THIRD TIER COMPLAINTS HANDLERS FOR HUMAN SERVICES AND JUSTICE

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Introduction

In June 2015, the International Ombudsman Institute published an interview with Peter Tyndall, who is currently Ombudsman and Information Commissioner for the Republic of Ireland. Before his appointment in 2013, he was Ombudsman for Wales for five years. He also served for two years as chair of the British and Irish Ombudsman Association, and is a member of the World and European Boards of the International Ombudsman Institute. In this interview, he argued that the adoption of privatisation over the last three decades has threatened citizens' rights to scrutinise and seek redress from public services. Privatisation, he claimed, has had this effect because it removes those services from the jurisdiction of the ombudsman, which provides independent, rigorous oversight, complaint handling and investigation.

Tyndall is not alone in voicing concerns about the impact of reform on accountability. Academics and practitioners have been doing so for several decades. The literature on this topic raises concerns over a very wide range of policy domains, from housing and education to welfare and transport. It also identifies a wide range of mechanisms that are supposedly under threat, from ministerial accountability, through freedom of information and ombudsmen, to private access to public law remedies via the courts. Most of the English-language academic literature on the topic focuses on the USA and the UK,[1] but by looking beyond the boundaries of the peer reviewed, one can find similar concerns being raised about almost any country with a government advanced enough to have services worth privatising and accountability mechanisms sufficiently strong to be undermined.

Tyndall is right, as a matter of principle, to be concerned about this. Individual citizens' rights to scrutinise and seek redress from public services, of the kind that are traditionally protected by an ombudsman, are of fundamental importance for a variety of reasons. Most individuals are at a significant disadvantage when things go wrong with public services, because these are generally provided by large organisations full of people who are familiar with the arcane and byzantine rules of the game, backed up by the power of the state. The problem is even more acute in the case of social services and welfare. These are usually provided to the most vulnerable and disadvantaged in our society. We know from experience that the vulnerable and disadvantaged find it particularly difficult to make their voices heard when their rights are not respected, or their needs are not recognised. Independent oversight bodies like an ombudsman, which can handle complaints and conduct formal investigations, are essential when things go wrong and appeals to the original decision-maker or their supervisor do not resolve the issue. Ombudsman are a vital counterweight to the asymmetries of information and organisation which lurk at the heart of public sector bureaucracies' dealings with their citizens.

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Why Australia's experience matters

In this paper, we consider how well Peter Tyndall's claims match Australian experience. Has administrative reform affected access to the scrutiny and redress protected by independent oversight bodies? If so, how have we responded to this challenge, and to what extent have we solved the problem? What, if anything, remains to be done?

We will answer these questions in two stages. First, we describe the history of administrative reform in Australia over the past three decades. This description will be brief, because it is now a familiar story that has been told elsewhere in more detail than we can or want to go into here. We will then trace the impact of this reform on oversight and accountability, and how the various governments in Australia adapted to this impact. The answers to these questions are of intrinsic interest to Australians, especially those who care about protecting access to administrative justice, particularly for the most vulnerable of our fellow citizens.

The Australian experience is also of broader interest for several reasons. First, all Australian jurisdictions set up ombudsman's offices in the 1970s, well before the onset of the kinds of reform we will be discussing. In the 1980s, most also put in place other, related mechanisms to foster administrative accountability towards individual citizens, like freedom of information and privacy legislation (although these lie outside the scope of our discussion). This system of administrative justice is supported by a democratic culture and set of democratic institutions which were firmly entrenched well before the modern era of administrative reform began.

Second, Australia has been one of the world leaders in administrative reform over the last three decades. Between 1990 and 2000, privatisations by the States, Territories and the Commonwealth generated estimated returns of US $69.7bn, more than any other OECD nation except France and Italy. This amounted to the highest per capita proceeds of any OECD nation (US $3,764), and the second-highest proceeds as a proportion of GDP (15.9 per cent, behind Portugal).[2]

In combination, these two factors mean Australia is exactly the kind of place where any negative impacts of administrative reform on ombudsman-style oversight, scrutiny and redress should be most evident. The UK and New Zealand are significant for much the same reasons. By way of contrast, Portugal also implemented a relatively large privatisation programme in the 1990s. But it differed from Australia in that it had experienced a significant period of authoritarian rule which ended in the mid-1970s. Thus, although Portugal established an Ombudsman as part of the democratic transition in 1975,[3] its complicated political history means we must exercise greater caution when explaining changes to accountability mechanisms solely in terms of public sector reform. Canada is a second contrasting example. It has a long democratic tradition similar to ours, and established ombudsman at provincial level at more or less the same time. But Canada did not establish a fully-fledged public ombudsman at federal level. Nor did it undertake privatisation on anything like the scale of Australia in the 1990s, either in relative or in absolute terms. One would therefore expect the impact on its accountability mechanisms to be correspondingly more complex and less severe.[4]

Australia is of broader interest for one further reason. Our federal system provides opportunities for each of the jurisdictions to respond in different ways to the challenges posed by reform. As we will show below, the States and Territories have indeed responded in their own ways, and as a result Australia is also an ideal case for considering the merits of alternative approaches to ensuring citizens' access to administrative justice.

Two eras of reform and accountability

Australia's experience of public sector reform is similar to that of most other democratic, industrialised countries, and especially our Westminster cousins. Without wishing to over-simplify, it is helpful to distinguish between two different phases of reform within the last two to three decades, based on the kinds of changes which were commonly advocated, and the rationales cited for doing so. Each of these had different effects on citizens' access to the ombudsman and other kinds of administrative justice.

New public management

The first phase of reform in Australia began in the 1980s, and peaked in the mid to late 1990s. It principally involved a shift away from governments directly delivering services, to governments regulating and/or funding the delivery of services by third parties, sometimes described as a shift from 'rowing' to 'steering'. Inspired by changes introduced by the Thatcher and Major governments,[5] and to a lesser extent by Regan's reforms in the USA, new public management involved the application of private sector organisational structures, modes of governance, and operations to public services. It also included the two kinds of reform – privatisation and contracting out – of most concern to those who care about access to administrative justice. We will focus on these below.

New public management also involved other reforms that were less controversial among those who care about citizens' access to accountability mechanisms. Examples include purchaser-provider arrangements between central government and line agencies, and private sector norms and management techniques within public sector bodies.

At Federal level, the peak period of this kind of reform was during the Keating and Howard governments, which were much more ideologically sympathetic to this kind of reform than the Hawke government had been. During this period, the Commonwealth Bank, Qantas, AUSSAT, the first two tranches of Telstra, airports in Perth, Brisbane and Melbourne, and various transport and scientific organisations were privatised.[6] The same period also saw the establishment of National Competition Policy, and the contracting out of employment assistance, children's and disability services, veterans' hospital and counselling services, and rural postal services. In 1996, the total value of services contracted by the Commonwealth government was $8bn.[7]

Analogous changes also occurred within the States and Territories. Victoria privatised a particularly wide range of assets including the power network, ports and financial operations like the state bank and insurance office. Other States and Territories privatised similar kinds of assets, but much less extensively: proceeds from privatisation in Victoria accounted for around three quarters of all those realised by States and Territories between 1990 and 1997.[8] Privately-operated prisons first opened in Australia at Borallon in Queensland in 1990 and then at Junee in NSW in 1993. Privately run prisons now operate in New South Wales, Queensland, South Australia, Victoria, and Western Australia. Somewhat less controversially, during this period all States and Territories began outsourcing things like information technology, cleaning, building maintenance, library services, legal services, recreation services and auditing functions. Contracting out was similarly widespread at the local government level. One of the more radical examples was the Kennett government's restructuring of local councils in 1994. As part of this, councils were required to expose 50 per cent of their budgets to competitive tendering. By 1996, the estimated value of services contracted by State and local governments was $5.3bn.[9]

Devolved/network governance

The second phase of reform began in the 2000s, and goes by many names ('distributed public governance' for the OECD, 'devolved governance' for the Australian Public Service Commission).[10] It constitutes an evolutionary descendant of new public management rather than a decisive break, not least in that advocates continue to emphasise the importance of 'steering' over 'rowing'.[11]

One of the more obvious differences between the two phases is that privatisation and contracting out are now less prominent policy tools than they were a decade ago. This is partly because the zeal of the 1990s left few obvious candidates for privatisation,[12] but also partly because experience has shown that some public services cannot be straightforwardly privatised or contracted out. In some cases there are political risks involved, but it is now also generally recognised that some of the goods and services governments provide cannot easily be produced (or provided appropriately) by market-oriented, for-profit businesses.

Reflecting more than a decade of this kind of experience, reform discourse is now more nuanced and complex. New public management drew its primary inspiration from trenchant critics of state bureaucracy, including Hayek and public choice economists. It framed reform as a choice between a wasteful and inefficient public service, and efficient and effective private corporations. Contemporary reformers, by contrast, draw on the work of Nobel laureate Elinor Ostrom[13] and others.[14] Less ideologically opposed to the involvement of the state, and less committed to the market as a universal policy solution, their focus is on finding the most appropriate mode of governance for those policy domains where the state remains involved.

Contemporary discourse identifies three modes of policy governance, each of which is appropriate under different circumstances. The first is the direct provision of services by the government itself. This is usually reserved for the core fiscal and public order functions of state: police, the courts and justice system, the military, taxation and transfer payments. The second is the use of market-like mechanisms in areas where private markets have not developed on their own. These can be used to solve distributional issues, or where policymakers seek to encourage behavioural change in contexts where individual choice and/or competition are seen as desirable. A prominent recent example is emissions trading schemes to reduce greenhouse gas emissions.[15]

The third mode gives the era its name, and is usually known as devolved or network governance.[16] This occurs when governments support third parties to deliver services or provide public goods. It bears certain similarities with contracting out, not least in that government usually provides financial support. But devolved governance embodies a fundamentally different ethos. NGOs do not merely deliver a service whose main features are decided by government. They are partners, involved in the process of policy development and planning as well as delivery. The Commonwealth Public Service Commission identifies devolved governance as particularly appropriate when flexibility or innovation are more important than central control, when service acceptance or close ties between provider and community are important, or when important expertise and resources (such as volunteer time) are not held by government.[17] Devolved governance is, in some ways, a new name for an old approach – Medicare, for example, displays several of its core features. But it has become particularly prominent, especially in social policy since the mid-2000s. At a national level, the National Disability Insurance Scheme combines elements of market-based and devolved governance in ways that are similar to Medicare. Two prominent contemporary examples of network governance in NSW are the transfer of out-of-home care to the non-government sector and the adoption of co-design in early intervention, both of which rely heavily on partnership with non-government providers.

New public management and administrative accountability

Accountability has been a prominent feature of debate about reform in almost all countries since the modern era began. In Australia, this debate proceeded through several distinct stages.

Advocates of new public management argued explicitly that reform would *improve* accountability. This claim rested on radical (and, in retrospect, radically narrow[18]) assumptions about what public services should be accountable for, and how that accountability should be exercised. In broad terms, new public management viewed public sector accountability mechanisms in much the same way as it viewed the public sector more generally: rigid, ineffective and more concerned with process than outcome. The solution was to encourage public sector organisations to be more responsive by introducing mechanisms and incentives modelled on the private sector.

Consistent with this, new public management involved substituting traditional accountability towards individuals, based on scrutiny and redress, with market pressure. Those who received services should, according to this logic, be treated not primarily as citizens but as customers. Anyone dissatisfied with the service they received could express this dissatisfaction most effectively by changing providers, in much the same way as customers of commercial companies do. Service providers, for their part, would be driven to anticipate and address their customers' needs for fear of losing their business. From this perspective, accountability is best achieved by establishing an institutional environment which allows customers to exercise choice or 'exit', rather than by empowering them to engage in a dialogue with providers over what constitutes appropriate service or how to respond to breaches of standards ('voice').[19]

By the mid-1990s, something approaching consensus had emerged among academics and public commentators that – whatever its merits may have been for managers and ministers – new public management did *not* improve accountability towards citizens. In fact, a considerable body of scholarly and professional literature from this period testifies to deep concern that the emphasis on market mechanisms of accountability and control was *weakening* mechanisms for individual scrutiny and redress.[20] Some commentators identified exactly the problem that Peter Tyndall raised: privatising public functions may move them beyond the reach of public law accountability mechanisms like public audit, freedom of information and the ombudsman.[21] Reform thus removes rights which citizens previously enjoyed. There was also profound confusion over whether and when public law accountability mechanisms continued to operate, which is a problem in and of itself.[22] This combination of uncertainty and concern tended to be expressed most clearly and frequently in respect of outsourcing, and to a lesser extent devolution of operational responsibility to public bodies operating at arm's length from a minister.[23]

This confusion flowed from two separate but related sources. First, public law is based on a deeply-entrenched distinction between public and private spheres, and it was by no means clear to all concerned that a private firm should be subjected to public sector norms of disclosure and accountability merely because it happened to have signed a contract with the state. This confusion was easier to maintain, second, because new public management was explicitly based on the view that private sector norms and approaches were superior – the whole point of outsourcing and other techniques was to divest government of operational responsibility, and hence of accountability.[24]

With the benefit of hindsight, however, we can see that the radical assertion of private, market-based forms of accountability under new public management was neither as profound nor as long-lasting as feared. Attempts to actually limit accountability met with

varying degrees success. Ombudsman offices and public auditors explored ways of holding public sector bodies to account for the actions of their subcontractors, and consistent with Westminster traditions, Ministers could and did intervene in the operations of nominally-outsourced prisons, schools and other services if they so chose. Between the late 1990s and the mid-2000s, many Australian jurisdictions explicitly re-established traditional, non-market forms of administrative justice over most of the services which had been affected by reform.

Interestingly for those who, like Peter Tyndall, are most concerned about the impact of privatisation on access to an independent complaints handlers, the earliest counter-reforms in Australia involved sectors where access to this kind of institution had been most radically affected: the newly-privatised and deregulated telecommunications, energy and water industries. The Telecommunications Industry Ombudsman, established in 1993, was a particularly early example. Energy and water ombudsmen were established in most States and Territories later in the decade.

Ensuring access to administrative justice in relation to contracted-out services took somewhat longer. In the early 2000s, all Australian jurisdictions except NSW and Victoria introduced a right to complain to the Ombudsman about public services provided under contract. The Commonwealth and WA achieved this by extending jurisdiction specifically to private bodies operating under contract with a public authority. The other jurisdictions introduced amendments couched in more general language, which brought within the Ombudsman's jurisdiction bodies operating 'on behalf of' or 'with the authority of' public sector agencies.

Victoria and NSW have not (yet) extended the Ombudsman's jurisdiction to all contracted services. They have instead taken a piece-meal approach of extending the Ombudsman's jurisdiction to specified providers, or providers in specified areas, regardless of whether they are public or private. Victoria has taken this further than NSW by expanding the jurisdiction of its Ombudsman under the *Ombudsman Act 1973* to cover 38 kinds of entity, including contractors in courts and health services, private prisons, and registered community service providers. The Victorian Ombudsman's jurisdiction now covers many – but by no means all – of the kinds of services which the State might contract out.

By contrast, residents of NSW have no general right to complain about outsourced public services provided by their State Government. Jurisdiction conferred by the *Ombudsman Act 1974* (NSW) has been extended only to privately-operated prisons[25] and 'accredited certifiers within the meaning of the *Environmental Planning and Assessment Act 1979*'. [26] In addition, the NSW Ombudsman also has extensive jurisdiction over community and disability services, under a separate Act which we will discuss in more detail shortly. But outside these areas, if someone should complain to the NSW Ombudsman about, say, a problem they have with a contractor working on behalf of a local council, the Ombudsman has no power to work directly with the contractor to resolve the issue. Often, the Ombudsman has to take the indirect route of working with the council as the contracting public authority, and trust that it will then resolve the matter with its contractor.

Nevertheless, by the early 2010s, the ability of ordinary citizens to scrutinise and seek redress had largely been restored in one way or another to the parts of government most affected by new public management. Moreover, the Australian experience of establishing ombudsman-style complaints handlers for privatised commercial operations suggests that one long-term impact of new public management may have been to foster the spread of public sector accountability mechanisms to the private sector. This is pleasantly ironic, given the visceral preference for all things private sector which lies at the heart of new public management rhetoric.

In re-asserting public sector accountability in this way, Australia appears to have avoided the serious reservations commentators like Peter Tyndall express about industry ombudsman, particularly that such institutions may not offer an equivalent level of impartiality and rigour as their public sector counterparts. This concern is legitimate, but our experience suggests it is not an inherent weakness of industry ombudsman schemes. In many Australian cases, participation in the relevant ombudsman scheme is a condition of receiving or retaining a licence to operate in the industry. This provides a degree of influence independent of industry goodwill. Critics of industry ombudsman schemes sometimes point to the fact that they are funded by the industry they oversight as a structural weakness. But experience in Australia has shown that, provided this is structured appropriately (e.g. by allowing the ombudsman to bill providers for time spent resolving complaints), it can provide strong incentives for providers to cooperate and resolve matters quickly.

Devolved governance and administrative accountability

Access to administrative justice in those parts of Australian governments affected by devolved governance is less clear, in part because this style of reform is newer and its implications are still being worked out.

We suspect that most Australians do not consider there to be a particularly severe threat to administrative justice this time around. There is certainly less overt concern in the contemporary academic and professional literature. This may be partly because the provision of social services by non-government organisations is generally viewed as more benign than the involvement of for-profit companies. It may also be due to rhetorical differences: unlike under new public management, there is widespread consensus among advocates of devolved governance on the importance of public sector accountability mechanisms like ombudsmen. A degree of complacency may also be at work: one might expect scrutiny and redress to be adequately provided by the jurisdiction most ombudsmen now have over contracted services. After all, governments provide a significant proportion of revenue for non-government organisations. According to a 2010 Productivity Commission report, this accounts for around a third of revenue for the NGO sector overall; in the case of education, social service and non-hospital health charities, the proportion is over half.[27] Thus, in a world where exposure to public sector accountability follows receipt of public funds, non-government partners in the devolved governance and delivery of public services should fall under the jurisdiction of an existing independent statutory complaint-handler.

We should not lull ourselves into a false sense of security, however. While not-for-profits may not have the same incentives as for-profit providers to cut costs, they are by no means immune from all the problems that oversight aims to address. In the NSW Ombudsman's experience, not-for-profits often have weak governance systems, especially smaller organisations with fewer resources. They therefore find it particularly challenging to handle fraud, corruption and systemic risks to clients. This is a significant issue, because devolved governance is likely to be associated with significant growth, both of individual not-for-profit organisations, and for the sector as a whole.[28]

Nor can we afford to assume that, simply because government is a significant funder of NGO-provided welfare services as a group, citizens will enjoy access to administrative justice under existing arrangements. Government funding is not evenly distributed across the sector: depending on the nature of the service they offer and the way they structure their operations, for-profit and community-oriented providers alike may be able to forego such support while providing services that are the equivalent of those attracting government funding. Simply 'following the money' runs the risk of making access to administrative justice unnecessarily arbitrary.

A similar problem arises from the fact that distributed or devolved models of governance assume non-government bodies will contribute their own resources, including finance, the time and effort of volunteers, or exercising independent judgment about how best to provide services in a particular community. They therefore envisage that, even those service providers which *do* receive public funds will deal with clients in ways not explicitly specified or funded under any contract with government. Such arrangements are likely to make practical decisions about access to public-sector mechanisms of administrative justice complex if jurisdiction is defined in terms of the flow of public funds. Finally, there are many models for funding social policy which simply fall outside existing ombudsman laws and their focus on contractual relationships. These include transfer payments to service receivers (which occur under several Commonwealth programs, such as child care rebates), or grant and block funding (such as, at Commonwealth level, legal aid and indigenous health organisations).

Those who care about access to administrative justice are now in a similar position to the mid-1990s. We have experienced around a decade of a kind of reform which is radically transforming the way important public goods and services are delivered. This reform agenda is blurring the distinction between the state and organisations which have traditionally been seen as outside the state. Because these boundaries have been blurred, it is no longer clear that citizens enjoy reliable access to administrative justice in all circumstances where it might be appropriate.

We suggest that the best way to protect individual access to administrative justice under devolved governance arrangements is to apply the lessons of history. We responded to the challenges of new public management by re-asserting access to scrutiny and redress in ways which were fundamentally consonant with the reforms themselves. New public management was grounded in a profound ideological commitment to the distinction between the state and the market; in most jurisdictions, the counter-reforms of the late 1990s re-asserted access to administrative justice by pushing the boundaries of the public-style accountability back out along the very lines by which it had been rolled back: within newly-privatised industries, and by extending the 'public' realm to include contractual arrangements. We must do something similar again, in ways adapted to the new reliance on civil society. Devolved governance is less doctrinaire about the methods used to deliver public policy, and more concerned with establishing partnerships among organised stakeholders within specific policy domains. We should therefore abandon the distinction between 'public' and 'private' bodies, and instead focus on identifying the other circumstances giving rise to a public interest in independent, effective investigations and complaints handling.

Adopting this approach would be a pragmatic consolidation of existing practice rather than an ideological leap in the dark. In most Australian jurisdictions, parliaments have already decided that in certain circumstances there is a public interest in independent review, and have adopted precisely those kinds of accountability arrangements in one form or another. At first these were piecemeal responses to local factors, but more recent examples appear to be direct responses to the fact that existing mechanisms of accountability are inadequate under conditions of devolved governance. Overall, experience suggests that a systematic and comprehensive approach would benefit clients and services alike.

From a historical perspective, there appears to be something of a natural affinity between devolved governance and administrative justice mechanisms with combined jurisdiction over both public and private bodies. Health services are a good example. These have long been provided in Australia by a combination of Federal and State/Territory governments, private organisations (both for-profit corporations and charities), and independent experts with a significant role in service provision (GPs and specialists). The overall governance

arrangements in this sector seek to ensure equitable access and contain costs by relying on a combination of quasi-market mechanisms (in this case, underpinned by public regulation of the price paid for pharmaceuticals and many medical procedures), and negotiation between governments and private providers. This firmly entrenched, complex configuration of multiple public and private interests goes hand in hand with laws dating back at least two decades in all jurisdictions, establishing independent statutory complaint handlers for all medical services, such as the Health Care Complaints Commission in NSW.[29]

The case for natural affinity between devolved governance and administrative justice mechanisms is strengthened by emerging evidence that arrangements in the disability services sector are converging on this kind of accountability as underlying governance arrangements also converge. Several States and Territories already have oversight bodies with general jurisdiction over disability services. The earliest of these is in NSW, where the Ombudsman has jurisdiction over all publicly funded and/or licensed providers of community and disability services, under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*. [30] The NSW Act was a particularly early example of this type of arrangement, and the circumstances under which it was introduced are instructive. It was around ten years before any other jurisdiction adopted similar oversight arrangements for disability or community services, and adoption remains uneven.

In the mid-2000s, which is to say early in the era of devolved public governance, the ACT and South Australia set up independent complaints handlers with jurisdiction over both community and disability services (the Human Rights Commission in the former, the Health and Community Services Complaints Commissioner in the latter). The Northern Territory followed suit in 2014. Victoria took a slightly different approach: it extended the Ombudsman's jurisdiction to include community services registered under the *Children, Youth and Families Act 2005 (Vic)*,[31] but established a separate Disability Services Commissioner in 2006. It appears that Queensland and Tasmania still lack an independent complaints handler with general jurisdiction over community or disability service providers, while Western Australia has no such body for community services. The recent establishment and ongoing rollout of the National Disability Insurance Scheme provides an opportunity to provide consistent access to administrative justice for people with disability. As the NSW Ombudsman's Office has argued elsewhere,[32] its experience suggests that independent oversight along the lines discussed here would improve the delivery of services to people with disability in numerous practical ways.

In addition to this natural affinity, an examination of areas of service delivery to vulnerable clients characterised by devolved governance suggests considerable practical benefits as well. Two areas where the NSW experience may prove particularly informative are community services and housing. As we have already noted, there has been ombudsman-style independent oversight of community services in NSW since 1993, and since the early 2000s this has been exercised by the Ombudsman's Office itself.

The introduction of this regime cannot be directly attributed to the introduction of devolved governance, because historically community services were provided either directly by the state (e.g. statutory child protection) or by individuals working directly with state authorities (e.g. foster carers).[33] This appears to be changing, however: NSW, for example, has begun to devolve a significant portion of community services over the last five to ten years. This was originally in response to recommendations made by the Wood Special Commission of Inquiry in 2008, but more recent efforts are the result of the Department of Family and Community Services' adoption of so-called 'co-design' in service planning and delivery. The proportion of matters received by the NSW Ombudsman's Community Services Division which relate to non-government organisations has risen as these changes have taken effect. The proportion was around 6 per cent between 2004 and 2008, and since then has risen to

around 12 per cent.[34] NSW find itself in the happy position, by accident of history as much as anything else, of already having oversight mechanisms which are well-adapted to this new governance regime. As devolved governance spreads into this sector, the NSW Ombudsman expects the trend in its complaint patterns to continue, and we believe the remaining jurisdictions would do well to consider adopting similar oversight arrangements.

By contrast, no State or Territory has an oversight body for social housing with these kinds of complaint handling and investigatory powers. In most jurisdictions, State-owned social housing falls under the jurisdiction of the Ombudsman, but other kinds of social housing do not. If our experience in NSW is any indication, this is an unsatisfactory situation. Moreover, there are signs the government is considering transferring at least some public housing stock to the community housing sector and private providers.[35] If this occurs, it is likely to exacerbate problems with current oversight and accountability arrangements.

The NSW Ombudsman's experience shows that public housing is a significant source of complaints, both from public housing tenants and members of the public who are their neighbours. In 2013-2014, Housing NSW, Land and Housing Corporation and Aboriginal Housing Office made up 17 per cent of all formal complaints and 26 per cent of all enquiries conducted under the *Ombudsman Act 1974*. These included complaints about failure to reply to complaints, applications and requests; failure to give adequate reasons for decisions; failure to comply with policies regarding giving notice before inspections; and failure to address safety issues such as maintenance or antisocial behaviour from other tenants.

There is no reason to think that these issues are peculiar to the state-funded housing sector; in fact, the available evidence suggests problems are equally present in the community housing sector. Around 7% of all enquiries and complaints to the NSW Ombudsman's Office about social housing concern matters which are not within its jurisdiction (e.g. because they concern community housing providers). This figure is surprisingly high, given that the Office makes no attempt whatsoever to seek out these kinds of complaints. On a slightly different note, 20 per cent of all social housing complaints which *do* fall within the Ombudsman's jurisdiction are from neighbours alleging nuisance from a public housing tenant. In many serious cases, complainants describe experiencing violence and witnessing criminal behaviour from neighbours. Such complaints are made by both private homeowners/tenants and other public housing tenants. There is no equivalent complaint handler for nuisance caused by tenants of community housing, and options for scrutiny and redress are limited. The national law regulating community housing providers limits the investigative powers of the Registrar of Community Housing to 'the compliance of registered community housing providers with community housing legislation'. Instead, aggrieved parties generally have to take their case to the NSW Civil and Administrative Tribunal or the courts to obtain relief.[36]

Conclusions

The Australian experience of administrative reform and counter-reform holds a number of lessons for those concerned about preserving ombudsman-style oversight mechanisms and protecting citizens' rights to scrutinise and seek redress from service providers.

First, our experience suggests that Peter Tyndall is right to be concerned that administrative reform, if left unchecked, can mean citizens lose these rights. Privatisation, contracting out and devolved governance can each, in different ways, mean that services which once fell within the jurisdiction of the Ombudsman can now fall outside it. Accountability institutions need constantly to adapt, and those of us who care about the protections they provide need to be vigilant and active in defending them.

Second, our experience suggests that reform is a complex phenomenon, and it can also provide unexpected opportunities to extend these rights in places where they may previously have been unavailable. The establishment of industry ombudsman over the last 20 years is a prime example: here, private industry has more-or-less willingly adopted a model of independent oversight developed in the public sector. Tyndall himself has expressed some reservations about such bodies, questioning their independence and suggesting their very multiplicity may be a source of confusion. But on balance, these valid technical concerns should not diminish our appreciation of the broader point: public-sector norms of accountability have established a bridgehead in the private sector.

Third, there are straightforward, practical ways to address the problems Tyndall identifies, and to take advantage of the opportunities we have mentioned. We can remove any ambiguity over access to independent oversight, scrutiny and redress in respect of contracted-out services by legislating to give ombudsmen jurisdiction over services provided by private bodies under contract with public agencies. All Australian jurisdictions except NSW (and to a lesser extent Victoria) have done this. Because NSW lags behind, the NSW Ombudsman's ability to address complaints in these circumstances is weaker than elsewhere.

Fourth, access to administrative justice in devolved policy environments can also be protected, but doing so requires us to abandon a founding principle of public law. We need to recognise that thirty years of reform have rendered the distinction between 'public' and 'private' spheres largely irrelevant to the actual experience our fellow citizens have of 'public' services. Instead, we should ensure administrative justice is available wherever the issues, organisations or activities give rise to a public interest in independent scrutiny and redress. Australian parliaments have already recognised this public interest in a number of individual cases, and have experimented with a range of responses: giving jurisdiction to the public ombudsman, establishing standalone oversight bodies, and industry ombudsman schemes. What matters most is that there be some independent entity with power independently to handle complaints and conduct investigations, regardless of the public-law status of the subject of complaint, and with a mandate to drive improvements across the sector through monitoring, reviewing and other engagement work.

This proposal also raises a profoundly important question: if we abandon the distinction between public and private as a basis for deciding where an ombudsman-like jurisdiction should exist, what other rationale should we adopt in its place? By way of concluding this paper and laying the groundwork for future debate, we propose four circumstances in which, we believe, there is a public interest in ensuring ombudsman-style oversight.[37] The first is where the client population for a service is vulnerable in some way which makes it difficult for them to make their voices heard. We have in mind vulnerabilities like mental health issues, drug problems, and also things that might not obviously constitute a vulnerability, like not speaking English fluently or being young. The second is where the nature of the relationship between client and provider means the client cannot easily choose whether to receive a service or who to receive it from, they must be protected by mechanisms of scrutiny and redress. Thirdly, similar protections must be in place where the relationship between the two is characterised by a structural asymmetry of information. This usually arises where large organisations provide services to individuals or families, but it can also arise where services rely heavily on expert knowledge.[38] Finally, such protections must also be in place where service providers are in a position to make decisions that are binding on their clients – where, in other words, the service provider is exercising the authority of the state. None of these are mutually exclusive, and where more are present, the need for independent oversight is all the greater.

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Endnotes

1 Even a brief and unsystematic scan of the peer reviewed literature gives a flavour of this Anglocentric diversity. Eg C Ludowise, 'Accountability in Social Service Contracting: The State Action Doctrine and Beyond,' 27 *Journal Of Health & Human Services Administration* (2004), P Leyland, 'Back to Government? Reregulating British Railways,' (2005) 12 *Indiana Journal Of Global Legal Studies* 12 , P Lipman and N Haines, 'From Accountability to Privatization and African American Exclusion,' (2007) 21 *Educational Policy*, M E Gilman, 'Legal Accountability in an Era of Privatized Welfare,'(2001) 89 *California Law Review*, E Genders, 'Legitimacy, accountability and private prisons,' (2002) 4 *Punishment & Society*, M Strayhorne, 'Oversight and Accountability of Water Privatization Contracts: A Proposed Legislative Policy,' (2014) 14 *Sustainable Development Law & Policy*, M J Trebilcock and E M Iacobucci, 'Privatization and Accountability,' (2003) 116 *Harvard Law Review*, R S Gilmour and L S Jensen, 'Reinventing government accountability: Public functions, privatization, and the meaning of 'state action',' (nd) 58 *Public Administration Review* (2006) 108 *Teachers College Record* 108, D Boyles, 'The Privatized Public: Antagonism for a Radical Democratic Politics in Schools?' (2011) 61 *Educational Theory*, 'When Hope Falls Short: HOPE VI, Accountability and the Privatization of Public Housing,' (2003) 116 *Harvard Law Review*.

2 OECD, *Privatising State-owned Enterprises. An Overview of Policies and Practices in OECD Countries* (Paris: Organisation for Economic Cooperation and Development, 2003), 26, Herbert Obinger and Reimut Zohlnhöfer, 'Selling off the 'Family Silver': The Politics of Privatization in the OECD 1990-2000. Working Paper No 121,' (Cambridge MA: Harvard Center for European Studies, 2005), 3.

3 Portuguese Ombudsman, 'Report to the Parliament 2011. Summary,' (Lisbon: The Ombudsman's Office - Documentation Division, 2012), 11.

4 One should not push the point too far, of course: access to administrative justice is probably affected by administrative reform in both Portugal and Canada (OECD, *Distributed Public Governance* (Paris: Organisation for Economic Cooperation and Development, 2002), 67.) The point is, the relationship between the two should probably be clearer in Australia.
5 Judy Johnston, 'The New Public Management in Australia,' (2000) 22 *Administrative Theory & Praxis* 22.
6 Reserve Bank of Australia, 'Privatisation in Australia,' (1997) *Reserve Bank of Australia Bulletin* December 14.
7 Keith Horton-Stephens and Colin McAlister, *Competitive Tendering and Contracting by Public Sector Agencies, Report No 48* (Melbourne: Australian Government Publishing Service, 1996), 3.
8 Reserve Bank of Australia, 'Privatisation in Australia,' 14-16.
9 Horton-Stephens and McAlister, *Competitive Tendering and Contracting by Public Sector Agencies. Report No 48*, 3.
10 See OECD, *Distributed Public Governance*.
11 Wilma Gallet et al, 'The Promises and Pitfalls of Prime Provider Models in Service Delivery: The Next Phase of Reform in Australia?' (2015) 74 *Australian Journal of Public Administration*.
12 Although there are some notable counter-examples, one of the most prominent at the time this paper was written being the privatisation of the NSW electricity distribution network. This was first proposed in the late 1990s, and again in the early 2000s. It was not implemented at the time due for political reasons, but appears likely now.
13 Elinor Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems,' (2010) 100 *American Economic Review*.
14 Robyn Keast et al, 'Mixing State, Market and Network Governance Modes: The Role of Government in 'Crowded' Policy Domains,'(2006) 9 *International Journal of Organization Theory and Behaviour* .
15 It must be acknowledged that the use of such policy tools was also a prominent part of later new public management, and was used in the UK under Major and NSW under Greiner to name but two examples.
16 Eg Australian Public Service Commission, 'Policy Implementation through Devolved Government,' (Canberra: Attorney-General's Department, 2009).
17 ———, 'Policy Implementation through Devolved Government,' 14-15.
18 Graeme Hodge and Ken Coghill, 'Accountability in the Privatized State,' (2007) *Governance* 20.
19 Cf Albert Hirschman, *Exit, Loyalty and Voice: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970).
20 Administrative Review Council, *The Contracting Out of Government Services, Report No 42* (Canberra: Attorney-General's Department, 1998); Robin Creyke, 'Report No 42 – The Contracting Out of Government Services - Final Report: a Salutation,' *Administrative Review Council* (1999) 51 *Admin Review*), Jacqueline Ohlin, 'Will Privatisation and Contracting Out Deliver Community Services? Research Paper No 15, 1997-98,' (Canberra: Parliamentary Library, 1998), Geoff Mulgan, 'Contracting Out and Accountability. Graduate Public Policy Program Discussion Paper 51,' (Canberra: Australian National University, 1997).
21 Carla Michler, 'Government By Contract - Who Is Accountable?,' (1999) 15 *QUT Law Journal*.
22 The Commonwealth Ombudsman noted that the current jurisdictional arrangements with respect to contracting can 'lead to some inconsistencies, and to some members of the public being denied immediate access to the independent and impartial service' offered by his Office. *Commonwealth Ombudsman,* Annual Report, *1999-2000* (Canberra: Commonwealth Ombudsman, 2000).
23 See, for example, Commonwealth Auditor-General, 'Some issues in contract management in the public sector', presentation to the Australian Corporate Lawyers Association and Australian Institute of Administrative Law conference on outsourcing, Canberra, 26 July 2000. Quoted in Verspaandonk, *Outsourcing-For and Against. Current Issues Brief 18 2000-01*.
24 For a contemporary overview of the issues involved, see Administrative Review Council, *The Contracting Out of Government Services, Report No 42*.
25 Technically, jurisdiction over prisons is extended by s246 of the *Crimes (Administration of Sentences) Act 1999*, but this merely states that the jurisdiction of the Ombudsman Act and relevant regulations apply to prisons managed under subcontract.
26 Accredited certifiers are brought in under the little-known s 5(1)(1f) of the *Ombudsman Act 1974 (NSW)*.
27 Productivity Commission, *Contribution of the Not for Profit Sector* (Canberra: Productivity Commission, 2010), 72-3.
28 Bruce Barbour, *Risky Business: the potential for improper influence inthe non-government sector* (Western Australia: Speech delivered to the Australian Public Sector Anti-Corruption Conference, 16 November 2011, 2011), Independent Commission against Corruption, *Funding NGO Delivery of Human Services in NSW: A Period of Transition* (Sydney: Independent Commission against Corruption, 2012).
29 Similar arrangements have also been put in place in non-devolved policy domains, such as legal services commissions. One common feature in these is an asymmetry of information and expertise which acts to the disadvantage of the customer. We will return to this point later.
30 Oversight under the *Community Services (Complaints, Reviews and Monitoring) Act 1993* was originally exercised by the Community Services Commission. The Commission was merged into the Ombudsman in the early 2000s.
31 *Ombudsman Act 1973 (Vic)* Item 19, Schedule 1.
32 Kathryn McKenzie, *Submission on Proposal for an NDIS Quality and Safeguarding Framework* (Sydney: NSW Ombudsman, 2015).

33 In June 2013, just under 95% of children across Australia in out-of-home care were in home-based arrangements. See Australian Institute of Health and Welfare, 'Child Protection Australia 2012-2013 (Child Welfare Series No. 58),' (Canberra: AIHW, 2014).

34 It should be noted that some of this increase may also be due to changes in the NSW Ombudsman handles matters involving what is now the Department of Family and Community Services. In absolute terms, the number of complaints concerning NGOs has usually been 30-50% higher since 2008, compared with the first part of the decade.

35 At the time of writing, this transfer is not formal NSW government policy. However, in November 2014 the government began a public consultation process as the first stage of a reform programme. As part of this, it explicitly identified greater involvement of the non-government and private sectors in the social housing system as a priority for consultation. See Department of Family and Community Services, *Social Housing in NSW: A discussion paper for input and comment* (Sydney: Department of Family and Community Services, 2014), 10.

36 We recognise that my argument raises a question which we do not have space to fully address here: if it is a good idea to provide access to administrative justice to tenants of community housing, why should we not extend access to all tenants of private housing? We discuss some principles on which we believe it would be reasonable to distinguish between tenants of community housing and other private tenants in the conclusion.

37 These principles also provide a basis of deciding where access to ombudsman-style administrative justice may not be necessary. For example, the first two principles provide a rationale for not extending access to administrative justice beyond tenants of community housing to all private tenants. Many tenants of private housing face no particular barriers to protecting their rights, and the existence of a private housing *market* means tenants can, in practice, leave unsuitable accommodation if needs be. Under such circumstances, there may not be sufficient benefit to funding a third-tier complaint handler in addition to tribunals and the courts.

38 Examples of experts who are already subject to this kind of oversight are doctors and lawyers (who fall under the jurisdiction of professional standards bodies for precisely this reason).