

CHAPTER 17

THE ROLES OF THE OMBUDSMAN

17.1 The Ombudsman is an 'agency' for the purposes of the FOI Act, and, as such, is subject to the operation of the Act. As a result of the combination of the FOI Act and Ombudsman Act, the Ombudsman plays three additional roles in respect of freedom of information matters. First, the Ombudsman may investigate the actions of agencies in dealing with FOI requests as part of his ordinary investigatory role.¹ Secondly, the FOI Act confers upon the Ombudsman specific power to act as advocate on behalf of FOI applicants before the Administrative Appeals Tribunal.² Thirdly, the Ombudsman is given the role of monitor and rapporteur in respect of the operation and administration of the FOI Act.³

Ombudsman's investigatory role

17.2 The FOI Act expressly permits the Ombudsman to investigate FOI matters, notwithstanding that the complainant has a right to seek review by the Administrative Appeals Tribunal of the agency decision giving rise to the complaint.⁴ In 1986-87 the Ombudsman received 67 formal complaints relating to agencies' actions on FOI matters.⁵ The Committee has considered whether there would be cost-savings or other benefits if the FOI jurisdictions of the Tribunal and Ombudsman were altered to reduce or eliminate the present overlap.⁶

1. FOI Act, s.52B(1) which confirms the jurisdiction arising under s.5(1)(a) of the Ombudsman Act.

2. FOI Act, s.52F.

3. FOI Act, s.52D(3)(b).

4. FOI Act, s.52B(2).

5. FOI Annual Report 1986-87, p. 42.

6. E.g. see Evidence, pp. 1361-62 and 1372-73.

17.3 The Committee recognises that Tribunal review and Ombudsman investigation each have unique characteristics.⁷ For this reason, each has a continuing role with respect to FOI matters.

17.4 The Committee considered whether these roles could with advantage be re-organised into a hierarchical or tiered system.⁸ The first tier would consist of investigation by the Ombudsman. Investigation is cheaper for complainants and agencies, less formal, and more oriented to conciliation than adjudication. A number of detailed schemes could be devised but the basic aim would be to use the Ombudsman to filter out types of cases which at present go directly to the Tribunal. There is some evidence that matters are being taken to the Tribunal that could be better resolved by the Ombudsman.⁹

17.5 The Committee notes that no submission advocated that Tribunal review be made a second tier above investigation by the Ombudsman. The Committee also notes the possible reluctance of the Ombudsman to act as arbiter over who may seek review by the Tribunal.¹⁰ The Ombudsman, the Administrative Review Council, and the President of the Administrative Appeals Tribunal, all favoured retaining the present system in which Tribunal review and Ombudsman investigation are available as alternatives.¹¹

 7. See generally Administrative Review Council, The Relationship between the Ombudsman and the Administrative Appeals Tribunal [Report No. 22, AGPS, Canberra, 1985], especially pp. 21-23. See also Evidence, pp. 1372-73 (Justice J.D. Davies), and submissions from the Administrative Review Council, pp. 17-24; the Commonwealth Ombudsman p. 20 (Evidence, p. 1327); and the Attorney-General's Department, pp. 49-50, (Evidence pp. 54-55).

8. E.g. see Evidence, pp. 1361-62 (Commonwealth Ombudsman). Compare the role of the Information Commissioner (in effect a specialist Ombudsman) under Canada's Access to Information Act 1982.

9. Evidence, p. 162 (Attorney-General's Department). But see the supplementary submission from the Commonwealth Ombudsman p. 1 (Evidence, p. 1341).

10. Evidence, p. 1361 (Commonwealth Ombudsman).

11. Submissions from the Commonwealth Ombudsman, p. 20 (Evidence, p. 1327); the Administrative Review Council, p. 23. Evidence, pp. 1372-73 (Justice J.D. Davies).

17.6 In view of this, the Committee rejects any two-tier approach. This rejection influences the position taken in the remainder of this chapter. The present special relationship of the Ombudsman to FOI can be seen as something of a half-way house on the way to creation of a fully-fledged information commissioner. In effect, by rejecting the option of making the Ombudsman the first tier in a hierarchical system for review of FOI decision-making, the Committee is also rejecting the creation of a fully-fledged information commissioner.

17.7 This, in turn, raises the issue of whether the Ombudsman should have any special roles or powers with respect to FOI. In general, the Committee believes that he should not. In the remainder of this chapter the Committee examines, first, the means of ensuring that aggrieved persons are given sufficient information to make an informed choice between complaint to the Ombudsman and seeking review by the Tribunal and, secondly, the various special roles of the Ombudsman in relation to FOI.

17.8 Publicity relating to FOI has tended to favour Tribunal review over investigation by the Ombudsman.¹² The Committee agrees with the suggestions made by the Administrative Review Council¹³ for improving the information available to aggrieved persons so as to enable them to make a fully-informed choice between the Ombudsman and the Tribunal.

17.9 The Committee recommends that FOI publicity and training material emphasise the role of the Ombudsman as a means of resolving disputes relating to FOI. In particular, the Committee recommends that steps be taken to ensure that information with respect to rights of review, supplied with reasons for decisions

 12. Evidence, p. 162 (Attorney-General's Department); submission from the Administrative Review Council p. 27. See also, for example, Harrison, K., Documents, Dossiers and the Inside Dope [Public Interest Advocacy Centre. Sydney. 1984], p. 83.

13. Submission from the Administrative Review Council, pp. 26-27.

pursuant to section 26, is sufficiently comprehensive to enable an informed choice to be made between applications to the Tribunal and complaints to the Ombudsman.

17.10 The Administrative Review Council drew the Committee's attention to a recommendation of the Council made in 1985. This was that both the Ombudsman and the Tribunal should be empowered to refer complaints or remit applications to the other body, with the consent of the complainant/applicant, where that is appropriate.¹⁴ The recommendation related to all types of matters, not just those relating to FOI.

17.11 The Committee has no firm view on the merit of this proposal. For example, the Committee is not convinced that any formal conferral of power to transfer matters is required. Where the Tribunal indicates at any stage of its review that the Ombudsman would be the more appropriate body to resolve the matter, it is always open to the applicant to abandon the review application and lodge a complaint with the Ombudsman. Equally, a complaint can be abandoned and Tribunal review sought. As a matter of detail, it is not evident to the Committee why an aggrieved person should be able to recommence in the Tribunal where the original Tribunal proceeding was transferred to the Ombudsman by the Tribunal, and the Ombudsman declined to investigate on the ground that the person was frivolous, vexatious or not acting in good faith in respect of the matter.¹⁵

Drafting matters relating to provisions on investigatory role

17.12 Four drafting matters concerning section 52B were brought to the Committee's attention by the Ombudsman. The first arises out of sub-section 52B(1), which gives the Ombudsman

14. Submission from the Administrative Review Council, pp. 1-2 referring to ARC Report No. 22, supra n. 7, Recommendations 2 and 3.

15. Contrast ARC Report No. 22, supra n. 7 pp. 26-27.

jurisdiction over agencies in respect of freedom of information matters. This grant of jurisdiction is

probably unnecessary, since FOI actions would come within the ambit of the general jurisdictional provisions of the Ombudsman Act (i.e. such actions are 'action that relates to a matter of administration' within the meaning of s.5 of the latter Act). However, this double-conferring of jurisdiction presents no practical problems, and does serve to underscore the Ombudsman's FOI role.¹⁶

The Committee agrees.

17.13 The second matter also arises out of a legislative duplication. To quote from the Ombudsman's submission again:

[T]he need for specific reference to section 6(3) of the Ombudsman Act in section 52B(2) of the FOI Act has been largely overtaken by amendments which have broadened the Ombudsman's discretions under s.6(3).¹⁷

17.14 The Committee recommends that sub-section 52B(2) of the FOI Act be amended to remove the now redundant reference to sub-section 6(3) of the Ombudsman Act.

17.15 A third drafting matter is that

since sub-section 52B(1) talks of action taken by an 'agency', it is unclear whether it was intended that the Ombudsman should have jurisdiction over the FOI actions of bodies that are 'agencies' for the purposes of the FOI Act but not 'prescribed authorities' for

16. Submission from the Commonwealth Ombudsman, p. 13 (Evidence, p. 1320).

17. Submission from the Commonwealth Ombudsman, p. 14 (Evidence, p. 1321). See also submission from the Administrative Review Council, pp. 24-26.

the purposes of the Ombudsman Act (the Human Rights Commission and National Crime Authority come to mind).¹⁸

17.16 The Committee takes the view that the FOI Act should not provide the Ombudsman with 'back-door' jurisdiction over agencies which are not 'prescribed authorities' for the purposes of the Ombudsman Act.

17.17 The Committee recommends that the Act be amended to make clear that it does not confer jurisdiction upon the Ombudsman with respect to bodies that are not 'prescribed authorities' for the purposes of the Ombudsman Act.

17.18 A fourth drafting matter is that

it is unclear whether FOI complaints against the Australian Federal Police are intended to be investigated under the Ombudsman Act or under the Complaints (Australian Federal Police) Act.¹⁹

17.19 The Ombudsman did not indicate his preferred solution. The Committee agrees that this uncertainty should be removed. However, the Committee lacks sufficient information to determine in which way the uncertainty should be resolved.

Ombudsman as advocate

17.20 Sub-section 52F(1) provides that, if the Ombudsman thinks it reasonable, he may represent, or arrange representation

18. Supplementary submission from the Commonwealth Ombudsman, p. 2. (Evidence, p. 1342).

19. Ibid.

for, any FOI applicant before the AAT. Sub-section 52F(2) provides:

Without limiting the generality of the matters to which the Ombudsman may have regard in deciding whether to represent an applicant in proceedings before the Tribunal under section 55, the Ombudsman shall have regard to -

- (a) the importance of the principle involved in the matter under review;
- (b) the likelihood that the proceedings will establish a precedent in future proceedings;
- (c) the financial means of the applicant;
- (d) the applicant's prospect of success; and
- (e) the reasonableness of the decision under review.

17.21 Section 52F follows a recommendation contained in the Committee's 1979 Report.²⁰ In line with another of the 1979 recommendations, section 52F representation is not available to third parties involved as a result of reverse-FOI.²¹

17.22 The Ombudsman does not raise with complainants the possibility that he may act on their behalf because resource constraints generally preclude him from acting.²² For the same reason, all but one formal request that the Ombudsman act under section 52F have been declined.

17.23 The Committee no longer considers that what is, in effect, an attempt to give priority to FOI matters in the allocation of scarce legal aid funds can be justified.²³ In the

20. 1979 Report, para. 29.23.

21. 1979 Report, para. 29.25.

22. Submission from the Commonwealth Ombudsman, p. 17 (Evidence, p. 1324); supplementary submission from the Commonwealth Ombudsman, p. 6. (Evidence, p. 1346).

23. Cf. Evidence, pp. 1358-60 (Commonwealth Ombudsman).

Committee's view, the ordinary processes of review and litigation have proved to be adequate independently of section 52F.

17.24 The Committee recommends that section 52F be repealed.

Ombudsman as monitor and rapporteur

17.25 The Committee does not believe that the Ombudsman should continue to have the role of monitor and rapporteur with respect to the FOI Act. The various aspects of this role appear to the Committee to be unnecessary.

17.26 Paragraph 52D(3)(b) permits, but does not require, the Ombudsman to include in his annual and periodic reports:

- (i) such observations as the Ombudsman sees fit to make concerning the operation of this Act during the year, or the part of a year, to which the report relates; and
- (ii) such recommendations as the Ombudsman sees fit to make concerning ways in which public access to documents of agencies or to official documents of Ministers might be better secured.

17.27 This provision reflects a recommendation in the Committee's 1979 Report.²⁴ That recommendation was premised upon the Ombudsman playing a greater role in respect of freedom of information matters than has been the case in practice. In particular, the Committee had anticipated that the Ombudsman would have general advisory and critical functions with respect to agencies' handling of FOI matters.²⁵

17.28 In fact, the Ombudsman has not performed these functions to any significant degree, largely because of a lack of

24. 1979 Report, para. 29.28.

25. 1979 Report, paras. 29.2, 29.27, 31.7 and 31.16-17.

resources.²⁶ Other means have developed to fill any resulting gap.²⁷ For example, the FOI Inter-Agency Consultative Committee has largely assumed the role envisaged for the Ombudsman of gathering experiences of individual agencies and considering freedom of information issues of wider interest. The Attorney-General's Department, which chairs this Committee, disseminates advice and conclusions upon points of general interest to all agencies.

17.29 The Committee considers that paragraph 52D(3)(b) is unnecessary.

17.30 Sub-section 52D(1) requires the Ombudsman to provide the Public Service Board with a copy of any evidence which shows that a public servant has been guilty of a breach of duty or of misconduct relating to the FOI Act.²⁸ Sub-section 52D(2) requires the Ombudsman to provide a copy of a report made to an agency under s.15(2) of the Ombudsman Act in respect of agency action under the FOI Act to the Public Service Board.²⁹

17.31 The Committee notes that the Ombudsman questioned whether these provisions served any practical purpose,³⁰ and the Public Service Board no longer exists. The Committee considers that sub-sections 52D(1) and (2) should be removed from the Act on the understanding that the Ombudsman will continue to have available, and to use in appropriate cases, the methods of dealing with administrative recalcitrance presently available to him in the Ombudsman Act.

26. Submission from the Commonwealth Ombudsman, p. 16 (Evidence, p. 1323).

27. Submission from the Attorney-General's Department, p. 74. (Evidence, p. 79).

28. FOI Act, s.52D(1) read with Ombudsman Act 1976, s.8(10).

29. FOI Act, s.52D(2).

30. Submission from the Commonwealth Ombudsman, p. 16 (Evidence, p. 1323).

17.32 Paragraph 52D(3)(a) requires the Ombudsman to include in his general annual report a report on his investigations of FOI-related complaints. The Committee regards this provision as unnecessary. The Committee would expect statistics and comment on these investigations to be included in annual reports in the same way as information relating to investigations of other matters. FOI matters should not be accorded special treatment.

17.33 The Committee recommends that section 52D be repealed, and the Ombudsman have no special role as monitor and rapporteur of the operation of the FOI Act.

17.34 In making this recommendation the Committee does not wish to discourage the Ombudsman from including in his annual reports anything arising from his operations relating to the FOI Act which he regards as appropriate to draw to the attention of the Parliament.

Deputy Ombudsman for FOI

17.35 Section 52C requires the Ombudsman to designate a Deputy Ombudsman as the Deputy Ombudsman for freedom of information matters. The requirement is symbolic only. The person designated possesses no powers not also possessed by the Ombudsman. Recommendations made in this chapter are intended to eliminate any special role for the Ombudsman with respect to FOI. Consistent with this approach the Committee sees no need for a designated Deputy Ombudsman for freedom of information matters.

17.36 The Committee recommends that section 52C be repealed.

Need for Part VA

17.37 It has been suggested that one reason for the majority of aggrieved FOI applicants seeking Tribunal review rather than lodging a complaint with the Ombudsman is the structure of the

Act.³¹ The Act provides for review of decisions in Part VI. Provision for complaint to the Ombudsman, however, is made separately in Part VA, which consists of sections 52A-52F. Recommendations have been made above that sections 52C, 52D and 52F be repealed. The Committee considers that the remaining elements of Part VA should be integrated into Part VI. The Committee believes this would be a modest contribution towards enabling an informed choice of the avenue of seeking to redress to be made.

17.38 The Committee recommends that provision for complaint to the Ombudsman be integrated into Part VI of the FOI Act.

31. Submissions from the Administrative Review Council, p. 26; and the Attorney-General's Department, p. 49, (Evidence, p. 54).

