

WHAT CAN WE AS OMBUDSMAN EXPECT IN THE FUTURE?

*Address by Prof. John McMillan, Commonwealth Ombudsman, to the International
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The road ahead is always a continuation of the road just travelled. We can better understand where we are going and what we can expect, by looking back at where we started and what we saw along the way.

The development of Ombudsman offices, both in Australia and internationally, has largely been a phenomenon of the last thirty years. In our region, New Zealand led the way in 1962, followed in Australia by all States and the Commonwealth in the 1970s. Over that period the office of Ombudsman has risen from obscurity to a prominent place in the governance framework in society.

The word 'ombudsman', almost entirely unknown in Australia thirty years ago, is now understood by most Australians as a term reflecting their right to an independent and objective evaluation of any complaint against government or big business. In a recent public awareness survey by my office in rural and regional Australia, nearly 60% of respondents who were asked what they could do if they had an unresolved complaint against a government agency, said they could complain to their local member of parliament or the Ombudsman. There was a 75% prompted recognition by respondents of my own office of Commonwealth Ombudsman. In short, the growth of Ombudsman offices has kindled an important social trend: *people now know they have a right to complain.*

The importance of this revolution in government and society is better appreciated if we look closer at the current structure and function of Ombudsman offices and complaint procedures in Australia. I will briefly mention some points:

- Ombudsman offices now cover all levels of government and significant industry sectors, such as banking, telecommunications, and energy supply. Each year the public sector and industry ombudsman handle upward of 150,000 complaints from members of the public. Hardly a month goes by without a proposal being seriously made in public debate for the creation of a new and specialist ombudsman, in areas as diverse as universities, child care, transport, small business, franchising, aviation, and the funeral industry
- In addition to their traditional complaint handling role, many Ombudsman offices also discharge other specialist functions. I will mention by way of example three specialist functions of my own office. First, we have a special statutory role under freedom of information and whistleblower protection legislation; secondly, a team of five people in the office conduct periodic inspections of the records of law enforcement agencies, to ensure they are complying strictly with the detailed laws that cover telephone interception, electronic surveillance and controlled operations; and thirdly,

we are required by statute to prepare a report that is tabled in Parliament on every person who has been held in immigration detention for two years or more.

- There has likewise been growth and evolution in the structure of Ombudsman offices. Again, to take my own office as an example, we now have seven statutory titles – Commonwealth Ombudsman, ACT Ombudsman, Defence Force Ombudsman, Taxation Ombudsman, Immigration Ombudsman, Postal Industry Ombudsman and Law Enforcement Ombudsman. The main reason for this development is to satisfy both a government and a public expectation, that an Ombudsman office can be a generalist office handling complaints across all areas of government, but also an office that plays a specialist oversight role in significant or sensitive areas of government administration.
- Another evolutionary change that has occurred in my office is that our jurisdiction has been extended to cover government service providers – that is, private companies that deliver services on payment from government, such as the management of detention centres, job capacity assessment, skills accreditation, and work referral.
- Lastly in this catalogue of reflections, the Ombudsman influence has spread throughout the agencies that we oversight. All those agencies now have their own internal complaint handling procedures that, in many cases, handle more complaints and inquiries each year than our own offices. The oversighted agencies can also take guidance from a large number of publications and policies in whose development we have played an influential role – for example, there is an Australian Standard on complaint handling (AS ISO 10002-2006); and there are well-defined administrative policies within government on matters such as the payment of administrative compensation, and recording oral advice.

As those developments illustrate, there has been substantial evolution over thirty years in the Ombudsman institution in Australia. There is every reason to think that evolution will continue. What can we expect? What should we be doing to guide this evolution? What lessons do we draw from the past?

I will mention four challenges, that together indicate the range of practical and theoretical challenges that we face.

1. Adapting to change

We must embrace the prospect of change in our offices. The adaptability of the office of Ombudsman is a great strength. Government and society change rapidly and we must catch the wave if we are to be relevant.

A wave that we once missed, but sensibly have since caught, is a closer partnership between public sector and industry ombudsman offices. Regular cooperation between the offices now occurs both informally and also formally, through bodies such as the Australian and New Zealand Ombudsman Association. The public/private divide no longer exists sharply in government and society, and nor should it divide the work of Ombudsman offices. We have much to learn from each other, and together the Ombudsman institution

grows stronger if there is a partnership between different offices, both domestically and internationally.

By adapting to change, my own office has picked up additional roles and functions. An example is the Postal Industry Ombudsman function, which has a jurisdiction extending both to Australia Post and to private sector postal operators registered with the scheme. Another example of adaptation is the recent extension in the jurisdiction of the Commonwealth Ombudsman to cover government service providers.

The preparedness to adapt and evolve has been the key to the large growth in my own office, which has nearly doubled in size in the last two years. Without entering a philosophical debate about the optimum size of organisations, there is no doubt that it is possible to be more effective with greater resources and a higher public profile and recognition.

2. Revising the role and philosophy of the office

The Ombudsman fraternity has to lift its profile – not in the way that we normally think, of educating the public to complain to us; but in the different way of re-positioning the office to explain its new role in the context of the changes in government and business that Ombudsman work has engineered.

In my discipline of public law, university students around Australia are still being taught that there are three arms of government – the legislature, the executive and the judiciary; that agencies such as my own form part of the executive branch of government; and that accountability and human rights protection rests on the shoulders of the judicial branch of government.

This theory and description of government accountability is inaccurate and dramatically overtaken by the substantial changes in government that I described earlier. In many areas of government and business, Ombudsman offices play a more active and proactive role in rights protection, and ensuring transparency and accountability, than courts and the legal profession. Moreover, to describe Ombudsman offices in the government arena as being part of the executive branch of government is to mistake their role, of being independent, external agencies that oversight the executive branch.

Briefly, we should be educating current and future generations to understand that in the government arena we have matured into a fourth branch system of government. The fourth branch – call it the integrity or oversight branch – includes Ombudsman, administrative tribunals, auditors-general, human rights, anti-discrimination and privacy commissions, and inspectors-general of different kinds.

More generally, Ombudsman offices should be more engaged in public discussion about how problems arising in government and business are best resolved and how human rights can be most effectively protected. Unlike courts, Ombudsman offices do not have law societies and law schools to champion their cause in a regular, vocal and public fashion. In short, we need to develop a higher profile in being our own champions.

3. Being strategic to have an influence

We need to reflect more on just what our role and relationship is to the agencies that we oversight. It is now a more complex and subtle relationship than in earlier times. All Ombudsman staffers would say that we do more than handle individual complaints. But what is that extra role, and how essential is it?

The agencies that we oversight now have their own complaint handling procedures; increasingly the people who come to us are on the rebound from agency complaint handling. The agencies under our jurisdiction have grown proportionately larger than our own offices: in my own jurisdiction, for example, I have a staff of 150 people that oversees the Australian Defence Force and Department, with over 90,000 employees; Centrelink, with 25,000 employees; and the Australian Taxation Office, with 22,000 employees, administering 10,000 pages of taxation legislation to over 13 million taxpaying entities.

As those figures suggest, we are peripheral to the main game – but we still want to be an important player. To do so requires strategic planning. There are many pathways that we can follow. One example of a different approach being adopted within my own office is to conduct a joint investigation with an agency, for example, into an incident in an immigration detention centre, or into the effectiveness of internal complaint resolution in the Defence Force. A joint review poses a special challenge for the Ombudsman's office, to work with an agency while maintaining independence from it. Again, it is the adaptability of the Ombudsman model that allows a sensible balance to be struck.

Another pathway that we are moving down within my own office is to monitor and audit agency activity in selected areas. As I noted earlier, we audit the records of law enforcement agencies to ensure legal compliance in the exercise of coercive law enforcement powers. In the new role of Immigration Ombudsman, we are developing a program of regular inspection and monitoring of areas such as detention arrangements, complaint handling, and compliance activity. There is a similar proposal in train in the new role of Law Enforcement Ombudsman to undertake a regular audit of police complaint handling. A parliamentary committee recently proposed that we should also have a compliance auditing function in relation to quarantine inspections.

Yet another pathway that many Ombudsman offices are moving down is the publication of manuals and guidelines, distilling our experience and wisdom on matters such as the principles of complaint handling, how to conduct an investigation, whistleblower protection, and payment of administrative compensation.

Those are examples of a broader challenge for Ombudsman offices, which is to provide intellectual leadership within the complaint industry. That, it seems to me, is a role that our offices should increasingly play. We are well-placed to gain a unique insight into why people complain about government and industry, the problem areas in administration, and the minimum standards for effective complaint handling and investigation. Drawing from our complaint and investigation experience, we can provide guidance and a perspective that

is different to the thinking otherwise available within the agencies that we oversight.

4. Preserving the core Ombudsman role

The influence that Ombudsman offices can exert partially depends on them preserving recognition of the brand name – ‘Ombudsman’. Again, there is a challenge to be faced.

On the one hand, as my earlier comments indicate, conventional descriptions of Ombudsman offices no longer apply. The way my office would now be described – its structure, activities, and objectives – is quite different to the description that would have been applied twenty, or even ten, years ago. The office has evolved and adapted to changes occurring around it.

On the other hand, Ombudsman offices should never move away from their distinctive role and essential governance principles. This is not the place for an extended discussion of that issue, but I shall again mention one relevant development in my own office. Over time we had developed rather waffly but also competing descriptions of the role we play – ‘improving public administration’, ‘ensuring fairness and equity’. A more precise and distinctive definition was required – something to highlight that the office can add value to the business of government and fulfil a role not discharged adequately by other processes in government.

The resulting definition of the role of the office (outlined in the *Strategic Plan*) is to ‘safeguard the community in its dealings with government’, by the independent review of complaints, assisting people to resolve complaints about government administrative action, fostering policies and principles for accountability, and fostering good public administration that is accountable, lawful, fair, transparent and responsive.

The core role of the office remains the investigation and resolution of complaints: they are the prism through which we see the larger picture. The distinctive role of the office as an ‘independent, external, complaint agency’ was described in the following terms in my *Annual Report 2003-2004*:

As a *complaint agency*, the role of the office is to pick up grievances expressed by members of the public and to gauge whether there has been defective administration. As an *external* agency, the Ombudsman should offer a perspective that might otherwise be lacking within government. As an *independent* agency, the office must – when the occasion requires – be resilient in pressing an unwelcome or unpopular viewpoint.

We now spend considerable time within the office talking about and spelling out just what it means to be an Ombudsman’s office – what are the essentials and the core values. The constant movement of staff in and out of the office has underscored the need for all current staff to have a clear and uniform understanding of why we are there, what we are doing, and the essential principles of Ombudsman work. The need to do so also becomes more pressing as our offices take on different functions and now play a that is evolving and changing.

Forums of this kind, discussing what we as Ombudsman can expect, are an important part of the discussion that should continually be occurring within and between our offices.