

Abstract

This article discusses whether the Commonwealth Ombudsman should be part of a fourth integrity arm of Federal government. It highlights that the Ombudsman is moving to a focus upon systemic administrative improvements. In particular the article examines recent immigration cases determined by the Ombudsman to 'test' the extent to which the role of the Ombudsman now transcends the individual complainant contributing to the improvement of overall government administrative integrity.

By Anita Stuhmcke and Anne Tran

The Commonwealth Ombudsman: An integrity branch of government?

The current debate for Federal constitutional reform generally assumes that a tripartite separation of governmental powers will be the bedrock of any new or altered Australian Constitution. This is the case irrespective of whether discussion centres upon the introduction of a Bill of Rights, or the recasting of the powers of the Executive, or the rebalancing of federalism, or whether Australia should become a Republic.

Recently however this assumption has been called into question. In 2004 Chief Justice Spigelman of the NSW Supreme Court proposed that we should recognize ‘an integrity branch of government as a fourth branch, equivalent to the legislative, executive and judicial branches’ which will ‘ensure that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose.’¹ The institutions Chief Justice Spigelman suggested as forming part of this integrity branch of government are emanations of the executive which have by legislation and practice developed an institutionalized independence, such as the Auditor-General and the Ombudsman. It is perhaps unsurprising then that this suggestion has been backed by public law Ombudsman, in particular by the current Commonwealth Ombudsman Professor John McMillan² and the current Victorian Ombudsman Mr Brouwer³.

The aim of this article is to weigh the merit of an integrity branch of government by analysing a small portion of the work of the Commonwealth Ombudsman. It uses the recent inquiry the Ombudsman completed into the immigration department as a case study to highlight both the strengths and limitations of the Ombudsman forming an

¹ Honourable JJ Spigelman, ‘The Integrity Branch of Government - The Second Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law’ <http://www.lawlink.nsw.gov.au/sc%5Csc.nsf/pages/spigelman_290404> February 2006.

² John McMillan ‘Future Directions – The Ombudsman’ Address to the AIAL National Administrative Law Forum, Canberra, July 2005 available at <www.comb.gov.au> 1 November 2006, noting the idea originates from Justice Spigelman – see note 2.

³ Transcript before Public Accounts and Estimates Committee, Inquiry into framework for statutory Melbourne, 21 February 2005

integrity branch of government. In essence this article argues that the current reorientation of the Ombudsman towards a systemics focus – to improve the entirety of administrative efficacy and efficiency - lends itself to Chief Justice Spigelman's view that the Commonwealth Ombudsman be considered part of an integrity branch of government.

Case study: immigration

The increasing focus on improving the overall integrity of government by going beyond the individual complaint to improving the system of administrative decision making can be seen in the recent immigration investigations of the Ombudsman. On 6th December 2006 the Commonwealth Ombudsman, Professor John McMillan released three damning reports into the immigration department's handling of 20 people detained in Australia's immigration system between 2000 and 2005. These cases had been referred to the Commonwealth Ombudsman by the Federal Government after the inquiries by that office into the wrongful detention of Cornelia Rau and the deportation of Vivian Alvarez Solon.

The reports identify a range of 'mistakes' by the department of immigration (DIMA), with the Ombudsman concluding that DIMA's administration was unsatisfactory. The Ombudsman made recommendations for administrative improvements which include training officers to ensure they understand the applicable legislation and policies, ensuring that records are accurately recorded and maintained, and improving internal monitoring and review practices.

The urging by the Commonwealth Ombudsman in the reports for the immigration department to change the way it deals with people with mental illnesses and children in detention highlights how an effective Ombudsman institution can suggest improvements in public administration and strengthen the accountability framework in Australia. Critically however, a significant limitation of the Ombudsman institution is that these recommendations are not enforceable. While the reports demonstrate the way that an Ombudsman office can through its investigations draw critical attention to administrative

deficiencies within government agencies they are not a guarantee ensuring that the recommendations made by the Ombudsman will practically improve administration by government agencies.

Case examples – Reports into the Immigration Department’s handling of people with mental illnesses and children in detention

The Commonwealth Ombudsman’s *Report into Referred Immigration Cases: Mental Health and Incapacity*,⁴ exposed the cases of nine people, who were taken into immigration detention despite being Australian citizens or entitled to lawfully live in Australia. One case involved a lawful citizen who was wrongly detained for 18 days as a result of immigration officers acting too quickly on information provided by a mentally ill individual. Mr A was mentally unwell and was detained after providing immigration officers with a false identity and partly incorrect information. His true identity and status was not established until 13 days into his detention after he was fingerprinted. The Ombudsman was critical of DIMA’s actions, pointing out that because of Mr A’s mental incapacity, DIMA ‘should have been slower to make the decision to detain Mr A until the reliability of his self-declared status could be verified.’

As a result of the investigation of Mr A’s and other cases, the Ombudsman identified a number of deficiencies in administration that contributed to the wrongful detentions. These included the lack of reliability of DIMA’s databases, poor record keeping procedures and inadequate training of officers. The recommendations made by the Ombudsman addressing these problems were accepted by DIMA, which indicated it was taking action to address the issues identified.

The Commonwealth Ombudsman’s separate report into the case of Mr G also exposed the administrative deficiencies which caused an absorbed person and lawful citizen to be detained for 43 days. DIMA was approached by three members of the Perth East Timorese Community who requested that Mr G be released from detention. They provided information of Mr G’s immigration and personal history. That information was not pursued by immigration

⁴ Commonwealth Ombudsman, *Report on Referred Immigration Cases: Mental Health and Incapacity* No 07|2006, available at <www.ombudsman.gov.au>

officers who advised Mr G's friends that he was not lawful and could not be released until his status was determined. Following continual demands for his release, Mr G's status was reassessed and he was found to satisfy the absorbed person visa.

A number of areas of concern were identified by the Ombudsman as a result of the investigation. Among these were the use of the detention power under section 189 Migration Act 1958 (Cth), missed opportunities to bring Mr G's detention to an end, failure to follow up information, failure to consider Mr G's absorbed person visa promptly and competently and failure to sufficiently regard Mr G's mental disorder and respond to his illness. DIMA agreed with the Ombudsman's recommendations and also indicated that it was implementing reforms and making policy changes to improve its services.

In the *Report into referred immigration Cases: Children in detention*⁵, the Commonwealth Ombudsman examined 10 cases where unsatisfactory administration and breaches of existing DIMA policy and Australian standards caused children to be detained even though in eight of the cases the child was either an Australian citizen or a lawful non-citizen.

One of the cases which highlighted deficiencies in DIMA administration was that of 10 year old MT. MT was an Australian born citizen. Although DIMA had a copy of MT's birth certificate on file because his mother had lodged it with the department when applying for a protection visa in 1999, DIMA's records showed that MT was born in the Philippines and his citizenship was either Philippines or unknown. In 2004, MT was taken into immigration detention with his parents when they were detained under s 189 when their bridging visas expired. Despite being told by his parents that MT was an Australian citizen, DIMA officers did not follow up the information provided or conduct database searches. MT was detained for 15 days. The Ombudsman attributed MT's wrongful detention to inaccurate computer records and indicated that had immigration officers 'comprehensively interrogated their own databases for all available

⁵ Commonwealth Ombudsman, *Report on Referred Immigration Cases: Children in detention*, Report No 08|2006, available at www.ombudsman.gov.au.

information’,⁶ MT would not have been detained. The Ombudsman recommended that extra steps such as the interrogation of immigration databases and questioning of parents about the status of their children were ways in which DIMA could improve its assessment of children.

The Ombudsman also found there was a lack of understanding of Australian Citizenship law and procedures by immigration officers in a number of cases. One such case was that of AP, an 11-month-old Australian citizen with an Australian father. AP was detained for 51 days with his mother who had been taken into detention under s 189 as an unlawful non-citizen. Although the DIMA officers involved were aware of AP’s citizenship, they formed a suspicion that AP’s citizenship had been fraudulently obtained because AP’s mother had made a \$5 000 payment to AP’s father before his birth. This was contrary to DIMA’s policy that requires officers to give an applicant the benefit of the doubt where documents appear regular on their face. The Ombudsman suggested that training in citizenship law was needed to ensure that immigration officers had an understanding of the legislation and procedures.

The Ombudsman’s report also revealed instances where DIMA failed to ensure that the best interests of a child were taken into account. In one case, no care arrangements were made for two siblings IH (aged 6) and JH (aged 11) upon the removal of their parents from Australia.

Similar to the investigations into the mentally ill, record keeping errors and failures to keep records up-to-date were other problems identified by the Ombudsman in its report into children in detention. In one case, the records of a child who had acquired Australian citizenship upon turning 10 years old were not updated until three months after her birthday. In another case, HS a 15-year-old child who held a valid bridging visa was detained for three days because the visa expiry date was incorrectly recorded on the ICSE database.

⁶ Commonwealth Ombudsman, *Report on Referred Immigration Cases: Children in detention*, Report No 08|2006, available at <www.ombudsman.gov.au> p. 7.

More than a complaint-handling mechanism?

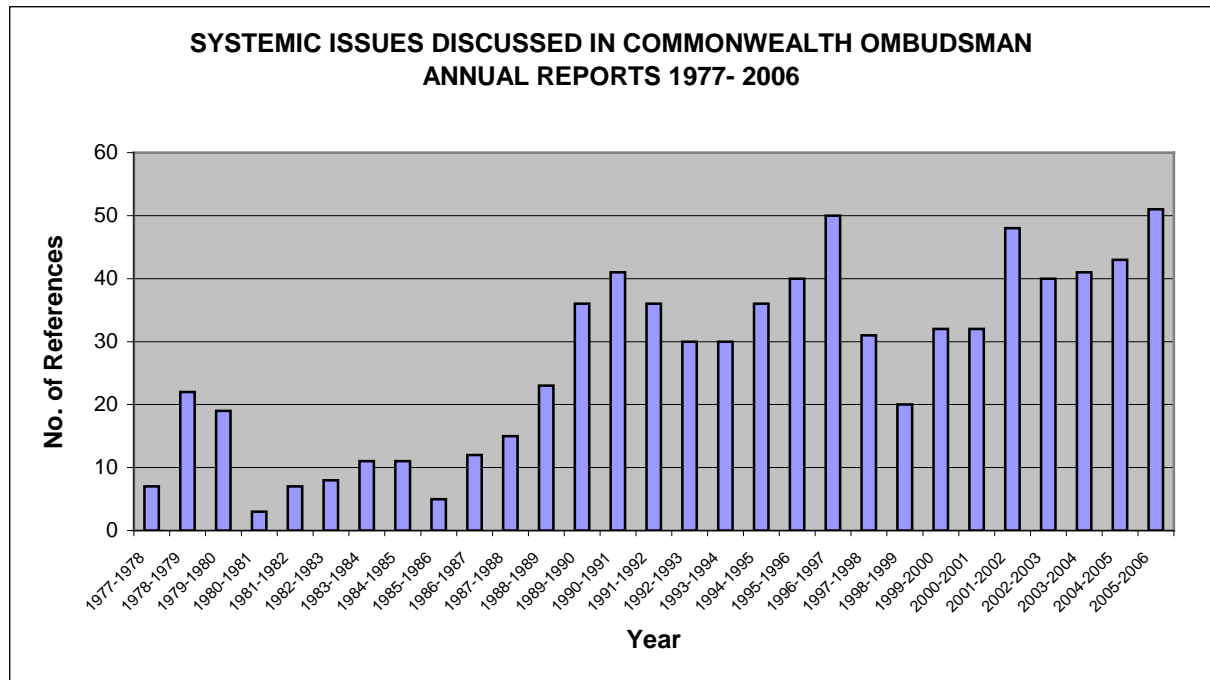
The Commonwealth Ombudsman annually investigates thousands of complaints from members of the public about the administrative decisions of government agencies like the department of immigration. Over its 30 years of operation the Office has handled around 400 000 complaints and dealt with many more written and oral inquiries. These issues are often only of concern to the individual complainant and are procedural rather than substantive in nature raising matters such as rudeness by agency staff or delay or mistake.

This reactive individual complaint-handling role is the traditional core business of the Commonwealth Ombudsman and is critical for principles of democracy (the right of a citizen to complain about government) and accountability (for that complaint to acted upon). Undoubtedly this role contributes to the integrity of government administration through improving the quality of decisions with respect to the executive function.

Importantly however the integrity function of the Commonwealth Ombudsman extends beyond the individual complaint-taking role. Originally introduced as part of the new administrative law package in 1976, the Ombudsman office now places growing emphasis upon being a proactive system reformer rather than a reactive complaint handler. The following graph demonstrates how the system fixing focus of the Commonwealth Ombudsman increases between 1977-2006. It is a statistical analysis of the descriptive mentions of the 'systemics' function in the Commonwealth Ombudsman Annual Reports which reflect the role and philosophy of the Office.⁷

⁷ The graph 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 (pp7-8) from the 1988-1989 Annual reports which refers to systemic impact as "normative" change
- 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 the appendix).
- 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.
- 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.



The above graph identifies that since the early 1990s the focus of the Ombudsman upon being a proactive institutional reformer has dramatically increased. Arguably, this change reflects a shift in government over this 30 year period. Since the early 1990s government has placed emphasis upon efficacy and efficiency and increased emphasis upon its own accountability. There is now a vast range of both private and public complaint handling bodies to ensure that government power is properly exercised and scrutinized. The graph highlights how the Ombudsman has reconceptualised its operations to attempt to add value to this new framework of administrative accountability. It has increasingly become a proactive system reformer and expanded its jurisdiction, recently becoming the Postal Industry Ombudsman and now playing a more active role in oversighting and auditing the way policing agencies handle complaints and conduct issues. The Ombudsman today is also increasingly involved in making submissions to parliamentary inquiries and commenting on various administrative practice matters.⁸

⁸ Commonwealth Ombudsman, 2005-06 Annual Report at 5 available at http://www.ombudsman.gov.au/publications_information/Annual_Reports/ar2005-06/download/PDF/commanrep.pdf > March 2007

Of course the fact that the Office is reconceptualizing its operations does not automatically translate into effective operation as either a system improver and/or a guarantee of integrity in administration.

Arguments in favour of a integrity branch of government

There are at least three general arguments which favour the introduction of an Australian integrity branch of government:

Firstly, the creation of more than three arms of government has international precedent as for example, Costa Rica has a legislature, executive and judicial branch of government together with a Supreme Elections Tribunal and an office of the Comptroller General and Taiwan (Republic of China) has five branches, the Executive Yuan, Legislative Yuan, Judicial Yuan, Control Yuan and Examination Yuan (with the role of some international ombudsman being similar to the Control Yuan).

Secondly, there is a broad movement internationally to recognise the importance of integrity systems. In Australia this was recognised by a 2005 report which both maps the integrity system across States and Federal governments and gauges its effectiveness.⁹ The report, a product of a five year funded research project between Transparency International Australia and the Key Centre for Ethics Law Justice and Governance at Griffith University aims to conceive of integrity agency and systems as a new way of evaluating government and business.

Thirdly, in Australia democratic accountability of Government to its citizens is achieved through the doctrine of responsible government, a doctrine reliant upon there being a separation between arms of government. It has however now become common legal parlance to observe that the separation of powers doctrine exists but to go onto explain that the growth of the executive has been the central theme of modern Australian

⁹ Brown AJ, Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems, *National Integrity Systems Assessment (NISA) Final Report, December 2005* available at <http://www.griffith.edu.au/centre/kceljag/nisa/nisa_final.pdf> March 2007

Government to the extent that as early as 1974 one author has written ‘most of the Australian parliaments have become mere rubber stamps of approval for legislation and other enactments formulated by cabinet.’¹⁰

As the above immigration case study illustrates there are also good reasons to think of the Commonwealth Ombudsman as part of this integrity branch of government. For example, while the judiciary no doubt play an essential role in ensuring that the executive government is subject to the law, as the immigration case study demonstrates, the Ombudsman office can in addition to the legislature and the judiciary assist to ensure that the activities of government agencies are subject to substantial scrutiny. Through its recommendations for administrative changes and monitoring of responses to recommendations made, the Ombudsman can play an active role in upholding the rule of law and contribute to the traditional forms of accountability such as judicial review.¹¹ Of course, as with any traditional ombudsman office the recommendations of the Commonwealth Ombudsman are not enforceable. This means that the Office must use a combination of techniques – from adverse publicity to cajoling and persuasion - to convince government departments of the correctness of its advised course of action.

It is arguable however that the ombudsman is not a ‘toothless tiger.’ Even though the actual impact of the Ombudsman’s recommendations are neither enforceable nor measurable, the immigration case studies outlined earlier in this paper illustrate that agencies are prepared to accept recommendations for systemic and administrative improvements. Indeed, the majority of the recommendations made by the Ombudsman are accepted by agencies.¹² The lack of determinative powers does not necessarily undermine the effectiveness of the ombudsman. Determinative as opposed to recommendatory powers could in fact diminish the co-operative relationship which exists

¹⁰ KW Wiltshire, *An Introduction to Australian Public Administration*, Cassell Australia, (1974) 89.

¹¹ J McMillan , *The Ombudsman And The Rule Of Law*, Address by Commonwealth Ombudsman, Public Law Weekend, Canberra 5-6 November 2004.

¹² Commonwealth Ombudsman, 2004-2005 Annual Report at 21 available at <http://www.comb.gov.au/publications_information/Annual_Reports/ar2004-05/download/PDF/commanrep.pdf> and 2005-06 Annual Report at 21 available at <http://www.ombudsman.gov.au/publications_information/Annual_Reports/ar2005-06/download/PDF/commanrep.pdf> July 2007

between government agencies and the ombudsman and which is an important feature in effectiveness of the office.

The former Commonwealth Ombudsman Ron McLeod in a systemic investigation report titled 'Report on the Investigation into a Complaint about the Processing and Refusal of a Subclass 202 (Split Family) Humanitarian Visa Application, August 2001 has stated in the executive summary that:

The history of this case is one of administrative ineptitude and of broken promises. Four and a half years after Mr Shahraz Kiane first attempted to bring his family to Australia, he is dead as a result of self-inflicted injuries sustained when he set fire to himself outside Parliament House.

and further at page 25:

From an administrative viewpoint, the handling of this case is a tragic reminder to all Government officials that in applying bureaucratic processes and procedures they should never lose sight of the human dimension of their work.

The above comment captures the form of administrative conscience that an integrity branch of government may infuse into government administration and illustrates the moral and ethical power of an external and independent oversight of executive action.

Conclusion

The brief outline above of the Ombudsman's reports into the immigration cases highlight a need for bodies to watch over administrative decision makers. They also reinforce the importance of such oversight bodies in improving the systemic defects and recommending change to minimize recurrence of such events. The issue here however is not to debate the necessity of such institutions or even their effectiveness but rather to ascertain if bodies such as the Commonwealth Ombudsman should formally become a fourth integrity arm of government.

Notably the suggestion of Justice Spigelman for a fourth arm of government is not one that aims to ensure the integrity or the equity or the humanity of government administration. Indeed to make this suggestion may actually run conversely to Justice Spigelman's suggestion that an integrity branch aims to ensure the government acts within the 'powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose'.

In a sense this suggestion may not go far enough. The immigration case study highlights the need for a body to ensure the integrity of government administration from a human viewpoint. Simple administrative mistakes, poor policy and sloppy agency procedure may lead to human suffering. While the Commonwealth Ombudsman may have neither the powers nor the jurisdiction to ensure that government decision makers act with integrity the operation of the Office is the above case study illustrates the need for something to watch over us.