THE OMBUDSMAN AND THE RULE OF LAW

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The cost associated with bringing an action in a court and now also before a tribunal is resulting in an increasing use by members of the public of the Ombudsman as a means for requiring government organisations to comply with the law. Section 15 of the Ombudsman Act (Cth) contemplates that the Ombudsman might intervene in relation to a decision that appears to have been contrary to law or to have been based wholly or partly on a mistake of law. There is, however, a qualification on this power in that s6(2) provides that where a complainant has a right to cause the action to which the complaint relates to be reviewed by a court or by a tribunal, the Ombudsman may decide not to investigate the action if he is of the opinion that it would be reasonable for the complainant to exercise the right of review so provided. The way in which this last mentioned provision is drafted is of considerable significance. It can be seen that the discretion is couched in the form that the Ombudsman may decide not to investigate the matter if it is reasonable for the complainant to pursue the alternative right of review. In a number of the Australian jurisdictions and in the United Kingdom, the discretion is reversed. A complainant must be left to pursue the alternative means of review unless the Ombudsman if of the opinion that it would not be reasonable to expect him or her so to act. This led the UK Court of Appeal to rule that good cause must exist before the Ombudsman can take up a matter that is capable of being challenged in a court. It is not necessary for the Ombudsman to be persuaded of the likely success of the judicial review: it is sufficient if the forum of a court or tribunal is available for jurisdiction to be excluded, unless it would not be reasonable for the judicial route to be pursued: *R v Commissioner for Local Administration ex parte Croydon LBC* [1989] 1 ALL ER 1033. If the Commonwealth Act had been phrased in this fashion, it may well have limited the availability and the preparedness of the Ombudsman to take up matters where they were capable of being reviewed by the Federal Court or the AAT or another tribunal.

This is not to say that the Ombudsman does not exercise the discretion in s6. Particularly in the case of tribunals, a complainant will normally be told to pursue the available means of review. But this is not done as a matter of course. Factors taken into account include the cost involved, which is viewed against the amount at stake, the delays which inevitably occur in bringing an action in a court or tribunal and the impact that such delays will have on the complainant, whether the decision concerned can be said to be a standard administrative decision, and finally the nature of the question of law that is involved. The result of this approach to the discretion has meant that matters have been taken up that the UK style discretion would probably have precluded.

I would, for example, have not hesitated to investigate the facts that were before the Court of Appeal in the case referred to above. They involved a decision relating to which school the complainant's child could attend. The basis of complaint against the decision was that

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* *Commonwealth and Defence Force Ombudsman, 1988-1991.*

there had been an inflexible application of policy. While such an argument can found a judicial review application, it also clearly constitutes defective administration and thus falls within the ambit of the Ombudsman Act. It also represents the very type of decision that the Ombudsman was established to investigate and which it should not be necessary for a person to have to go to court to challenge.

Of greater significance, perhaps, are those cases where an amount of money is involved. Traditionally, of course, the courts have always provided the avenue of relief from the wrongful imposition of fees or charges. However, where the amount involved is small, this protection can be meaningless. It is not surprising therefore to find persons coming to the Ombudsman to seek assistance.

No better example of this can be provided than that of the imposition by the Department of Immigration, Local Government and Ethnic Affairs of a fee for seeking review of an adverse decision relating to an application to visit or migrate to Australia. The fee in question was initially $200 and subsequently rose to $240. There was no legislative basis for the imposition of this fee but it was collected over a two year period notwithstanding advice from various quarters that to do so was illegal. An action challenging the validity of the fee was commenced but not continued after legal aid was refused the applicant except on terms that could have involved her in meeting the costs of the action if unsuccessful.

Following my intervention, the Minister conceded that there was no legislative basis for collecting the fee and the practice was discontinued. There is not question that, but for my intervention, the Department would have continued to collect the fee not withstanding its doubtful validity. In practical terms, no action could possibly have been brought to have prevented this occurring because the sum at stake simply did not warrant the risk of costs involved. Shortly after this intervention another agency abandoned its practice of collecting a fee that had no legislative basis following my request that it obtain advice on the question from the Attorney-General's Department.

Another instance of successful Ombudsman intervention where judicial proceedings could in theory have been instituted but reality dictated otherwise was a case involving a breach of copyright by an agency had reproduced material in which the copyright lay with a member of the public. It declined to pay any compensation for its action . The agency file revealed that the legal officer of the agency had indicated that a breach of copyright had occurred and appropriate payment should be made. Management had however taken the line that the amount involved was small (around $600), the likelihood of the agency being sued for a sum of this size was slight and accordingly liability should be denied. Following my intervention, an appropriate sum of money was paid to the member of the public affected by the agency's action.

While the approach followed by the agency is frequently employed in the private sector, I could not see why a government agency should be able to pit the might of the Commonwealth Government against a citizen. So to act constituted an abuse of power but to seek protection through the judicial system was unrealistic.

A further case in which I exercised the discretion to continue to deal with a complaint was based not on the size of the amount at stake but on the fact that the parties had already litigated the issue and it seemed to me inappropriate for the complainant to have to return to court. A successful action had been brought to challenge liability for sales tax. When the complainant sought to recover the tax already paid, the Australian Tax Office

raised an objection to recovery of the overpaid tax that had not been taken before the court and which was, indeed, based on an argument that the use of the word 'may' in the relevant section imported a discretion whether or not to refund the overpaid tax. I took up the issue on the basis that the word 'may' was being used in the permissive sense and did not more than authorise the repayment of the monies concerned. This was accepted by the ATO but a further objection was then raised. This was also countered and the amount involved, some $300,000, was refunded.

As indicated above, the discretion not to intervene is more likely to be exercised where tribunal review is available. However, the practice of most agencies to be represented in actions before the AAT has induced me to look more carefully at instances where a complainant professes to be disadvantaged by not being able to afford legal representation. More obviously, I will take up an objection in tax cases where the effect of the regulations relating to AAT filing fees results in multiple fees having to be paid to attempt to recover a small sum of disputed tax. Likewise, I pursue complaints where the sum at stake does not justify the filing fee, eg compensation for mail lost or damaged by Australia Post.

These are but some recent examples where the Ombudsman has proved to be a more effective means of enabling a member of the public to obtain his or her legal rights than other avenues of review. The matter was highlighted for me as a result of a letter that I received recently from a firm of solicitors concerned with an exemption of certain goods from sales tax. The letter read in part:

> Because we find ourselves unable to accept the arguments that have been advanced to us, we have adopted this approach to you to ask your assistance in attempting to require the Deputy Commissioner to apply the guidelines laid down by the Commissioner of Taxation, the application of which would be to accept that the goods are exempt from sales tax under ... in the First Schedule to the Sales Tax (Exemptions and Classifications) Act. You may be interested to know why we have sought your assistance in this matter rather than pursue it through the provisions in the legislation relating to objections and appeals to either the Administrative Appeals Tribunal or the Federal Court. Our reason is quite simple, namely that we believe that, in this set of circumstances, you can obtain the desired result far more expeditiously, and far more economically, than through the procedures available in the sales tax legislation particularly as the guidelines have been so clearly stated by the Commissioner of Taxation.
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> The delay in bringing a matter such as this to one of these judicial authorities is estimated at 2 to 3 years and such delay in this case has the effect of placing a sales taxpayer in an invidious position pending the final decision - should he charge tax on goods which he believes to be exempt or should he take the risk which could, in the long run, entail him in a severe financial predicament.

The legal profession seems to me to have been rather slow in appreciating the value of the Ombudsman's office in dealing with complaints. However, this letter illustrates a recognition on the part of one firm at least that the litigation process is not the only way to achieve an end and may indeed be disadvantages to the client.

Another, and in many ways more insidious, threat to the rule of law has come to my attention. I have seen instances where an agency, having lost

before the Federal Court, takes advice as to whether an appeal could succeed and is told that there is a chance of success on appeal. Rather than going on with the appeal, the instant case is conceded but the statement of the law as laid down in that case is not followed. The preferred version that might have been given by the appeal court is that which is adopted. A similar approach is followed if an appeal is pending. Rather than treat the law as being that stated by the judge at first instance, the adverse decision is ignored and the law is continued to be applied in the form that it is hoped that the appeal court will determine. This action is justified on the basis that courts are known to change their minds or that the court has misinterpreted the legislation and that it will be put right by the higher court or by an amendment to the Act.

A similar approach is taken to Administrative Appeals Tribunal decisions that agencies do not like. The stated justification is similar to that applying to courts with the added argument that experience has shown that differently constituted tribunals produce different interpretations of the relevant legislation. In addition, of course, the AAT does not give a binding pronouncement upon the law and a failure to adhere to a ruling, technically speaking, does not constitute a refusal to follow the rule of law.

There is not a great deal that I can do in these latter cases other than attempt to persuade the agency of the folly of its ways or to threaten to expose the action engaged in should the issue come to my attention in a later case.

The preceding cases are examples of circumstances in which the Ombudsman's office provides a means of review notwithstanding the fact that the issue arising involves a question of law and there is nothing flowing from the office of Ombudsman that in itself makes any interpretation of the law by him definitive. This will not always be the approach followed. If the outcome of a complaint does turn on a difficult and disputed question of law, the complainant will be advised that it is not part of the Ombudsman's role to give legal advice or to choose between competing legal arguments. However, even in cases of this kind it may be that the Ombudsman will be persuaded to exercise his discretion and investigate a case - for the reasons set out previously relating to the complainant's circumstances. In such a case, it is common practice to request the decision-making agency to seek advice from the Attorney-General's Department on the legal issue involved. Such advice will constrain the actions of the agency.

There is another way of looking at these examples of the Ombudsman's work. They demonstrate the significance of the Ombudsman in upholding the rule of law. The courts have regrettably become the province of the rich and the legally aided.

It is instructive to look back to one of the most significant early stances by the courts to assert control over the executive. In *Dyson v Attorney-General* [1911] 1 KB 410 it was suggested that the making of a declaration of the application of a taxpayer should not be countenanced by the court because of its likely disruptive effect on administration. The court rejected this argument. Farwell L J said:

> there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any Court (at 423).

The observation is interesting in the light of the attitude of the agencies alluded to above. An equally pertinent remark from the same judgement is:

> If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression (at 424).

This is as true today as it was in 1911, but regrettably the cost of judicial review has become such that the courts can not always provide that defence to which Farwell L J was referring. The institution of Ombudsman is playing an increasingly significant role in providing a means of protecting citizens from an executive that is inclined to place efficiency and effectiveness ahead of compliance with the law.