

Senate Occasional Lecture

Friday 28 November 2014

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‘Exploring the role of the Commonwealth Ombudsman in relation to Parliament’

First of all, I would like to acknowledge the traditional owners of the land on which we meet and pay my respects to their elders both past and present. I am very happy using the word ‘meet’ actually, because this Ombudsman is not the hectoring, lecturing sort of Ombudsman, I hope. The word ‘lecture’ has that sort of hectoring overtone to it, so what I want to do today is talk to you about our role in the context of the Parliament and our role in general.

I have been the Ombudsman for a little over two years now. It seems like, as a lot of you might understand, as you go on in life two years flashes by pretty quickly. And so my reflections on the role are influenced by the fact that I have been here for two years and I have had almost twenty years’ experience with ombudsmanship altogether. But I have also had about 45 years’ work in the private sector, so I am not really from a public sector-type background. Most of my experience has been in the private sector. And I was just thinking today, as I was coming along, that the very first job that I ever had started 56 years ago virtually today when I was working in the Myer underwear department after having completed my intermediate year at school. I don’t remember ever getting the intermediate certificate, by the way, I am not sure whether they handed them out in 1958 or whenever that was. Anyway, that is by the by.

What I want to do today is to talk broadly about my perceptions of the role of the Ombudsman under various headings: I want to talk about leadership, I want to refer to some history issues, I want to talk about what I regard as good ombudsmanship, I want to talk about the policy contribution that an Ombudsman can make, and I want to talk a bit about the future of the role of Ombudsman.

There are some people, both in government and the community, who think that all the Ombudsman does is to handle complaints, that we investigate complaints that people can’t resolve in their dealings with the Commonwealth or ACT government agencies. That is a very narrow view these days, and it falls dramatically short. In fact, it is a very old-fashioned notion. In reality, we are leaders in building better public administration. We have got a critical place between government and the public, and we are a safety net for members of the community. Ombudsman schemes are an integral part of a framework that provides access to justice, to consumers as well, and we contribute significantly to the standards of public administration. We promote good governance, accountability and transparency,

through oversight of government administration and service delivery. Ombudsmen contribute to improving accountability and good governance in three main ways.

Firstly, we do resolve individual disputes. We investigate complaints, and we safeguard citizens from government actions which could adversely affect them, and we give citizens a voice to complain where they would otherwise fear to do so. Ombudsmen are often the only avenue readily available to individual citizens seeking recourse on matters of maladministration or official misconduct that affect everyday lives. Because ombudsmen services are free, they are practically valuable to the most vulnerable.

We investigate systemic problems. I had a conversation with a very senior public servant very recently who didn't realise that we do that. And we do that on our own initiative, from time to time. On other occasions we might have one complaint made to us which we can see might well apply to many other thousands of people. So we look at how we can fix problems through an Ombudsman investigation, not only in relation to the complaint that has been made to us, but also to help others who might have been adversely affected by, for example, maladministration.

We contribute to improving public sector performance, and that works in two ways: directly, where the information from complaints about areas of poor service delivery is fed back to agencies; and indirectly, where the potential oversight of each decision by the Ombudsman is an incentive to public servants to improve the quality of their actions and decisions. In our case, we can add a fourth element. That is, we monitor law enforcement agencies for their compliance with the relevant legislation. It is a topic on which I will elaborate later.

An Ombudsman can get good insight into how a policy or the delivery of that policy can go off track or where there is a mismatch between what the government offers and what the public expects or demands. It is recognised that mechanisms are needed to ensure administrative processes are sound. No agency, of course, sets out to perform badly, but mistakes are inevitable in any industry or field of endeavour, and the public sector is certainly not immune from that.

Now I want to deal with some historical matters. The idea that people have a right to complain about government without hindrance or reprisal, and to have their complaint resolved on its merits, is firmly established. Most agencies are willing to engage with, resolve and seek to learn from complaints. It is best summed up by saying—and this is really a quote from Colin Neave—‘agencies deal with complaints while ombudsmen deal with disputes’. Agencies should rightfully be the first to receive and deal with complaints. If the citizen is not satisfied, they can come to us. For this reason, we are

very interested in agencies' complaint-handling systems. The better they work, the fewer disputes that come through to ombudsmen.

The role of Ombudsman initially came across as being very combative—that is why I referred to the 'lecturing and hectoring' point I made at the outset. However, Ombudsman offices have developed into being powerfully influential and able to work in collaboration with agencies and departments under their jurisdiction with the objective of continually improving the quality of public administration. The Commonwealth Ombudsman commenced operations in 1977. At that time, dealing with the Commonwealth Ombudsman was a new experience for Commonwealth public servants. Some of you may have been in the public sector at that time. Indeed, what the Ombudsman did initially, may well have come as a shock to what was then called a permanent head of a government department and leaders of agencies. Those permanent heads no doubt saw themselves as running the country. The effect of the Ombudsman's scrutiny of administrative acts of their departments may well have been interpreted by them as reducing their power.

The first Commonwealth Ombudsman, Professor Jack Richardson, was not backward in coming forward in his approach to the role. He engaged in a lot of publicity for the existence of the office of the Ombudsman back in 1977, suggesting that citizens disturbed about administrative acts performed for them, should come direct to him in order to obtain appropriate redress. That publicity included paying for an advertisement for his office on milk cartons in the ACT, and one can imagine a permanent head of a government department confronting a smiling picture of Jack on a milk carton with an advertisement and contact details for his office as that permanent head poured milk on his breakfast cereal. And 'his' is correct in those days—there were no women heads of department.

In short, there was quite a deal of conflict between the first Ombudsman and senior members of the bureaucracy in Canberra initially. Around the time of the establishment of the Commonwealth Ombudsman, other state ombudsmen were being set up. Some were established before the Commonwealth Ombudsman. In 1989, the first industry ombudsman was announced by the banking industry. This was followed shortly thereafter by organisations handling complaints about telecommunications, general insurance, investment products, energy and water. There are lots of ombudsmen these days. Those industry ombudsmen were established essentially to redress what was seen to be a power imbalance between individual consumers and industry, when many organisations were being privatised like Telecom as part of asset sale initiatives or by various state governments or as a result of freeing up markets. The government-owned telecommunications company was sold, and the market for financial services was deregulated from around 1987. So the industry ombudsman, along with government ombudsmen, as they have developed, have been seen as a very important access to justice mechanism given that their services are free to consumers and generally small

businesses. They also have extensive public awareness programs in place, which has had the effect of making the Ombudsman name readily recognised in the Australian community. In fact, over seventy per cent of the Australian community now have an appreciation of what an Ombudsman does.

Moving to the present, the 2014 Federal Budget and the report by the Commission of Audit highlighted the changing environment for public sector agencies in general. For us, this has included a change in some functions in the future, a requirement to manage, of course, with fewer resources and a growing role for what has come to be known as an integrity agency. None of these factors have affected our core purpose which is to influence agencies to treat people fairly through our investigation of their administration. In pursuing this purpose the office seeks outcomes that deliver fairer treatment of people, accessible, effective and targeted complaint-handling services, agency compliance with legislation in the use of intrusive and coercive powers and the effective and efficient conduct of our own business. The ombudsman of all organisations needs to be a shining example to the rest of the public sector in relation to management and the way in which we conduct our business, and so we pursue these outcomes through four pillars of assurance, integrity, influence and continuous improvement. Essentially we aim to provide assurance that agencies act with integrity and treat people fairly. We work with agencies to influence them to improve public administration and assure the Australian community and the government that those agencies treat people fairly by monitoring their complaint handling. Access to justice is assured through that accessible, effective and targeted complaint-handling services.

Like every other agency, our role will continue to evolve. As governments' activities and citizens' expectations of government change, so must ombudsmen. We should no longer see change as unusual; it is with us in the public and the private sectors and now always will be. As announced in the 2014 Federal Budget, the Private Health Insurance Ombudsman function is expected to come to our office from 1 July 2015 and we are having discussions with that agency at the moment about the best way to transition that role to us. It is also expected that the handling of Freedom of Information complaints will come to us from 1 January 2015. In addition, developments on Norfolk Island and the ACT have resulted in some function changes.

Norfolk Island has enacted its own Ombudsman Act which includes provisions that establish the position of a Complaints Officer and the requirement for the Commonwealth Ombudsman to inspect and report on the Complaints Officer's records at least annually. Under an arrangement between the ACT Government and the Australian Government, the Commonwealth Ombudsman is also the ACT Ombudsman, which is a role I enjoy because some of the work that we do at the Commonwealth level is remote from the community, whereas the role as ACT Ombudsman is very close to the community, dealing with the sort of issues with which communities are directly involved. Problems about parking

and problems about tenancies for public tenants, all those sorts of issues come to the ACT Ombudsman and it really is good for our office because it brings us back to earth in a sense.

The ACT Ombudsman's office was established in 1989 as part of the framework for ACT self-government. On 1 July this year, the *Officers of the Assembly Legislation Amendment Act 2013* came into effect. That changed the status of the ACT Ombudsman, the ACT Auditor-General and members of the ACT Electoral Commission so that we became very clearly officers of the Legislative Assembly. There is much to commend this initiative because then there is no doubt about the role that the Ombudsman in the ACT jurisdiction has, to make reports direct to parliament. That is available to us in our legislation at the Commonwealth level but it is certainly there with great clarity in relation to the ACT Assembly, which as I say, is a very welcome development.

We are assuming a greater role as an 'integrity agency', overseeing and investigating the activities of Australian and ACT public sector agencies. This year we were instructed with new functions, such as our role in the Public Interest Disclosure (PID) scheme because of our independence, impartiality and investigative skill. These attributes developed through traditional complaint-handling roles, mean that we can play a bigger role in improving and maintaining the standard of public administration in Australia. The PID scheme is central to our growing integrity role. It seeks to improve accountability and integrity in the Commonwealth public sector by supporting agencies to address suspected wrongdoing. The scheme became effective on 15 January 2014. It conferred a number of roles and powers on the Commonwealth Ombudsman to ensure the scheme provides robust protections to public officials who report wrongdoing in the public sector while protecting national intelligence and security. Our role includes assisting both agencies and disclosers, to interpret, understand and comply with the legislation. The oversight of agency decisions and annual reporting to the parliament also provides transparency and accountability. As I said before, our complaint-management function is enshrined in the Ombudsman Act.

The parliament has passed other legislation which gives us additional roles where clear, impartial, external oversight is required and that is what we call our monitoring role. One of these functions, and one which is most closely aligned to our core complaint-management business, is our review of the Australian Federal Police's administration of part five of the Australian Federal Police Act. Part five of the Act has regard to the AFP professional standards and provides the framework for its complaint-management system. The introduction of that part of the Act resulted from a review of the AFP's disciplinary processes with a view to moving towards a more administrative approach to professional standards. We now focus on how the AFP deals with complaints, not just the subject matter of the complaint. The AFP Act requires my office to inspect records of AFP complaint investigations and to review the comprehensiveness and adequacy of the AFP's administration of part 5 of the Act. We are

then required to report to parliament on our findings. In conducting these reviews we don't reinvestigate the AFP's investigations into complaints, rather we assess its complaint records against specified criteria, which are in turn based on what is in the AFP Act, the AFP Commissioner's Orders and his guidelines and best practice in complaint management. By focusing our reviews on the administration and processes of the AFP's complaint-management system, we can incorporate factors for assessment that the complainant may not be aware of, such as conflicts of interest.

People who lodge complaints with the AFP, or AFP officers who may be the subject of a complaint, should expect that the complaint will be managed in an objective and professional manner. Therefore, during our inspections we have regard to matters such as the consideration given by investigators to possible or actual conflicts of interest, how conflicts of interests were managed and whether the investigators contacted relevant witnesses. I am giving you this as an example of the sort of monitoring role which we perform because we do consider the entire complaint-management process from start to finish, including the reasonableness of the findings from the investigation, to identify where the AFP complaint-management process may not have been complied with. We can then raise these issues with the AFP which can then take appropriate action. Our oversight of the AFP's complaint management system is all-encompassing and we also investigate complaints, of course, about the AFP that are made to our office direct.

As well where we identify AFP conduct or practice which is not the subject of a complaint, we may choose to commence our own motion of investigation ourselves deciding that something should be looked into, and we have developed a very productive working relationship with the AFP. Another example of where the parliament may prescribe a monitoring role for our office includes when legislation is passed that empowers agencies to conduct covert or surveillance activities. Again, as the public would not, or at least should not, be aware of those covert, secret activities, they are unable to make a complaint about an agency's actions—we can't get a complaint about something the public does not know about—therefore the legislation will often include an independent oversight mechanism to increase accountability and transparency of agencies' use of those powers.

Currently my office performs this independent oversight in relation to powers such as intercepting telecommunications, preserving and accessing stored communications, using surveillance devices, undertaking covert and undercover operations and exercising coercive examination powers. In performing some of these functions, my staff inspect the records of Commonwealth and also state and territory agencies, and I have myself been on a visit to work with my staff just to see what is done, which I found very illuminating indeed. After inspecting each agency's records, we then report to ministers in the parliament on agency compliance with the relevant legislation. The Ombudsman is also required to appear before parliamentary joint committees to brief parliamentarians on some of

our monitoring activities and answer questions about how we conduct our inspections. We welcome this scrutiny on behalf of the parliament to ensure that our office conducts this work to the highest possible standard. We have an established set of methodologies for each of these oversight roles which are applied consistently across all agencies. These methodologies are aligned to best practice in auditing standards, focus on areas of high risk and are based on the principles of transparency, accountability and procedural fairness. Our methodologies are also based on legislative requirements and best practice. We also give, as required by legislation, notice to each agency of our intention to inspect their records and provide them with a broad outline of our inspection or review criteria. This focuses agencies on what we will be assessing and keeps surprises to a minimum.

To ensure procedural fairness we provide a draft report on our findings to the agency before it is finalised and we report to the relevant minister. So there is a constant involvement with ministers and also with the parliament to ensure that the community can be reassured about the use of some of these covert and surveillance powers. Occasionally we may also report to the parliament if we identify an issue that falls outside that which is required of us, but which we consider to be an important issue of safety in the community or interest. For example, the ACT Ombudsman is required to monitor ACT Policing's compliance with chapter four of the Crimes (Child Sex Offenders) Act which establishes the ACT Child Sex Offenders Register and relevant access restrictions. In 2010, as a result of performing this monitoring role, it became apparent to our office that the Act could be improved to help reduce the likelihood of child sex offenders reoffending and could be strengthened to help ACT Policing monitor offenders. We wrote to the ACT Attorney-General, who responded and in due course amended the legislation in 2012. Most recently we have used our monitoring experiences to inform our submissions to and our appearances before parliamentary inquiries into proposed reforms to the Telecommunications (Interception and Access) Act and the Crimes Act.

During the course of performing these oversight functions we interact with parliamentary process at most stages, including the drafting and passage of legislation, through to the monitoring and reporting of how the legislation is applied. Robust oversight also allows my office to provide assurance to the parliament that agencies are engaging in sound administrative practices and to identify and report on issues that may impact on the community, and of which the community would not otherwise be aware.

I now want to talk about what I call good ombudsmanship, which is a long word 'ombudsmanship', and I have made it up for the purposes of today, but it is pretty illustrative.

Ombudsmen, out of necessity, to maintain both actual independence and perceived independence work, to a very real extent, in isolation. You have got to be, as an ombudsman, a person who is very

comfortable occupying the middle ground because obviously you can't be an advocate for a department or an agency, and also you can't be an advocate for a citizen or community member. You have to be there as a person seeing fair play and forming views based on fairness and other considerations but you have to be very comfortable in the middle. We can also work, as ombudsmen, against entrenched and powerful interests. Most ombudsmen have experienced resistance to the oversight of government. While we need to, and do, maintain good working relationships with agencies, we also need to maintain our distance. It is what I call 'collaboration without capture': working with agencies, but not being unduly influenced by them. For that reason it is important that ombudsmen institutions support each other.

I am the regional president of the Australasia and Pacific Ombudsman Region of the International Ombudsman Institute and I am also a board member of that Institute and also the Chair of the Pacific Ombudsman Alliance, which deals with ombudsmen in the Pacific region. I was formally the Chair and one of the co-founders of the INFO Network, which was the organisation of financial ombudsmen throughout the world. The International Ombudsman Institute (IOI) is a global organisation that promotes cooperation between 150 ombudsman institutions all around the world. I recently had the great pleasure of going to its board meeting in Vienna. The IOI encourages the exchange of information at regional and international levels, but the main goal of the Institute is to facilitate communication between all members in order to be a forum within which ombudsmen can frankly discuss issues which confront them. Our involvement in the Institute gives us a platform for voicing regional issues and ideas to the international ombudsmen community and to influence the discussion about the place of ombudsmen within the integrity landscape now, and into the future, and to learn about developments overseas.

Some of the matters which have come up internationally include a move to have a complaints agency with jurisdiction over a single department. In my view, a very unwise development, given the possibility of complaint-handler capture or an unworkable relationship if things do not go well between the complaint handler and the single agency about which it handles complaints. That relationship problem can, in my opinion, develop for the following reasons: coupled with proposals for single agency complaint handling, comes suggestions that the complaint handler should have on its staff, specialists in the business of the agency about which it gets complaints, so that the complaint handler has a deep technical knowledge of the business of the agency, in respect to which complaints are received. This can lead to the complaint handler second guessing the agency's decisions, which should not be its role. The Ombudsman's role is based on examining administrative processes and service delivery. It is for other agencies to handle appeals from decisions.

An ombudsman needs to develop a collaborative approach, as I said earlier. If there is a second guessing of decisions based on technical or legal differences, the potential for breakdown in a relationship is heightened and in the end a poorer service for the community because, as the complaint handler or ombudsman has no determinative powers, it can't force an agency to do anything. Only influential powers and the power to influence will be lessened, if there is a deep-seated difference regime between the complaint handler and the agency. There is a chance, in the same circumstances, of complaint handler capture, so that the complaint handler does not act independently where a complaint handler deals with complaints about a single agency. Where there is a one agency, one complaint handler regime in place, the temptation is to have staff secondments and a whole lot of things, which can lead to the complaint handling organisation becoming cosy with the organisation subject to its jurisdiction. So that is one of the issues, just giving you an example, of the sort of issues that could come up in the international community and from which we can learn here in Australia.

Closer to home, the Pacific Ombudsman Alliance (POA) is a service delivery and mutual support organisation for ombudsmen and allied institutions of countries that are members of the Pacific Islands Forum. Our office receives funding from the Department of Foreign Affairs and Trade to provide secretariat services and funds activities which are selected and evaluated by the Pacific Ombudsman Alliance Board, which I chair and which has members on it, for example, including the Ombudsman from Papua New Guinea, the Ombudsman from Vanuatu and the Ombudsman from Marshall Islands. So what is the point of a regional network? Members of POA share a number of critical development challenges stemming from their geographic location, small populations and markets that limit economies of scale. As well they work in an inherently contested environment, often vulnerable to the political whims of the government of the day, and where from time to time there are significant allegations of corruption. That is the sort of thing that is regularly confronted by the Ombudsman in Papua New Guinea and from time to time the Ombudsman in the Solomon Islands. The POA provides a regional support mechanism that facilitates dialogue and cooperation between ombudsmen and allied institutions on issues relating to accountability, transparency and integrity. The members of the Pacific Ombudsman Alliance share many challenges and use the alliance to exchange ideas and experiences and target assistance to its members to build institutional capacity. The Pacific Ombudsman Alliance also provides a visible international support structure that can assist ombudsmen in strengthening their domestic positions.

My office supports it because we are a well-established office with access to expertise and resources in ombudsman theory and practice and we have an established relationship with the Pacific Ombudsman Alliance and with its members collectively and individually. As well the Commonwealth Ombudsman has an established relationship with parliamentary and industry ombudsman officers across the world through the International Ombudsman Institute and other organisations. At the

moment we manage four aid-funded international programs for the Pacific Ombudsman Alliance. We work in Indonesia and Papua New Guinea and the Solomon Islands and we can offer coordinated support by counterpart countries across programs. I should say that we learn, in a way, just as much from what is going on in some of those areas, as we might give to those people that we work with, because we always keep an open mind about whether or not we can learn, as well as invest in, providing information ourselves. In short, our international connections allow us to tap into overseas experiences and provide leadership to other offices which need our help.

I just want to spend now a moment on policy contribution. Given the theme of this talk rather than lecture, I would like to mention the role of an ombudsman in relation to policy development. The first Commonwealth Ombudsman, my friend Professor Jack Richardson, who unfortunately has now passed away, said almost 30 years ago ‘occasionally, it is still said that ombudsmen do not and should not, delve into matters of policy. I believe that to be a misconception of the Ombudsman’s function.’ Some controversy is unavoidable by an Ombudsman, as Bob Ellicott who, as Attorney-General, had appointed Professor Richardson as Ombudsman, commented also in 1985. Professor Richardson had served that position with great distinction, though not always without controversy, but then, he was not intended to be non-controversial. But I am not here to argue today for, or defend, the notion that I as Commonwealth Ombudsman should be able to critique government policy. What we do is make appropriate submissions when requested to parliamentary inquiries where legislation is being examined, and that has been our policy for many years and that will continue into the future. The overall aim of my presentation today was to outline how my office works within the scope of the parliamentary process. To me that is part of the parliamentary process and reinforces the valuable contribution that we make to improving public administration.

So where do I see the future of ombudsmen? I recently read a publication produced by the Catalan Ombudsman in Spain, to which contributions were made by a professor and lecturer in constitutional law at the University of Barcelona. The publication *International Framework of the Ombudsman Institution*, describes a growing interest among international organisations including the Council of Europe and the United Nations in the implementation and strengthening of the Ombudsman Institution as an institutional mechanism to guarantee human rights. In this publication the strong connection is made between maladministration, the hiding or non-disclosure of that maladministration and the development of corrupt practices, flowing initially from that maladministration and its non-disclosures. So the focus of our office on maladministration is really about reducing the possibility of corruption because hidden maladministration, in the view of many commentators, can then lead to corrupt practices developing. So it follows that the Institute of Ombudsmen is therefore important, not only to protect human rights but more broadly. That publication also refers to the ombudsman being

appropriately and doctrinally referred to, and I think this is a lovely phrase myself, as ‘a magistrate of persuasion’¹. Only Europeans, I think, could put together something like that.

In other words, the impact of the Ombudsmen Institution’s final decisions are not derived from the non-existence, normally binding, or coercive, or determinative powers, but from the rigour, objectivity and independence with which ombudsmen conduct their activities. In other words, from their implied authority and one could say, their ‘gravitas’. Indeed, international studies and the International Ombudsman Institute have stressed it like the relevance of the ombudsman, as a mechanism essential and necessary for the strengthening of democracy and the guarantee of rights, especially in times of economic crisis. In Australia, too, this is relevant not only in relation to government ombudsmen but to those industry ombudsmen that I talked about before. Internationally the ombudsman role has continued to develop and be recognised as an important part of a democratic state.

So what I have been saying today is this: the ombudsman is not just a complaint handler, we have got a very strong commitment to exposing systemic issues. We have a very strong monitoring role which has developed over the last almost 40 years. We have very strong mutually beneficial international connections and overall, our approach in order to get a better result for the community, is to collaborate with departments and agencies, but not be captured. That concludes my presentation and I hope that I have given you an insight into the work we do. Thank you.

¹ International Framework of the Ombudsman Institute, Sindie de Grenges de Catalunya, May 2014, p. 10.