

Role of the Ombudsman

Introduction

29.1 As we have foreshadowed in Chapter 27 and elsewhere, we believe that there is a strong case for supplementing the formal Administrative Appeals Tribunal external review procedure with a less formal, conciliatory rather than arbitral, dispute settling mechanism of a kind that would be an attractive and inexpensive alternative to the Tribunal in the first instance, and substantially lessen the necessity of frequent recourse to it. After considering various alternative mechanisms which exist or could be created for this purpose, we have concluded, for reasons spelt out in paragraphs 29.29–31 below, that the functions we have in mind could most effectively be performed by the Commonwealth Ombudsman, or at least from his office in the person of a Deputy Ombudsman with special responsibility for freedom of information.

29.2 The functions we have in mind for the Ombudsman in respect of freedom of information include not just his familiar powers in investigation, conciliation and recommendation, but also a role as counsel before the Tribunal on behalf of applicants where in his opinion such intervention was justified. We also envisage the Ombudsman performing a number of useful advisory and critical functions in relation to the general operation of freedom of information legislation.

29.3 In developing a role for the Ombudsman which is significantly greater than appears to have been contemplated by the present Bill, our intention has been to facilitate the task of the individual who seeks to assert his right of access to information. We are keenly aware that expense and fear of litigation are prime obstacles for an individual seeking administrative review by normal adjudicative processes. These, and other considerations such as the inequality of the parties to the dispute, the difficulty of an individual assessing the merits of his claim without some knowledge of the contents of a document, likely bureaucratic resistance to radical legislation, and the realisation that the objectives of the Bill will only be accomplished by the persistence of members of the public making individual claims, have convinced us of the particular appropriateness of an Ombudsman capable of acting as conciliator and counsel in matters concerning freedom of information.

29.4 We have also taken account of overseas precedents which illustrate the wide variety of powers which governments have given, or groups and individuals have proposed, for their Ombudsmen for the purposes of freedom of information. In Britain, for example, Mr Clement Freud's Private Member's Bill, which was introduced into the House of Commons in January 1979, provided that a complaint would be investigated by the Ombudsman with an ultimate right of appeal to the courts.¹ The Canadian Green Paper² suggests a variety of possible review procedures including the appointment of a special Information Commissioner with power to order the release of documents. The Canadian House of Commons

¹ Great Britain, House of Commons, 'Official Information Bill', *Hansard*, 19 January 1979, cols 2131–2213 and see Chapter 2 para. 2.47.

² Canada, Department of the Secretary of State, *Legislation on Public Access to Government Documents*, Supply and Services Canada, Ottawa, 1977, p. 39.

Standing Joint Committee on Regulations and other Statutory Instruments proposed in June 1978 that there should be a right of review to an Information Commissioner with advisory powers, and, regardless of the opinion of the Commissioner, an ultimate right of appeal to the courts.³ Legislation enacted in New Brunswick in June 1978 provides that an appeal may be made to the Ombudsman or to a Judge of the Supreme Court.⁴ A Bill proposed by the Prince Edward Island Government provides for the appointment of an Information Commissioner with a power to order release as the sole avenue of appeal.⁵ And, in British Columbia and Ontario private member's Bills have provided for appeal to the provincial Ombudsmen instead of the courts.⁶

The Ombudsman as conciliator

29.5 The procedure to be followed by the Ombudsman in investigating disputed claims for information would be similar to the procedure adopted by the Commonwealth Ombudsman in relation to general administrative complaints. The Ombudsman would investigate complaints from an aggrieved member of the public and, subject to proposed restrictions in relation to clauses 23, 24 and 25 which are outlined in a subsequent paragraph, examine the documents in question on a confidential basis. The Ombudsman would, where circumstances warranted it, be free to seek an advisory opinion from the Administrative Appeals Tribunal concerning a freedom of information matter, in the same way that he is now able to do so in relation to his general administrative duties (*Ombudsman Act 1976*, s. 11). If he formed the opinion that a complaint was unjustified then he would advise the complainant accordingly and inform him of his rights under the Bill. It could be expected that the Ombudsman's advice would normally be accepted by the complainant, though he would still be free, regardless of the opinion of the Ombudsman, to proceed for review by the Tribunal where applicable.

29.6 If the Ombudsman were of the opinion that a complaint was justified and, for example, that a document should be released he would inform the minister or agency concerned. If the Ombudsman's opinion did not prevail with the minister or agency he would advise the complainant of his right to proceed for review before the Administrative Appeals Tribunal if applicable. It is to be anticipated, however, that most complaints found to be justified by the Ombudsman during the course of investigation would be remedied by the agency concerned without resort to either the adverse publicity of a public report or a full hearing before the Tribunal. The experience of the Commonwealth Ombudsman has been that in the two years or so in which his office has been operating there has been no case where an agency has directly refused to effect an appropriate remedy.

29.7 We have recommended in paragraph 28.11, and repeat here for convenience, that for the purposes of freedom of information the Ombudsman should not investigate a complaint before the completion of internal review unless he is of the opinion, taking into account the urgency and importance of the complaint and the attitude of the agency concerned, that his intervention is warranted at that time. It is important for the long-term future of freedom of

³ *Minutes of Proceedings and Evidence*, Issue no. 34, Third Session of the Thirteenth Parliament, 1977-78 (June 27 1978), pp. 3-12.

⁴ New Brunswick, Legislative Assembly, Right to Information Act, assented 28 June 1978.

⁵ Prince Edward Island, 'Access to Public Documents Bill'—no. 53. Given first reading in May 1977, but was not passed by the legislature and appears to have been dropped.

⁶ Private members' bills are given little consideration in the Canadian provincial legislature and are rarely passed. See Chapter 2, para. 2.41.

information that proper and effective internal review procedures develop, and the unnecessarily premature intrusion of the Ombudsman may well impede that development.

29.8 On the other hand, there ought to be no such inhibition about the Ombudsman playing an active conciliatory role merely because a matter is or may be on its way to the Tribunal. We have already noted (paragraphs 27.5 and 27.24) the inhibiting role that section 6 (3) of the Ombudsman Act does specifically play in this respect, and our view that—whatever its utility may be in other contexts—it ought to have no application in freedom of information matters.

29.9 Recommendation: For the purposes of the Freedom of Information Bill, the Ombudsman should not be precluded in any way by section 6 (3) of the Ombudsman Act or otherwise from investigating a matter which is also subject to review by the Administrative Appeals Tribunal.

29.10 We also noted earlier (paragraph 27.5) that section 9 (3) of the Ombudsman Act bars the Ombudsman from gaining access to any information the disclosure of which the Attorney-General certifies would, inter alia, prejudice security, defence, international or Commonwealth–State relations, or would disclose Cabinet or Cabinet Committee deliberations. This has sweeping implications for the Ombudsman’s capacity to usefully conciliate disputes arising under clauses 23, 24 and 25. Except for Commonwealth–State matters which, here as elsewhere, we do not see as possessing the same degree of sensitivity as the other categories in the list, we do accept that there should be some limitation on the Ombudsman’s powers in this area, and would regard it as justifiable that he not be empowered to physically inspect the documents in question. But we are concerned that the Attorney-General’s certificate under section 9 (3) of the Ombudsman Act might be construed as cutting off not only access to the documents but to all information concerning them, which would reduce the Ombudsman to impotence in a freedom of information context. We are concerned to ensure that the Ombudsman does maintain the right to investigate and conciliate in these areas, and that he is able accordingly to discuss the matters with relevant officials, inspect other relevant documents, and to advise applicants of their rights.

29.11 Recommendation: In relation to clauses 23, 24 and 25 of the Bill the Ombudsman’s powers should include those of investigation and conciliation insofar as he is able, but not include (except in the case of Commonwealth–State relations matters) the power to inspect the documents for which exemption is claimed.

29.12 The other important general restriction on the Ombudsman’s powers imposed by the Ombudsman Act, and previously noted, is paragraph 5 (2)(a)—preventing him investigating action taken by a minister personally, as distinct from the minister’s delegate. The question of the Ombudsman’s power in relation to ministerial decisions is a very important consideration in freedom of information. By virtue of clause 9 of the present Freedom of Information Bill a person has a legally enforceable right to obtain access not only to a document of an agency, other than an exempt document, but also an official document of a minister, other than an exempt document. An official document of a minister is a document relating to the affairs of an agency in the possession of a minister. It follows that on some occasions a decision to refuse access to a document will be made by the minister concerned. Furthermore there is a real likelihood

that where clauses 23, 24, 25 and 26 are argued as the grounds for withholding documents, the decision to refuse access might also be made by the minister concerned. In view of the likelihood of ministerial involvement in the withholding of policy documents, it is crucial for the Ombudsman to be empowered to investigate ministerial decisions refusing or deferring access to information. While this is a significant departure from the present position of the Commonwealth Ombudsman who, in his investigation of administration in general, is precluded from examining ministerial decisions, the two areas are, however, different and warrant a different approach. The statutory right conferred on the public at large by freedom of information legislation carries with it an obligation to provide an effective means of legally enforcing that right. If, as we believe, the intervention of the Ombudsman is required to enforce that right he must have power to review ministerial decisions in matters concerning freedom of information. We accordingly propose that for the purposes of freedom of information, ministerial decisions be within the purview of the Ombudsman. We note that this would also require a reconsideration and possible deletion of paragraph 39 (4) which prevents the Ombudsman granting a certificate of unreasonable delay where a matter has been made, or referred to, a minister.

29.13 Recommendation: For the purposes of freedom of information, ministerial decisions should be within the jurisdiction of the Ombudsman.

29.14 Nearly all witnesses with whom we discussed the Ombudsman's proposed conciliatory role endorsed the concept wholeheartedly, seeing it as a natural extension of that officer's present work and a useful informal way of resolving disputes without becoming enmeshed from the outset in the time-consuming complexities of Tribunal procedures. Some reservations were expressed on the basis that conciliation would most probably be ineffective following reconsideration and reaffirmation at the internal review stage, and that an activity involving 'conciliation' (as distinct from 'administrative oversight') could more appropriately be exercised by an extended preliminary conference procedure at the Tribunal level than by someone in the position of the Ombudsman.⁷ We do not believe, however, that these concerns justify any modification of the role we propose for the Ombudsman; the former underestimates the proven force and utility of the Ombudsman's position in securing a rethinking of even the most apparently entrenched positions, while the latter both understates the extent to which the Ombudsman plays now a straightforward conciliatory role and possibly overstates the likely utility of a Tribunal preliminary conference.

29.15 We sought a reaction to our proposals at an early stage in their formulation from the Commonwealth Ombudsman, Professor Richardson, himself. He gave clear general support in principle, but drew attention to one particular area of possible difficulties. He was concerned that two sometimes conflicting bodies of jurisprudence would develop, for example, on the question of public interest, if a complainant were allowed to pursue a claim either before the Tribunal or the Ombudsman according to his preference.⁸ He also considered it inappropriate for an independent statutory office holder to apply, as a matter of law, the jurisprudence of the Administrative Appeals Tribunal.⁹ He proposed instead a filtering process whereby the Ombudsman, not the complainant, would

⁷ See especially Department of the Capital Territory, *Transcript of Evidence*, pp. 2254-57.

⁸ *Transcript of Evidence*, p. 1587.

⁹ *ibid.*

on each occasion choose whether his office or the Tribunal was the appropriate avenue for review and, in doing so, would ensure that appeals based on particular clauses were always reviewed by the same body.

29.16 Having given the matter careful consideration, we do not share Professor Richardson's concern that the jurisprudence developed by the Ombudsman would differ from, and conflict with, the jurisprudence of the Administrative Appeals Tribunal. Clearly the interpretations and rules laid down by the Tribunal would form the precedents which the Ombudsman would apply in conciliation and, in doing so, the Ombudsman would no doubt develop rules of thumb to avoid any possibility that decisions made by his office would conflict with those of the Tribunal. We also prefer a scheme which would permit the individual, rather than the Ombudsman, to elect the avenue of relief according to his own personal and financial resources.

The Ombudsman as counsel

29.17 While conciliation has, so far, proved very satisfactory as a method of dispute resolution in the first two years of the Commonwealth Ombudsman's oversight of administration in general, it must be acknowledged that the heavier policy and political flavour of most freedom of information disputes is likely to give rise to a number of conflicts which can only be resolved by the Administrative Appeals Tribunal. We have little doubt that professional representation will be necessary in a great many of the freedom of information cases which thus come before the Tribunal. Officers of the Department of the Capital Territory gave evidence that, from their experience, there was little need for applicants to be represented before the Tribunal since proceedings were inquisitorial, with members of the Tribunal doing all in their power to assist applicants, intervening on their behalf where necessary.¹⁰ They conceded, however, that most of the Department's cases before the Tribunal involved residential ratings with hearings concentrating on disputed matters of fact and the construction of relatively straightforward criteria. Accordingly there was little comparability between these cases and potential freedom of information disputes which would, to a great extent, involve the application of more vague, shifting criteria, involving a weighing of public interests which would raise complex legal questions requiring for their effective presentation proper professional representation.

29.18 As the legislation now stands, however, there is a built-in disincentive to applicants obtaining professional advice of the quality and in the quantity they may need; the Administrative Appeals Tribunal, here as elsewhere, has no general power to award costs in favour of a successful applicant. Since all but the most trivial matters are likely to be expensive to litigate, only well-off individuals, organisations and corporations will enjoy the luxury. In Chapter 30, we discuss this difficult and sensitive question at some length, and make the recommendation, among others, that the Tribunal be empowered to exercise a discretion in appropriate circumstances to recommend to the Attorney-General that a successful applicant's costs be paid. It is an integral part of our general solution to the problem, however (and one also further developed in Chapter 30), that the Ombudsman be available to act as counsel for applicants in appropriate circumstances. We believe it is only by this means, and not by either ordinary cost rules or the (uncertain) availability of legal aid, that the majority of freedom of information cases demanding resolution by the Tribunal will, in fact, be resolved.

¹⁰ Cited footnote 7, pp. 2258-59.

29.19 We do not suggest that representation by the Ombudsman should be automatic or as of right. In deciding whether to represent an applicant before the Tribunal, the Ombudsman should be required to give due weight to such considerations as the importance of the principle involved in the matter; the precedential value of the case; the financial means of the complainant; the complainant's prospects of success; and the reasonableness of the agency's action in withholding the information. These criteria would ensure that the Ombudsman only intervenes in circumstances which justify his so doing.

29.20 It may be that our proposal that one office should be responsible for the dual functions of conciliation and counsel will be controversial to some who consider that the Ombudsman's essential quality of objectivity will be prejudiced. We note however, that when questioned as to the desirability of this combination for freedom of information purposes, witnesses generally indicated their approval; some saw a similarity between the conciliator-counsel role proposed here, and the various State Commissioners for Consumer Affairs who were empowered to both conciliate and to argue the cases before the relevant Credit Tribunal.¹¹

29.21 This joint role was, in fact, initially proposed for the Commonwealth Ombudsman by the Commonwealth Administrative Review Committee (Kerr Committee 1971),^{11a} although it was subsequently rejected by the Committee on Administrative Discretions (Bland Committee 1973).^{11b} It is certainly a principle well known to the Swedes. The Swedish Ombudsman has long been empowered to institute proceedings against those who, in the execution of their official duties, have acted illegally or negligently. It is a principle which the Canadian government proposes to apply in the case of the Privacy Commissioner. A Bill has been introduced providing that the Privacy Commissioner would become an Assistant Ombudsman with strong powers of access to information, and, in the case of a minister's refusal of a request for a document, he could apply to the Federal Court for a determination.¹² It is a principle which we believe is practicable and appropriate in the Australian context.

29.22 To the extent that it is necessary, the functions of conciliation and counsel can be kept separate in the Ombudsman's office. But whether agencies show a reluctance to speak and provide documents as freely or negotiate as co-operatively will depend more on their perception of the role of Tribunal proceedings than on administrative arrangements within the Ombudsman's office. If they perceive these proceedings as adversarial rather than inquisitorial, they will adopt the litigant's philosophy of 'hiding one's hand'. This philosophy is misguided. The real purpose of a hearing before the Tribunal is not to enable argument as to whether a decision-maker was wrong in the sense of allocating praise or blame but rather to determine, from the material presented by the parties and all other relevant material, what is the right or preferable decision in the circumstances. Provision for universal discovery and pre-trial conferences in the Administrative Appeals Tribunal Act recognise this different approach in Tribunal proceedings. Once the necessary attitudinal change is made, then negotiations between agencies and the Ombudsman should proceed smoothly despite his additional role as counsel.

¹¹ M. Jacobs, journalist with *The Advertiser* (Adelaide), *Transcript of Evidence*, p. 1909 and J. Goldring, *Transcript of Evidence*, p. 767.

^{11a} Australia, Parliament, *Commonwealth Administrative Review Committee Report* (Hon. Mr Justice Kerr, Chairman), Parl. Paper 144/1971, Canberra, 1971.

^{11b} Australia, Attorney-General's Department, *Committee on Administrative Discretions* (Sir Henry Bland, Chairman), *Final Report*, AGPS, Canberra, 1973.

¹² Canada, House of Commons, Ombudsman Bill (C-43) introduced 5 April 1978.

29.23 Recommendation: For the purposes of freedom of information the Ombudsman should be empowered to act as counsel before the Administrative Appeals Tribunal on behalf of an applicant if he forms the opinion that his intervention is warranted. In forming his opinion he should take account of such considerations as:

- (a) the importance of the principle involved in the matter;
- (b) the precedential value of the case;
- (c) the financial means of the complainant;
- (d) the complainant's prospects of success; and
- (e) the reasonableness of the agency's action in withholding the information.

The Ombudsman and Reverse-Freedom of Information cases

29.24 We have considered whether, and to what extent, the services of the Ombudsman should be available in Reverse-Freedom of Information cases (discussed in Chapter 25) to third parties who wish to prevent the release of information which they have provided to government. The question which concerned us was whether, if the Ombudsman chose to represent a third party before the Tribunal, such representation would reflect adversely on, and unfairly prejudice, the applicant's case for release. Circumstances could arise when the Ombudsman would be called upon to represent both parties. In view of the complications of enabling the Ombudsman to appear on behalf of third parties, as well as other applicants, we propose that the Ombudsman's powers in relation to third parties be restricted to the power of investigation and conciliation.

29.25 Recommendation: The Ombudsman's powers in Reverse-Freedom of Information cases, in relation to people seeking to prevent the release of information which they have submitted to government, should include the power of investigation and conciliation but not include the power to act as counsel before the Administrative Appeals Tribunal on their behalf.

The Ombudsman as adviser and critic

29.26 With the Ombudsman playing a major role in the enforcement of the rights and obligations under the Bill, his office would, after a comparatively short period of time, develop a body of expertise on all aspects of the Freedom of Information Bill. In view of this, we considered whether the Ombudsman should also be charged with administrative responsibility for monitoring compliance with the Bill and of systematic report as to the extent to which agencies had fulfilled their obligations. We concluded that it was more appropriate to vest this function in a particular department headed by a minister directly responsible, and answerable on a regular basis, to the Parliament. The subject of administrative monitoring, and the particular role we propose in this respect for the Attorney-General's Department, is discussed in detail in Chapter 31.

29.27 We formed the view that the Ombudsman's knowledge and expertise could best and most appropriately be utilised by vesting general advisory and critical functions in his office. The Ombudsman and his officers would advise agencies, at their request, concerning their obligations under the Bill and in the course of their reports to Parliament would offer from time to time suggestions for improvements and reform in relation to procedure, practice, the

regulations or the text of the Bill itself. In Chapter 32 we make further comment and recommendation as to the nature and content of the Ombudsman's reports.

29.28 Recommendation: The Ombudsman should be empowered to advise agencies, at their request, concerning their obligations under the Freedom of Information Act and, in his reports to Parliament, to offer suggestions for improvement and reform in relation to freedom of information in general.

Establishing the appropriate machinery

29.29 We gave careful consideration to the most appropriate way of formally establishing the machinery to exercise the various functions described above. It became clear to us very early that, because of the close comparability of these functions with the general administrative role performed by the Ombudsman, such machinery should, as a practical budgetary matter, be physically located within, or alongside, the present office of the Ombudsman, and be administered along with the ordinary functions of that office. There were still several options available, however, so far as the formal delineation of function was concerned:

- (1) the appointment of a separate statutory office-holder, perhaps known as the 'Information Commissioner' or 'Information Ombudsman' for freedom of information purposes;¹³
- (2) the vesting of all relevant powers and duties in the Commonwealth Ombudsman himself;
- (3) the vesting of the relevant powers and duties in a specifically designated office-bearer, perhaps known as the 'Deputy Ombudsman (Information)', within the Ombudsman hierarchy; or
- (4) the vesting of all relevant powers and duties in the Ombudsman himself, but on the understanding that these freedom of information matters would be delegated to a Deputy Ombudsman specifically appointed for this purpose.

29.30 Our preference is, on balance, for option (4). Option (1) could be expected to be resisted on the basis that, even if this was more a matter of appearance than reality, it would involve the establishment of a new bureaucracy. Options (2), (3) and (4) all pick up the advantage of overt association with the Ombudsman's office, with its prestige, public visibility and accessibility and its accumulated experience of investigation and conciliation. Options (3) and (4) have the advantage over (2), as they would achieve a certain separation

¹³ We have noted overseas trends towards vesting Ombudsmen with specific limited functions. There are single-purpose Ombudsmen in correctional institutions in Canada and the United States, Military Ombudsmen in several countries, Privacy Ombudsmen and Press Ombudsmen. The concept of an Ombudsman with such a specific and limited jurisdiction is not unique in Australia and was proposed in the Defence Force Ombudsman Bill 1975. This Bill passed the House of Representatives and reached second reading stage when Parliament was dissolved in November 1975. The proposed Defence Force Ombudsman was authorised by clause 5 to investigate, within certain limits, administrative action 'taken by the Defence Force, or by a public authority, with respect to a matter that is related to the service of a member of the Defence Force'. He could also refer any complaint to the Commonwealth Ombudsman, if the action was taken by a public authority, and the matter was consented to and could more conveniently be investigated by the Commonwealth Ombudsman. Although the Bill was not passed, a Defence Ombudsman was appointed and has continued to function under administrative arrangements made in 1974. See 'Citizens hope: Ombudsman for the 1980s', an address given by the former Chief Ombudsman for New Zealand, Sir Guy Powles at the Law Centre, University of Alberta, Canada, October 1978, *Commonwealth Law Bulletin* 5, 2 April 1979, pp. 522-34.

consonant with the difference in powers and responsibilities between freedom of information matters and administrative oversight in general. Of these two, option (3) obviously better formalises this distinction, but has a number of technical difficulties associated with it, not least the consideration that a Deputy Ombudsman simply so created would have no staff of his own to perform freedom of information work. The simplest solution is thus option (4), which would preserve a de facto separation by virtue of delegation from the Ombudsman to an appropriate deputy; this would not of course remove the power of the Ombudsman himself to also exercise the delegated powers should he so choose.

29.31 Recommendation: The relevant powers and duties should be vested in the Commonwealth Ombudsman for delegation to a Deputy Ombudsman appointed for freedom of information purposes.