

2015 AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW CONFERENCE THE COMMONWEALTH OMBUDSMAN – FUTURE VISION

*Colin Neave**

I have been the Commonwealth Ombudsman for nearly three years now. Prior to that, I led the Financial Ombudsman Service. Altogether, I have had almost 20 years of experience with ombudsmanship.

Ombudsmanship, in both theory and practice, has changed over that period as is only to be expected of an institution that exists in the context of a dynamically changing society.

What I would like to do today is to give you a sense of what I, as the Commonwealth Ombudsman, see as being the role of ombudsmen and their place in the public sector environment.

And I would like to share with you the work that we have been doing in my office to describe where we will be over the coming years – our vision for the future.

Some history

The Commonwealth Ombudsman commenced operations in 1977. At that time, dealing with the Commonwealth Ombudsman was a new experience for Commonwealth public servants.

The Ombudsman's approach must have come as a shock to senior public servants at the time. And one must remember, of course, that the introduction of the Commonwealth Ombudsman came as part of a broader suite of administrative law reforms, all of which placed new levels of constraint and accountability around the exercise of power by officials.

The first Commonwealth Ombudsman, Professor Jack Richardson, was not backward in coming forward in his approach to the role. He worked very hard to promote the office of the Ombudsman.

In my Canberra office today there are a number of hand-painted signs that must date from around that time. They variously show citizens tied up in red tape, a bull being led by the nose by Commonwealth bureaucracy and similar themes.

They all announce, very clearly, that if you are dissatisfied with your dealings with the Commonwealth government, you should speak to the Ombudsman.

Professor Richardson also famously arranged to advertise his office on milk cartons distributed in the Australian Capital Territory (ACT), ruining the breakfasts of any number of then agency heads.

Colin Neave AM is the Commonwealth Ombudsman. This article is an edited version of a paper presented at the 2015 AIAL National Administrative Law Conference, Canberra ACT, 23 July 2015.

The present

Proving that perceptions can be hard to shift, there are enough long memories in Canberra to ensure that nearly 40 years later current and former senior public servants still talk about the milk cartons!

My concern, though, is that the perception of ombudsmen held by some people has not changed since the 1970s.

That is, some people think all ombudsmen do is handle complaints.

They think ombudsmen are combative, preferring to hector and lecture than find solutions.

And they see ombudsmen, and I am referring to parliamentary ombudsmen specifically here, as being something from outside the normal architecture of government.

Why is this a concern? I will give you three reasons among many.

- first, it sells short the enormous contribution ombudsmen make at all levels of government to improve public administration as a whole;
- secondly, it colours interactions agency officials have with ombudsmen and their staff – if you are expecting a combative approach from an ombudsman (or anyone for that matter) then that is probably what you will see regardless of reality; and
- thirdly, it leads to perverse policy outcomes including the proliferation of niche oversight agencies.

There are some people, both in government and the community, who think that all the Ombudsman does is handle complaints; that we investigate complaints that people cannot resolve in their dealings with Commonwealth or ACT government agencies. That is a very old-fashioned and narrow view, and falls dramatically short of reality.

Ombudsmen are leaders in building better public administration. We have a critical place between government and the public, and we are a safety net for members of the community.

Ombudsmen are an integral part of a framework that provides access to justice. We promote good governance, accountability and transparency through oversight of government administration and service delivery.

My office does this in five main ways.

- First, we do resolve individual disputes between individuals and agencies. We investigate complaints, and we safeguard citizens from government actions which could adversely affect them. We also 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 that affect everyday lives. And because ombudsman services are free, they are particularly valuable to the most vulnerable.
- Secondly, we investigate systemic problems. I find it surprising that some very senior public servants I speak to do not realise we perform this role. We investigate systemic

problems following complaints, or on my own initiative. The key issue here is that some issues have a one-to-one relationship between the problem and the individual. But many others have a one-to-many relationship. That is, a single administrative problem could be adversely affecting a large number of people and detracting from good public administration as a whole. So we use our own motion investigation powers to expose and remedy systemic issues.

- Thirdly, we contribute to improving public sector performance by feeding the intelligence we gain from looking at complaints and complaint trends back to agencies.
- Fourthly, through our oversight of the Commonwealth and ACT public interest disclosure schemes we assist in the discovery and remedying of serious wrong-doing within the Commonwealth and ACT public sectors. This is one reason why ombudsmen should be considered to be *integrity* agencies. I will return to this theme a little later.
- And fifthly, we have an increasing role in monitoring the use of intrusive and coercive powers by law enforcement and other agencies.

Strategic vision

Every organisation, whether in the public or private sector, exists within a broader context.

Organisations that fail to adapt when that broader context changes risk irrelevance.

Ombudsmen and other oversight agencies have been slower than some to recognise that simple truth.

That is not to say that ombudsmen should bend to every whim of government, but it does require ombudsmen to give regular consideration to their place in government.

Like every other agency, the role of ombudsmen will continue to evolve. As government's activities and citizens' expectations of governments change, so must ombudsmen.

Change cannot be considered unusual – it is in fact the only constant in today's public sector environment.

For some time my office has articulated its purpose this way:

- *To influence agencies to treat people fairly through our investigation of their administration.*

That is a fine purpose for an ombudsman.

But I think the future is going to require more of us. I now describe the purpose of my office, for the coming three to five years, this way:

- To provide **assurance** that the organisations we oversight act in **integrity** and treat people fairly, and
- To **influence** enduring systemic **improvement** in public administration in Australia and the region.

The way we manage the evolution of our role over the coming years will be based on four key concepts which we have called our 'four pillars': **assurance, integrity, influence** and **improvement**.

I will tell you more about what I mean by each of the 'four pillars'.

Assurance

I am firmly of the view that the role of the Ombudsman will increasingly be to support and oversight agency complaint handling processes. We will provide **assurance** to agencies, Government and the public that the organisations we oversight are dealing with complaints effectively.

There are two main drivers for this. One is philosophical, the other pragmatic.

At the philosophical level, the correct place for complaints about agencies to be resolved is within the agencies themselves. It is the agencies that have the ongoing relationship with the citizen making the complaint. And it is the agencies whose duty it is to provide efficient and effective services to their clients. It stands to reason that agencies also have an obligation to resolve complaints, whenever possible, within the agency at the time the complaint is made.

At the pragmatic level, the ever-increasing number of citizen interactions with government means that ombudsmen simply will not have the capacity to be the primary vehicle for dealing with complaints about agencies. We cannot be front-line complaint handlers to the whole public sector. In other words, you cannot drink from a fire hose.

I recognise that with the best will in the world, not all complaints will be resolved by agencies. But the more adept agencies become at complaint handling, the better; and the more the traditional role of the Ombudsman will change.

I cannot foresee a day when ombudsmen will not receive and investigate complaints, but the nature of those complaints and the investigations that need to be conducted will change.

I would expect ombudsmen in the future to do fewer complaint investigations. The more individual agencies address the needs of complainants, the lower the volume of work flowing through to ombudsmen. The corollary of that, though, is that the complaints that do end up with the Ombudsman will be harder to resolve.

The model of complaint handling by ombudsmen will move from what might be described as a volume business, to a more specialised role of monitoring complaint handling by others and resolving difficult disputes.

Integrity

Integrity issues, along a spectrum ranging from personal impropriety to corruption, confront us daily in the media.

The Ombudsman is already a central figure in the Commonwealth's integrity framework. My expectation is that the significance of this part of the Ombudsman's role will grow over the coming years.

After all, the root cause of public sector corruption is not rampant criminality. It is the opportunity provided by weak administrative systems.

Looked at this way, maladministration can be seen as the vulnerability that allows corruption to enter and flourish within the public sector. The Ombudsman's role in stamping out maladministration is the first line of defence against corruption.

The Commonwealth Parliament has seen fit to vest additional functions in the Ombudsman, which enhance this role.

The public interest disclosure scheme established under the *Public Interest Disclosure Act 2013* (Cth) (PID Act), which we oversee, seeks to improve accountability and integrity in the Commonwealth public sector by supporting agencies to address suspected wrongdoing.

The scheme established under the PID Act confers a number of roles on the Ombudsman to ensure it provides robust protections to public officials who report wrongdoing in the public sector.

The Ombudsman is responsible for reviewing the Australian Federal Police's administration of Part V of the *Australian Federal Police Act 1979* (Cth) (AFP Act). That part of the AFP Act has regard to the AFP's professional standards and provides the framework for its complaint management system.

My office inspects records of AFP complaint investigations to review the comprehensiveness and adequacy of the AFP's administration of Part V of the AFP Act.

In conducting these reviews we do not investigate the AFP's own complaint investigations. Rather we make an assessment of the administration and processes involved in handling complaints. That way we can assess issues that the complainant may not be aware of, such as conflicts of interest.

Monitoring roles such as this are becoming increasingly important for ombudsmen and will be a significant feature of the way ombudsmen execute their responsibilities in the future.

Another example is the Ombudsman's role in monitoring the use of covert and intrusive powers such as surveillance activities.

Proper oversight of these sorts of powers is critical. As you would expect, the public will not (or at least should not be) aware of the use of these powers.

And since you cannot complain about something you are not aware of, people affected by the use of the powers are unlikely to approach my office.

Best practice therefore requires the legislative schemes that create coercive and intrusive powers to include an independent oversight mechanism to increase accountability and transparency of agencies' use of the powers.

My office performs this independent oversight in relation to powers such as intercepting telecommunications, preserving and accessing stored communications, using surveillance

devices, exercising coercive examination powers, and exercising certain immigration-related powers.

Parliament recently expanded my office's responsibilities to include oversight of agencies' access to 'metadata' that will be stored as a result of the Government's data retention reforms.

I welcome these additional roles for my office and anticipate them becoming an ever more important dimension to the role of the Ombudsman.

Influence

Focusing on how the Ombudsman will influence outcomes will be critically important to the role over the coming years.

I find this a particularly interesting issue to reflect upon because it goes to how the Ombudsman is perceived, but also to how the Ombudsman and his or her office perceives itself.

The Ombudsman only has the power to *recommend* change. I am not empowered to enforce or seek enforcement of any recommendation.

So it is incumbent on all ombudsmen when considering making a recommendation to ask the question: 'How do I make this happen?'

I recently read a publication produced by the Catalan Ombudsman in Spain called *International Framework of the Ombudsman Institution*,¹ to which contributions were made by a professor and lecturer in constitutional law at the University of Barcelona.

The publication describes the ombudsman as 'a magistrate of persuasion'. I think that is a lovely phrase which sums up nicely the approach ombudsmen should take.

But of course it leaves much open to interpretation. There are lots of ways to 'persuade'.

To my mind the best sort of persuasion comes as a result of mutual respect: agencies' respect for the rigour, objectivity and independence with which ombudsmen conduct their activities; and respect by ombudsmen and their staff for the integrity and efforts of agencies to do the right thing.

My office will continue to invest in strong relationships to achieve outcomes and effect change. Building a relationship of trust at all levels with agencies and the community will provide a platform for our views to be heard and also receive early warning about issues that agencies know will impact our work.

This will require us to negotiate the balance between being a trusted partner of agencies and maintaining appropriate independence. In a phrase: 'collaboration without capture.'

¹ Available at:
http://www.sindic.cat/site/unitFiles/3682/International%20framework%20of%20Ombudsman%20institutions_oct2015.pdf

But what does all this say about the Ombudsman's place in the framework of government?

To my mind it is critical that my office is outwards focused and sees itself as a part of the architecture of government.

Independence is vitally important for an ombudsman, but it does not require detachment from what Government and the public sector is trying to achieve.

The world of the Ombudsman cannot include a 'them' and an 'us'. Every public servant, whether working in an agency like the Commonwealth Department of Human Services (DHS) or the Ombudsman's office, shares an obligation to promote good public administration for the benefit of the Australian people.

This means that the place of the Ombudsman is on the *inside* working with agencies to fix problems, not on the *outside* simply criticising the fact that problems exist.

Over the coming years my office will be working hard on how we are 'positioned' in this regard – both by building trust with agencies and by being clear about how we view ourselves and our role.

I mentioned earlier that one of the downsides of the general misconception about what ombudsmen do is that it is leading to perverse policy outcomes. Let me explain what I mean by that.

There has been a proliferation of oversight agencies created in recent years. Some handle complaints, some also have policy or advocacy roles. Many share some of the key characteristics of an ombudsman and even adopt the name. But they operate in niche areas and often have a one-to-one relationship with the agency they oversee.

Reducing traditional ombudsman oversight has the effect of narrowing the view the ombudsman has of the public sector as a whole and undermines his or her ability to see sector-wide trends.

The danger in small bodies overseeing only one or two agencies in a niche area lies in the possibility of complaint-handler capture or an unworkable relationship if things do not go well between the complaint handler and the agency.

That relationship problem can, in my opinion, develop from the suggestion that a single agency complaint handler should have on its staff specialists in the business of the agency.

This can lead to the complaint handler second guessing the agency's decisions, which should not be its role.

Good complaint handling and good systemic oversight are skills that are quite distinct from the intricacies of the business of the agency being oversighted. They are the professional skills of an ombudsman.

Any agency that says you must understand all of its intricacies to form a view about its administrative processes and service delivery is just trying to dazzle you with complexity.

Why are these bodies created? Part of the reason is that governments want to adopt the 'ombudsman' brand without taking everything else – the rigour, the independence – that goes along with a traditional ombudsman.

They want an oversight body that is 'part of government', not an outsider like an ombudsman.

Governments are, of course, entitled to make these sorts of judgements. But my contention is that if ombudsmen do more to see themselves as part of the architecture of government, and promote that idea, the perceived need to create niche agencies will be diminished.

An ombudsman's independence will not be put at risk by this sort of 'positioning'.

Failure to better articulate the case of ombudsmen, however, does leave the institution at risk.

Improvement

I have spoken already about the misconception among some that the Ombudsman only investigates individual complaints and does not address systemic issues.

Over the coming years I intend to focus more attention on encouraging systemic improvement in public administration. My own motion investigations will focus on areas where systemic and whole-of-government improvement is required.

Systemic improvement to public administration in one area has the potential to improve public administration generally. Every improvement provides greater assurance that the organisations the Ombudsman oversees will act with integrity and fairness.

I am interested in examining new ways to measure and report on our impact on public administration.

I am also keen to collaborate more with agencies, academia and civil society to bring new thinking about how to improve public administration to the fore.

Whether it is appropriate for ombudsmen to contribute to policy debate has long been an issue of contention.

It is inevitable that ombudsmen will from time to time speak about policy issues. I do not seek to be an active participant through the media in controversial policy debates, but my office does make appropriate submissions to parliamentary inquiries and to agency consultation processes.

That has been the approach of my office for many years and it will continue into the future.

The leader of every organisation should measure his or her success on whether they are leaving behind a better organisation than the one they found when they first arrived in the job. Ombudsmen have the added measure of whether they are leaving behind a better public sector.

Industry ombudsmen

I have not said much so far about industry ombudsmen.

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.

Those industry ombudsmen were established essentially to redress what was seen to be a power imbalance between individual consumers and industry when many organisations, like Telecom, were being privatised as part of asset sale initiatives or as a result of freeing up markets.

There is an intersection between parliamentary ombudsmen and industry ombudsmen. A number of parliamentary ombudsmen, including me, also have responsibility as an industry ombudsman.

I am the Postal Industry Ombudsman, the Overseas Students Ombudsman and, since 1 July 2015, the Private Health Insurance Ombudsman.

There is an opportunity for parliamentary ombudsmen to do more industry ombudsman-style work.

We are expert in complaint handling and identifying systemic issues. Our infrastructure is already established. Why not look to expand?

There is one main challenge in this area.

To be effective, industry ombudsmen need to use charging mechanisms to create an economic incentive sufficient to change industry behaviour.

As you would appreciate, the incentives for private sector bodies are different to those for public sector bodies.

Unfortunately, while there is a degree of 'user pays' funding for my office's industry ombudsman functions, I do not have the ability to introduce a more sophisticated charging regime that would put my office on an equal footing with other industry ombudsmen.

That is something I intend to speak to the Government about.

I will leave for another day the question of whether parliamentary ombudsmen ought to charge agencies for their services.

International engagement

I would like to finish today by saying a couple of things about the international community of ombudsmen.

My view is that international engagement is a vital element of any parliamentary ombudsman role.

I am the Regional President of the Australasian and Pacific Ombudsman Region of the International Ombudsman Institute (IOI). I am also a board member of that Institute and the Chair of the Pacific Ombudsman Alliance, which deals with ombudsmen in the Pacific region.

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.

The Pacific Ombudsman Alliance is a service delivery and mutual support organisation for ombudsmen and allied institutions of countries that are members of the Pacific Islands Forum.

My office receives funding from the Department of Foreign Affairs and Trade (DFAT) 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 including the Ombudsmen from Papua New Guinea, Vanuatu and the Marshall Islands.

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. It provides a visible support structure that can assist ombudsmen in strengthening their domestic positions.

My office also works in Indonesia, Papua New Guinea and the Solomon Islands under other DFAT-funded aid programs.

I should say that we learn just as much from what is going on in those areas as we give to those people we work with. Our international connections allow us to tap into overseas experiences and are invaluable.

I will continue to advocate for a strong Ombudsman presence in Australia's aid programs.

Conclusion

The work of my office, and of ombudsmen around Australia and our region, have made a demonstrable difference to citizens' access to justice and the standard of public administration over the past 40 years or so.

I want to build on that success and ensure my office and the institution of ombudsmen adapts to the challenges of the contemporary public sector.

My office's vision for the future is about how we set ourselves up to do just that.

I look forward to working with all of you to make the vision a reality.