

Evaluating ombudsman: A case study in developing a quantitative methodology to measure the performance of ombudsman

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The ombudsman institution has been described as an “enigma”. Indeed, evaluations of the performance and effectiveness of the institution have been rare. This paper describes the creation of a methodology enabling the first quantitative longitudinal analysis of the Australian Commonwealth Ombudsman. The methodology covers a 28 year period of the Office from its inception in 1977 through to 2005. In essence the methodology is comprised of the creation of two data sets (one for systemic investigations and one for individual complaints) to allow comparative analysis which may assess both roles of the ombudsman and test for statistical interaction between the dual roles. While there is a brief example in the conclusion of the paper on the results of the data analysis the main aim of this paper is to detail the steps taken to develop the methodology to enable replication and adaptation across other ombudsman institutions.

INTRODUCTION

Since ombudsman appeared outside Scandinavia in the 1960s the institution has been subject to much debate within public administration literature with overwhelmingly support being attributed to the success of the institution.¹ A central feature of this evaluation literature however, is the absence of any accepted or universal empirical methodology used to support this conclusion.² Indeed the variety of empirical approaches used in the literature include: on location observation as to how the ombudsman works;³ surveys of the general population;⁴ analysis of specific case studies;⁵ seeking of written submissions from interested persons;⁶ surveys of complainants to the office;⁷ assessing the framework of an office against a list of criteria.⁸

Without exception this existing empirical work focuses upon assessing the individual complaint taking role of ombudsman. This is despite traditional acknowledgment that the public law ombudsman institution has a proactive system fixing role which supplements its individual complaint taking role, for example in Alberta, Canada in 1970, Chief Justice Milvain states in *Re Ombudsman Act (1970)* (72 WWR 176, 190 and 192):

the basic purpose of an Ombudsman is provision of a “watchdog” designed to look into the entire workings of administrative cases. ... [he] can bring the lamp of scrutiny to otherwise dark places even over the resistance of those who would draw the blinds. If [his] scrutiny and reservations are well founded, corrective

measure can be taken in due democratic process,
if not no harm can be done in looking at that
which is good.

Implicit in the above statement is the dual function of most ombudsman. The first and most dominant role being the “correction” of administrative deficiencies arising through individual grievances (such as rudeness by government officials or mistake or slowness). The second more subservient role being a system fixing role where the recommendations and investigations of an ombudsman may improve procedures, policy or legislation impacting upon many more people than a single individual complainant.⁹

Apart from lacking consistency and failing to evaluate this duality of ombudsman roles the existing evaluative literature is also descriptive and localized. Indeed, the seminal attempt to create a universal method of ombudsman evaluation was undertaken 30 years ago by Danet in 1978.¹⁰ Ayeni in 1993, 15 years after the 1978 publication of Danet’s article “Toward a Method to Evaluate the Ombudsman Role” states that the article by Danet remains “the most comprehensive and authoritative attempt to articulate an evaluatory framework for the ombudsman plan”.¹¹ This sentiment is echoed in 2000, some 22 years later by Aufrecht and Hertogh¹² who explain that it was in 1980 at the second international ombudsman conference where one panel focused on the “efficiency and effectiveness of the ombudsman” where Brenda Danet argued that after an initial period of prescription (where everyone told themselves how good it would be to have an ombudsman) followed by a time of description (what is the function and jurisdiction of

the individual office) that it was time to make a “serious commitment to evaluation” (does the office deliver what was promised?). Aufrecht and Hertogh point out that today our attention remains on prescription and description.

This is also the case in Australia¹³ where despite calls throughout the history of the Office for independent critical examination of its operation¹⁴ between 1977-2005 there is only one external evaluation of its effectiveness.¹⁵ This absence of Australian empirical study is particularly noteworthy given firstly, that at the federal level the Commonwealth Ombudsman (the “Office”) has now been in existence for 30 years and secondly that the Office has been one of the busiest ombudsman offices in the world¹⁶ and that finally, the comparative numerical impact the Office has upon complaint resolution and government service delivery in Australia:

over a twenty-five year period, the number of Federal Court applications for administrative law matters is less than 10, 000, as compared, in the same period, with nearly 500,000 complaints to the Commonwealth Ombudsman alone, and that the combined administrative review caseload of the major Commonwealth tribunals since they were established has been over 400,000 decisions...¹⁷

Of course the Office itself has kept Annual Reports recording comprehensive statistics with respect to individual complaint numbers and sporadic and has made attempts to measure its own effectiveness in terms of its dual systemic role throughout the 28 year period under study.

The aim of this study is to help to redress this lack of international systematic evaluation through producing a methodology to evaluate the dual roles of the ombudsman institution and to afford comparative data analysis by focusing upon the Australian Commonwealth Ombudsman. Given the shared genesis of the ombudsman concept from a Swedish grundnorm the methodology developed in this study has both national and international application.

It is broadly agreed that the modern office of the ombudsman originated in Sweden in 1809 with the creation of the Parliamentary Ombudsmen (Riksdagens ombudsmän).¹⁸ This original Swedish prototype has been transplanted and modified to suit the needs of the political institutions of each individual country. Finland followed Sweden in 1919, and by the middle of the twentieth century other countries begin to rapidly copy and adapt government or classical ombudsman: Denmark (1954), Norway (1962) and contemporaneously in the English speaking world first in 1962 in New Zealand¹⁹ and then in the United Kingdom (1967). The result today is that the ombudsman now exists on every continent. By the late 1960s the concept spread to most Canadian provinces and American states. It also began to spread to Africa, Tanzania (1968) and Israel (1971). In the 1970s the ombudsman concept was introduced in most Australian jurisdictions (1977

at the federal level, 1972-1979 at the state level), Puerto Rico (1977), France (1973), Portugal (1975), Austria (1977). In the 1980s the ombudsman idea had been accepted in almost every Western European country and had begun to spread to Asia with the institution being introduced in Hong Kong (1989), Macao (1992), Jordan (1994), Republic of Korea (1994) and Thailand (1999) with the Asian Ombudsman Association being organized in 1996. Currently, an estimated 120 countries have national ombudsman offices.²⁰ It is not only the classical ombudsman which has proliferated. Supra-national structures such as the European Union and organizations such as universities and privatized industries (eg: telecommunications and electricity) have adopted the ombudsman model due to its own particular needs. Today's ombudsman is an international phenomenon which has "conquered the world".²¹ Australia is no exception to this trend. In addition to a federal Commonwealth Ombudsman Australia has 8 public law ombudsman – 6 state ombudsman and two territory ombudsman²² and a plethora of industry bodies which fulfill similar roles.²³

This study is among the first empirical attempts to evaluate a mature ombudsman institution using quantitative methodology. Its measures of impact and performance will be particularly relevant to the ombudsman institution and to complaint-handling bodies more generally. Given the above factors: the generic origins of the institution, its international prevalence together with its role as a democratic imperative it is surprising that there is a lack of empirical measures of the impact and effectiveness of ombudsman. This is particularly the case with its subservient system fixing or systemic role.

THE METHODOLOGY

Part 1 Introduction

This study develops a quantitative approach to allow for the testing of the following two hypotheses about the operation of the Office:

(1) that the Commonwealth Ombudsman is increasingly using its systemic investigatory function to improve government administration; and

(2) that the systemics function is linked to number and types of individual complaints.

The comparative longitudinal quantitative approach used by this study has both strengths and limitations. A strength is the ability of numerical data to measure past outcomes and predict future variances. A quantitative approach is therefore useful to explore relationships between computed variables over time and cross-sectionally. As quantitative research is the application of a numerical approach another advantage is that it can relate diverse factors. The use of a quantitative paradigm does however mean that this study primarily measures quantity of systemic impact rather than quality. Of course,

wherever possible, the study will utilize qualitative research methods to examine systemic investigations holistically and to make observations as to quality of impact.²⁴

This Part begins by detailing the parameters and outline of the research design. This involves outlining the research question, explaining the origin of the data and identifying the research materials used. The main focus of this Part is to scope the study, to identify exactly what is being measured. This involves the application of the methodological approaches such as those of Danet mentioned previously²⁵ to identify and isolate the measurable systemic functions of the Office. This discussion identifies nine functions of the Office – all of which may impact upon its systemic role. Of these nine functions this study measures three: formal reports and own motions and submissions. It is made explicit in Part II that this study evaluates only a small part of the Office’s systemic functions.

Part III then explains the research techniques used to create both data sets of systemic investigations and individual complaints. It details the methods uniformly applied to across both data sets. These include: the normalization/standardization of government departments over the 28 year period; the allocation of years to individual Ombudsman; the source of staff numbers and population statistics. Parts IV and V then make transparent the different data assumptions and methods with respect to systemic investigations and individual complaints respectively.

Part IV explains the reliability of the systemic investigations data set based upon the use of a “Master List” of 231 systemic investigations. The source of this list and its reliability are made transparent. The integrity of this data is critical to this study and its limitations are therefore clearly identified. This Part then details the steps taken to create a data set from the Master List of 231 systemic reports. In short, each report was read and coded for 12 attributes covering its context, process and outcomes. Part IV itemizes and explains each variable extracted in the reports, one case example is provided in the Appendix to make assumptions explicit to the reader.

Part V echoes this approach with the data set for individual complaints. This Part explains how the 28 years of data is normalized and identifies the individual complaint statistics used by this study. This data set is based upon the statistical records kept by the Office. With some exceptions, these statistics have been maintained fairly uniformly over time.

Parts III, IV and V make transparent the accuracy of the data used in this study. This is necessary for reader confidence in the certainty of results. Importantly, by making clear all assumptions Parts III, IV and V ensure that this study may be replicated by future research and provide a platform to draw upon jurisdictional and international comparisons between ombudsman.

Part II Introduction to the research design

A The research question

The central research question is to determine how and to what effect the Office uses its systemic investigatory powers. As noted above the two central hypotheses to be tested are:

(a) that the Commonwealth Ombudsman is increasingly using its systemic investigatory function to improve government administration; and

(b) that the systemics role (ie: formal reports and/or own motion powers and submissions) is linked to number and types of individual complaints.

Both of the above are beliefs traditionally held about the Office. The first is that the Office achieves systemic change and that an avenue for achieving this is through formal reports and/or own motion investigations and submissions. The second is that there is a relationship between individual complaints and the systemics investigatory function for example, that formal reports and own motion investigations both reduce the number of individual complaints in particular areas and that such investigations originate from areas where there are large numbers of individual complaints.

To address the research question effectively this study develops 6 research aims:

1. To create two longitudinal data sets: one for a defined portion of the systemic investigations function of the Office and the other for individual complaints.
2. To develop a methodology to allow a comparative evaluation between the systemics function and the individual complaint-taking role.
3. To conduct a systematic, quantitative analysis of formal reports and own motion investigations and submissions undertaken by the Office across identified legislative powers from 1978 to 2005.
4. To assess the quantitative systemic impact of formal reports and own motion investigations in terms of impact upon improving public administration.
5. To examine how the use of formal reports and own motion investigations corresponds to the dual role of the Office as an individual complaint handler.
6. To analyse whether the resolution of systemic investigations results in less individual complaints through providing a comparative historical assessment of the office.

The first three of these aims are addressed in this paper.

B Scope of the study: Systemic functions must be measurable

The immediate difficulty is that much of the literature commenting upon the impact of ombudsman views the function of improving administration as immeasurable.²⁶ However, to develop a quantitative methodology it is necessary to have measurable functions. This section develops principles upon which specific systemics functions of the Office may be classified as measurable or immeasurable for the purposes of a quantitative analysis.

To identify what may be measured it must be noted there is no singular universal definition of an ombudsman's systemic functions. Indeed the phrase "systemic impact" or has several possible interpretations according to the literature.

The broadest meaning of what systemic impact means is from the 1991 Review, mentioned above which defines systemic change or systemic improvement as being "[T]he Ombudsman's potential to induce broader change in the administrative system..."²⁷ The Review states that systemic change means "major reforms to Australian public administration" and that these "have been relatively uncommon".²⁸ This conceptualisation accords with the only international study on the systemics role, an Alaskan²⁹ study which explains that legislative and policy changes were the most

measurable systemic impact of an ombudsman. The narrowest concept of systemic impact is suggested by a Australian Federal industry ombudsman, the Telecommunications Industry Ombudsman (the “TIO”) stating that it “considers an effective outcome to a systemic investigation is a suitable change in a provider’s behaviour”.³⁰ This “thin” notion is based upon Hill’s research as enunciated by Hertogh who states that ombudsman

not only should provide individual redress, but are also expected to have an effect on administrative action and produce some form of “policy impact”: administrative policy changes that have consequences into the future and beyond the particular decision complained against.³¹

At first blush this definition seems contradictory to a narrow approach to defining systemic impact however Hertogh goes on to give examples of policy impact as: the replacement of misleading or inaccurate forms; the improvement of communication within the agency’s clients; a higher quality of service; general improvements to an agency’s functioning or better record keeping. Hertogh states that together with changes in agency’s internal rules and regulations these are all examples of policy impact.

Thick and thin

This study places these definitions as to the impact of systemic recommendations made by the Office into a gradation from “thick” to “thin”. This is based upon the distinction between policy and procedure. The thickest form of systemic change (best enunciated by the 1991 Review above) refers to administrative reform brought about through changes to policy and/or legislation. The thinnest form of systemic change is procedural change. The methodology adopted in this study therefore categorises the systemic impact of the ombudsman into thick (policy/legislative) change or thin (procedural) change. As this study begins from a legal perspective it suggests changes in law and policy are the most thick and measurable activity of the office with a scale that slides “down” from that point.

This may be done as the Office argues that it may investigate both procedure or matters of administration and matters of policy.³² For example, in its early reports the Office suggests:

It would be absurd if the Ombudsman could find, for example, that a Commonwealth prisons regulation providing that sleeping arrangements for Commonwealth prisoners should be communal was unreasonable or unjust or in all the circumstances wrong, yet if the same arrangements were implemented by an administrative “policy” decision of a department

the Ombudsman would lack competence to investigate the issue at all.³³

Specifically the Office argues that the *Ombudsman Act 1976* (Cth) does not exclude a matter from being a matter of administration because it is also a matter of policy.³⁴

Direct and indirect

Having determined that the impact of the Office in terms of systemic change can be classified into “thick” and “thin” it is then necessary to determine exactly what, within those categories, may be measured. To assist in this process a further category created within systemic impact is “direct” as opposed to “indirect” impact.

The distinction between the two has been described by Nebenzhal as “the direct impact of the ombudsman is meant the benefit which accrues to his clients – the complainants – from his operation; the indirect impact of the ombudsman refers to the benefits accruing to others, including the public at large.”³⁵ This study applies Nebenzhal’s conceptualization but departs from the notion of direct impact benefiting a complainant and instead talks about direct and indirect in terms of the practical ability to measure the systemic impact of the operations of the office. It develops a sliding scale between direct impact (measurable) and indirect impact (immeasurable).

On this scale **direct** impact is a systemic result which is measurable, such as where the Office publishes admonitions in letters and published case notes or, more particularly for the purposes of this study where the Office suggests policy or legislative change in formal reports, own motion investigations and submissions to government.

At the other end of this scale **indirect** impact is not measurable. It is more elusive and encompasses less tangible functions than does direct impact. To provide three such examples of indirect systemic impact, the first is the role of the Office as a “teacher”³⁶ where it points out the path of righteousness through the answers demanded in an investigation. Secondly, the function of the Office as a watchdog which was a point made in a 1983 study of the Hawaiian ombudsman noting that comments from agencies “indicate that even the unjustified complaints tend to make the agencies more careful in handling their affairs.”³⁷ Or, at the extreme end on this sliding scale into immeasurability, the observation that the mere existence of the Office changes behaviour:

the mere existence of an Ombudsman strengthens the citizen’s confidence in public administration and has a preventive effect favouring an administration based on the principles of law, justice and fairness: the citizens know they can seek the assistance of a highly qualified, neutral person if they feel they have been wronged by the bureaucracy, and the administrators will be even more motivated not

to give rise to justified complaints which may call forth the Ombudsman's intervention.³⁸

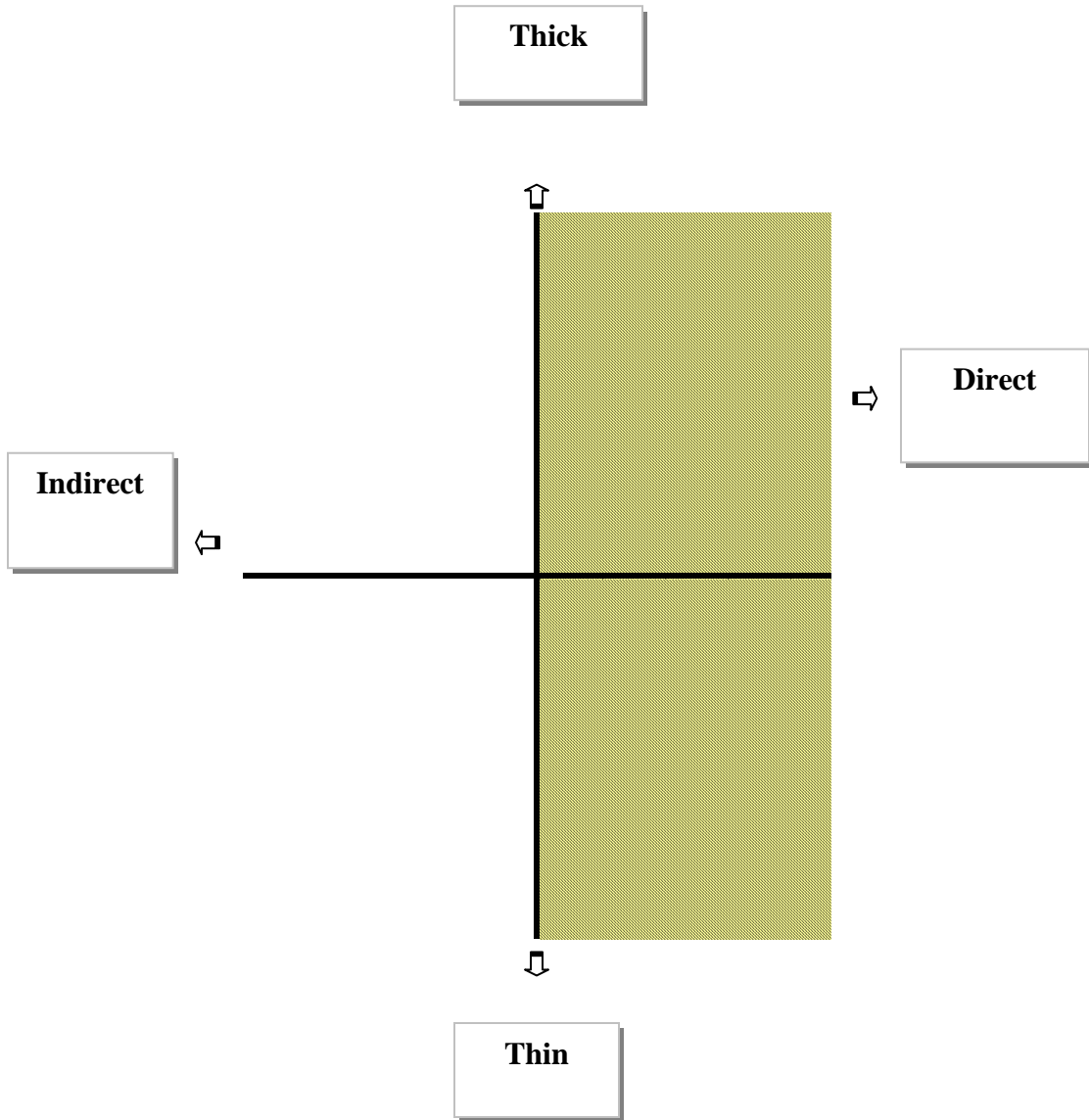
A further dimension of the difficulty of measuring indirect change is the "extent to which the Ombudsman's Office was instrumental in determining the official decision" as this "varies from case to case".³⁹ This is particularly apparent with the example of Senate submissions where it is difficult to ascertain just how influential the input of the Office is with respect to certain administrative changes – such as the introduction of the statutory scheme Compensation for Detriment Caused by Defective Administration (CDDA) established in 1995 which was the result of much lobbying from the Office.⁴⁰ That noted, a quantitative analysis demands measurable data and as the continuum progresses away from direct and towards indirect such as where the Office supplying submissions to law reform bodies the exactness with which input is measurable similarly decreases.

What does this study measure?

This study measures direct systemic change. Direct improvements are more easily measured as they are clearly identified and their impact – in terms of quantity - obvious. Within the category of direct systemic change the study classifies the change as "thick" or "thin".

Figure 1.1: What is measurable: Thick/Direct and Thin/Direct change

A. Fig, 1.1



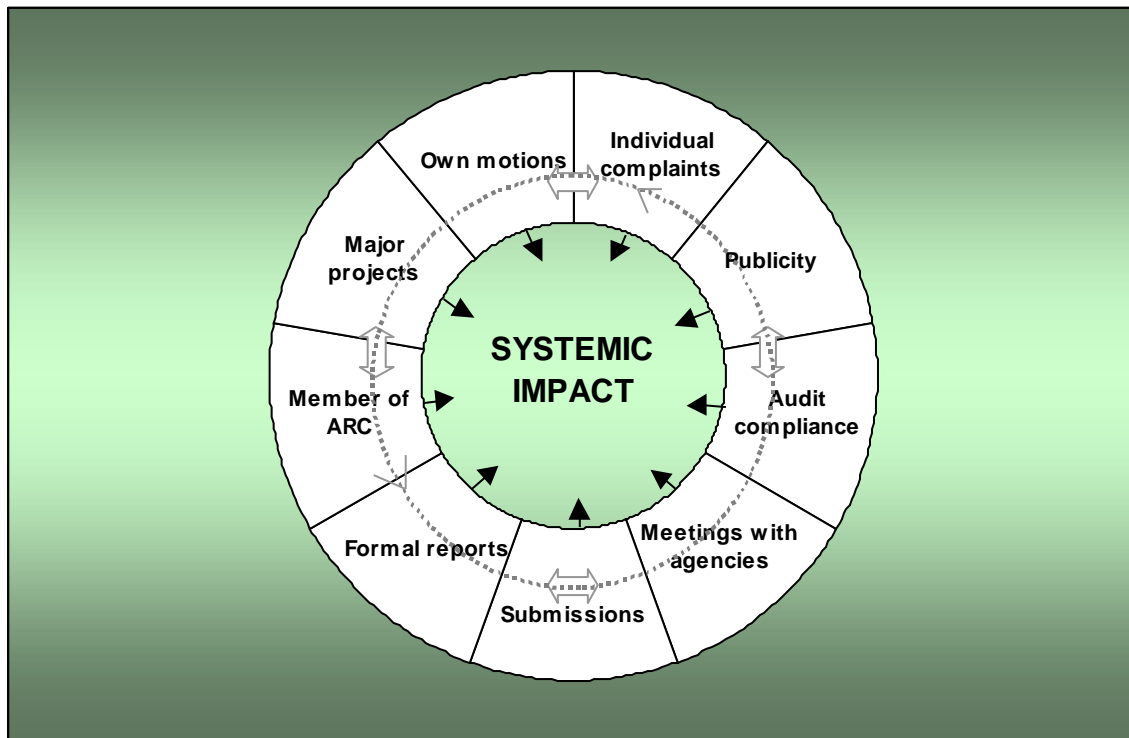
The systemic functions of the Office measured by this study must therefore fall within the Direct quadrants (as identified in Figure 1.1). Two additional points to note are that firstly, this study does not measure all functions within this quadrant and secondly, this study does not attempt to evaluate the remaining half of the quadrant of “indirect” as this is the most difficult impact to both identify and measure. An example of “thin and indirect” would be an informal suggestion for change to an administrative procedure of an agency, such as an alteration to a manual.⁴¹ An example of “thick and indirect” may be where the Office suggests a policy change in an informal meeting. While the ability to measure indirect impact is beset with difficulty it should be emphasized that a general consensus exists in the literature⁴² that real but immeasurable systemic improvement does occur as a result of the public accountability system of which the Office is part.

With this in mind, this study isolates instances where it can identify and measure thick and direct or thin and direct impacts. This study therefore limits its focus to a small part of the systemic work of the Office and excludes a large proportion of the work of the Office that will fall into all four quadrants of Figure 1.1. The following section defines the functions of the Office measured in this study, of these functions only the direct impact is measured.

C Scope of the study: The systemic functions measured

Given the generality of the systemics definitions, Figure 1.2 identifies nine functions of the Office that have systemic impact. This Figure highlights that no singular function of the Office is used in isolation to deal with systemic issues.

Figure 1.2: Functions of the Office with Systemic Impact



As identified in Figure 1.2 the general definition of systemic impact will capture most of the functions of the Office. Indeed, improvements in administrative decision-making may result from any singular or combination of the above functions of the Office.

To take the example of the individual complaint function of the Office, an individual complaint may result in systemic change. This point is captured in the following quotes:

Mr Norm Geshcke a former Victorian Ombudsman:

The complainant alleges an injustice has occurred; my role is to investigate his allegations and determine whether an injustice has occurred. If so, to have it redressed. If not, say so and clear the agency. If so, and it arises through bad practice, to suggest a change of practice or law.

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Professor Dennis Pearce, a former Commonwealth Ombudsman:

The Ombudsman is primarily concerned with complaints about specific decisions. However, he also fulfils the wider role of improving procedures and bringing about desirable changes to legislation and policy. This is achieved through two avenues. First and most commonly, the receipt of complaints from members of the public may reveal an inequity in the pattern of difficulties that should not be allowed to continue. A single complaint is often sufficient to highlight a deficiency in legislation or agency policy that needs to be dealt with before other persons are adversely affected. Second, the

Ombudsman is empowered to initiate investigations into matters of defective administration of his own motion. This power is used when a general issue comes to the Ombudsman's attention that he perceives will have an adverse affect on members of the public.⁴⁴

Indeed, there are numerous examples of indirect systemic change occurring throughout the history of the Office sourced from Annual Reports, for example the 2003-2004 Annual Report in the case study titled "improvements to policies" states:

Ms F complained that during her time in Australian Federal Police (AFP) protective custody she was refused access to a translator. Ms F also complained about the time and manner in which the AFP released her from the ACT City Watch House.

The matter was referred to the AFP and was successfully conciliated through the AFP's workplace resolution process. As a result of this complaint, the AFP made some improvements to its policies for handling people in custody.⁴⁵

Also identified in Figure 1.2 is the point that an overlap of each of the functions of the Office may inform or be the basis for such change. So a major project may have arisen from an individual complaint, result in a formal report originating in an own motion investigation that may then form the basis for a law reform submission.

An examination of each of the nine key functions represented in the above diagram follows.⁴⁶ This explanation identifies that in terms of the research aims of this empirical study only three of these functions which are the more formal investigatory functions - the own motions and formal reports functions and submissions - are classified as direct and therefore measurable by this study.

Individual complaints

As Hill notes the mere fact that an individual complainant was helped does not mean the agency was affected in any important way.⁴⁷ Indeed, a selected example of a case study provided in the Annual Reports of the Office illustrate this point:

A Member of Parliament complained about the ATO's imposition of general interest charge (GIC) on a constituent who had previously been led to believe by ATO staff that no such charge would apply. One day after the Ombudsman staff inquired about this complaint, the ATO had contacted the constituent, clarified the situation, apologized for any inconvenience, and arranged to have the GIC remitted. The ATO then undertook subsequent follow-up action to confirm that the remitted GIC was properly credited to the constituent's bank account.⁴⁸

In the above case although the individual complainant received a positive outcome, the decision did not lead to any change in the operation of the Department. Conversely, in the case study below, although the complainant received a negative outcome the resultant decision did influence the operation of the department as a whole.

Mr G's decision to use an Australian sounding name rather than his own Arab one led to his name being incorrectly recorded by DILGEA on his citizenship certificate. Unfortunately, he chose a Jewish name which caused some problems when he wanted to return to the country of his birth to register his children there.

I did not recommend the issue of a replacement certificate recording Mr G's true name, because there was no evidence of defective administration by DILGEA. However, I did raise with the Secretary my concerns about the tendency for DILGEA to apply the guidelines on citizenship certificates rigidly, even though the Act conferred a discretion on delegates. I was promised that my concerns would be taken into account during a forthcoming review of departmental guidelines.⁴⁹

Of course this must not exclude the suggestion that individual complaints will lead to systemic improvements. Arguably the remedies sought after any investigation by individual Ombudsman are always twofold – to dissolve the injustice to the individual and to improve administrative methods so that the same complaint does not reoccur.

Individual complaints are not used as a measure of systemic impact in this study. This is due to the following: firstly, this function of the Office spreads across the entire range of Figure 1.1 including thin and indirect to thick and direct. As the Office does not consistently identify when individual complaints may have resulted in thick or thin

systemic change this means that much systemic impact will not be measurable across the entire four quadrants. Secondly, the *Ombudsman Act 1976* (Cth) provides that a complaint may be made orally and dealt with informally, as written complaints may also be. This is the case even where individual complaints raise systemic issues. Again this means systemic impact may result from an individual complaint⁵⁰ however it is not practical to measure such reform.

Publicity

While an ombudsman may lack coercive powers it has been suggested that ombudsman may change agency behaviour through publicity, as an ultimate sanction of the office is to make offenders publicly known. Publicity mechanisms include special and annual reports to Parliament and general media coverage through speeches, media releases, television, radio, internet and newspapers. Of course this may have varying impact as Philippa Smith, a former Ombudsman, notes that “the power of an Ombudsman in reality comes from the potential power of embarrassment and the credibility and thoroughness of the work done” and “[A]ll an ombudsman can do then is report the situation and hope the resultant publicity shames the agency into action. Ombudsmen have had mixed success with their recommendations - some agencies seem to have no shame.”⁵¹

There is broad agreement in the literature that publicity may force an agency to action and instances can be provided as to when and how the Office effects persuasive influence

on agencies through publicity, as another former Commonwealth Ombudsman, Professor Dennis Pearce states:

In one particular case where I had a very long debate with the agency concerned and we were not getting anywhere...I outlined my options. One of them was to go public and the agency immediately changed its mind.⁵²

This view has been supported by external agencies such as government departments, as Gerry Ryan a former Secretary of Australia Post notes:

There is already a powerful parliamentary disclosure measure available to the Ombudsman in the case of inappropriate responses by government agencies to his inquiries, his findings and his recommendations...such public reporting capability is a highly persuasive influence.⁵³

The barrier to measuring this function within the parameters of this study is that it is “indirect”. Due to the constraints of this study (as outlined below) it is not possible to measure whether a suggestion made to an agency is adopted because of publicity or other factors.

Major Projects

The notion of major projects is formalized in 1992 when a Major Projects section is established. As described in the words of the then Ombudsman Philippa Smith:

The Major Projects Section's brief is to investigate cases which raise complex systemic or other administrative issues; allegations of serious malpractice; and cases involving large amounts of money. It may also conduct primary investigations into serious complaints concerning the AFP, including complaints about the AFP from or on behalf of Aborigines which are associated with a death or serious injury resulting from custody.⁵⁴

By 1995 about 150 important systemic issues from complaints about various agencies had been identified, and 25 have been taken up as Major Projects.⁵⁵

The following years Annual Report reflects upon the ongoing work of this section:

this year also saw the consolidation of our major projects work, and the Major Projects team pursued over 50 major projects, involving

complex cases requiring intensive investigation. Most of these projects raised matters of broader public interest affecting thousands of other citizens. Many other systemic issues are pursued during the course of our general investigation work. Through these projects we have achieved significant reforms to improve the quality and fairness of public administration. Appendix A provides a listing of our major projects work and its progress.⁵⁶

The work of the Major Projects section peaks under Philippa Smith's stewardship. By 1998-99 the Major Projects section completed 6 major investigations,⁵⁷ by the end of Ron McLeod's term as ombudsman in 2003 the section has merged into a special investigations section.

While clearly having a systemic approach the exclusion of Major Projects from this study is due to the use of the terminology "major project" resulting in internal confusion. A 1996 internal Office report into the Major Projects function states:

While some members of the Office have a clear view of what is meant when they use the term "major project", others have called for clarification. The most common area of concern is the difference between major projects and

systemics, although there is also some confusion about the relationship between major projects, complex investigations and own motion investigations.⁵⁸

The outcome is an absence of consistent identification of formal reports as Major Projects. Further, over the 28 year period the “Major Project” terminology applied to a section which existed for around 10 years and during this period Major Projects were generally classified under the broad definition of systemic investigations. As noted below, in order to be systematic this study evaluates formal reports - some of these are described by the Office as major projects (ie: the investigation into the Nomad crash) however in terms of analysis they become measurable and “direct” only when they reach the status of formal reports. This is done in the interests of promoting internal consistency and a accurate historical comparative analysis.

Meetings with agencies

The Office has traditionally followed a structure of placing investigators into teams who work with the agency they investigate. This results in Office meetings with agencies that involve various degrees of formality. Meetings can range from case investigations to less formal discussions as to how to alter procedures or change policies arising from a complaint(s). As the Office states:

In order to foster cooperation the office has sought to establish lines of communication with agencies which are not limited to resolve single complaints...Regular meetings with agencies provide a means of monitoring processes in relation to individual complaints, of discussing issues germane to those complaints, and of canvassing broader legislative, policy and procedural questions.⁵⁹

Clearly such meetings may result in systemic improvements to the way an agency carries out its administration and processes. However being “indirect” in nature the exclusion of this function from this study is due to the inability to measure such change at this point due to restraints such as lack of resources (see below) that may enable the investigator to overcome the existing lack of clear documentation.

Submissions

An important systemic role is the contribution to law reform and policy through submissions to inquiries. Submissions to recent parliamentary enquiries include:

March 2006 – Commonwealth and Taxation Ombudsman to Joint Committee of Public Accounts and Audit: Inquiry reviewing “Certain tax matters” within Australia

March 2006 – Commonwealth Ombudsman to Senate Legal and Constitutional Committee: Inquiry into the provision of the Telecommunications (Interception) Amendment Bill 2006

While it is not always clear whether the impact of such submissions will result or cause change they are included in this study as they are “direct” and therefore capable of measurement. Submissions are also included as they are one of the three major systemic functions of the Office identified by the current Commonwealth Ombudsman, Professor John McMillan being: (1) to initiate and conduct own motion investigations, (2) to make suggestions and recommendations to agencies and (3) to make submissions to government and parliamentary inquiries.⁶⁰ The Office has listed submissions and due to itemization in Annual Reports some data triangulation is possible to verify the reliability of the data.

Member of the Administrative Review Council (ARC)

The Office is an ex-officio member of the ARC. The ARC is responsible for overseeing and monitoring Australia’s system of administrative review.⁶¹ Membership of this body provides the Office both with recognition of the role performed in the landscape of administrative review and the ability to contribute to systemic change of administrative review in Australia. For example, two recent projects of the ARC are the investigative powers of government agencies and the scope of judicial review. This role is “indirect” and therefore not measurable within the confines of this study.

Audit compliance role

A growing function of the Office is compliance function investigations.⁶² This is a systemic function in that it extends to “continued improvement in the management of controlled operations”.⁶³ Under the *Surveillance Devices Act 2004* (Cth) the Office inspects records that law enforcement authorities are required to compile when using surveillance devices in criminal investigations. This annual function exists with respect to reports and recommendations to monitor the compliance of the ACC and the AFP with controlled operations. This power now extends to the records of the Building Industry taskforce under the *Workplace Relations Act 1996* (Cth). For the purposes of this empirical study, although “direct” the audit compliance role is not included. Its growth is relatively recent and does not therefore lend itself to a longitudinal study. Notably this function is a worthwhile focus for future research.

Own motion investigation

This is a “direct” systemic function of the Office measured by this study. This power will most often present as a formal report under section 15 of the *Ombudsman Act 1976* (Cth) and may also translate into other formal reporting mechanisms (ss16-19, 35A *Ombudsman Act 1976* (Cth), see below).

Section 5(1)(b) provides that the Office “(b) may, of his or her own motion, investigate any action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department or by a prescribed authority.” This section allows the Office to act as an “on the spot” auditor or trouble shooter. Section 5(1)(b) of the *Ombudsman Act 1976* (Cth) empowers the Office to investigate, on an own motion, action that relates to a matter of administration:

The Act also provides that, in addition to investigating individual complaints, I may investigate a matter of my own motion. The own motion power may be used, for example, to investigate deficiencies of a systemic character (that is, where it appears there are problems associated with an agency’s practices, policies, or procedures). Such an investigation may be undertaken because a specific complaint has pointed to the possibility of some underlying systemic problem or because the receipt of a number of complaints on the same matter has suggested such a possibility.⁶⁴

This power may be used to investigate “matters of administration of a “systemic” nature where it appears that there may be some endemic operational flaw within an agency.”⁶⁵

Such own motion powers are used sparingly⁶⁶ as Ron McLeod notes it is unusual for a formal statutory power such as section 5 to be invoked by the Office as “[I]n general terms, the *Ombudsman Act 1976* has proved an effective legislative basis for the

operations of the Office. However, practices have developed which allow the Office to deal with many complaints in a highly informal and effective fashion which was not envisioned when the Act was first drafted.”⁶⁷ This is because while the legislation contemplates that a complaint can only be finalized by either the exercise of a statutory discretion to investigate or not to investigate further, or by making a report, many investigations are finalized by an investigator talking to the agency’s contact officer and arranging a satisfactory outcome.

Formal reports and reports in the public interest

While these are technically distinguished from own motions, in practice own motions will normally result in formal reports. These are classified as “direct” and are measured by this study and include the legislative powers which pertain to the Office acting within its jurisdiction with respect to the Australian Federal Police and also as the Australian Capital Territory Ombudsman. Under this function are section 15, 16, 17 reports and reports made public under s35A of *the Ombudsman Act 1976* (Cth). The reports are where the Office can conclude an investigation by reporting to an agency and recommending that further action be taken.

Section 15 of the *Ombudsman Act 1976* provides that a report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was

based on a law that was unreasonable, unjust, oppressive or improperly discriminatory. In such circumstance the Office may determine that an administrative action is defective. This provision authorizes a special ground for review under which the Office can impugn a statutory or common law administrative action and has the capacity to make the Office a legislative scrutineer or possible human rights enforcer. This section furnishes the Office with the power to make formal reports, containing recommendations to the agencies and departments concerned. A copy of this Report also is provided to the relevant Minister.

While classified as “direct” it must be noted that even under this section the Office cannot force an agency to follow its recommendations. Under s15(4) the Office “may request the Department or prescribed authority to which the report is furnished to furnish to him or her, within a specified time, particulars of any action that it proposes to take with respect to the matters and recommendations included in the report.” Section 15 allows the Office to make suggestions arising out of the investigation to any other agency, body or person.

In addition section 35A of the *Ombudsman Act 1976* allows reports to be released in the public interest. Philippa Smith articulated this as being “important to allow an understanding of what the Ombudsman does and to allow debate on important issues of public administration”⁶⁸ This power is replicated in section 41A of the *Complaints (AFP) Act 1981*.

In terms of sanction the greatest power of the Office lies in sections 16 and 17. Where, if the agency has not acted upon the recommendations, the Ombudsman may make a report to the Prime Minister under section 16 and may also report to Parliament under s17. The Office notes however that

experience indicates that the Ombudsman's formal reporting powers, conferred pursuant to sections 16 and 17 of the Ombudsman Act, have not had the persuasive value that the Parliament might have expected when the legislation was enacted. Although there have been only two reports under section 17 of the Act, there have been a number of other occasions on which an agency has resisted a recommendation made by an Ombudsman pursuant to section 15 and appears not to have felt any reluctance in doing so by reason of the fact that further reports could be made to the Prime Minister and the Parliament.⁶⁹

Conclusion

This study measures three out of the nine possible system changing functions identified in Figure 1.2. These are own motions, formal reports and submissions. In some ways the distinction between these three categories is artificial. For example an own motion – as characterized by this study – will generally be identified herein as a formal report, as own motion investigations carried out under the legislation (section 5 of the *Ombudsman Act 1976*) will appear in this data set as a formal report – normally under section 15 of the *Ombudsman Act 1976*). The essential point, returned to below, is that this study examines only a portion of the Office’s role as change agent and evaluates its frequency.

D Origin of Data

This study uses two data sources:

- (a) formal reports and own motion investigations and submissions listed in the “Master List” (provided by the Office and coded by the author as discussed below) and accessed via the Office; and
- (b) the statistics for individual complaints contained in each Annual Report from 1976-2005 (compiled by the author as discussed below).

A study of formal reports/own motion investigations

This empirical analysis examines formal reports and/or submissions and/or own motion investigations completed by the Commonwealth Ombudsman and the Australian Capital Territory Ombudsman pursuant to the following legislative powers:

Sections 5, 15, 16,17,18 & 35A *Ombudsman Act 1976* (Cth)

Section 18 *Ombudsman Act 1989* (ACT)

Sections 46, 31, 34, 36, 50 *Complaints (Australian Federal Police) Act 1981* (Cth)

As explained above, the investigations based upon the above legislative powers used in this methodology are located in a list of “Completed Projects” as created by the Office.⁷⁰

It is therefore important to note that the reports forming the basis of this study are selected upon their membership of this “Completed Projects List” rather than by their legislative assignation. Through data triangulation this list is refined and a finalized table of systemic investigations used by this study termed the “Master List” which refers to written reports from which the data set is coded.

A study of individual complaints

This empirical analysis also examines any link between individual complaints and systemic investigations. Every Annual Report of the Office contains a statistical report of individual complaints. This study standardizes the statistics in these reports and itemizes them into portfolio, year and individual Ombudsman to allow meaningful analysis and comparisons of the longitudinal operation of the Office. The study also uses the statistics

contained in the Annual Reports of the ACT Ombudsman from 1989 to current day to identify the individual complaints of that role. Assumptions made in standardizing the statistical records of individual complaints are explained in Part V.

E Parameters of the study

Parameter One: Type of systemic investigation studied

The first parameter is that the research question is confined to the three systemic functions of the Office identified above: formal reports, submissions and own motion investigations. As Figure 1.2 identifies there are a wide variety of techniques used by the Office to create systemic change. In fact, formal reports, submissions and own motion investigations are used in a very small proportion of cases. In 1991 the Office itself states:

The office has always operated on the basis that efficient and effective complaint resolution was more likely in an atmosphere of cooperation rather than one of confrontation. Consequently, while it has never eschewed vigorous debate or the use of its formal powers where necessary or appropriate, it has sought to resolve issues and differences through consultative processes.⁷¹

The Office pursues a policy of aversion to formal investigations, as Professor Jack Richardson, the first Ombudsman notes:

Almost from the beginning in 1977 we embarked upon a policy of attempting to deal with complaints on an informal basis rather than to invoke the formal investigatory processes specified in the Ombudsman Act. We felt the handling of complaints by informal means placed less strain on the resources of departments and prescribed authorities and at the same time did not prejudice the interests of our complainants in any way. If it was clear from the outset that if a complaint was of a very serious nature or would involve substantial investigation resources, or if it became apparent during the course of an informal enquiry that an agency was resisting the Ombudsman we did not hesitate to embark upon a formal investigation. But this was usually unnecessary.⁷²

The above policy is put into practice as the decision to proceed with a systemic investigation is discretionary and ombudsmen are reluctant to proceed to formal investigations as Professor Dennis Pearce states:

Where minor irregularities are detected or where there is only circumstantial evidence, I sometimes suggest that Telecom give the customer the benefit of the doubt and waive or reduce disputed charges. To my disappointment, my proposals are not always accepted by Telecom, but I accept that judgments in this areas are necessarily subjective when the available evidence is not strong enough to justify me issuing a formal report pursuant to s.15 of the Ombudsman Act.

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Indeed it has been suggested by Professor Dennis Pearce a former Commonwealth Ombudsman that the own motion power should be exercised with care for two reasons – as it is inappropriate for the Ombudsman to investigate matters on his or her own volition that have a high policy-political content as “[T]he Ombudsman not only must be apolitical but must also clearly appear to be so” and “the Ombudsman needs to be careful with the commitment of resources and dealing with complaints from members of the public should be first priority.”⁷⁴ More recently in 1997-1998 Ron McLeod observes that “the Ombudsman Act contemplates that a complaint can only be finalized by either the exercise of a statutory discretion not to investigate or not to investigate further, or by making a report...The legislative provisions do not reflect this type of outcome nor the informality or speediness of the process...”.⁷⁵

Formal reports – which constitute the backbone of this study - are therefore a very small component of the Office’s work. This conclusion is based upon qualitative research. Such qualitative analysis identified some systemic statistics in Annual Reports such as when Professor Dennis Pearce states that “[D]uring 1989-90 in 83 instances some change was made to a practice or procedure and 23 changes to a law or policy were made following my investigations. In many cases it was unnecessary for me to proceed to the stage of making a formal recommendation.”⁷⁶ Further this research identified that a possible cause of the small number of systemic issues is due to the prescribed formal investigation legislative sections whereby the Office provides the agency with an opportunity to review and discuss its findings. This process is geared against the issuing of formal legislative reports. As explained by the then Ombudsman Geoffrey Kolts:

Before proceeding to a report critical of an agency, I am required under sub-section 8(5) of the Ombudsman Act to give the agency an opportunity to make submissions. In practice I fulfill this requirement by providing a draft of my conclusions and inviting any submissions on it (it is my practice also to foreshadow any appropriate recommendations I might make if I confirm my draft conclusions). This has the effect of ensuring that only where the agency rejects my findings do I have a need to continue to a formal report under section 15. In many cases that does not occur because the agency

concerned takes appropriate action, on receipt of my draft comments, to resolve the complaint. Indeed, the number of formal section 15 reports completed during the year was small (5). In other cases, I may decide to modify my conclusions and recommendations in light of a submission. Where this occurs, it may be necessary to provide a further draft report to the agency and invite further submissions.⁷⁷

Further, Philippa Smith notes that “[O]ut of the 7643 investigations completed last year, only six proceeded to formal section 15 reports, and none were referred to the Prime Minister or Parliament.”⁷⁸ In the following year she similarly states that “[T]his year the office received about 22, 000 complaints and only issued 9 section 15 reports.”⁷⁹ There is also descriptive commentary in Annual Reports such as that by the then Ombudsman Alan Cameron who observes that “[A] formal report and recommendations are seldom necessary as agencies are usually willing to remedy the problems revealed by my investigations.”⁸⁰ Such commentary indicates that formal reports are a small portion of the Office’s systemic work.

The above observations and inclinations of individual Ombudsman as to the small use of the formal powers is important due to the fact that the use of such powers is an exercise of discretion, and discretion exists at every stage of the investigative process. For example, to return to section 5 of the *Ombudsman Act 1976* there are two means under

that section by which an investigation by the Ombudsman may commence. Section 5(1)(a) states that where there is a complaint the ombudsman “shall investigate” and section 5(1)(b) allows the Ombudsman discretion to investigate of his or her own motion. Section 6 operates to introduce discretion in both subsections of 5(1). It provides a wide⁸¹ discretion not to investigate or if the ombudsman has started to investigate to not investigate further. It also allows the Ombudsman at any time prior to or during an investigation to determine whether or not and when to pursue an investigation under s5(1)(a) or (b). Indeed the Act assists in the exercise of discretion by allowing the Ombudsman to undertake a preliminary inquiry under s7A.

The comparatively small usage of own motions, submissions and formal reports does not undermine the value or accuracy of this study. Indeed, the very reticence to use formal reports exhibited throughout the history of the Office actually makes them an ideal focus for a novel study into systemic impact. This is because they are definable and “direct”. In terms of a quantitative analysis the small number of investigations means that a data set may be created from the Master List which lists the 231 reports used by this study. This study does not refute that there are a myriad of other mechanisms which may result in systemic change – indeed these have been explained above - rather it provides a in-depth analysis of a snapshot of what the Office may or may not achieve in the formal reports provided for under its enabling legislation.

Parameter Two: Adoption of a quantitative measure

As noted earlier there is a perspective in ombudsman literature of incongruity in applying a numerical statistical approach for what may be viewed as the immeasurable outcome of

improving administrative justice. An aim of this research is to suggest that such categorization is possible and that it is useful to quantify results, impact and outcomes of systemic investigations.

As previously stated, the adoption of a numerical measure provides a quantitative longitudinal comparison study which uses content analysis as its basis. The benefit of a longitudinal approach as stated by Danet is that a “one-time reading of any of these measures on the functioning of any ombudsman’s office is far less meaningful than longitudinal monitoring in which changes over time are carefully studied for emerging trends.”⁸² The benefit of a quantitative approach is its ability to measure past outcomes and predict future variances. For example the data presented in this study could be analysed to determine whether innovations such as the Special Tax Adviser commencing operations in April 1995 (with a resulting increase of 145% in complaints) has an impact upon individual complaint numbers and/or systemic investigations. It may also predict what the future totals of individual complaints taken by the Office will be and in what portfolios.

A quantitative approach allows exploration between computed variables over time and cross-sectionally. This form of research is typically associated with the process of enumerative induction. Of course, the conceptualisation of this study within a quantitative paradigm has disadvantages – it runs a risk of losing sight of the entire picture by reducing the notion of systemic to a subset of statistics; that will oversimplify social reality; stripping away the context from the data.⁸³ For this reason this study utilized qualitative research methods examine the notion of systemic investigations

holistically in order to understand the context of its operation. This research uses qualitative research methods to explore the validity of assumptions made about relationships found to be statistically significant.⁸⁴ Qualitative research techniques have been used in this empirical study in two accepted ways, firstly to check the external validity of the quantitative assertions and secondly as a precursor to the quantitative work.⁸⁵ Textual material and informal interview has primarily been used for this purpose.⁸⁶

The quantitative evaluation is therefore integrated with qualitative research design to “triangulate” the results. The logic being to both check the findings of the quantitative study and to attempt to explain the broad relationships established between the variables. For example the qualitative use of documentary data such as the Annual Reports of the Office, government pronouncements and proceedings allows the statistical results to be explained. The Annual Reports⁸⁷ of the Office provide information on budget resources and decisions made with respect to the pursuit of systemic investigations in light of scarce resources – information which can amplify certainty as to why the use of systemic investigations may have altered throughout the history of the Office. Data triangulation is therefore useful on a number of levels. It allows for checking the findings of the quantitative study and assists in checking the accuracy and the limitations of the information used. Most importantly it provides a greater understanding of the meaning and context of behaviour. Individual Ombudsman may have different perceptions of the use and extent of their own motion powers or perhaps more importantly, have been hampered by resource constraints or a lack of a full term spent in the Office. Such factors

are ascertained from documentary histories and applied to enhance the validity of the observations made from the quantitative data.

Importantly there are limits to the ability of the researcher to effectively triangulate the data. The Master List used is not complete and may not detail all reports and all submissions. Indeed only 21 out of the 231 formal reports are submissions. While data triangulation using the Annual Reports renders it certain that the Office undertook more submissions than 21 submissions over its 28 year period the list was confined to those 21 submissions as these could be located and read and analysed by the author.

Conclusion

The above parameters make clear the strengths and weakness of the methodology used. This transparency enables this study to be applied to evaluate other ombudsman with systemic functions. For example, following the recent initiative of the Telecommunications Industry Ombudsman to appoint a Systemic Complaints Officer and introduce a Systemic Complaints Procedure the TIO states “we have not yet been able to devise a methodology for measuring the extent of that success. It is possible that measuring the success of some aspects is not possible, while the cost of measuring others would simply be excessive.”⁸⁸ This study attempts to fill this gap by proffering the possibility that a quantitative measure of systemic success of an ombudsman may be undertaken at little expense.

Part III Explaining the research method – assumptions applied to both systemic investigations and to individual complaints

Each Annual Report since the inception of the Office details its activities, including statistical tables on matters such as individual complaints. Additional information which can be drawn from Annual Reports of the Office includes budget and staff numbers. External figures which may be relevant to evaluating an ombudsman such as population figures may be drawn from authorized areas such as the Australian Bureau of Statistics.⁸⁹ However, over the span of almost 30 years, there are differences in the way in which information and statistics have been captured. Such variances include changes in jurisdiction of the Office and changes in the names of government departments. In order to conduct a comparative analysis of the statistics over this period, assumptions have been made to standardize data. This Part explains the assumptions made which apply equally to both systemic investigations and individual complaints.

A Standardisation of government departments

Complaint statistics and commentary in Annual Reports is on the basis of the Department name at the time. As Government department names have changed and portfolio rearrangements have occurred between 1977-2005 complaint statistics attributed to one department in any given year may be placed in a different department the following year. As noted by Professor Jack Richardson the then Ombudsman:

There are risks in comparing too closely apparent trends from year to year in the number of complaints we receive about alleged actions of particular departments and authorities. Not only are such bodies abolished and created from time to time by the government of the day, but even without change of name their function can be varied from year to year or within a year, while major government initiatives administered by a body can precipitate sudden surges in the rate of complaint to the Ombudsman.⁹⁰

This risk applies to both systemic investigations and individual complaints. This study has therefore had to identify how to overcome this danger and normalize and track the information in Annual Reports against departments accurately and effectively over time.

In essence this study has taken the major area of individual complaint from each department and tracked it through 1977-2005 in an effort to normalize the statistics through nullifying any name changes and/or portfolio changes. So, for example, complaints about payments for higher degree tertiary study are treated consistently over the 28 year period as belonging to the portfolio of Social Security even though in the early years of the Office such complaints are recorded against the education department. This is because they are classified by complaint type and from the prism of viewing the

function of departments today and applying that categorization retrospectively. This allows this study to compare like with like in terms of the two data sets. To overcome various department anomalies, this study redistributes complaints statistics and formal reports/own motions/submissions into 8 key portfolios:

Social Security

Taxation

Telecommunications

Immigration

Australian Federal Police

Defence

Australian Capital Territory

Other

In relation to the systemics investigations data set an additional “All” category was inserted.

The identification and selection of the above portfolios therefore serves the dual purpose of nullifying the effect of name changes over time and allows the reader to compare like with like over the historical time span selected for this study. For the purposes of transparency, a snapshot is provided in the Appendix of the historical list which tables the Department names/portfolios that have been included in each key category for the

purposes of this study. This allows the reader to track the longitudinal assumptions made.

B Jurisdiction

This study covers three separate legislative instruments:

Ombudsman Act 1976 (Cth)

Ombudsman Act 1989 (ACT)

Complaints (Australian Federal Police) Act 1981 (Cth)

The *Ombudsman Act 1976* (Cth) which established the Office is largely without amendment. Certain powers have been added – for example the role of Defence Force Ombudsman and the disclosure of information/public interest power in section 35A. Such additions do not alter the premises of this study, as for example, the Defence Force Ombudsman is the same person as the Commonwealth Ombudsman and therefore any specialized reports by the Defence Force Ombudsman are attributed to the sitting Commonwealth Ombudsman.

The ACT Ombudsman was created under the *Ombudsman Act 1989* (ACT). This separate jurisdiction is incorporated through the segregation of complaint numbers both individual and own motion into an ACT portfolio prior to 1989. This means that the numbers continue to be separately recorded when the separate ACT Ombudsman Annual

Reports are issued from 1989 onwards. This allows for a comparison of ACT own motions and also provides the ability to do so with links to budgetary considerations.

Similarly to the ACT the complaints about the AFP are tracked from inception and then individually under the *Complaints (Australian Federal Police) Act 1981* (Cth) which was amended to allow own motion investigations into Federal Police in January 1995.

C Individual Ombudsman and allocation of years

Throughout the 28 years under study seven individuals have held the position of Ombudsman:

Professor Jack Richardson 1977-1985

Geoffrey Kolts 1986-87

Professor Dennis Pearce 1988-1991

Alan Cameron 1991-1992

Philippa Smith 1993-1998

Ron McLeod 1998-2003

Professor John McMillan 2003-current

It is assumed that the individual Ombudsman has responsibility for all specialist and investigative functions within the Office. Thus this study will attribute a report to the person occupying the position of Ombudsman even when the person who submits/signs off is not the Ombudsman. As an example throughout the operation of the Office there have been several persons in an acting role while presumably the Ombudsman has been on leave. In such situations the report is attributed to the official Ombudsman.

As far as possible this study attempts to make transparent what a quantitative approach may “hide”. For example a “hidden” fact is that the formal reports/submissions/own motions and individual complaints resolved in this study are attributed to the incumbent Ombudsman whereas they may actually have been carried out by a previous ombudsman. The rule of this study is to attribute the Ombudsman submitting the report with Ombudsman status for that year.

There are however occasions when an Ombudsman is acting only part of the year and not attributed with report. The principle applied is that if less than half year by the “new ombudsman” who submits that years Annual Report than the previous or “old” ombudsman is attributed with that year and is attributed with the report and individual complaints. In six of the 28 years the Ombudsman who sign the Annual Report is not attributed with that year, rather the their predecessor remains named as responsible:

1985/86 - Jack Richardson attributed as Ombudsman for this study (Geoffrey Kolts submits Annual Report – year of acting Ombudsman)

1987/88 – Geoffrey Kolts attributed as Ombudsman for this study (Dennis Pearce submits Annual Report - takes over in February 1988)

1990/91 – Dennis Pearce attributed as Ombudsman for this study (Alan Cameron submits Annual Report – takes over in April 1991)

1992/1993 – Alan Cameron attributed as Ombudsman for this study (Philippa Smith submits Annual Report - takes over May 1993)

1997/1998 – Philippa Smith attributed as Ombudsman for this study (Ron McLeod submits Annual Report - takes over in February 1998)

2002/2003 – Ron McLeod attributed as Ombudsman for this study (John McMillan submits Annual Report - takes over in March 2003)

**Part IV Explaining the research method – assumptions applied to
systemic investigations**

A Assumption One – usage of “Master List”

The fact that a methodology is possible in researchable terms, is needed and should be developed does not mean that the path towards it is clear and unfettered. The major impediment to conducting a scientific methodology into the systemic investigations of the Office is the traditional self-proclaimed focus upon individual complaints. In ombudsman practice the first and basic instrument of self-evaluation is the keeping of records of cases and contacts. The Office has consistently engaged in self assessment as evidenced through the keeping and analyzing of records through the collection and publication of information in Annual Reports;⁹¹ through the engaging of external commercial consultants and the commissioning of surveys;⁹² carrying out studies of its own and by facing the external scrutiny of external parliamentary enquiry. The focus upon individual complaints dictates that the above information collation and analysis is consistently targeted at individual complaints rather than the systemic investigative function. For example, over the thirty years of the Office each Annual Report contains statistics as to complaints and complainants and since the early 1990s the Office has initiated the long term collection and recording of data through consultants carrying out client satisfactions surveys for individual complainants. This emphasis in record keeping reflects the norms and assumptions of the Office that its core function is the resolution of individual complaints.

In contrast, with respect to detailing systemic impact, the Annual Reports of the Office generally use a descriptive style such as case studies.⁹³ These case studies are selectively chosen and tend to positively spin the workings and effectiveness of the Office with respect to systemic change.⁹⁴ From year to year the quantity of reporting is variable. At

most there may be a whole chapter in an Annual Report devoted to the systemic impact of the Office while at the other end of the spectrum there are years where the Annual Reports make no mention of systemic impact at all.⁹⁵

To overcome these inconsistencies this study uses Annual Reports qualitatively and instead relies upon as its data source an original summary of completed projects titled “List of projects, formal reports and submissions”. This list is referred to as the “Completed Projects List” and an example is contained in the Appendix. This Completed Projects List, prepared by the Office for internal purposes, is a record keeping exercise listing formal reports in chronological order. The Completed Projects List contains a listing of the names and other non-identifying information of each file identified by the Office an own motion investigation or formal report or submissions to bodies such as to law reform commissions.

The formulation of this Completed Projects List provides some insight into the systemic investigatory role of the Office. While it should be noted that this list was not prepared by the Office with “systemics” (or a study such as this) in mind the choice of inclusions and exclusions from the list provides for an examination of the classifications and categories the Office itself uses. For example, as would be expected the majority of the reports contained in this list are investigations which flow from the Office acting according to the jurisdiction provided under the *Ombudsman Act 1976*, including in the roles of Taxation Ombudsman, when investigating action taken by the Australian Taxation Office; and the role of Defence Force Ombudsman, when investigating action arising from the service of

a member of the Australian Defence Force. Importantly, it also includes formal reports and own motions under other legislation which grants the Ombudsman jurisdiction over complaints about the Australian Federal Police under the *Complaints (Australian Federal Police) Act 1981* (Cth) and the ACT Ombudsman under the *Ombudsman Act 1989* (ACT). On the other hand missing from the original “Completed Projects List” and also not included in this study are the reports originating from the auditing role of the Office. For example, these include the compliance reports the Office completes annually to monitor the compliance of the ACC and the AFP with controlled operations.

A further value in using the original “Completed Projects List” is that it refers to reports completed by the Office that are not made available to the public.⁹⁶ This allows for analysis of any trends in the extent of the public reporting transparency of systemic investigations by the Office. As the Office website states, “[T]he Ombudsman is subject to statutory secrecy provisions, and for reasons of privacy, confidentiality or privilege it may be inappropriate to publish all or part of a report.”⁹⁷ The wider study will evaluate in the frequency with which such privacy provisions are utilized.

Each item listed on the “Completed Projects List” broadly corresponds to individual files kept in the Canberra Office and/or located on the Office website. Each of the reports referred to in this “Completed Projects List” is therefore capable of being read in its entirety as it relates to an actual full (or partial) written project, formal report and/or submission stored by the Office. It is this larger written report which is read, coded and analysed by this study. This is further discussed below in Part B.

The data in this study is therefore compiled from a list of reports self-identified by the Office. While this provides the advantage of a controlled and identifiable number of reports it has the disadvantage that the completeness of the “Completed Projects List” is open to question. This is where data triangulation has been used. Through data triangulation, in particular the Annual Reports of the Office, two shortcomings of the original “Completed Projects List” are apparent. Firstly, a “small” number of reports are not included in the list and have been located and obtained either from the material at the Office or upon the Office web site.⁹⁸ Secondly, a small number of inconsistencies exist between the “Completed Projects List” and the material documented in Annual Reports. These shortcomings have been rectified as far as possible through the compilation of the final “Master List” by for example identifying any material lacking from the Master List (such as section 16 reports under the *Ombudsman Act 1976*).

For transparency this study contains extracts of both the Completed Projects List and a completed Master List. The Master List used for the purposes of this study both amends and updates the Completed Projects List to ensure the accuracy of this study. The Master List utilizes the essence of the Completed Projects List, corrects its errors and includes and excludes information based upon the three systemic functions examined by this study.

The use of this Master List is essential. It renders the evidence identifiable and subject to collation by allowing coverage of the first 28 years of formal reports, submissions and

own motions (with an end point of June 2005)⁹⁹ of the Office. This longitudinal timeframe of information is critical in allowing analysis of the statistics to reveal contrasts between reporting styles, approaches and the shifting focus of systemic issues over periods of the Office.

B Assumption Two – identification of variables

Relevant data is extracted from each report identified in the Master List. In order to create a data set capable of meaningful analysis the following dependent variables are identified from the content analysis:¹⁰⁰

- (a) number of cases in which administrator accepts ombudsman's recommendation either immediately or in principle;
- (b) number of cases where administrator rejects ombudsman's recommendations;
- (c) number of cases where recommendations made (and accepted or rejected by administrator) are policy as opposed to procedure as opposed to legislative;
- (d) how the investigation was initiated;
- (e) which agency investigated;

- (f) duration of investigation;
- (g) length of report;
- (h) support of agency in investigation;
- (i) section of legislation used to carry out investigation;
- (j) date released and the individual Ombudsman;
- (k) media release and publicity;
- (l) ongoing monitoring; and
- (m) an overall rating in terms of impact.

Measurement in each category counts frequencies. The relevance of each measure and validity of the variables selected is explained below.

(a) and (b) number of cases in which administrator accepts ombudsman's recommendation either immediately or in principle or where administrator rejects recommendation;

The most basic questions to ask in terms of impact is whether the systemic recommendations of the Office are taken notice of and to what degree? This is a question present in the methodologies of both Danet and Hill. Danet notes that this measure can be used as a general measure of responsiveness and also be analyzed by department or agency to diagnose where the “most critical problems lie”.¹⁰¹ This measure will, in the context of the Office, provide overview as to systemic impact upon government departments and agencies. So, where most of the recommendations of the Office are rejected and few steps taken to progress or alter that decision, an inference may be made that the systemic impact of the office is negligible. Conversely where there is a high acceptance rate it may be inferred that the impact is high.

Danet's study phrased this as the concept of asking when the ombudsman finds a complaint justified and makes a recommendation how does the system respond? This aspect of Danet's study is applied to systemic investigations through examining the quantity of recommendations of the Office and in particular, when those recommendations are rejected by departments leading to the usage of the ultimate power of the Office to report to Parliament and the Prime Minister.

These measures fail to take into account quality of impact and also do not measure whether an agency has actually implemented the recommendations it claims to have. Both measures predominately rely upon statements as to the acceptance of recommendations made in the formal reports and own motion investigations and submissions.¹⁰² This information has not been consistently recorded. Some Annual Reports and formal reports note recommendations made and rejected while most do not. The most recent reports seem to have a better strike rate on this point.

In a small number of the 231 investigatory reports it is however difficult to distill both outcomes of the recommendations and sometimes even the actual recommendations themselves. This is also due to the process of issuing reports. Draft reports are issued to departments prior to recommendations being finalized. This means that many of the recommendations may have already been implemented prior to the final version of the report being issued. It is at times impossible to know exactly what recommendations were made or adopted from draft reports. This point is discussed in (m) below.

(c) number of cases where recommendations made (and accepted or rejected by administrator) are policy as opposed to procedure as opposed to legislative;

This variable provides a measure as to how the Office uses its recommendations by identifying differences between the type of recommendation made. This study uses two categories: policy and legislative change being one and procedural change being the other. As noted previously this reflects distinctions drawn by previous empirical studies

such as that by Aufrecht & Brelsford where legislative change is viewed by as “potentially the most useful objective measure of long-term systemic impact.”¹⁰³ This study therefore classifies each recommendation in every report as either “thick and direct” (policy and legislative change) or “thin and direct” (procedural only) as explained in (m) below.

It is difficult to discern the take-up of recommendations by administrators. Indeed this measure highlights the different standards of record-keeping between the dual roles of the Office where details are kept as to numbers of individual complaints, whom the complaints were against, how they are resolved – whereas this is not done with systemic investigations. The Office has not undertaken a continuing efficiency audit with respect to agencies accepting or rejecting its recommendations. This aspect of take-up was therefore not measured by this study.

(d) by whom and how investigations are initiated

This measure examines why and how the discretion to undertake own motion investigations, formal reports or submissions is triggered. Aufrecht and Brelsford note this will also assist in identifying how individual Ombudsman see their own office – whether it is an office for solving the complaints of citizens or improving the system. Aufrecht and Brelsford state that “[W]hile we suspect the overwhelming majority will be citizen complaints, the number of ombudsman-initiated cases could vary considerably among ombudsman.”¹⁰⁴

This measure identifies six categories of complaint origin which may trigger systemic investigations:

Individual meaning one or two complaints.

Series where individual complaints are collated over time or a large number of individual complaints received or mentions in Annual Reports of numerous complaints over a period of time.

Referral to the Office from an agency.

Organisational to the Office from company/accountant/solicitor/minister/media.

Submission by the Office to law reform body or similar.

Ongoing monitoring where the Ombudsman reviews whether recommendations implemented.

In order to ensure accuracy this information had to be triangulated with cross checking against the relevant Annual Report or subsequent year.

The breakdown into the above six categories is critical for analysis. For example, if a large number of systemic investigations are concerned with the ongoing monitoring of agency conduct by the Office this may lead to discussion as to whether its role is becoming more proactive rather than reactive.

This measure also allows testing of assertions made in leading academic commentary. For example Professor Dennis Pearce suggests that most Ombudsmen are anxious to pursue the issue of a pattern of repeated individual complaints and that in such cases “Ombudsmen’s recommendations for changes of this kind are seldom rejected by the agencies concerned.”¹⁰⁵ A further assertion by Walter Gellhorn, a leading international commentator, is that this power will be used “chiefly to enquire into problems of general public concern as distinct from individually focused conflict”.¹⁰⁶ This variable provides factual analysis of these observations.

(e) which agency investigated

Again a basic question is what is the problem – who is it about? Danet termed this measure the “Target of the Complaint”. Every Annual Report contains information about which department/agency was complained against in terms of individual complaints. Similarly, systemic investigations target department(s)agency(s). This study neutralizes the impact of changes in departmental names and portfolios by assessing the major areas of complaint and allocating specific departments to those areas (explained above).

This information therefore identifies the department/agency investigated with the aim of exploring the systemic focus of the Office and how that correlates with individual complainants. Further, the Office may investigate more than one agency at a time. The number of investigations where the Office targets all government departments may be viewed as having a wider impact than those that specifically focus upon individual agencies. In some investigations the Office may not target all departments but its investigations impacts upon more than one agency. Where that occurs in the Master List the report is placed into the Portfolio which is specific rather than “other”. There are seven such reports:

1981/1982 - Immigration & Other (allocated to Immigration)

1982/1983 - AFP & Other (allocated to AFP)

1983/1984 - Immigration & Other (allocated to Immigration)

1986/1987 – ACT Fire Brigade & AFP (allocated to AFP)

1991/1992 – Defence & Other (allocated to Defence)

1998/1999 - Immigration & Other (allocated to Immigration)

2002/2003 - AFP & Other (allocated to AFP)

(f) duration of investigation

This is a measure attempting to identify the twin concepts of Danet's measures of efficiency and resources. This is a difficult concept to draw more than generalized conclusions from. At most, where own motion investigations are taking years to complete the level of cooperation of agencies in the investigation and the efficiency of the Office itself are open to question. Such a result is generalized as of course long investigations may also indicate thoroughness and a heightened level of difficulty which indicates quality of outcome.

At the very least then, an index of how long investigations take may be assessed against the complexity of the reports (gauged through aspects such as length and agencies complained about) and external factors not apparent in the reports themselves such as staffing levels and information contained on systemic investigations more generally in the Annual Reports.

In the Master List the duration of investigations is measured in months. It was not always possible to know duration and where this is the case unknown is recorded against that category. The duration of the investigation was often determined by examining the content of the report to discern start date and the signature and date of the Ombudsman at the end of the report taken as the close date.

(g) the length of report

A simple index of time and resources spent on investigations is derived from the page length of the report. While this measure does not take into account either report writing differences or methodological differences it does provide a general overview of the complexity and the degree of the investigation carried out. In this sense the length of a report, at a superficial level, indicates the depth of investigation. Obvious difficulties with this measure lie in the fact that the conclusion of some investigations amount to a 2 page letter and others in a long formal report. Another difficulty is the use of Appendices in reports (all appendices were removed from the page count for the purposes of this study).

(h) support of an agency

This apparently simple measure, as to whether the agency cooperated with the investigation, is included as it reflects the true nature of the systemic impact of ombudsman. As Caiden notes “[T]he Ombudsman institution is a democratic device conceived to operate in a spirit of democracy with a cooperative government and an obliging officialdom which on the whole runs efficiently and is genuinely concerned to rectify any wrongdoing that may inadvertently occur.”¹⁰⁷ The notion of the Ombudsman operating by recommendation only and working to reform and improve administration is

assessed by examining whether the investigation was supported, assisted and facilitated by the government department or agency being investigated.

There is a more subtle and subjective aspect of measurement - that of the role of the Office as facilitator or as adversary.¹⁰⁸ As a facilitator an ombudsman works as a neutral third party helping the administrator and the citizen to resolve differences and improve processes. The facilitator assumes that the administrator will listen to what is reasonable. The main weapon here is persuasion and trust. In this sense maintaining the respect of administration is an important goal of the ombudsman. On the other hand when the ombudsman is an adversary they are no longer neutral, the ombudsman has taken sides against the administrator and will do what they can to get the administration to follow their recommendation. In this instance the source of power is to go to a higher authority – the legislative body - to force change.

Measuring this variable therefore allows conclusions to be drawn as to whether there is a link between style and effectiveness – for example does a more adversarial style result in greater or lesser systemic change? This measure was one identified as important by Aufrecht and Brelsford¹⁰⁹ who observed that the more adversarial the ombudsman then the greater the systemic change. Observations to the opposite have been made by the Office that not much “is ever achieved by confrontation” with agencies.¹¹⁰

In practice this measure is extremely difficult to accurately record. Apart from either strident negative comments or glowing supportive comments (eg: explicit thanking of

agency for help) the form of participation of the agency is often not mentioned in the reports in the Master List. It is therefore generally assumed by this study that the agency has cooperated except in four situations: firstly where there is an identifiable section 16/17/18 report to Parliament or the Prime Minister or where the report clearly states there was a lack of cooperation; secondly, when the Report states “it is a matter for government”; thirdly, when the agency states it has in place a process but does not specifically agree eg: the agency will state it is doing certain activities but these are not necessarily the Office suggested – this is particularly so when the ombudsman says “I welcome the initiatives but believe my recommendations offer additional mechanisms for further reducing the likelihood of overpayments.” Fourthly, it is also not agreed where agency says it will “consider” the Office recommendation.

Of course as well as the measures of “agreed” and “disagreed” there was a need to incorporate a third category of not relevant which applies to submissions. To read the Master List with respect to this variable the following codes were used: 1- yes; 2- no; 3 – irrelevant.

A further aspect of lack of cooperation is the escalation of matters into a more formal report to Parliament or the Prime Minister by the Office. This data is analysed in the wider study.

(i) section of legislation used to carry out investigation

The Office utilizes different legislative powers to make its reports – the study examines how this has changed over time and what this demonstrates about criterion used. For example a growing increase in Ombudsman Act 1976 s35A reports which are released in the public interest may allow conclusions to be drawn as to the changing role in public transparency and public relations of the office. On the other hand a growth or decline in section 15 reports of the Ombudsman Act 1976 and s31 of the *Complaints (Australian Federal Police) Act 1981* which require the Ombudsman to report to the head of an agency when the finding is of “defective administration and make recommendations as a result of defective administration” may allow broad generalities as to the presence of good administration in the system of public administration.

(j) date of report and Ombudsman

The date used to “cut off” reporting is the Annual Report issue date of the Office which is June of each year rather than Calendar years. The date of the report and the individual Ombudsman responsible for the investigation (see above) is recorded. As noted above assumptions had to be made and consistently applied as some formal reports begun by one Ombudsman may be finished by another. This means that the individual Ombudsman the report is published under will be the ombudsman it is attributed to.

(k) media release

This study records the use made by the Office of the media. Apart from media usage this variable demonstrates the extent to which the Office is subject to statutory secrecy provisions and for reasons of confidentiality, privacy or privilege it may not be appropriate to publish all or any of a report. For example there is a wide discretion not to release reports which are not in the public interest. This aspect of the data collection will demonstrate the frequency with which reports are made public. In the Master List:

1- yes (includes where exec summary released) but not where it states abridged version;
2 – no.

(l) ongoing monitoring

This category is added due to the obvious difficulty an Ombudsman has in making recommendations and then completing the investigation without the ability to obtain feedback that acceptance of the recommendation means that they have been put into action by the agency concerned. The category refers to a statement of ongoing monitoring of the agency by the Office.

(m) overall rating in terms of impact

The categories of recommendation are based upon the thick/thin distinction discussed above. On the Master List existing recommendations of reports are allocated into one of four categories:

1. Thick and direct recommendations

This includes recommendations for either legislative and/or policy change. Importantly where a single report contains both thin (procedural) and thick (legislative and policy) recommendations it has been included within this category.

A policy recommendation is a change in plan of actions statement of aims and ideals; including directing the agency to develop new guidelines. A legislative recommendation is where the Office recommends changes to legislation or directs agency to investigate changing legislation.

2. Thin and direct

This contains reports where recommendations are only made for procedural change.

Procedural recommendations are where the Office suggests change in a regular order of doing things; a particular course or mode of action; a mode of conducting legal parliamentary or other business; includes reviews.

3. No recommendations

This is where a report makes no recommendations at all. This may be somewhat misleading where agencies have already accepted draft recommendations but is accurate in terms of the contents of the final report.

4. Not applicable or unknown

The presence or lack of a recommendation is not applicable to submissions made by the Office to law reform bodies or external inquiries.

The category of unknown will apply to missing reports or reports not made public and to some read and analysed reports where there is an implied reference to recommendations or where a section 16/17/18 report has been made following a formal investigation.

At times the above classification is subjectively done by the researcher and at other times the agency will itself state what it believes recommendation to be (when this is the case this classification is adopted). The case study (included in the Appendix) demonstrates how the above categories were determined to assist in the internal and external validity and reliability of this study.¹¹¹

Part V Explaining the research method – Assumptions applied to individual complaints

As previously noted two different sets of data are used in this study. The first is the Master List explained above, which was created for systemic investigations and the second is the data set for individual complaints. While individual complaint statistics have been consistently recorded in Annual Reports of the ACT Ombudsman, the Commonwealth Ombudsman and for the AFP throughout the Office history, such statistics have not been uniformly recorded. This study creates a data set for individual complaints over the 28 year period to enable like to be compared with like. This Part explains the assumptions used in this data creation.

A Assumption One – Complaints finalised

The Annual Reports list a number of columns for statistical recording. These columns variously include: “complaints received” and “complaints issues received” and “complaints finalised”. This study uses the column of statistical totals recorded by the Office of “complaints finalised”. While such matters may extend over a time period of more than one year, the resolution of a complaint is attributed to the year within which it is finalized. Using the statistical totals of “complaints finalised” has two advantages.

Firstly, it is generally (with the exception described below, consistent). Secondly, it demonstrates matters completed by the Office.

Commonwealth Ombudsman Act 1976

For complaints recorded in this jurisdiction the application of the “complaints finalised” column has not been consistently applied by the Office over the 28 year period. From 1977 through to and including the 1994/95 Annual Reports the column consistently totals “complaints finalised”. In 1995/96 and 1996/1997 the column was changed to “issues finalized”. The result of this change is to increase total complaint numbers (ie: one finalized complaint may have many finalized complaint issues). In order to standardize these years the total of “Issues finalized v Complaints finalized” is averaged from 1999/2000 through to and including 2004/2005 (as in those six reports both figures were available) and a 12% adjustment arrived at. The totals in 1995/96 and 1996/97 are therefore reduced by 12% to arrive at a complaints finalized total. This figure of 12% is used to determine the portfolio of Defence complaints in 1997/1998 as well (which was the only year where a separate Defence category is not recorded).

From 1996/97 onwards it is possible to determine “complaints finalized” through the body of the Annual Report rather than the final statistical tables. For example in 1997/98 there is a complaint count for “issues finalised” in the tables at the end of the Annual Report however a “complaints finalized” column is within the text, this is the total used. The six reports from 1999/2000 up to 2004/2005 then return to including a “complaints finalized” column in the statistical tables.

Ombudsman Act 1989 (ACT)

The individual complaints for the ACT have been recorded in separate ACT Annual Reports since 1989. These are the totals used. Prior to that the figures are included in the Office Annual Report totals for the Ombudsman Act 1976.

Complaints (Australian Federal Police) Act 1981 (Cth)

The AFP complaints are tallied from 1981/82 when they are recorded in the Commonwealth Ombudsman Annual Reports. Adjustment to the AFP “complaints finalised” column is required for the period from 1995/96 through to and including 1999/2000 when the totals were recorded as “complaints received” rather than “complaints finalised”. In order to standardize these years again a adjustment using four years of AFP complaints 2001/2002 through to 2004/2005 is made. For those four years the columns of “complaints received as opposed to complaints finalized” is averaged and an adjustment of 1% arrived at. This 1% adjustment down is then applied to 1995/96 through to and including 1999/2000. AFP numbers include federal police in the ACT, or local community ACT policing.

B Assumption Two - Exclusion of outside jurisdiction complaints

In order to standardize complaint numbers the numbers of “complaints finalised” excludes complaints recorded as being “outside jurisdiction”. This removes the number

of complaints recorded as being outside the jurisdiction of the Office from the overall total of complaints.

Out of jurisdiction complaints are excluded due to inconsistent record keeping over the 28 years under study. A change in recording practices in 1989 renders it impossible to separate “out of jurisdiction” complaints from the category of “numbers of inquiries made to the Office”. This applies from 1989/90. For this reason the inclusions of the “out of jurisdiction” totals in the Annual reports from the years 1977/78 through to 1995/96 are subtracted to arrive at a total of “complaints finalized”. The subtraction stops at 1996/1997 as the numbers of outside jurisdiction from that time are then excluded from the totals in the Annual Reports themselves.

This subtraction occurs for the AFP. It is not necessary for the ACT “out of jurisdiction” complaints. These are excluded but have never been originally included in the total complaints by the ACT Ombudsman as they were seen “negligible”.¹¹²

C Assumption Three – Discretion used

The study also tabulates total complaint numbers excluding complaints where discretion not to investigate is used. This is done across the *Ombudsman Act 1976 (Cth)*, the *Ombudsman Act 1989 (ACT)* and the *Complaints (Australian Federal Police) Act 1981 (Cth)*. In relation to the ACT this information is only available for a seven year period.

Conclusion

This study adopts as a measure of success of systemic impact¹¹³ as whether “an administrative improvement ...foreshadowed”.¹¹⁴ Meaning that the making of the recommendation itself is counted as having systemic impact. This definition is adopted as firstly, this study is quantitative. Secondly, it is a transparent measure and is not “out of step” with pre-existing studies such as Larry Hill’s of the New Zealand Ombudsman.

At first glance it appears a broader criteria than earlier studies such as Hill’s, which defined impact as “those situations in which, as a result of the Ombudsman’s investigation, government departments make policy changes that have consequences reaching into the future beyond the particular decision complained against.”¹¹⁵ In actuality the approach is similar, Hill used the terms impact and reform synonymously and classified policy impacts into substantive policy and procedural policy.¹¹⁶ Substantive policy being normative statements about objects as to what should be done in any given situation and likely to affect citizens directly. Procedural policy being instrumental in character as intermediary and affecting the implementation of substantive policy, Hill gives the example of improving record keeping or eliminating delay.¹¹⁷ These changes are minor and their principal immediate impact is internal to the agency. Hill was surprised to find that substantive reforms predominated over procedural ones. Of course a close analysis of the parameters of the research show that this surprise should

not have been quite so effusive. It is the definitions adopted by Hill that lead to this result. Indeed the definition of substantive is very expansive and would presumably include many of the activities of the ombudsman – this was reflected in Hill's findings that in only four years out of 12 did the number of procedural reforms exceed substantive. This highlights an important issue to be flagged for this study – that the choosing of definitions will undoubtedly influence the “success” of the Office in terms of measuring systemic impact.

Similarly to Hill's study, it is likely that the definition adopted of systemic investigations here will also result in a greater likelihood of “success” for the Office. One reason for this is that a quantitative approach will not immediately appear to measure either quality of change or the issue as to whether change has actually occurred at all. For example, it may therefore be inferred that a large amount of systemic investigations by the Office indicates good performance as a change agent. This inference is an adoption of Hill's comments that policy changes “that are individually small may over time amount to quite a large body of administrative reform, and the following cumulative analysis of the New Zealand Ombudsman's policy impact indicates that it has been considerable.”¹¹⁸ On the other hand a small amount of systemic investigations may reflect a lack of importance being placed upon that role by the Office and suggest reasons contributing to such lack of focus including resources; staffing and policy.

Another reason for a likelihood of performance success by the Office in this study is that this measure is done by asking “What are the goals of the program...?”¹¹⁹ reflecting the

recent trend in the literature on evaluating ombudsman which is to ask the ombudsman themselves as to what they consider to be measures of their own effectiveness.¹²⁰ The aim of the Office as noted in the 2005 Budget portfolio statement is “to ensure that administrative action by government agencies is fair and accountable”.¹²¹ If the Office is characterized as primarily a complaints handling instrument in public administration the scale as to what can be expected in terms of systemic improvements declines. If on the other hand, the Office is characterized as a systemic change agent expectations move to the alternate end of the scale. It is important then to recognize that this study begins from a characterization of the office as complaint handler rather than systemic fixer. This characterization is sourced in the historical formation of the Office and in its own characterizations through Annual Reports and its mission/values statements.¹²²

Any good study must be transparent about its limitations. There are of course inherent difficulties in measuring the achievement of qualitative administrative justice goals such as “encouraging compliance with the rule of law, contributing to government accountability...and enhancing participatory democracy”¹²³ as fundamentally, “[A]chieving administrative justice necessarily requires value judgments to be made about trade-offs between competing objectives, for example, speed versus accuracy of decision making.”¹²⁴ These difficulties remain even when the systemic role of the Ombudsman of “improved public administrative administration” is placed within the more black letter concept of administrative law as the aims and objectives of administrative law are far from formulaic.¹²⁵

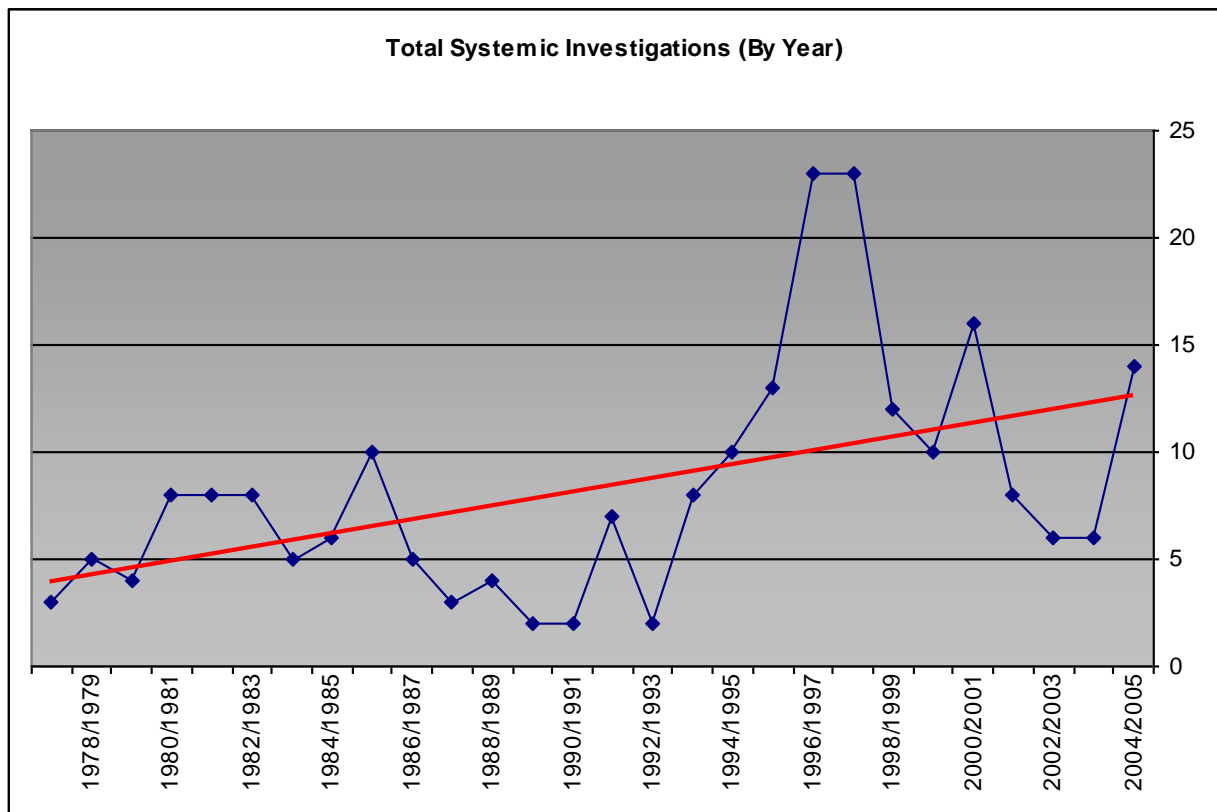
With the above points in mind – the possible bias of measures and the difficulty of defining the goals to measure it against - this study tracks systemics as a scientific exercise and from this makes inferences as to quality of impact. In doing so it follows internationally successful measures of quantitative performance of bodies such as courts where, for example, in the United States focus groups and statistics have been used to measure the performance of judges.¹²⁶

The conclusion provides one selected data results with respect to systemic investigations. This is the result of the methodology described in this section which designs instruments to aggregate the statistics and information provided by the Office in a consistent and usable fashion. The reliability or consistency of the instrument refers to two main aspects: consistency over time and internal consistency. The notion of time consistency in this study is clear – the concept of formal reports, submissions and own motion investigations have remained constant through there being no major amendment to the legislative instruments that provide the jurisdiction for the functions of the Commonwealth Ombudsman or the ACT Ombudsman or the jurisdiction for the AFP. This seems likely to continue into the future,¹²⁷ ensuring that this methodology has ongoing relevance. The alterations or perhaps more accurately, additions, to the powers of the Office over the 28 year period such as the establishment of additional legislative powers (eg: the ACT Ombudsman) do not alter the reliability of the research design. In terms of internal consistency the fact that statistics recorded by the Office in its Annual Reports (for individual complaints) and reports available in the Office have been used (for systemic investigations) allows others to review and retest results.

CONCLUSION

The methodology creates twin sets of data which provide fertile ground for analysis and in-depth understanding of the duality of the roles of the Office. By way of example, the following is the simplest analysis of the systemic data set. It shows an overall trend of the Office towards an ever increasing amount of systemic investigations being completed between 1977-2005.¹²⁸

Graph 1.1: Total systemic investigations by year



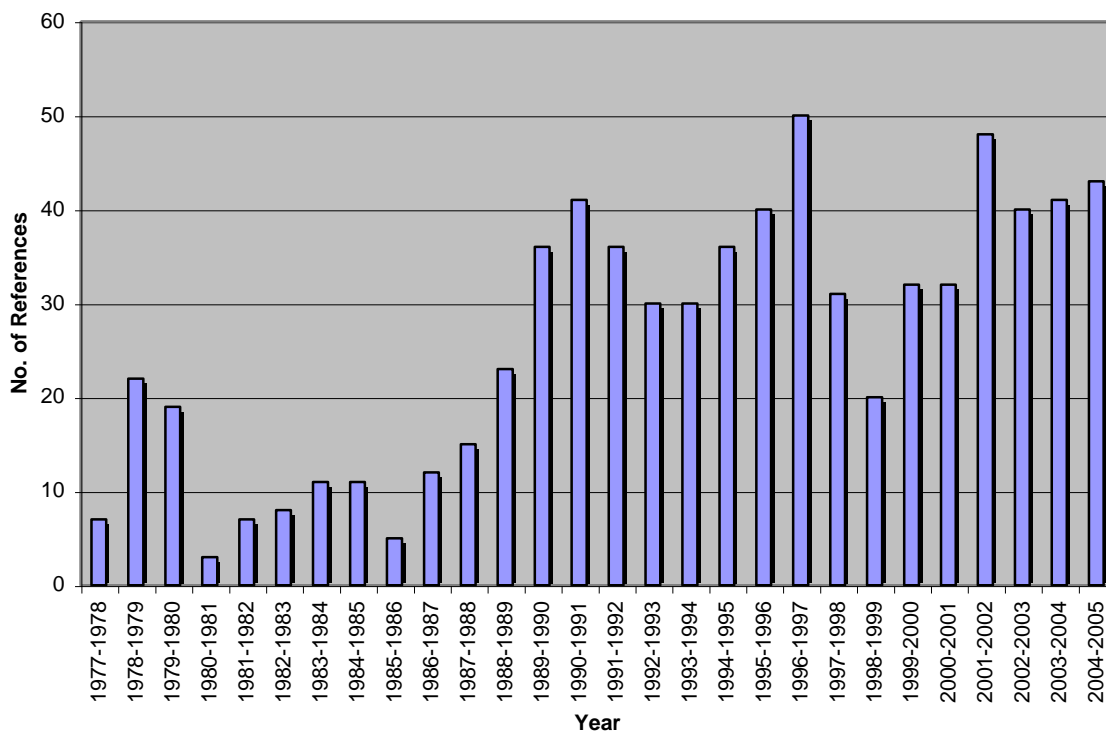
This general trend towards an increasing focus upon systemic investigations is confirmed through data triangulation. As the Office does not maintain statistics in the Annual Reports with respect to systemic investigations this study has undertaken a statistical analysis of the descriptive mentions of the systemics function over the 28 years of Annual Reports, for as Professor John McMillan states:

[T]he annual reports of the Commonwealth Ombudsman have been important documents in the history and development of the office. Numbering twenty-seven reports, they chart the history of the office, each year giving a snapshot of complaint investigation in the preceding year, while reflecting on the role and philosophy of the office.¹²⁹

Graph 1.2 demonstrates how the descriptive mentions of administrative improvement in Annual Reports increase between 1977-2005.¹³⁰

Graph 1.2: Systemic Issues Discussed in Commonwealth Ombudsman Annual Reports

1977-2005



At its simplest level triangulation of the quantitative data sets against the qualitative data of the Office Annual Reports confirms the results of the quantitative data sets. The above qualitative data, similarly to the quantitative data identifies a sharp increase in mentions of systemic matters in Annual Reports since 1990 (with spikes in increases around 1997) which confirms the analysis of the numerical data set in Graph 1.1.

In summary it is concluded that the creation of a quantitative methodology such as the one described in this paper may be useful as a planning and evaluative tool for all ombudsman offices. While the methodology would necessarily need to be adjusted to apply to an individual office or to be adjusted to suit individual outcomes the basic creation of data sets which are able to be subject to longitudinal comparison illustrates that the institution of the ombudsman can be evaluated. While a longitudinal study which is quantitative in nature such as this one may not be able to provide all answers to all issues such as whether the above increase in systemic investigations has resulted in improved quality of public administration within the confines of its parameters it can be a useful longer term planning tool with predictive value.

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¹¹ Authors making such claims include recent commentators on: the UK Ombudsman see M. Seneviratne, *Ombudsmen: Public Services and Administrative Justice* (London: Butterworths, 2002); the South Pacific Ombudsman see Judge Satyanand “Growth of the Ombudsman Concept” (1999) 3 *Journal of South Pacific* <http://www.vanuatu.usp.ac.fj/journal_splaw/articles/Satyanand1.htm#1> at 10 May 2007; North American and Canadian Ombudsman see B Richard, Ombudsman, New Brunswick Office of the Ombudsman, *Annual Report of the Office of the Ombudsman* (2003/2004) and L.B. Hill, “The Ombudsman Revisited: Thirty Years of Hawaiian Experience” (2002) 62(1) *Public Administration Review* 24, 41; Latin American Ombudsman see F. Ugla, “The ombudsman in Latin America” (2004) 36(3) *Journal of Latin American Studies* 423, 441; European Ombudsman including specialist ombudsman see G.B. Melton, “Lessons from Norway: The Children’s Ombudsman as a Voice for Children” (1991) 23(2) *Case Western*

Reserve Journal of International Law 197; African Ombudsman see C.M. Fombad, "The Enhancement of Good Governance in Botswana: a Critical Assessment of the Ombudsman Act, 1995" 2001 27(1) *Journal of Southern African Studies* 57; Eastern European Ombudsman see M. Ambroz, "The mediating role of the Ombudsman in the protection of human rights" (2005) 14 *International Journal of Social Welfare* 145; Asian Ombudsman see C. Lo & R. Wickins, "Towards and Accountable and Quality Public Administration in Hong Kong: Redressing Administrative Grievances Through the Ombudsman" (2002) 25(6) *International Journal of Public Administration* 737.

² Evaluations range from "the most informal intuitive sense of goodness or badness to more formalized scientific analysis", S.E. Aufrecht & M. Hertogh "Evaluating Ombudsman Systems" in R. Gregory & P. Giddings (eds) *Righting Wrongs: The Ombudsman in Six Continents* (2000) 389, 393.

³ For example Hill in his 30 year study of the Hawaiian ombudsman uses observation together with statistical complaint analysis to form conclusions as to the institutionalization of the office: Hill, *Supra* note 1.

⁴ Ambroz, *Supra* note 1 (this survey examined the level of awareness of human rights rather than specifically examining the ombudsman).

⁵ Lo & Wickins, *Supra* n 1.

⁶ Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman* (Canberra: AGPS, 1991) 1.

⁷ D. Bevan, "Survey of complaints referred to agencies" (Paper Presented at the 22nd APOR Conference, Wellington, New Zealand) < <http://www.ombudsmen.govt.nz/> > at 6 April 2006: results of engagement of consultants by the Queensland Ombudsman to conduct a telephone survey of people who had complained to that office in the 2003-2004 financial year. The specific aim of this survey was to investigate how complainants followed advice given by the ombudsman.

⁸ Seneviratne, *Supra* note 1.

⁹ There is no requirement that an ombudsman institution perform both roles.

¹⁰ B. Danet, "Toward a Method to Evaluate the Ombudsman Role" (1978) 10(3) *Administration and Society* 335.

¹¹ V. Ayeni “Evaluating Ombudsman Programmes” in L.C. Reif (ed) *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (1999) 169, 170.

¹² S.E. Aufrecht & M. Hertogh, “Evaluating Ombudsman Systems” in R. Gregory & P. Giddings (eds) *Righting Wrongs: the Ombudsman in Six Continents* (Amsterdam: IOS press, 2000).

¹³ This is despite the increasing adoption of principles of Quality Management or Strategic Management into the standard thinking and routines of many of the State and the Commonwealth Ombudsman offices, such management principles result in the adoption of performance indicators and benchmarks and have resulted in the publication of sets of Values and Strategic Plans for their work. For example the strategic plan of the Office has performance indicators with which to measure its own effectiveness

<http://www.ombudsman.gov.au/commonwealth/publish.nsf/content/aboutus_role> at 28 February 2007.

¹⁴ See, eg, R. Snell, “Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma” in Chris Finn(ed) *Sunrise or Sunset? Administrative Law in the New Millenium* (2000) 188, 188.

¹⁵ Senate Standing Committee on Finance and Public Administration, *Supra* note 5, 64.

¹⁶ The International Ombudsman Institute found that the Office dealt with the second highest number of complaints of any office in the world in 1988, cited in the Commonwealth Ombudsman, *Annual Report* (1987-1988) 31.

¹⁷ Robin Creyke, “The Performance of Administrative Law in Protecting Rights” (Unpublished paper) 19.

¹⁸ This is the official name of the Institution, it is more commonly known as JO or the Justitieombudsman see the Swedish website of the Parliamentary Ombudsman < <http://www.jo.se>> at 18 April 2005. Due to its linguistic origins and the fact that the title “ombudsman” is used across most Australian jurisdictions that is the title used by this paper, there are other variations such as “ombud” or “ombuds”.

¹⁹ Modeled upon the Danish ombudsman the New Zealand institution instigated the creation of a long wave of new offices in other Commonwealth countries around the world: “Tanzania (Permanent Commission of Enquiry, 1966), Guyana (Ombudsman, 1966), most Canadian provinces and territories (starting in 1967), the United Kingdom (Parliamentary Commissioner for Administration, 1967), Mauritius (Ombudsman, 1968, commencing activities in 1970), India (*Lok Ayukta*, in some states commencing in 1971), Australia (starting at the state level in 1972, Commonwealth Ombudsman started in 1977), Zambia (Investigator-

General, 1974), Papua New Guinea (Ombudsman Commission, 1975), Nigeria (Public Complaints Commission, 1975), Trinidad and Tobago (Ombudsman, 1976), Jamaica (Parliamentary Ombudsman, 1978), St. Lucia (Parliamentary Commissioner, 1979, started operations in 1983), Solomon Islands (1980), Zimbabwe (Ombudsman, 1982), Barbados, (Ombudsman, 1980), Sri Lanka (Parliamentary Commissioner for Administration, 1981), Pakistan (*Wafaqi Mohtasib*, 1983), Uganda (Inspector-General of Government, 1987), Western Samoa (1988, in operation 1990); Lesotho (Ombudsman, 1993), Malawi (Ombudsman, 1994), Botswana (Ombudsman, 1995), Antigua and Barbuda (Ombudsman, 1981, commenced activities in 1995), South Africa (Public Protector, 1995), Malta (Ombudsman, 1995), Vanuatu (Ombudsman, 1995), Belize (1994, commenced activities in 1999). See J Hatchard, *National Human Rights Institutions in the Commonwealth: Directory* (3d ed, 1998). An Ombudsman for the Overseas British Territory of Gibraltar was appointed in 1999. The Bangladesh Constitution contains provisions for an ombudsman, The Gambia has recently appointed an ombudsman and Kenya is contemplating establishing an ombudsman”: see L.C. Reif, “Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection” (2000) 13 *Harvard Human Rights Journal* 23, fn 19.

²⁰ These figures are as at 2004 see International Ombudsman Institute <<http://www.law.ualberta.ca/centres/ioi/eng/history.html>> at 18 April 2005. This institution is proliferating, in 2000 this figure was 90: see Gregory & Giddings, *Supra* note 2.

²¹ K. Heede, *European Ombudsman: Redress and Control at Union Level* (London: Kluwer Law International, 2000).

²² All of the State Ombudsman were also established in the 1970s: Western Australia - 1971; South Australia - 1972; Victoria - 1973; Queensland - 1974; New South Wales - 1974; Tasmania – 1978; Northern Territory – 1977; Australian Capital Territory – 1983 by the *Ombudsman Act 1989* (ACT); *Ombudsman Act 1974* (NSW); *Ombudsman (Northern Territory) Act* (NT); *Ombudsman Act 2001* (Qld); *Ombudsman Act 1972* (SA); *Ombudsman Act 1978* (Tas); *Ombudsman Act 1973* (Vic); *Parliamentary Commissioner Act 1971* (WA). This part does not include the ACT Ombudsman as that office is incorporated as part of the empirical analysis of this study.

²³ A. Stuhmcke, “Resolving consumer disputes: out of the courts and into private industry” (2003) 31 *Australian Business Law Review* 48.

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- ²⁴ As explained below qualitative methods are used to triangulate data such as analysis of the Commonwealth Ombudsman Annual Reports. For a variety of perspectives on the usefulness of the integration of these two approaches see J. Brennan (ed) *Mixing Methods: Qualitative and Quantitative Research* (1992).
- ²⁵ Danet *Supra* n 10.
- ²⁶ J. Olsen, “Efficiency of ombudsman institution and developing quality indicators” (Paper presented at the 3rd Seminar of ombudsman and chancellors of justice of the Baltic Sea Countries, August 2003) <http://www.oiguskantsler.ee/index.php?lang=eng&main_id=462,581,583,683> at 3 February 2006.
- ²⁷ Senate Standing Committee on Finance and Public Administration, *Supra* note 5, 63.
- ²⁸ Senate Standing Committee on Finance and Public Administration, *Supra* note 5, 64.
- ²⁹ S.E. Aufrecht & G. Brelford, “The Administrative Impact of the Alaskan Ombudsman” in Caiden GE (ed) *International Handbook of the Ombudsman: Country Surveys* (1983) 231. The actual office of the Alaskan Ombudsman has been abolished. Unfortunately this study qualifies itself at the outset stating “Our study is inevitably impressionistic simply because not until we were almost finished did we develop useful categories and distinctions to which hard quantitative data could be related. Our most difficult task was to calculate long-term systemic impacts.”
- ³⁰ Telecommunications Industry Ombudsman, *Annual Report* (2004-2005) 64.
- ³¹ M. Hertogh, “Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands” (2001) 23(1) *Law & Policy* 47, 48.
- ³² External observers state that in practice the ombudsman has investigated and reported recommending changes in policy on a number of occasions: A. Rose, “The Role of Administrative Review Bodies” (1999) 58(1) *Australian Journal of Public Administration* 65, 66.
- ³³ Commonwealth Ombudsman, *Annual Report*, (1981-1982) 25.
- ³⁴ Commonwealth Ombudsman, *Annual Report* (1979-80) 44 and the Commonwealth Ombudsman, *Annual Report* (1981-82) 24. In doing so the federal ombudsman has rejected the limitation applied to the state ombudsman of Victoria where the classic distinction between administrative, judicial and legislative powers was adopted in *Glenister v Dillon* [1976] VR 550 at 556-558 and 564 and the decision of *Booth v Dillon* (No 2) [1976] VR 434.

³⁵ I.E. Nebenzahl, “The Direct and Indirect Impact of the Ombudsman” in G.E. Caiden (ed) *International Handbook of the Ombudsman: Evolution and Present Function* (Greenwood Press, London, 1983) 59.

³⁶ Phrase borrowed from L.B. Hill, *The Model Ombudsman: Institutionalizing New Zealand’s Democratic Experiment* (Princeton, Princeton University Press, 1976) 212.

³⁷ W. Ikeda, “The Ombudsman in Hawaii” in G.E.Caiden (ed) *International Handbook of the Ombudsman: Country Surveys* (1983) 241, 247.

³⁸ W. Haller, “The place of the Ombudsman in the world community” (Paper presented at the Fourth International Ombudsman Conference, Canberra 23-27 October 1988) (1989) 35.

³⁹ Commonwealth Ombudsman, *Annual Report (1977-1978)* 16.

⁴⁰ Whether its introduction can be solely attributable as an example of systemic reform introduced by the Commonwealth Ombudsman is worthy of study but is beyond the aims of this study.

⁴¹ See the Commonwealth Ombudsman, *Annual Report (1982-1983)* 59:

During 1981 and 1982 I received a number of complaints which indicated particular difficulties in the Sydney Passport Office in processing passport applications. Complaints ranged from inability to contact the office by telephone, to long waiting periods in the office, and delays in receiving passports following the submission of applications. In July 1982 my Deputy visited the Sydney Passport Office to examine its operations and discuss measures that were being taken to relieve problems recognised by the Department.

⁴² Senate Standing Committee on Finance and Public Administration, *Supra* note 5, 64.

⁴³ P. Smith, “Red Tape and the Ombudsman” (1998) 88 *Canberra Bulletin of Public Administration* 18, 20.

⁴⁴ D. Pearce, “The Commonwealth Ombudsman Reports, (1988) 41(24) *Canberra Survey* 1,4.

⁴⁵ Commonwealth Ombudsman, *Annual Report (2003-2004)* 75.

⁴⁶ As explained below this study examines the Office functions under the *Ombudsman Act 1976* (Cth); *Ombudsman Act 1989* (ACT) and the *Complaints (Australian Federal Police) Act 1981* (Cth).

⁴⁷ Hill, *Supra* note 36, 204.

⁴⁸ Commonwealth Ombudsman, *Annual Report (2003-2004)* 76.

⁴⁹ Commonwealth Ombudsman, *Annual Report (1989-1990)* 37.

⁵⁰ Commonwealth Ombudsman, *Annual Report* (1995-96) 31 states [M]any other systemic issues are pursued during the course of our general investigation work.”

⁵¹ P, “Why Ombudsman are better than lawyers” (1999) 26(11) *Brief* 42, 43.

⁵² Senate Standing Committee on Finance and Public Administration, *Supra* n 22, 23.

⁵³ *Ibid.*

⁵⁴ Commonwealth Ombudsman, *Annual Report*, (1992-1993) 4.

⁵⁵ Commonwealth Ombudsman, *Annual Report* (1994-1995) 45.

⁵⁶ Commonwealth Ombudsman, *Annual Report* (1995-1996) 31. This continues in the Commonwealth Ombudsman, *Annual Report* (1996-1997) 84 which states that “[T]he work of the Major Projects section has proven to be a cost effective way for the office to identify problems and improve public administration. This year the Major Projects team completed some 18 projects, with another 20 projects in progress, involving complex cases requiring intensive investigation. Most of these projects raised matters of broader public interest affecting hundreds and even thousands of other citizens.”

The office also pursued many other systemic issues during the course of its other investigation work.”

⁵⁷ Commonwealth Ombudsman, *Annual Report*, (1998-99) 21.

⁵⁸ M. Durkin, *Review of the Major Projects Function of the Office of the Commonwealth Ombudsman* (June 1996) 15.

⁵⁹ Submission by the Commonwealth Ombudsman to the Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, Submitted on 28 February 1991, 38.

⁶⁰ Commonwealth Ombudsman, *Annual Report* (2003-2004) 4.

⁶¹ See FAQ section of the Administrative Review Council website <<http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/FAQS>> at 1 June 2006.

⁶² One of the newest compliance roles is for the Office to conduct an annual review of new information gathering powers conferred on the Building Industry taskforce: Commonwealth Ombudsman, *Annual Report* (2003-2004) 6.

⁶³ See Commonwealth Ombudsman “Report on activities in monitoring controlled operations 2004-2005” <www.comb.gov.au> at 1 May 2006.

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- ⁶⁴ Commonwealth Ombudsman, *Annual Report* (1990-1991) 1.
- ⁶⁵ Submission by the Commonwealth Ombudsman to the Senate Standing Committee on Finance and Public Administration, *Supra* note 59, 79.
- ⁶⁶ This point is further discussed below under the parameters of the study.
- ⁶⁷ Commonwealth Ombudsman, *Annual Report* (1997-1998) 2.
- ⁶⁸ Commonwealth Ombudsman, *Annual Report* (1995-1996) 40.
- ⁶⁹ Submission by the Commonwealth Ombudsman to the Senate Standing Committee on Finance and Public Administration, *Supra* note 59, 44.
- ⁷⁰ The term “Office” is used to cover both the Commonwealth Ombudsman and the Australian Capital Territory Ombudsman.
- ⁷¹ Submission by the Commonwealth Ombudsman to the Senate Standing Committee on Finance and Public Administration, *Supra* note 59, 38.
- ⁷² Commonwealth Ombudsman, *Annual Report* (1983-1984) 13.
- ⁷³ Commonwealth Ombudsman, *Annual Report* (1987-1988) 50.
- ⁷⁴ D. Pearce, “The Commonwealth Ombudsman Reports, (1988) 41(24) *Canberra Survey* 1, 3.
- ⁷⁵ Commonwealth Ombudsman, *Annual Report* (1997-1998) 3.
- ⁷⁶ Commonwealth Ombudsman, *Annual Report* (1989-1990) 7.
- ⁷⁷ Commonwealth Ombudsman, *Annual Report* (1986-1987) 14-15.
- ⁷⁸ Commonwealth Ombudsman, *Annual Report* (1994-1995) 13.
- ⁷⁹ Commonwealth Ombudsman, *Annual Report* (1995-1996) 5.
- ⁸⁰ Commonwealth Ombudsman, *Annual Report* (1991-1992) 15.
- ⁸¹ The section states that the discretion allows the Ombudsman to take into account whether further investigation “is not warranted having regard to all the circumstances”.
- ⁸² Danet, *Supra* note 10, 360.
- ⁸³ K.F. Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (Sage Publications, 1998) 192.
- ⁸⁴ Statistical modeling was done in this study by the Consulting Unit at the Australian National University using a general linear model in the Statistical package GenStat.

⁸⁵ See generally G.D. Bouma & R. Ling, *The Research Process* (Oxford University Press, 5th ed, 2004).

⁸⁶ It is recommended that further research be undertaken involving interviews with government department personnel.

⁸⁷ The Ombudsman is required to present an Annual Report to Parliament: *Ombudsman Act 1976* (Cth) s 19.

⁸⁸ Telecommunications Industry Ombudsman, *Annual Report* (2003-2004) 22-23.

⁸⁹ Cat. No. 3105.0.65.001 Australian Historical Population Statistics TABLE 2 Population by sex, states and territories 30 June 1901 onwards.

⁹⁰ Commonwealth Ombudsman, *Annual Report* (1983-1984) 1.

⁹¹ The statutory duty to issue an annual report has two main external functions: to provide information and to render account see M. Oosting, "The Annual Report of the Ombudsman" in L.C. Reif (ed) *The International Ombudsman Yearbook*, (Vol 2, 1998) 86, 86.

⁹² For example: Roy Morgan Research Centre, *Public Awareness Survey* (June 1992); AGB McNair, *Complainant Satisfaction Survey* (May 1994), (July 1996, refers to it being third in a series of 1994, and 1995 survey by AGB McNair).

⁹³ There are exceptions see Commonwealth Ombudsman, *Annual Report* (1989-1990) 8, which presents a table of systemics.

⁹⁴ Again, there are exceptions see Commonwealth Ombudsman, *Annual Report* (1995-1996) 5-6 which gives examples of positive systemic change and a lack of agency cooperation.

⁹⁵ This is particularly the case during the earlier years of the Office.

⁹⁶ Although the full report may not be publicly available where there is an abridged version of a report released that may be used and noted in this study.

⁹⁷ <www.comb.gov.au> at 1 October 2006.

⁹⁸ See for example the Commonwealth Ombudsman website where there is a report "Review of Centrelink's Complaint Handling System" dated September 2000. This report is not in the original "Completed Projects List" but is included in the revised Master List.

⁹⁹ This necessarily means that only the first few years of the current Ombudsman, Professor John McMillan are discussed.

¹⁰⁰ These variables are an application of Danet's study and the Alaskan study which recommends collating the following:

- (1) number of cases in which administrator accepts ombudsman's recommendation immediately;
- (2) number of cases where administrator rejects ombudsmans recommendations
- (3) number of cases where ombudsman backs down if his recommendations is rejected
- (4) number of cases when ombudsman pursues the issue higher in the administrative structure
- (5) number of cases when the ombudsman goes to legislators
- (6) number of cases when ombudsman goes to the press.

¹⁰¹ Danet, *Supra* n 5, 354.

¹⁰² Subject to what data triangulation is possible through Annual Reports.

¹⁰³ Aufrecht & Brelsford, *Supra* note 29, 239.

¹⁰⁴ Aufrecht & Brelsford, *Supra* note 29, 237.

¹⁰⁵ D. Pearce, "The Ombudsman: Neglected aid to better management" (1989) 48(4) *Australian Journal of Public Administration* 359.

¹⁰⁶ W. Gellhorn, *Ombudsman and Others* (Cambridge, Harvard University Press, 1967) 429.

¹⁰⁷ G. Caiden, "The challenge of change" (Paper presented at the Fourth International Ombudsman Conference, Canberra 23-27 1988) (1989), 21.

¹⁰⁸ Aufrecht & Brelsford, *Supra* note 29, 237.

¹⁰⁹ Aufrecht & Brelsford, *Supra* note 29, 240.

¹¹⁰ Commonwealth Ombudsman, *Annual Report* (1990-1991) xv.

¹¹¹ Internal validity in quantitative design concerns the internal logic of the research and to ensure it is based upon valid comparisons. External validity asks the question of generalizability see D.T. Campbell & J.C. Stanley, *Experimental and Quasi-Experimental Designs for Research* (Chicago, Rand McNally, 1963) 5.

¹¹² Australian Capital Territory Ombudsman, *Annual Report* (1998-1999) 2.

¹¹³ This is in keeping with public management research see J. Boston, "The Challenge of Evaluating Systemic Change: The case of Public Management Reform"

<www.inpuma.net/research/papers/sydney/jonathonboston> at 1 February 2006. Broad steps taken to evaluate systemic change in the field of public management which are usefully categorized by Boston as to:

1. choose the appropriate criteria for evaluation and determining what is success
2. determine and secure relevant evidence
3. interpret the evidence and arrive at an overall assessment

¹¹⁴ Commonwealth Ombudsman, *Annual Report* (1982-1983) 32.

¹¹⁵ *Supra* note 36, 205.

¹¹⁶ Definition of policy being “those decisions which agencies make that will affect how some of their activities – particularly those having to do with their public-in-contact – will be handled in the future”

Supra n 36, 210.

¹¹⁷ *Supra* note 36, 212-13.

¹¹⁸ *Supra* note 36, 220. Hills study shows that between October 1962 and 31 March 1975 the Ombudsman was responsible for at least 1777 separate reforms of the administrative process.

¹¹⁹ *Supra* note 2, 393.

¹²⁰ It should be noted that much of this literature is directed towards non-traditional non-public ombudsman such as C. McKee & S. Belson, “The Ombudsman in Canadian Universities and Justice for all” (1990) 15(2) *Studies in Higher Education* 197; C.L. Estes, D.M. Zulman, S.C. Goldberg & D.D. Ogawa, “State Long Term Care Ombudsman Programs: Factors Associated With Perceived Effectiveness” (2004) 44(1) *The Gerontologist* 104.

¹²¹ Department of Prime Minister and Cabinet <www.pmc.gov.au/accountability/budget/2005-06/pbs/ombudsman.doc> at 14 May 2007, 186.

¹²² Commonwealth Ombudsman

<http://www.ombudsman.gov.au/commonwealth/publish.nsf/content/aboutus_role> at 28 February 2007.

¹²³ M. Neave, “In the Eye of the Beholder – Measuring Administrative Justice” in R. Creyke & J. McMillan (eds) *Administrative Justice – the core and the fringe* (2000) 130.

¹²⁴ *Ibid*, 128.

¹²⁵ Margaret Allars suggests that administrative law aims to promote values of openness, rationality, fairness and participation see M. Allars, “Private Law But Public Power: Removing Administrative Law

Review From Government Business Enterprises” (1995) 6 *Public Law Review* 44; M. Taggart similarly sees the fundamental values of public law accountability as openness, fairness, participation, impartiality and rationality see M. Taggart, “The Impact of Corporatisation and Privatisation on Administrative Law” (1992) 51(3) *Australian Journal of Public Administration* 371; Aronson, Dyer and Groves add to the list - “.openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality” see M. Aronson, B. Dyer, M. Groves, *The Judicial review of Administrative Action* (2004) 1.

¹²⁶ National Center for State Courts <http://www.ncsconline.org/D_Research/TCPS/> at 15 February 2006 (see especially “Court Statistics Project”).

¹²⁷ Mooted changes to legislation seem focused upon the specialist roles of the ombudsman rather than systemics.

¹²⁸ This does have a low R squared value (0.22) which demonstrates predictive reliability. This trendline is a guide only.

¹²⁹ Commonwealth Ombudsman, *Annual Report* (2003-2004) 1.

¹³⁰ The graph, done with the assistance of Anne Tran uses the measure of:

- Counting the individual pages of each Annual Report which mention/discuss/identify: “systemic issues”, improvements/changes in practice and procedure, own motion investigations, recommendations for change in legislation and where investigations found there was “defective administration”. It excludes 2 pages (7-8) from the 1988-1989 Annual Reports which refers to systemic impact as “normative” change. This graph therefore takes into account the relatively recent use of the term “systemics”.
- These individual pages were then calculated against the page totals of the Annual Reports including Appendices in the total page count for uniformity (as in some earlier reports, there was significant discussion of systemics in appendices).
- Data accuracy may be affected as some annual reports have 2 columns per page where as others were written with only one column of text.

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- Further, even though there was more in-depth discussion of systemics per page in the more recent annual reports, this was not accounted for as it counts as a single page.