual responsibility'. To have two independent agencies with audit responsibilities

for the same body, particularly when the agencies have differing remits, is not a recipe to commend. There have also been other changes with the hiving-off of defence factories into a company structure such as Australian Defence Industries where we have been subject to very unfair and inaccurate criticism.

It seems that in some cases choice of auditor has been accompanied by a certain amount of special pleading—including suggestions that we lack commerciality and are nitpicking. There is little doubt that these suggestions ignore the fact that (like many of our immediate clients) the AAO has developed in reaction to the changed environment.

A criticism sometimes made is that the AAO lacks the full range of non-audit services offered by private auditing firms. This suggestion alarmed the JCPA which perceived a possibility for conflicts of interest and threats to the independence of the audit role. The JCPA dealt with this concern in the context of the public sector audit process by recommending that, as a condition of the award of a contract by the AAO to a private firm, the firm not offer any other service to the auditee during the life of the audit contract. I would not go so far. The Committee also recommended the AAO not develop specialties in non-audit services.

Despite excellent access and very fair hearings, I remain concerned about the degree of support I have for the proposition that the AAO should remain effectively and by right in the accountability chain for GBEs (though there has been some success in practice in keeping business and a growing recognition in many quarters of the good sense of the view). In the past there seems to have been a presumption that audit is just another service like tax advising or payroll preparation by a sub-contractor which should be bought by a commercially-oriented government organisation on price and on other services provided, with little weight placed on the peculiar circumstances of GBEs or on the role of the public's auditor in protecting and informing the ultimate shareholder (as well as the Executive). I imagine that this reflected a wish to have the CBEs as commercially oriented as possible (which I support), despite the reality that they must make sure that their actions reflect Government policy. I very much hope the compromise reflected in the JCPA approach (and, indeed, my additional compromise) will be found acceptable.

The private profession recognises the difference in relation to government organisations. A recent joint submission by the Australian Society of Accountants and Institute of Chartered Accountants to the Senate Standing Committee on Finance and Public Administration stated:

It is suggested that the accountability requirements must be even more stringent in the case of government companies having regard to their additional responsibility to the public in general.

The bottom line for me is that, without confirmation of a continuing and effective accountability role for the Auditor-General where all government activities are concerned, the long-term effectiveness of the Westminster system of accountability is in doubt.

The Joint Committee of Public Accounts clearly recognised this danger and Report 296 contained two important proposals to arrest the erosion of accountability. Firstly, it

recommended new audit legislation which would affirm that the Auditor-General is the external auditor of all Commonwealth Government bodies and organisations in which the Commonwealth has a controlling interest. This would set the mandate. But in order that the Audit Office provides the sort of service that I believe is required, it is necessary also to bring into play a second recommendation for the new legislation which would define the Auditor-Generals authority to settle the terms and conditions of employment of AAO staff. (This could not, of course, mean giving me a blank cheque.) This is consistent with the reform process in which we seek to play a positive part.

In supporting the Committee's recommendations, I am aware that there is room for private-sector auditors in assisting with the public-sector audit function. The Committee also recommended that there was value to be had from improving the AAO's relationship with the private sector. In particular, their report recommended that I

- have some discretion to contract private-sector auditors to undertake audits on my behalf, and
- appoint an advisory committee on audit practices and standards. This committee, made up of private-sector representatives, would provide technical advice to the AAO to ensure the Office's practices and standards were formed with knowledge of private-sector practices, without necessarily adopting those.

I have already acted on both of these recommendations and the other recommendations made by the Committee in regard to the AAO's relations with the private sector.

A portion of audit work has been contracted-out to compensate for the tight resource situation the AAO finds itself in. I hope that the contracting may also allow us to redirect some of our limited resource capacity towards performance audits. In the past performance audits have proved to be of great interest to Parliament and its committees because of the substantial benefits they can offer in meeting our common objective (which we share with the Executive) of improving the effectiveness and efficiency of public-sector administration.

It is relevant to point out that the sub-contracting of our audit work does not necessarily adversely affect public accountability concepts, as the Auditor-General's relationship with Parliament is still maintained.

PERFORMANCE AUDITS

Another aspect of the mandate that was considered in depth by the JCPA was the importance of performance auditing, and in particular efficiency audits, to the government audit mandate.

Efficiency or value-for-money audits were introduced into the Commonwealth sector after the Royal Commission on Australian Government Administration recommended:

If ... departmental managers are to be given a clearer responsibility for their managerial functions and greater freedom and discretion to perform then it will

be more important that the quality of their performance should be subject to critical review.¹

While the efficiency audit process has been constantly improved upon since the Royal Commission, this original justification is still seen as valid and the JCPA recommended that the Auditor-General should continue to have responsibility for efficiency audits.

The Committee also looked at the results and effectiveness of the AAO's efficiency audits and concluded that, while some audits might not have been as successful as hoped, efficiency and the smaller project performance audits had made useful contributions to improved Commonwealth-sector efficiency and effectiveness.

In fact, the Committee was so concerned about performance auditing that no fewer than 17 recommendations were made in this area, including recommendations that efficiency audits of statutory authorities and government-owned companies be undertaken and the percentage of AAO resources devoted to efficiency audits be significantly increased, to around 50 per cent.

The percentage of resources I could afford to allocate to efficiency audits has been one of my and my predecessors' greatest frustrations. Our mandatory financial statement work imposes an overwhelming requirement on our resource allocation, severely handicapping our ability to undertake efficiency audits. We have been doing what we can in terms of productivity gains, including implementing substantial changes to our organisation structure and task management and reviewing efficiency audit procedures. Without the improvements recommended by the JCPA in the AAO's resource position, it is highly doubtful that any significant improvement in performance audit coverage can be achieved and certainly nothing approaching the 50 per cent of resource utilisation for efficiency audits recommended by the Committee.

One recommendation made by the Committee was that I should consult with Parliamentary Committees on topics for efficiency audits. I have taken steps in this regard and am always most interested to seek the views of Parliament's Committees and discuss with them the work of the AAO. Initial discussions were held recently with representatives of the House Committees and we are looking towards providing Committees with an information package regarding the conduct of efficiency audits and the role they play in the overall audit mandate.

THE AAO'S RESPONSE

The AAO has not been idle in responding to the challenges it is facing from these changes. To be honest, competitive pressures have hastened and strengthened our efforts to achieve maximum efficiency and a high level of service. Our ability to react, however, has been limited by constraints placed upon the AAO that are not present in comparative

¹ Royal Commission on Australian Government Administration, Report, AGPS, Canberra, 1976, chapter 3.

private-sector audit firms with which we are in competition, or even in the revamped government business enterprises.

Initially I felt I should hear what the immediate clients thought about the Office. I met with Ministers, Departmental Heads, Chairmen and Board Members of Statutory Authorities, GBEs and SMAs wherever possible, as well as with the private sector.

The views that I got included some tough criticisms as well as very positive support. For my part, I tried to 'sell' the positive value of the AAO. I came back to the office and with my staff reviewed where we were and where we should go and how we should get there. We have put our backs into trying to meet legitimate criticisms well before we were confronted by Report 296. I don't have any doubt about our ability to meet the demands placed on us if given the chance provided by that report.

At a practical level, the AAO's reaction to the JCPA's recommendations has been to implement as many of the recommendations as possible, within present constraints, while addressing our own continuing program of reform.

These reforms include (I have mentioned some already):

- revision of our corporate plan in cognisance of the JCPA's recommendations and the day-to-day challenges facing the Office;
- restructuring of our task management structure and work methods to provide improved client service and increased productivity from present resources, an aspect we refer to as the 'audit manager concept';
- introduction of state of the art audit planning and control management systems again directed at increasing productivity;
- establishment of advisory committees whose private sector members will provide new perspectives on the AAO's strategic direction and audit practices and standards; and
- fostering relations with the private sector accounting bodies and audit firms including sub-contracting of audit work, promoting staff interchange schemes, increased AAO involvement in professional educational activities and negotiating with the Institute of Chartered Accountants to have the AAO accredited as a training centre for admission of staff to membership of the Institute.

We have also continually revised our procedures for the production of audit reports. Previously reports on regularity and project performance audits have been incorporated into consolidated biannual reports. Efficiency and special audits were the only audits reported and tabled separately. To ensure audit reports are more timely, commencing with the 1989/90 year major regularity and project audits will be reported immediately after an audit has been completed, rather than waiting for the consolidation of the audit results into a biannual report. We hope that a short, sharp report will be assimilated and appreciated more readily, relieving Parliament and the Committees of the task of wading through lengthy biannual reports and perhaps allowing better scheduling of any hearings.

A regular report on audits will be issued as a consolidated overview of portfolios — including of audits reported separately and the results of less substantial, but still important, audits.

This change, part of an evolutionary process, follows one made six months earlier (April 1989) in which we grouped audits according to the portfolio breakdown followed in the Budget Papers, which followed our introduction in the September 1988 Bi-annual Report of an overview aimed at putting into context and to classify our findings as good, bad or indifferent.

Management and boards of our clients, Ministers and Parliament have been briefed on the current directions of the AAO, the challenges it faces and the importance to everyone of the JCPA's recommendations. It is hoped that the improvements we have implemented will provide further evidence of a lean, professional organisation and improve perceptions of the AAO that are in some areas more appropriate to an AAO of the past (or to one which never existed). We have done what we can. Without support from the Executive and Parliament for the recommendations of the JCPA, the central difficulty of an under-resourced AAO, not able to compete in a seller's market for professional staff, remains a limit on the effectiveness of the audit function.

THE FUTURE

The Joint Committee of Public Accounts Report 296 will be seen in years to come as a most significant contribution to the debate on executive accountability, the role of the Parliament, and the essence of our democratic process. The recommendations made in the report offer benefits to all: they preserve the accountability chain, provide extra revenue for private-sector auditing firms, keep the pressure on the AAO to provide a high standard of service, and strengthen our relationship with the Parliament.

In accordance with the procedures adopted for reacting to committee reports, the Government is preparing a response to the recommendations of Report 296. I understand a paper was drafted for possible consideration in the Budget Cabinet but other priorities intervened. For my part, I have prepared and submitted for the Cabinet my comments on the recommendations, which you would have gathered from what I have said here today generally support the Committee's recommendations. I hope that the Government will see merit in supporting an effective Audit Office from both the Executive's and the Parliament's perspective. In this context I should make it clear that we understand and appreciate the Government's economic imperatives.

It is important, however, that we overcome any perceptions that may exist that the provision of additional resources to the AAO would be a sunk cost and recognise that those resources, particularly where efficiency audits are concerned, will produce savings through improvement in the efficiency, effectiveness and accountability of public sector administration.

As I said earlier, the Parliament is the Auditor-General's ultimate client. It is important we have an effective working relationship and that is something the AAO strives to do well, particularly in providing assistance to Parliament's Committees.

If we are to capitalise upon the valuable consensus gained by the Joint Committee and ensure the effectiveness of the Auditor-General's independent accountability role, Parliament and the Government need to support the recommendations of the Joint Committee of Public Accounts. After all, without mutual support and pursuit of common objectives the foundation of an effective relationship between 'allies' is very much at risk.

United Kingdom National Audit Office

Summary of Funding and Staffing Arrangements

Funding Arrangements

1. Under section 4(2) of the *National Audit Act 1983* the C&AG is required to present Estimates each year to the Public Accounts Commission, not the Treasury.
2. The Public Accounts Commission comprises the Leader of the House of Commons, the Chairman of the Public Accounts Committee (PAC) and seven other Members of the Commons, excluding, Ministers.
3. The PAC and the Treasury are informed by the C&AG of the Estimates before they are presented to the Commission. The PAC normally takes evidence from the C&AG and produces a report; the Treasury prepares a written submission to the Commission.
4. The Commission examines the NAO Estimates, having regard to any advice from the PAC or the Treasury, and presents it with any modifications to the House of Commons. The Treasury is then authorised by Parliament to make the necessary issues from the Consolidated Fund.
5. The NAO Estimates are included in the Treasury's Public Expenditure Survey forecasts and the Public Expenditure White Paper each year.
6. The C&AG is therefore subject to broad financial control by Parliament. '... In particular the Government and the Executive may only influence the Estimate by making representations to the Public Accounts Commission. All experience since the passing of the 1983 Act has been that, while the Treasury do comment on the detail of the Estimate, the Commission makes up its own mind on the C&AG's proposals ...'.
7. Apart from the NAO Estimate, only one other is outside the direct control of the Executive, being the Estimate for the House of Commons Administration, which is also presented for Parliamentary approval.

Staffing

8. The C&AG has the power under the *National Audit Act 1983* to appoint such staff to the NAO as he considers necessary.
9. Any significant increases would have to be justified before the Public Accounts Commission, which would have the final word through its power to adjust the cash provision.
10. The C&AG also determines the remuneration and terms and conditions of service of NAO staff. He is required to have regard to the desirability of keeping remuneration and terms and conditions broadly in line with the Civil Service.

11. Taken overall, NAO terms and conditions are said to be better than in the Civil Service.

12. NAO staff have to resign to take up a permanent post in the Civil Service — and vice versa. Two-way secondments, usually for a specified period (eg. 2 years) are available, and the NAO may take staff up to Executive Officer level on loan from Civil Service Departments.

13. The employment powers under the 1983 Act enabled the C&AG to introduce a Performance Related Pay Scheme for qualified staff in 1984. Its objectives were to strengthen motivation of existing staff, to attract and retain qualified staff, and to bring pay level more into line with competing employers.

14. ‘This has improved significantly’ the performance of staff and has helped combat recruitment and retention difficulties — but has not solved the problems completely.

New Zealand Audit Office

Summary of Proposed Funding and Staffing Arrangements

Funding Arrangements

1. The enactment of a new Public Finance Act is said to be imminent. It contains new funding arrangements for Offices of the Parliament, including the Audit Office. The arrangements are to be as follows:
 - (a) Before the start of each financial year the Chief Executive of each Office of Parliament, including the C&AG, will submit to the House of Representatives an estimate of revenues, expenditures, cash flows, outputs and opening and closing financial position for the Office for the financial year.
 - (b) The Estimates will be referred to a new special standing committee for examination as it sees fit. The Committee will have the ability to call for expert advice, including from the Treasury.
 - (c) The Committee will be chaired by the Speaker and include 3 members of each of the government and opposition parties, excluding Ministers.
 - (d) The standing committee will recommend the Estimates to the House which, if it agrees, will commend them to the Governor-General, by way of an address, and request their inclusion in an Appropriation Bill for the year.
 - (e) The Appropriation Bill containing the Estimates for the Offices of Parliament will be dealt with by the House in accordance with its normal procedures. That means the Estimates are liable to further select committee examination and debate in the House.
 - (f) Once the Appropriation Bill is passed, the resultant votes for the Offices of Parliament will be the administrative responsibility of the Speaker rather than a Minister.

Staffing Arrangements

2. The other legislative initiative which is expected to pass later this year, and for which there is the support of the House's Finance and Expenditure Committee, is the enactment of a separate Audit Office Act. This, in part, would break the connection with the Public Service, and vest in the C&AG the rights, powers and obligations of an employing authority under New Zealand's industrial relations legislation.

Office of the Auditor-General of Canada

Summary of Funding and Staffing Arrangements

Funding Arrangements

1. The essential elements of Canada's Constitution Act governing the appropriation of moneys are that the appropriation must originate in the House of Commons and the purpose of the appropriation must be recommended by the Governor-General, representing the executive branch.
2. Estimates of all ministerial portfolios are reviewed by the Treasury Board. The Minister for Finance is the responsible Minister for the Office of the Auditor-General (OAG). In constitutional terms the government has complete control over the Appropriation Act but by convention this control has not been exercised with respect to the Audit Office appropriation.
3. Estimates may be reviewed by parliamentary committees. For the past two years (1988 and 1989) the Estimates of the OAG have been reviewed by the Public Accounts Committee which takes evidence directly from the Auditor-General and his staff.
4. Since the enactment of the Financial Administration Act in 1977 the Auditor-General has prepared his own Estimates, and to date the Treasury Board has not exercised its authority to modify these Estimates.
5. In practice, the Government's budgetary policies have not, to date, influenced the funds made available to the OAG, but in times of restraint the Office has agreed to lapse a proportion of its appropriations. As a policy, the Estimates proposed by the Office for its use are calculated to be the least amount necessary to satisfy its statutory duties.
6. The Auditor-General Act empowers the Auditor-General to report to the House where, in his opinion, the Estimates submitted to Parliament are insufficient to allow him to properly conduct his duties. However, the House has no power to remedy the matter as it can only provide supply on the recommendation of the Governor-General.

Staffing Arrangements

7. The staff of the OAG are public servants appointed under the Public Service Employment Act and remuneration levels for OAG staff are generally the same as for similar groups elsewhere in the Public Service but for senior management categories levels are generally higher than equivalent groups.
8. There are no restrictions on staff moving between the OAG and other parts of the Public Service.

9. The OAG has not experienced problems with losses of staff to the private sector or other areas of the public sector because its terms of employment are “largely competitive with the private sector”.

DISCUSSION

Question: could we have something about those examples where ‘risk management’ became ‘risky management’, where cutting out controls turned out to be more costly than having the controls in the first place?

Mr Taylor: I’m not going to at this stage respond with detailed examples unless somebody from the Audit Office in the audience wants to do that. What I would have to do is go back and refer to some of our published reports. I would not want to go beyond that. What I wanted to give you, well I did want to give you one example. It’s never been reported, and I don’t think it’s an important thing, but we were told at one stage that we should not worry about checking Bills which were I think for less than we won’t use a figure because I don’t want to give it away — below \$X. Almost within three months, people from right around the world, Australian Government Departments, were receiving bills or just under that amount — fraudulent bills for services that had never been provided.

Obviously in that particular situation you have to keep an eye on it. Of course we then got a circular which said ‘By the way don’t pay bills for these particular organisations’. Of course then they could move off. I mean the point I’m making is not to criticise risk management, but merely to say that one has to then watch the consequences as a situation obviously existed where the cost of checking bills under a certain amount was greater than the potential error. But once the nasties found out about the lessening of scrutiny they moved in large numbers. Then you have to adjust and of course that was done by those particular set of responses.

It isn’t quite as easy as people like to make out. The essential point that I would like to make is that what one does is one ‘loosens up’. I think that is entirely appropriate, having looked at it, and it seems sensible. That is exactly what we are doing with our own audit manager. We are saying we are not going to check at this level anymore, we will check at that level. But we would be less than professional in our approach if we were not to beef up our professional review area so that we could then do snap checks, peer review into the workings of that lower level of responsibility at a lower point. One gets the impression that some people think that risk management is all about saying ‘well this is what we do, now you forget about it, and off you go’. Any management is all about making sure that what you are doing is still appropriate.

Question: Given that independence is linked to security of tenure, and given that the present government is currently taking steps to dismantle the Interstate Commission which has constitutional tenure, I wonder how independent you can afford to be?

Mr Taylor: Well, I’m not 21 anymore and I don’t expect to have another Government job, and indeed I don’t want another government job. I’m not really at risk of wanting to please someone so that I would get later preferment. Indeed it seems too common now for Auditors’-General particularly because they are appointed until they are 65, for them not to be appointed when they are 21, and I think that that is very sensible.

The Constitution is very difficult to change. The Audit Act is not so difficult to change but it would require both sides of Parliament to have me booted out and it would have to be for due cause. I have never lost any sleep over that and indeed I would go further, I

believe that any auditor General worth his or her salt would not think for a moment about the possibility of being dismissed, even if you were on a contract.

It doesn't enter my head and I doubt whether it would have entered any of my predecessor's heads. I suppose that we are used to the concept of Public Service, I believe that it is a very important vocation, or I wouldn't still be here. The repercussions I believe, on a government for wantonly dismissing someone in a position like mine would be enough to deter it, assuming it could even get it through both Houses. But there has never been any indication, I've never had the slightest worry. I mean my relationship on an individual level with Ministers is excellent. You may say therefore I am suspect, but I am still, I am sure, not entirely the most popular person around, because I am complaining about what I see as a diminishing linkage in accountability with Government business enterprises.

I started off doing that privately to Ministers then I became, as I must if I am going to do my job properly, more and more public, but I hope always within the bounds of good sense, rational debate amongst individuals and bodies and attempting to come to a resolution that is sensible for us all. Having said all that I think that I would be very concerned if judges could be sacked because people did not like a particular decision say in a zoning of a town. I would be very concerned if Auditors'-General could be sacked. Therefore I think it is wise to have these impediments so that a sudden rush to the head doesn't result in your head rolling before people have thought more sensibly about it. I hope that answers your question.

Question: Mr Taylor, do you believe that it would be appropriate for Government Departments and Authorities to employ auditors from the private sector as internal auditors? If you do agree with that, how would we meld their work into the work of your office?

Mr Taylor: Yes, thanks that is a good question. The simple answer is that we are so short of auditors and particularly so short of auditors that are commercially experienced — by that I mean who are used to accrual accounting rather than cash accounting, which has been the norm in the Government — I don't think there is any choice but to be contracting out, including an internal Audit. We would prefer it if the external Auditor, and I think everybody would, if the external Auditor wasn't also doing the internal audit. I mean one wants to get some 'arms lengthening'.

I'm also concerned about it as a long-run thing because I believe that internal audit provides an extremely good training ground for people going to the top of a particular organisation. Now that may sound strange to many people, but when you think about it, it is quite logical.

The internal audit area is increasingly being used a management consultancy type operation. Now that in itself is a danger because we don't want to run the risk of ignoring the normal traditional audit function in financial statements. But what better training ground, what better way of finding out what is going on in your own operation than to have your own gifted people being pushed through it, and giving you an insight to what is going on?

It's absolutely essential that internal audit report to the Chief, that it not be sifted through whoever runs the accounting or finance area, in my view — that it does provide the chief CEO with another eyes and ears, which is essential. Why would one want somebody outside to be providing that eyes and ears? I just don't think that it is a very sensible long term procedure. I think it is better to get your own, but if you can't, and that seems increasingly to be the situation, it makes sense, and I do not object to it, to in fact work with private sector internal auditors and we do quite well.

Question: I have a two part question. The first part is 'Do you have a formal mechanism for evaluating the quality of audit?' Particularly, related to an earlier seminar, I think it was a Mr Michael Sharp was referred to as the 'auditor to the auditors'. And the second part: 'What is the future of Efficiency Audits as you see them within the Audit Office, and particularly its relationship with Department of Finance?'

Mr Taylor: Very good questions today. Michael Sharp is indeed our External Auditor. I believe that there is nobody in the Commonwealth which is more subject to external review than the AAO. We've had some 12 months of review by a Parliamentary Committee. If people think that it is an easy thing for the Auditor to be interrogated by the Public Accounts Committee, I really do have news for you. It was not an easy thing for me personally, nor for the organisation. We were not let off lightly at any time by that group.

The external auditor, Coopers and Lybrand, have taken over from a previous audit firm, which was doing it I think for the previous eight years. Again, there I was up in Sydney talking with Michael Sharp earlier last week. He's not been at all restrained in telling me things that he thinks that should be done better. He is to meet tomorrow with the Minister for Finance and the Secretary of Finance and no doubt he will be telling them whatever he believes he should tell them.

We certainly are under review. Every time we put out an efficiency audit or a performance audit or a project audit, we are reviewed. Some members of the Committee are not impressed or they think we are attacking some policy or some Minister or some bureaucrat unfairly, they get stuck into us. The individual bureaucrats are certainly not backward in defending themselves, putting up smoke screens at times and even genuinely thinking we're wrong.

If we can't get anywhere there we go to senior management. We might go, if its a business enterprise, to the Audit Committee, then to the Board and then perhaps to the Minister and then to the Parliament. It is a sequential interaction all the time, so by the time we put in a report to the Parliament it has been pretty thoroughly thrashed over — often, I might say, in parenthesis, the things that have been earlier denied completely as we progress through this are finally admitted to and corrected, and of course, 'we were going to do it all the time' the management is made very interesting.

On quality control generally we also have an Internal Audit Practices group who are responsible, if you like, for the intellectual integrity of our audit performance. They review that, they support me as a member of the Audit Standards Committee of The Australian Accounting Research Foundation, where I meet with private enterprise people and we recommend audit standards generally. As I have mentioned we have just established a Technical Advisory Committee which comprises in fact some of the top

technical people from the big five. They're sitting around with us looking at what we are doing as well. So my very honest belief is that we are very much reviewed, very much.

Now did that get to the point that you were seeking. Good.

Question: I would like to just draw you out a bit more about the relationship between the Auditors-General and Government Business enterprises. Let me put a proposition to you. The accountability of some institutions to Parliament, for instance, is very different than others within the Federal bureaucracy. For instance, the accountability of QANTAS to Parliament would be on a much less degree than, say, the accountability of the Department of Social Security. Given that proposition isn't that therefore a different role for the Auditor General in relation to the enterprises that are at that end of the spectrum rather than the ones at the Social Security end of the spectrum. Related to that, is an organisation like your own, which has resource constraints isn't part of the solution to resource constraints some reduced involvement with business type enterprises that are Government owned?

Mr Taylor: There is a point there and that indeed has been well covered by the Joint Committee Report which says that we should not be so involved, within my terms, with the commercial end of the scale as in the non-commercial end. I agree completely with that view. The closer the government organisation is to the market the less need there is for some surrogate analogue or artificial competitive pressure to be put on it. I see myself actually as trying to put into the protected parts of the public sector, the more protected parts of the public sector, some analogue of competitive pressure, some pressure for them to perform — to look at the bottom line, to be concerned about outcome rather than input. So I do not disagree. Of course yes we should put more of our effort into the most protected areas where the competitive forces are absent, totally. Completely agree.

Now we get to QANTAS. QANTAS is in fact not in the free market at all, not at the moment anyway. It's Government owned, it has no private share holding and, as I have said earlier, the money that supports it comes from you, not because you choose to invest in QANTAS, rather than say Continental Airlines or British Airlines or whatever have you, but because you pay taxes. It may well be run well and all the rest of it but it is not an analogue of TWA in America. It is not owned by the private sector and it is not just out there in the market. It cannot go 'belly up' as TWA can, as Peoples' Express did, without the Government deciding that that will happen.

The stock market has little or no effect on QANTAS at the moment, it has no effect on QANTAS at the moment. There is no possibility of Sir Peter Ables coming in and making a hostile takeover, he can't do it.

If in fact there were 'bum management', God forbid, one of the powers of the market is that the share price goes down and the predators can move in and they can throw out the bum management and they can replace it with people who may regard as better. If they don't work the share price goes down and we have the same cycle. Eventually they go belly up. Now I saw it happen in the States over three and a half years. It won't happen to QANTAS. There is no choice for shareholders, I have mentioned that, there is no bankruptcy and there is a Government behind them. So I still maintain that there is a

need for the public sector to be more accountable because of the lack of market, the lack of, indeed the institutional investors.

The only time institutional investors are really interested in QANTAS, and when they do their reviews and what have you, is when there is a prospect of privatisation. So there are a lot of things that are quite appropriate to the commercial sector that do not apply. Therefore, I maintain very very strongly that if we are to allow the public sector corporations to pretend that they are in the private sector by lessening the accountability requirements to the Parliament which after all is the source of the money, I mean we are the source of the money but Parliament is the way that they get it.

We are making our public sector managers more protected than private sector managers. Now think about it, is that what we want? Do we want public sector managers more protected than private sector managers. The whole thrust of where we are going is to make public sector managers more accountable, more responsible for their results, more concerned with output, less concerned with process and that isn't the way to do it in my view — to make them more protected.

Would you like to follow up or have I missed something out? Would you like to draw me out more? I mean there is just such a lot of nonsense talked about this particular issue. I mean the whole point about giving managements more freedom is that they have to be more accountable. It's got to be both otherwise its just license.

Question: Don't let me stop you. You are going very well. In fact I perhaps need to apologise in advance for this question because I think we have given you quite a third degree, a real grilling and I have been quite impressed with the commitment which you're expressing to the peculiar role of the great office of Auditor General. But like a good parliamentary officer, and I am a parliamentary officer, I am sitting listening and wondering how you fit into the constitutional scheme of things. A moment ago you mentioned decisions of the judiciary and earlier when you talked about independence a thought went through my mind that the only body which has the independence which you're describing, from the Parliament and from the executive, is in fact the Judiciary. Are you seeking for the Audit Office that kind of status, that kind of separation from the powers in this state?

Mr Taylor: Well I think I've worked far too long in the central co-ordinating agencies, Prime Minister's Department, the Public Service Board and I become slightly worried when anybody wants to get totally independent. The Judiciary I think are in a particular position but even they can't have unlimited resources. They complain about lack of resources. The only difference that I have with Judiciary is that I am not paid as much as the judges. That is the only difference. So I don't really feel any need to argue particularly one way or another there. I really don't have any personal worries about my independence. I have said on the record that if I find that resources become so constrained that I'd no longer feel that I can do my job properly, I will do three or four or five or six Efficiency Audits and nothing more. I'll qualify all the accounts, say that I don't have the resources to do them all and the efficiency audits will be of the Prime Minister's Department, the Department of Finance and the Treasury.

What I am really saying is that is that I feel I do have a lot of freedom and I do have total independence. I've never had, I mean I've been to some Ministers from whom I

expected to get some pressure. I know already that I'd had more than a little bit of pressure from an area and I expected with cause that the Minister would back that up. I went to see him, at my suggestion, and he couldn't have been more helpful — couldn't have been better, couldn't have been more supportive of my independence and what I was doing in his portfolio which was going to cause him some problems.

The reality is that in their hearts of hearts the Executive know that it is better to have me, or somebody like than not to, and that if they do have to have someone like me, it is better to have them independent and apolitical and totally positive, you know, in trying to improve things, rather than just be negative and say 'this is wrong' and 'that's wrong' and all the rest of it. I mean what I try to do is to get managements that are as interested in improvement as I am to agree with me about things that we are going to do to improve things. Independence hasn't been a problem, as yet and I don't think it ever will be.

I don't really buy the resource argument totally which is weakening my case a bit because I find it is causing me problems. I forgot, yes — Efficiency Audits. I am soon not going to be able to do any. That's literally correct because they take a lot of time. One has to go through a certain procedure, one has to get the evidence like a court. One has to then make sure that people accept that what you are saying is right or that you are able to answer them if they continue to say that it is not right. Now, part of putting out these twenty little reports soon is to try and meet the problem that, shortly, that I am not going to be able to do any Efficiency Audits. Now, rather than sit down on my bottom and say that I am not going to do any, I'm searching for other ways of getting the same result. So that we are now, with some prodding from the JCPA, looking to do Efficiency Audits in six months.

One of the problems that I have is that I say to my people, by the way we think we can do it, we will have to narrow the focus, we will probably give up some trawling expeditions where we might get higher return, its a shame but we'll perhaps be able to do it. The worry I have though is that I can't convince my people that they should act more as management consultants because they say 'but we need the evidence', and that takes time.

What I would like to do is go into an organisation, have a quick look around, talk to people about their problems and what have you and then come up with, if you like, a 'McKenzie type' 'round about — round off' saying, 'Look, we think your major problems are in these areas and you should address them in these ways and use us as a consultant.' Only we wouldn't say it. We can't do that, and we will help you do it. We would say 'use somebody else as a consultant and get them to help you do it.'

I would be quite happy to do that and then perhaps come back in six months and see whether anything has happened. That's a real possibility. There is a lot of resistance to that in the organisation because it does not like to say things that it cannot prove. The reason why it doesn't like to say things that it cannot prove is that if it gets up in front of a Parliamentary Committee once and is shown to be not well-based in its recommendations, a lot of our leverage, our power will have gone. So it gives me a lot of worry, but as you can see that I am trying desperately to improve productivity, increase productivity.

Thank you very much for being so nice an audience I'm sorry about the rather disjointed presentation. I probably shouldn't ever prepare a speech because I know so much about this now I am inclined to go on a bit. Thank you.

Harry Evans:

Well on behalf on the assembled group I thank you very much for that. It was very interesting and informative and I am sure that we have all benefited by it. The full paper will be in the "Papers on Parliament" series, an excellent, I can't say well-selling, but an excellent series. Thanks very much.

Senate Public Lecture Program

UNCHAINING THE WATCH-DOGS SERIES 1989, NO. 2

Canberra, Monday, 23 October 1989

**Professor Dennis Pearce
Commonwealth Ombudsman**

**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 1809.¹ 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

¹ 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.² 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

² 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.³ 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.⁴ 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 written⁵

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

⁴ 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.

⁵ 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.⁶

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

⁶ *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.”⁷ 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.)

⁷ 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.⁸

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

⁸ 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:⁹

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,¹⁰ '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.

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

¹⁰ 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.¹¹ 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

¹¹ 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 position¹² 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 deprivations 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':¹³

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,

¹² 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.

¹³ *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.¹⁴ 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.

¹⁴

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

Senate Public Lecture Program

UNCHAINING THE WATCH-DOGS SERIES, NO.3

Canberra, Thursday, 7 December 1989

**Professor Cheryl Saunders
President, Administrative Review Council***

**THE ROLE AND INDEPENDENCE OF
STATUTORY OFFICE-HOLDERS:
THE PARTICULAR CASE OF ADVISORY BODIES**

* The views expressed in this paper are mine, and do not necessarily represent the views of the Administrative Review Council or any other members of it.

Mr Harry Evans, Clerk of the Senate

Welcome ladies and gentlemen, this is the third of our series called “Unchaining the Watch-dogs”.

We have heard from the Ombudsman, professor Dennis Pearce, and we have heard from John Taylor, the Auditor-General. This is the third in our series and we have with us today the President of the Administrative Review Council. Since our circular was put out referring to her as Dr Cheryl Saunders, she has in fact become Professor Cheryl Saunders, I understand.

The Administrative Review Council, as you probably know, was intended to be the pinnacle of the administrative review system, a sort of council of guardians I suppose. It was supposed to oversight the whole system and see that it was working properly. Therefore it is quite appropriate that we look at the Administrative Review Council last.

Professor Saunders

Well, thank you very much.

The common theme of this series is the role and independence of statutory officers who have responsibility for scrutinising aspects of administration. The other two speakers in the series, the Ombudsman and the Auditor-General, fit that theme, which is an important one, very well. In one sense, the Administrative Review Council does too. The Council is an integral part of the administrative review system which over the past 13 years has played a major part in achieving greater openness and accountability at the Commonwealth level of government in Australia. Because it is in effect the Council’s role to monitor the operation of the entire review system and to advise the Government accordingly, the Council largely designs its own work program and has the responsibility of choosing those aspects of the system on which it should concentrate its efforts from time to time. Inevitably, much of the work of the council throws light on the activities of the executive branch of government of particular components of it.

The Council differs from the other participants in this series, however, as a body whose primary function is to advise government on what might loosely be described as policy questions arising within the ambit of the administrative review system. The Ombudsman and the Auditor-General, by contrast, although dependent of government to implement their findings, have more substantive functions.

Significantly, both also provide advice directly to Parliament. On a spectrum of statutory authorities running at one end from bodies which advise government on particular references to, at the other, bodies with executive functions, the Council would be closer to the former although, perhaps, a little further down the line. If they were on the spectrum at all, which their special affiliation with the Parliament must leave open to question, both the Ombudsman and the Auditor-General would be closer to bodies with substantive functions of their own.

In my contribution to this lecture series I have therefore chosen to focus on the quite distinct circumstances of advisory bodies established by statute. Much of what I have to

say initially has been informed by my experience with the Administrative Review Council, and the second part of the lecture will deal specifically with the functions and operation of the Council. I intend to begin with some general observations about advisory bodies, however, the relevance of which is not confined to the Council. I hope that they might have the effect of stimulating thought about the role which statutory advisory bodies play in the overall structure of government.

Statutory advisory bodies have received very little detailed attention as a phenomenon in their own right. By contrast, statutory authorities generally and, more recently, independent statutory officers, have been the focus of quite a lot of research and writing. At one level the issues that arise are the same. Where do these bodies fit within the traditional theories, to which we still cling, of ministerial responsibility to Parliament for the business of government? What relationship do they have to the departments of state, particularly for the purposes of resource allocation and management? In the case of advisory bodies, however, these issues may take different forms or require different emphases, because of the advisory function itself.

Advisory bodies

There are three features of the circumstances of advisory bodies which raise particular questions for their relationship with the rest of the system.

The first is that, like other statutory authorities, advisory bodies have links with both the government and the Parliament which must be accommodated appropriately and consistently with constitutional principle. The functions of most advisory bodies require them to advise the Government, rather than Parliament. On the other hand, the fact of creation by statute gives such bodies a special standing, which may have implications for both the political and judicial processes. While accepting that advisory bodies are part of the executive branch, it is clearly appropriate in these circumstances that the Parliament from which they derive their authority takes a continuing interest in the way that authority is used.

The second feature concerns the relationship between an advisory body and its portfolio department. The reliance of such bodies on departmental support and advocacy is most obvious in relation to resource allocation although it occurs in other contexts as well. An advisory body can effectively be stymied by an inadequate allocation of resources, whatever the lofty goals of its constituent statute.

The third feature is the need for advisory bodies to operate independently in formulating the advice which they give to government. This flows from the purpose for which they are established. In most cases the justification for creation of a statutory body to give advice to Government is to introduce expertise of a particular kind or kinds into the decision-making process. Variations on this theme sometimes occur where the advisory body is required to canvass public opinion, or to represent the views of a particular segment of the community. Even in these cases, however, the essential function of the body is to offer facts or opinions which would not necessarily find their way into the process otherwise. Both the Government and the Parliament are entitled to rely on the integrity of that advice. In such a scheme, bureaucratic and political perspectives are introduced after the advice is given. They may result in the advice being modified or, perhaps, not accepted at all, but at least everyone will know where they stand.

If the views of the advisory body are not formulated independently, within its terms of reference, their value as an element in the decision-making process is lost. From the standpoint of the community, at least, the exercise has been a waste of time and money. From the standpoint of the Parliament, moreover, the true responsibility for the decision ultimately taken is likely to be confused. A decision of a Minister to act on the advice of a statutory body established for the purpose may be subject to a different sort of scrutiny to a decision within the department and/or ministry in the traditional way. If the advice is not in fact independent, it is relevant for the Parliament to know.

These features suggest some standard principles which might be adopted, or considered for adoption, in relation to statutory advisory bodies.

1. There should be a statutory requirement for reports from such bodies to be tabled in the Parliament, within a fixed period after submission to government. This at least makes the report a public document and its existence a matter of public knowledge.
2. The ambit of the terms of reference within which the body is being asked to give advice must be clear and public. In some cases, of which the Administrative Review Council is an example, its functions will be fully described in its constituent statute. In others, including the Australian Law Reform Commission, the body is dependent on formal terms of reference from government which, again, describe the ambit of the advice required. Under a third technique, the constituent statute describes the subject matter on which advice is or may be sought, but enables it to be further circumscribed by directions or guidelines issued by the Minister. The principles espoused here demand that any such directions or guidelines be made public, preferably by tabling in the Parliament. To the extent that these instruments qualify or supplement functions conferred on a body by statute, there is a question whether they are legislative in character and should be subject to disallowance as well as tabling. This was one of the issues raised at the conference on rule making hosted by the Administrative Review Council earlier this year.
3. The constituent statute should prescribe criteria or selection mechanisms for appointment to the advisory body. The criteria should be set in the light of the function which the body is intended to perform. They may well need to be phrased in general terms, so as not to unduly inhibit appointments. Even on this basis the existence of criteria will require appointments to be justified and enable them to be evaluated by reference to the purpose for which the body was created. This requirement would not only help to ensure that advisory bodies were satisfactorily constituted but would have the advantage of focussing attention on the purpose of the body at the time of its establishment.
4. An independent secretariat should be provided to service each statutory advisory body, adequate to the purpose for which the body is created. It is unrealistic to expect a body to provide high quality independent advice if it is limited to a pool of hard-pressed departmental officers for its support.

5. A mechanism might be developed within the Parliament, to review the appropriations to advisory bodies within each portfolio, in the light of the purposes each body is intended to serve.
6. The role of advisory bodies should be borne in mind in measuring their performance. Adoption of recommendations by government alone is too blunt a measure. A high adoption rate may indicate high performance; equally, it may indicate advice unduly tailored to suit known governmental or departmental preferences. A low adoption rate may have implications for the performance of the government or the department, as well as the advisory body itself. There are circumstances, moreover, in which high quality, expert advice has an important educative effect, however unlikely it is to be accepted in toto in the short term. There are often circumstances in which it cannot be clear-cut whether advice has been accepted or not, in whole or in part.

The Administrative Review Council

For the remainder of the paper I propose to describe the role and operation of the Administrative Review Council, in the light of some of the issues I have identified earlier.

The Council was established by the *Administrative Appeals Tribunal Act 1975*, as a component of an integrated, reformed,

Commonwealth system for administrative review. The three principal elements of the system are

- an Ombudsman, to deal with complaints about what may loosely be described as maladministration;
- the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act), providing a simplified process and codification of the grounds and remedies for judicial review in the Federal Court, including a right to reasons;
- the Administrative Appeals Tribunal (AAT), as a general appeals tribunal providing a mechanism for high quality, independent review on the merits.

The Council's statutory function is to advise the Attorney General on the matters set out in section 51 of the AAT Act, which between them effectively cover all aspects of administrative review at the Commonwealth level which were features of the system in the 1970s. They do not encompass features more recently introduced, most notably the FOI and privacy legislation, and there is a question whether they should do so. Nor do they extend to the mechanisms for review of decisions of the ACT administration since self-government, although a close relationship continues to exist between the two review systems. The admittedly short experience so far points to a need for some ongoing monitoring of the operation and scope of administrative review in the ACT, by a body constituted by the ACT legislature for the purpose.

The manner of the creation of the Council suggests that the primary focus of its advice initially was expected to be the operation and jurisdiction of the AAT, perceived as the

most innovative feature of the new system. The Council's terms of reference, however, have enabled it to adapt its activities to the changing needs of the review system as it has evolved. While the Council does not depend on references from the Government, requests to deal with particular issues are of course given priority and met as quickly as circumstances permit.

Membership

The Council has 13 members. Three of them are ex officio: the President of the Australian Law Reform Commission (ALRC), the President of the AAT and the Ombudsman. The ex officio membership has proved an important feature of the constitution of the Council. The co-ordination of administrative review at the Commonwealth level is one of its most distinctive features, justifying its description as a 'system' rather than as a series of disparate review bodies. The participation of the Ombudsman and the President of the AAT enables the Council to monitor and maintain that co-ordination as well as providing a direct source of information and understanding for the performance of its other statutory responsibilities. The links with the ALRC has facilitated co-ordination of a different kind, between the work programs of these two bodies. Two current projects in which this collaboration has practical significance are customs and multiculturalism. All three ex officio members, of course, are valuable contributors to the work of the Council as individuals in their own right.

The remaining 10 members of the Council are appointed on a part time basis in accordance with criteria set out in section 50 of the AAT Act. The criteria are general but have served the purpose foreshadowed earlier of focussing attention on the particular qualifications of individuals proposed for appointment to the Council. Over the years a pattern has begun to emerge in the composition of the Council, one of the most distinguishing features of which is its diversity. The current membership, for example, might be assigned to the following categories:

- Representatives of the community which uses the review system.
- Public service officers traditionally at departmental secretary or deputy secretary level. Line departments and central agencies are usually represented. The line departments are significant users of administrative review.
- The central agencies are the Department of the Prime Minister and Cabinet and the Attorney-General's Department. The link with the Department of the Prime Minister and Cabinet is particularly important given the need for review issues to be considered at a comparatively early stage in the formulation of policy. The link with the Attorney-General's Department has now become traditional and is founded in common sense. It is one mechanism for dealing with the problem which all advisory bodies face, of competing advice to the Minister from the portfolio department. While cross-membership alone cannot prevent such competition, it at least engenders mutual understanding between the department and the advisory body.
- Members drawn from the private sector, with business or management qualifications.

- Members of the legal community, for example judges, legal practitioners and academic lawyers.

Another hallmark of the Council's membership, which also has become traditional, is its quality. The Council has generally been fortunate enough to attract members who are leaders in their fields and able to speak authoritatively from their particular perspective. It never ceases to amaze me that such busy people contribute so whole-heartedly to the work of the Council and I take this opportunity to put my appreciation of that fact on record .

Secretariat

In view of my earlier remarks I should note that the Council has a secretariat of its own, which has convinced me of the importance of this arrangement. Not only does a separate secretariat assist the Council to provide independent advice to the government, but it tends to enjoy the confidence of other participants in the administrative review process, whether from the public sector, the community or the review bodies themselves. Again, the Council has benefited greatly from the talented array of directors of research and project officers it has managed to attract, who have been essential to the success of its operation.

Work program

The work program of the Council over time can be divided into three phases.

Initially, the Council concentrated heavily, although not exclusively, on identifying the principles which should govern review on the merits for the purposes of deciding which jurisdictions should be conferred on the AAT. It did so by systematically examining each of the major portfolios in which Commonwealth decision-making impacts directly on individuals. Social security, tax, customs, veterans' affairs and migration were dealt with in that way.

By the middle of this decade, the relevant principles were fairly well established and the Council had reported to the government on decision-making in the more obvious portfolios. A change of emphasis thus became possible. Review on the merits remains an important part of the work of the Council but it is no longer its major preoccupation. The Council's activities in relation to merits review, moreover, are taking new directions. First, the Council has recently embarked on an examination of decision-making in some of the remaining portfolios which has a more complicated aspect. Often, for example, as in the community services and health portfolio, it involves decisions taken in the course of administering grant programs to the States. There is an important and difficult question, presently being examined by the Council, how the principles which underlie the review arrangements should be implemented in relation to decisions of this kind.

A second development which has affected the merits review role of the Council is the growth in the number of review tribunals in addition to the AAT. Some of these are intermediate tribunals, providing first tier external review in large volume jurisdictions, and have been established with the encouragement of the Council. The Social Security appeals Tribunal, the Veterans' Review Board and the Student Assistance Review

Tribunal fall into this category. More recently a new single jurisdiction tribunal, the Immigration Review Tribunal, was established, with no formal links with the rest of the system.

The creation of additional review tribunals clearly has the potential to detract from the efficiency of the original concept of a single appeals tribunal. In itself, however, it does not necessarily represent a retreat from the values of capable, independent review on the merits hitherto offered primarily by the AAT. My personal assessment is that such a retreat would now be unacceptable. Nevertheless, in the interests of maintaining both the efficiency and fairness of the system, the merits review aspect of the Council's work now also extends to the activities of the intermediate and single jurisdiction tribunals. Under one of its current projects, the Council is sponsoring a series of meetings between members of all tribunals to identify opportunities for co-operation, discuss issues of current concern, and work out a future relationship between the Council and each tribunal on a mutually satisfactory basis.

The second phase in the evolution of the Council's own work program began several years ago, when the emphasis on extension of merits review was balanced by a roughly equal emphasis on the operation of the system as a whole. An important component of the latter is the accessibility of the system to all groups in the community who might benefit from it. The Council's ongoing access project has identified a range of actual or potential impediments to access including lack of knowledge about the system; costs of using it; deterrence by primary decision-makers or internal review bodies; and perceptions by potential users of the review bodies themselves. The access project is currently running in parallel with the Council's multiculturalism project, which is concerned with the effect of different cultural backgrounds on the ability and willingness of members of the community to question government decisions which affect them. I suspect that one of the major problems we are likely to uncover is lack of knowledge and understanding about the way in which the system of government works. That problem is not, of course, confined to newcomers to Australia, as the report from the Senate Standing Committee on Employment, Education and Training last year made abundantly clear.

The activities of the Council are now moving into a third phase, in which advice to government is linked to a more comprehensive and specific view of the role of the administrative review system, in its broadest sense, in the overall structure of government. I would like to say a bit more about this in my concluding remarks. The Council is take a correspondingly greater interest in those aspects of the governmental structure which impinge upon administrative review. Some evidence of this development is provided, however, by the Council's current project on rule making, launched so successfully in the Senate committee rooms earlier this year.

Achievement

The Council keeps a running record of acceptance or otherwise of its advice, in terms of the Government's response. Information on this matter also is included in its annual report. In general, I think the record is quite good. My purpose here is not to judge the Council's actual performance, however, which is best done by others, but to mention some of the issues that arise in the course of judging the performance of a body like the Council.

Two preliminary points should be made initially. The first picks up the issue I raised earlier, about the approach of the Council in developing its advice to government. As with any advisory body, there is a question whether the advice it would give on the basis of its expertise or accepted principles should be tempered by reference to considerations of what is likely to be feasible or acceptable in economic or political terms. Advice unduly influenced by such considerations may be more likely to be accepted. On the other hand, it may also be less reliable. In the long term, as a basis for the formulation of policy.

The line to be drawn here is a subtle one. Utopian advice is not particularly helpful either and will not be taken seriously. Within the bounds of reasonableness, however, the Council tends to take the view that it should give government the advice which it considers correct or preferable, without being swayed unduly by whether it will be adopted at once. On one occasion when it departed from this approach, in relation to migration review, the result complicated the ensuing debate even further. In some cases the Council deals with this problem by advising on what it perceives to be the correct outcome and also suggesting a fallback position, if that advice is not acceptable. This technique has the danger that the fallback position will be automatically adopted, but at least it makes clear for future reference what the relevant principles are.

The other preliminary point concerns the manner in which government determines whether or not to act on the Council's advice. Under the Australian system of government the reality is that the Minister will be briefed on the advice by the department. There are two potential difficulties with this. One is expertise, particularly where a report is long and complex, or has involved outside consultations and represents a delicate balance between competing principles or interests. Another is the time which the department can dedicate to such work, which may not reflect its own priorities. Over time the Council and the Attorney-General's Department have worked out a *modus vivendi* on this issue which seems to be satisfactory. There is a useful level of interaction between officers from both bodies and the Council has expressed its readiness to discuss its reports with departmental officers when briefs are being prepared.

There are at least four factors which complicate accurate measurement of the effect of Council activities. I mention these here partly to give a better understanding of what the Council does and partly because some of them, at least, are likely to be common to other advisory bodies.

1. The point of time at which an issue reaches the Council is a relevant factor. Sometimes an issue arrives too late: after it has been decided by Cabinet or, worse, included in a bill which has been introduced into the Parliament. The Council is aware that contrary advice is unlikely to alter the immediate course of events at that stage. Nevertheless, it often offers the advice, as a guide to later development of the system. By contrast, sometimes issues are brought to the Council's attention at such an early stage that the Council's views are reflected in the initial formulation of policy. If, as increasingly happens, this contact takes place at officer level with informal reference to the Council, the Council's advice will not appear on the public record although it will have influenced the outcome on the issue.

2. On some occasions the views of the Council influence the action that is taken by government, quite significantly, although the detail is so different that it would not be accurate to say that the Council's advice had been adopted. An example is the migration review arrangements, enacted by the Parliament earlier this year (*Migration Legislation Amendment Act 1989*). Those arrangements differ markedly from the Council's advice. Nevertheless, the need for external merits review of migration decisions and the usefulness of a preliminary filter of some kind in such a large volume jurisdiction are both features of the new system in which the Council's influence can be seen.
3. Sometimes the Council's advice floats ideas which may take a while to become accepted but which ultimately are likely to influence government action. One example may be the work the Council is presently doing on the review of decision taken in the course of intergovernmental arrangements. Another may be the advice recently given in the Council's report on the ambit of the AD(JR) Act on judicial review of decisions taken under non-statutory schemes.
4. Finally, there is a significant proportion of the Council's work which does not fully manifest itself in public advice at all. A recent example is the project on intermediate and single jurisdiction tribunals, the chief benefits of which will lie, at least initially, in getting tribunal members together and providing a basis for informed, future action.

Administrative review and Parliament

I would like to conclude by speaking briefly about the relations which the Council has with the Parliament and the relationship between administrative review and the work of the Parliament.

The Council has the normal, formal, relationship of a statutory advisory body with the Parliament. Under section 58 of the AAT Act it is required to prepare an annual report which must be tabled in the Parliament within 15 sitting days after receipt. There is no requirement to table other reports, although to the best of my knowledge they have always been tabled. The Council's shorter letters of advice, which comprise a substantial proportion of its work, are appended to its annual report.

As a body whose statutory function is to advise the Attorney-General, clearly there are certain proprieties that the Council observes in its relationship with the Parliament. If this represents an embryo doctrine of separation of powers between the legislature and the executive, perhaps some thought might be given to what the other elements of such a doctrine might be. Within these broad limits, however, the Council has developed a very good relationship with the Parliament over the years. It has been manifested this year, for example, in the assistance we received from the Department of the Senate in convening our conference on informal rule making and in the submission which the Council made, with the approval of the Attorney-General, to the Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals. Taking a longer perspective, the inclusion of the adequacy of review arrangements in the terms of reference of the Senate Scrutiny Committees has had a substantial and important effect on the development of administrative review.

I think that we may be arriving at a critical point in the development of the Australian constitutional system. If so the opportunity to do something about it exists over the next 10 years, as we approach the centenary of the Constitution.

The need for action arises because Australia as a nation seems, for the moment at least, to have set its sights against constitutional guarantees of individual rights. Whether this position will be maintained indefinitely in the face of the adoption of such guarantees elsewhere in the world is impossible to predict. The Australian debate on the issue however, is consistently so hostile, not to mention confused, that it does not seem worthwhile to pursue it seriously at present.

If that is correct, a much greater burden of protecting individual rights and interests is thrown on the rest of the system and in particular, of course, on the Parliament. The need to ensure that Parliament works effectively becomes correspondingly more important. I suspect that everyone here will agree that there is room for improvement in that regard; in particular as far as the role of the Parliament in relation to executive action is concerned. I note, for example, the recent article in *The Australian* (6 December) about the McIntosh study, which was reported to find 'strong support for reform to balance up the Parliament-executive equation'. A more graphic statement of the problem appeared last month in *The Guardian*, apropos of parliamentary government in the United Kingdom, which described the accountability of the executive to Parliament as a 'thin and painless phenomenon' and concluded that:

'the existence of untrammelled executive power is at the heart of the entire style of British government: leader-dominated, heavily whipped, excessively disciplined, swift and ruthless to act, unaccustomed to the laborious task of building, issue by issue, a political consensus.'

Closer to home and more recently, we have seen the extreme results of an executive dominated parliamentary system in Queensland. No Australian jurisdiction is necessarily immune from those problems.

If we accept that the checks and balances in our system lie primarily in the political process, it will be necessary to look at that process carefully, to ensure that it is able to produce the desired result. It may be that quite significant rethinking will be needed. In my view, however, the relationship between the parliamentary process and administrative review has already been a significant early step in this direction. Administrative review provides avenues for individuals unhappy with executive action to seek redress. It complements the role of Members of Parliament in this regard: and I suspect that there is room for further interaction. I am aware of an incipient idea that all this external review is unnecessary because public agencies and officers can be trusted to carry out their responsibilities properly. All sorts of answers to that are possible, only two of which need to be made now. First, it is a mistake to see administrative review as a denial of the hard work and quality of the public service; but nevertheless, experience tends to show that trust alone is no substitute for good old-fashioned checks and balances over time. And secondly, a large proportion of the issues pursued through review tend to represent error or misjudgment in relation to a particular case and do not raise considerations of trust at all.

Administrative review has turned out, possibly unexpectedly, to complement the role of Parliament in another respect as well. The system has had the effect of enforcing greater openness and impartiality in executive decision-making and focussing attention not only on the decisions made but on the policies underlying them. These features in turn have contributed to the base of knowledge and understanding on which the parliamentary process can work. This approach to achieving an appropriate balance between executive flexibility and public accountability may prove to be the Australian alternative to more familiar constitutional devices adopted elsewhere. It has the potential to make a real contribution to the theory and practice of effective parliamentary government. There is a long way to go, of course, but getting there could be a satisfying process.

DISCUSSION

Question – Are there any proposals for further developments in the relationship between the ARC and the Parliament?

Professor Saunders – I think that as far as the Council and the Parliament are concerned we should continue the way we have been going, which has been in my view very satisfactory this year. We keep an eye on the Parliamentary Committee activities and have made submissions to inquiries particularly relevant to us. If we have the time and the resources and we are permitted to do so, we hope to contribute more to that process. Of course, we will undoubtedly also be having some contact with you in the course of the rule making project.

Question – It has been suggested that perhaps there should be a Parliamentary Committee with the explicit task of looking after the administrative review system, or sort of oversighting it in a political way. Do you think that is of any value?

Professor Saunders – I think that there would be value in that. I know that the Ombudsman has had discussions with chairmen of some of the committees to ask them to look at his annual report when it comes out. Certainly we would be very glad for someone also to have responsibility for looking at our annual report; obviously we all try to flag things that we consider to be issues of current concern when we produce these reports. If you accept that the administrative review system is becoming an important component of government as an aid to openness and accountability and represents in that sense a support to Parliament, I think it would be for someone to assume a degree of responsibility for monitoring developments which affect administrative review including looking at Bills that come in that seem to be relevant. Whether you need a new body or whether it can be done through some of the existing committees is another question.

Question – In your view, would it be a good idea for Members of Parliament to be represented on the Administrative Review Council?

Professor Saunders – I have thought about that from time to time in the past, partly because I was once on the Archives Council where there is representation from the Parliament which seemed to me to work very well. In some respects it is an attractive idea. The problem it would cause for us is that we do get advice about policy proposals at the point when they are going into Cabinet and I think that that would dry that process up; in fact I am sure it would. I do not think that that would be healthy for the review system. As it is we sometimes have to struggle to get involved at that early stage, which as I said earlier is the stage when it is really helpful to give advice. If we were not involved until the Bill stage, I think that we might find things started going off the rails. So rather reluctantly I think I would have to say that that would not be a good idea.

Question – I was particularly interested to hear about reference to the Council's (ARC) Multicultural project currently running in parallel with the Access project. Would you be in a position to expand further upon that Multicultural project?

Professor Saunders – We still have to settle some details of the directions in which we are going to go. As part of the multicultural policy that was launched earlier this year, we were given some additional funds to conduct a project on the relevance of cultural diversity both to primary decision making by government and also to the way in which review operates. We have just hired someone to lead that project, which will be based in Melbourne.

The project will concentrate primarily on the relevance of cultural diversity to people who have had a decision made by government which affects them, which they are not happy about. The project is not confined to the review system in the narrow-ish sense that I was talking about it today, with its three core components. It concerns the whole range of mechanisms: whether people can even ring up the department, or use the internal review mechanism, when they are dissatisfied or unhappy with a government decision.

For the first couple of months we will be spending time trying to get some feedback from the communities themselves and seeing what sort of information is already around. Ultimately, having identified the problems and suggested possible solutions, we have to start putting them into effect ourselves in some way.

At that point, as I foreshadowed in my paper the multicultural project simply becomes part of the broader access project. It concerns what people know about government, whether they feel free, or happy to go and complain. Whatever is done in the project I think will have implications for the community as a whole. At least I hope so.

Question – Will Council concern itself with action by Government where no-one else is prepared to take action?

Professor Saunders – Is it a decision or action that affects individuals?

Yes.

Professor Saunders – Only incidentally. We come at the issue in different ways from time to time. We were at one stage involved in the Law Reform Commission's project on standing, for example. We have recently put in a submission to another body to draw its attention to the use of test cases in administrative law, to pick up the circumstances of people who are not willing or able to test a decision for themselves.

Of course in a sense the Access project comes at the problem from another direction by trying to make it feasible for people to use the system if they want to. But apart from that we are not dealing with this as an issue in its own right, no.

Mr Evans – Okay, I think we can conclude there.

I think I should mention that the paper that we have heard today will come out in polished form in the series of papers the Senate Department is putting out called Papers on Parliament. It does not quite fit the title but it will appear in that series anyway.

Thank you very much.

