

THE COMMONWEALTH OMBUDSMAN - UPDATED AGENDA

*Philippa Smith**

The traditional role and culture of a Commonwealth Ombudsman has been to impartially review complaints, resolve disputes, and address defective administration where it is found in Commonwealth departments.

Described this way it is a reactive and complaint driven role dealing with the matters that reach us. In my view the role of Ombudsman is also to stimulate and lead change by identifying the matters causing difficulties. The Ombudsman's 'own motion' capacity is an important recognition of that role. Our role is also to stimulate an environment of debate by both agencies and consumers as to what standards of service and decision making should be expected in the public sector. These ideas are not new in themselves but they set a new agenda for the Ombudsman's office over the coming years with the Ombudsman joining the debate about best practice standards and consumer rights.

The Current Situation

My predecessors have outlined¹ some of the functions of the office and the sheer volume of work. Last year the office dealt with some 38,000 contacts (including 22,000 enquiries and 16,000 investigations). This covered 118 agencies (99 Commonwealth, 19 ACT), and many more topics all with a total of 76 staff spread across Australia.

With such a volume of work we can be justly proud of our 'value for money' but the statistics also indicate that the availability of the Ombudsman's office is not as well known or understood as it should be. About 54% of Australians know of its existence but this awareness is linked with education. Those most in need and the least educated may not have easy access to our services. (The same survey indicated that the other administrative tribunals had an even lower profile).

The Changing Environment

The proliferation of specialist tribunals and other review bodies has no doubt improved the administrative fairness of decision making but it has also created a maze for the uninitiated and life's vocation for the more obsessive if 'forum hopping' is allowed to occur.

The distinction between the realm of the public and private sector is now also blurred. The establishment of 'industry ombudsmen' reflects community expectations that the private sector should also provide mechanisms of redress to ensure accountability and fairness by large (private) industries.

The public sector meanwhile is being 'commercialised' and is contracting out services that were once regarded as the domain of the public sector. Community expectations are also changing. Many consumers are more questioning and more aware of consumer rights generally.

The Ombudsman's Role

So what is the role of the Ombudsman's office in this new environment? These changes provide both opportunities and challenges for

* *Philippa Smith is the Commonwealth Ombudsman.*

the office. The low level of awareness about the office, and the proliferation of review bodies, indicates that there is a significant co-ordinating and educative role required so that people are informed about their rights and responsibilities, and about the principles of fairness in decision making.

Compared to other specialist tribunals the Ombudsman has a unique role. Our brief is to review the matter not only from a perspective as to its lawfulness but also as to whether it is fair and reasonable in all the circumstances. This role - and my capacity to undertake own motion enquiries - is important if we are to look beyond the individual case and identify and prevent the systemic causes of complaints.

The recent 'Access to Justice' report² put it this way: 'if the Ombudsman were to focus more on systemic issues than individual complaints, complaints that are made will advantage not only the complainants but all people in similar circumstances including many people who may never, or only rarely, make complaints. In this way a focus on systemic problems could be a useful, if largely invisible, improvement in access to justice.'³ I agree.

In the past the office has been trapped in a somewhat reactive and bandaid role in trying to resolve the complaints it receives. In this context, I am pleased to acknowledge the Government's allocation of some increased funding (\$1.3 million) to this office from this financial year onwards so that the office can take on a more active role.

The increased allocation will be used to enhance our work on major projects and in improving our capacity to report on the nature and type of complaints received and standards for

administrative practice. The increased funding will also allow for outreach programs to focus on particular Government activities and groups. In 1995-97 such a focus will be placed on aboriginal matters, immigration, employment, education and training (and its links with social security), tax and the Child Support Agency. The fruits of these initiatives should develop over the coming years. I do not, however, underestimate the volume and complexity of work involved in each of these fields. In the arena of tax a recent Parliamentary Committee has recommended the need for a separate Tax Ombudsman within the Commonwealth Ombudsman's office to allow for a greater depth and speciality of knowledge. I agree that we need a greater degree of specialist expertise and staff for the review of tax complaints and tax rulings.

The need for specialist units within the Ombudsman's office is particularly urgent for tax but also needs further consideration and development for other areas of our work (eg FOI). In recent times there has been pressure for a range of specialist ombudsmen known by that name or some other descriptive title. This is pleasing in that it demonstrates that the concept and value of 'Ombudsman' is alive and well. There are, however, some inherent problems. The proliferation of bodies is confusing to the public and creates inevitable gaps and duplication in jurisdiction, not to mention high infra-structure overheads. Such specialist bodies will also need to be continually vigilant to avoid organisational capture arising from their close association with the special public and the organisations subject to jurisdiction.

As indicated above, in the Commonwealth Ombudsman's office we see the need for more specialist units (and networks) within the office

itself, together with a higher profile for these activities. The generalist infrastructure, however, hopefully allows for cross fertilisation of staff and ideas, lower overheads and less potential confusion for consumers.

Other Frontiers

As previously noted the growth of industry Ombudsmen marks another change on our administrative landscape and must be seen as a plea from the consumer to have equal rights and protection in the commercial environment. It has a lot to recommend it, but much still needs to be done to secure at least minimum standards and accountability before the title 'Ombudsman' can be used. If standards are not set, the title may mislead rather than protect consumers.

The issue has some urgency in Australia. In other countries the growth of industry ombudsmen has got out of hand, particularly in North America. It should also be remembered that no matter how high the standards are, industry ombudsmen will always lack two important powers available to parliamentary ombudsmen. That is the statutory power to access information from a third party, and the power to summons a witness on oath. There is also, of course, our power of embarrassment in tabling a report to Parliament.

With these thoughts in mind I question why the Commonwealth Ombudsman's powers should always be limited to functions *owned* by the government. Other factors such as funding by government, the functions themselves, and clientele may be equally relevant.

An increasingly important role of the Ombudsman is finding the onus of responsibility in decision making

between departments, agencies, and the private sector. For example, one recurring issue has been the transfer for people from DSS to DEET benefits and the administrative and consequent eligibility gaps that arise between the departments. The aim should be to achieve a 'seamless' service wherever possible from a client's perspective.

In other cases I find that the office cannot effectively deal with problems where the service is undertaken on a contract basis or by an organisation funded by the Commonwealth government to undertake certain services. It means that buckpassing as to responsibility is possible and that consumers can, or cannot, have the matter reviewed depending on who finally provided the service.

Currently, such matters are often outside my jurisdiction. This is frustrating to both me and the complainant. The Administrative Review Council has released a discussion paper⁴ highlighting these and other anomalies as they relate to health, housing and community services. They concluded that it was important that government funded services should have independent complaint mechanisms to ensure an accountability and standard of service for clients.⁵ They recommend an enhanced role and jurisdiction for the Commonwealth Ombudsman.⁶

The Government's employment white paper⁷ has also recommended the establishment of private employment agencies to operate along side the CES. Again I raised the potential dilemma for clients' having to deal with say DSS, CES and a private employment organisation on similar or the same issues. I pointed out that if someone had a problem it was important to have a one-stop shop. It is also important for the review body to have the ability to trace the cause

of the problem between the various agencies, to identify the administrative gaps and anomalies and, of course, a final point of responsibility. Nor could it be argued that the clients were able to 'shop around' in a competitive market. The Government has moved to make a number of legislative changes which will allow the Ombudsman's office to investigate complaints and systemic issues related to such 'private' employment agencies.⁸

While seeking a broader jurisdiction to allow this office to deal with complaints and service standards in some contracted or *funded* activities, it is clearly not appropriate for the Commonwealth Ombudsman to be involved in complaints relating to many commercial activities. The Ombudsman Act has recently been revised to allow the Ombudsman the discretion to decline an investigation where it relates to commercial activities.⁹

But what should be the boundary lines? A number of our complainants have recently raised issues about the tender arrangements where small businesses have claimed that the Department and/or its agent acted in an unreasonable or unconscionable way. Our investigations have raised important issues of principle, as to the responsibilities of agencies in such dealings.

Equally, Telstra has argued that, given its commercial activities, it should be excluded from the Ombudsman Act and Freedom of Information Act. Again, recent investigations related to the Casualties of Telecom cases, and a steady stream of matters related to yellow pages, silent numbers and the like indicate to me that there are strong public interest grounds as to why administrative review mechanisms are appropriate and

valuable in the 'commercialised' setting.

Determinative Powers

Finally, there is the old chestnut as to whether the Ombudsman's office should have determinative powers.

Industry Ombudsmen do, but they do not have the power of referring matters to Parliament in the way that a Parliamentary Ombudsman does.

There is no doubt that some of the appeal of specialist tribunals has been the perception - and reality - of clients getting a quick answer (through determination).

In practice, the vast bulk of cases of the Ombudsman's office are resolved and conciliated within weeks, and even days. This has led to effective and co-operative arrangements with most departments. Similarly, not all cases involve a simple yes/no and we have the flexibility of looking at a range of surrounding issues and circumstances.

Having said this, there may be classes of complaints where determinative powers may be of benefit to all sides. Where defective administration has occurred and act of grace payments are recommended by the Ombudsman may be one example. Another area that may deserve further comment and debate are for those matters dealing with eligibility/benefit issues of less than \$5,000 in value. The costs of a protracted debate between the Department and Ombudsman may in such cases outweigh the desirability of retaining a consensual approach.

Mediation

A lot has been said recently about mediation.

Mediation has always been part of the Ombudsman's *modus operandi*. It is not, however, currently recognised in our legislative base focussing, as it does, on consideration of 'defective administration'.

It can be argued, however, that perhaps 80% of all complaints result from either a lack of communication or from no communication at all. Once the parties start to understand each other's viewpoint a resolution may be possible. This outcome evolves from much of our work. In other situations we have effectively set up agreed mediation processes by which civil action through the courts can be avoided. In a recent case this was successfully achieved for an aboriginal housing project worth \$2.46 million where the grounds for tender were to be argued through the Federal Court.

This, I believe, is a useful and constructive role for the Ombudsman. Some care, however, is required in the current enthusiasm for mediation. In any alternative complaint resolution process care should be taken to ensure that the complainant is not deprived of something that was his or hers by right, or by law, simply because a decision can be reached by compromise or consensus.

Conclusion

When the Ombudsman was first established in 1976, the office was heralded as part of a new deal of administrative review.

The environment and times pose a range of challenges and opportunities but in my view the Ombudsman's office is still one of the most exciting additions to the administrative framework. The process of improving public administration is as dynamic as the constant changes occurring within that administration. Within that

context, the challenge of ensuring fairness and better standards of service will continue to keep us on our toes.

Endnotes

- 1 D Pearce, 'The Ombudsman and the Rule of Law', (1994) 1 *AIAL Forum* 1; A Cameron, 'Lion hunter', (1994) 1 *AIAL Forum* 29; D Pearce, 'Minding the People's Minder', (1994) 1 *AIAL Forum* 42.
- 2 Australia, Access to Justice Advisory Committee, *Access to Justice* (1994).
- 3 *Ibid* paragraph 12.51.
- 4 Administrative Review Council, *Administrative Review of Funding Programs (A Case Study of Community Services Programs)*, forthcoming.
- 5 *Ibid*.
- 6 *Ibid*.
- 7 Australia, House of Representatives *Working Nation, Policies and Programs* (1994).
- 8 Employment Services Bill 1994, clause 111.
- 9 *Ombudsman Act 1976*, s6(12).