

Ombudsman needs full independence

*By John Wood**

It's a dark day for the Office of the Commonwealth Ombudsman, and not for the reasons parroted in the media about Allan Asher's faux pas in collaborating with a Greens senator to raise questions about his resources.

Rather it is because of the way in which the ombudsman has been harassed, even after apologising for his self-styled "unwise" conduct. That an ombudsman can be dressed down by the head of the prime minister's department – an agency subject to his jurisdiction – and by minister Gary Gray, demonstrates his office's lack of independence from government.

The office is one of the largest in the world in terms of the volume of complaints heard, and it has greatly enhanced the accountability of government to individual citizens. But a lack of resources has undermined its effectiveness and there are clear conflicts of interest in the current funding arrangements.

Australia should follow comparable democracies such as Britain and New Zealand, and countries as varied as Norway, South Africa and Thailand, and make the ombudsman a statutory officer reporting to parliament, like the auditor-general. The budget of the ombudsman's office should be approved by a parliamentary oversight committee.

Background

The Office of the Commonwealth Ombudsman began operation on 1 July 1977, following the enactment of the Ombudsman Act 1976. The new agency was part of an administrative law package recommended by various committees between 1968 and 1973. The other elements of that package, also enacted in 1976, were the Administrative Appeals Tribunal, a new system of judicial review of administrative decisions, and the Administrative Review Council, whose job was to monitor and review the new structure.

During the 1960s and 1970s it had become evident that the federal government was having an increasing impact on the everyday lives of all Australians. Its increasing involvement in areas such as welfare, education and health, as well as in its more traditional areas – customs, immigration and taxation – resulted in calls for the level of government that seemed most distant from the populace to exhibit greater transparency and accountability. The ability to challenge administrative decisions and actions was, for all intents and purposes, non-existent in Australia before the 1970s. Reforms in this area had also been taking place at state government level.

‘Sensitive to the needs of citizens’

For the ordinary citizen, the ombudsman’s office was the key institution in the new administrative law package. Its role was to investigate complaints, to undertake investigations of Commonwealth administrative actions on its own initiative, and to report, as necessary, on the public interest implications of matters of public administration. As the prime minister, Malcolm Fraser, put it at the time, “The establishment of the office is directed towards ensuring that departments and authorities are responsive, adaptive and sensitive to the needs of citizens.”

Since then, the office has dealt with about 550,000 complaints, including 18,313 in the most recent reporting year (2009–10). It has jollied, cajoled and berated government agencies into accepting that they have a responsibility to account to the public. It has assisted those agencies to establish and improve their own complaint-handling mechanisms. It has forced governments to accept and develop a system for making *ex gratia* payments for those suffering financial detriment as a result of defective administration. The office has exposed flaws in many operational systems, including the Australian Taxation Office, Centrelink, child support, immigration detention, employment, education, and family allowance payments, as well as deficiencies in administration of freedom of information legislation and failures in service delivery to Aboriginal clients. Increasingly, the office has contributed to the rethinking of policy approaches by virtue of submissions to parliamentary inquiries and by undertaking investigations into systemic problems in agencies or the administration of schemes.

Ultimately, the recommendations following an ombudsman's investigation are those of the person occupying the position. Consequently, the personality of the occupant has been a major factor in the performance and direction of the institution itself.



The extrovert first ombudsman, Professor Jack Richardson (*pictured*), was ideally suited to take on the hitherto secretive mandarins who headed the major departments in the late 1970s. His public and private exchanges with the legendary Treasury secretary, John Stone, are now the stuff of history.

The doggedness and determination of his successor, Professor Dennis Pearce, in repeatedly making reports to the prime minister when agencies failed to implement his recommendations, eventually led to the parliament's establishing mechanisms to consider the ombudsman's work more fully, mechanisms that have sadly lapsed in recent years.

The fourth ombudsman, Philippa Smith, became probably the most public face of the office as she revitalised the organisation and undertook a major outreach program to ensure that those who often most needed its services were aware of its existence. Her numerous public reports and public comment had a similar effect within the bureaucracy.



Professor John McMillan (*pictured*) left an indelible imprint on the office. Undoubtedly the father of freedom of information in Australia, he added a different sort of intellectual rigour to the office and the setting of priorities for its work, and had to take on the onerous task of reviewing the circumstances surrounding the detention of immigrants.

Allan Asher recommitted to ensuring that those who are least able to deal with bureaucracy are better able to deal with agencies and to access his office.

Independence?

Is the office independent? As this week's events suggest, yes and no. Although there is no doubting the legislated independence and freedom from direction of the office itself, the office remains an agency of the executive government. Unlike many of its international cousins – and indeed some of its state counterparts – the ombudsman is not an officer of the parliament. He or she is nominated to the prime minister, generally following some form of selection process, by the head of the prime minister's department (itself subject to the ombudsman's jurisdiction and thus having a theoretical conflict of interest), who recommends the person to the governor-general for appointment. Parliament has no say in the process, not even a right of veto.

Funding

Even more worrying, perhaps, is the mechanism for funding the office. If one wanted to curb the ombudsman, the most effective way to do it, short of repealing the legislation, is to starve the office of resources. And this is what occurred during the Richardson, Pearce and Smith terms of office. In the last instance, immediately after the Howard government came to office, the prime minister's portfolio was among those targeted for expenditure cuts. The head of the department selected the ombudsman for the bulk of the required savings. No less than \$1.9 million, or 22 per cent of the annual budget, was cut by the head of an agency that was subject to the ombudsman's jurisdiction – at a time when the number of complaints to the ombudsman was increasing at a rate of about 20 per cent each year. Was this perhaps revenge for the previous prime minister's *increasing* the ombudsman's budget by the very same amount a few years earlier despite opposition from the same agency?

To be truly independent, the ombudsman should become an officer of parliament and the budget for the office should be approved by a parliamentary oversight committee. As in New South Wales, the government would nominate a person to the parliamentary committee, which would then have the power to approve, or not approve, the appointment. The ombudsman would submit his or her proposed budget to the parliamentary committee for consideration at

the same time as it considered the office's annual report and plans for the forthcoming year, and the committee would then recommend a budget to the government. The New Zealand Ombudsman's budget is dealt with in this way. Such a process has been supported by (the late) Jack Richardson, Dennis Pearce, Philippa Smith, John McMillan and Allan Asher.

The ombudsman's office has been a resounding success. The fact that any person can make a complaint, at no charge, and have it resolved by an independent and impartial authority is a major tool for ensuring the accountability of government administration. That the ombudsman's processes are themselves transparent is a further strength. The past thirty-five years have demonstrated that, when necessary, the ombudsman has stood up for the principles of fairness, equity and proper redress. Armed with extensive powers, the office *can* get to the truth of the matter, and thus has exposed flaws, negligence and defects and pointed to better policy directions. Above all, perhaps, the ability of the ombudsman to determine a matter on whether the action complained about was "reasonable in all the circumstances" – irrespective of whether it was lawful – makes it a unique attribute of our system of integrity. It's time to take a vital further step in ensuring the independence of the office. •



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