

## WHO GUARDS THE GUARDIANS? RECENT DEVELOPMENTS CONCERNING THE JURISDICTION AND ACCOUNTABILITY OF OMBUDSMEN

*Katrine Del Villar\**

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*For this is not the liberty which wee can hope, that no grievance ever should arise in the Commonwealth, that let no man in this World expect; but when complaints are freely heard, deeply consider'd, and speedily reform'd, then is the utmost bound of civill liberty attain'd that wise men looke for.*

John Milton, *Areopagitica*.<sup>1</sup>

### **Introduction**

Writing in 1980, Kevin Cho said "Australia rivals Canada in its passion for Ombudsman",<sup>2</sup> there being at that time executive ombudsmen<sup>3</sup> (or Parliamentary Commissioners) in each of the States, the Commonwealth and the Northern Territory.<sup>4</sup> Since that time, ombudsmen in Australia have "gone forth and multiplied".<sup>5</sup> The past decade or so has witnessed the expansion of the ombudsman concept into the private sector, with the creation of industry ombudsmen schemes at both national and State levels to handle complaints about privatized essential services,<sup>6</sup> as well as complaints about industries which were never part of the public sector.<sup>7</sup> The ombudsman model has also been chosen to deal with single-issue complaints within a particular industry, a recent example being the proposed Music Industry Ombudsman which will have jurisdiction over censorship, but not other aspects of the music industry.<sup>8</sup>

Not only have specialist ombudsmen been established at both Commonwealth and State levels, but the public ombudsmen in many jurisdictions have been given additional functions, some of which represent a dramatic departure from their traditional role. In recent years, the Commonwealth Ombudsman has been given jurisdiction to investigate complaints against the National Crime Authority, the Commonwealth and NSW Ombudsmen have been tasked with monitoring compliance with controlled operations legislation, Victoria's Ombudsman has been given a very broad jurisdiction over complaints by whistleblowers, and the NSW Ombudsman has acquired both investigatory and supervisory jurisdiction in relation to complaints of child abuse, not just in relation to public sector employees.

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\* *Research Specialist, Information and Research Service, Commonwealth Parliamentary Library.*

Concerns have been expressed that the conferral of additional jurisdiction may compromise ombudsmen's reputation for impartiality and independent investigation, by conferring functions without the resources necessary to carry them out properly, and, in some circumstances, by giving ombudsmen a monitoring role without the ability to investigate.

Cases brought against ombudsmen in recent years have highlighted their considerable ability to damage an individual's reputation, in investigating such matters as allegations of sexual abuse,<sup>9</sup> professional misconduct<sup>10</sup> and police corruption.<sup>11</sup> Yet, despite the substantial influence possessed by ombudsmen, there has been little attention given to means of ensuring their accountability for the exercise of their investigatory powers. Developments relating to ombudsmen's obligation to disclose documents pursuant to freedom of information legislation,<sup>12</sup> the role of the courts in reviewing the exercise by ombudsmen of their powers,<sup>13</sup> and the connection between ombudsmen and parliaments appear to be as ad hoc as the accretion of additional areas of jurisdiction. An opportunity to reconceptualise the role of ombudsman was recently passed up when Queensland became the first jurisdiction to complete a comprehensive review of its Ombudsman. After a major independent review<sup>14</sup> and parliamentary review<sup>15</sup> of the office, the Queensland Parliament enacted the *Ombudsman Act 2001*, which largely replicates the substance of existing legislation.

Before continuing, it is worth briefly mentioning two recent developments which will not be considered further in this paper. Last year, the Telecommunications Industry Ombudsman (TIO) survived a constitutional challenge brought by two internet service providers who had failed to join the TIO scheme as required by legislation.<sup>16</sup> The case focused on the constitutional limitations on Commonwealth ombudsmen schemes, limitations which do not affect ombudsmen at State level or those established by industry without Commonwealth legislative backing. Secondly, South Australia has recently passed legislation that will expand the jurisdiction of the Ombudsman to cover government business enterprises, State owned corporations and outsourced government services, as well as giving the Ombudsman an "administrative audit" role.<sup>17</sup> Much has been written over the past decade about the need to extend public sector methods of accountability, including ombudsman review, to corporatised, privatised and outsourced bodies providing government services,<sup>18</sup> and there is no need to rehearse the debate here.

### **Expansion of Statutory Ombudsmen's Jurisdiction**

It is axiomatic that the role of public sector ombudsmen is, in Justice Kirby's words, "improving public administration and increasing its accountability"<sup>19</sup> by providing an independent review of administrative actions taken by a range of executive agencies.

Legislative developments in recent years have brought some executive agencies which have traditionally been excluded from the ombudsmen's purview, including the National Crime Authority, within jurisdiction. The Victorian Ombudsman has been given sweeping new powers to investigate and oversee the investigation of complaints by whistleblowers. Parliaments have also conferred on ombudsmen functions not directly involving the resolution of citizens' grievances against government, such as under controlled operations legislation.

Additionally, in New South Wales the Ombudsman has been given jurisdiction to investigate cases involving alleged child abuse. This represents a fundamental departure from the traditional role of ombudsmen in two respects: it empowers the Ombudsman to investigate actions taken by private bodies, including private schools and child care centres, and it involves investigation of matters wholly unrelated to administration, namely, whether child abuse has occurred.

The vesting of additional functions in the various ombudsmen is testimony to their success in handling complaints,<sup>20</sup> but it can also be perceived as somewhat “ad hoc”.<sup>21</sup> In some instances, the acquisition of these additional roles may not be appropriate, for, as Pearce has noted, ombudsmen have not had the same level of success in the performance of these functions as in their traditional complaint handling.<sup>22</sup>

### ***Complaints relating to policing***

In general, ombudsmen exercise a reinvestigatory role with respect to complaints against police.<sup>23</sup> That is, although in some jurisdictions a complaint may be made either directly to the ombudsman or to police,<sup>24</sup> there is either a legislative requirement or an administrative arrangement to the effect that the investigation of grievances is conducted initially by police and the ombudsman’s role is to monitor police internal investigations and ensure they are conducted properly.<sup>25</sup> Ombudsmen usually investigate only if they are not satisfied with the outcome of the internal investigation. The exception is New South Wales, where since 1993 the Ombudsman has had a power of direct investigation over the use of police powers, in addition to a supervisory jurisdiction over primary investigations conducted by police.<sup>26</sup>

### ***Boyce v Owen – reinvestigatory power against police***

A recent case from the Northern Territory, *Boyce v Owen*,<sup>27</sup> highlights the vexed relationship between ombudsmen and police. In that case, a journalist from the *Northern Territory News* questioned Northern Territory police about whether a senior police officer had acted improperly in tipping off the subject of a search warrant after signing the warrant. Police instigated an internal inquiry, and informed the Ombudsman of this. Two weeks later, the internal investigation was completed and the material was sent to the Ombudsman for his “independent consideration ... [and] advice on whether or not ... the particular allegation can be sustained”.<sup>28</sup> The Ombudsman decided the matter needed further investigation and wished to reinterview witnesses. The police officer whose conduct was in question, Superintendent Owen, challenged the Ombudsman’s jurisdiction.

The Court of Appeal of the Northern Territory held that the Ombudsman had no jurisdiction to conduct the investigation. The Ombudsman’s jurisdiction to investigate complaints against police is enlivened only when either a complaint is made by a “person aggrieved” to police and referred by the Commissioner of Police to the Ombudsman, or where a complaint is made direct to the Ombudsman.<sup>29</sup> The Court held that there was no valid complaint made by the *Northern Territory News*, because a journalist was not a “person aggrieved”, having no greater interest than

ordinary members of the public.<sup>30</sup> Thus, the matter having been raised in the first instance with the police, the Ombudsman had no power to reinvestigate the matter.

### ***Complaints against the NCA***

Since October 2001, the Commonwealth Ombudsman has had jurisdiction to investigate complaints about the administrative actions of the National Crime Authority (NCA).<sup>31</sup> The Ombudsman may transfer complaints about the NCA to another Commonwealth, State or Territory authority for investigation if that authority has jurisdiction to investigate the complaint and could more effectively or conveniently deal with it.<sup>32</sup> This is similar to existing provisions which permit the Ombudsman to decline to investigate a complaint which could be more appropriately dealt with by another body, such as the Privacy Commissioner, the Public Service Commissioner or an industry ombudsman.<sup>33</sup> The Ombudsman may also make cooperative arrangements with equivalent State and Territory bodies which have power over the NCA or certain members of staff of the NCA, to determine which authority should investigate complaints in a given case.<sup>34</sup> These provisions are necessary in view of the fact that the NCA is not solely a Commonwealth body, but a transjurisdictional body which employs Commonwealth and State staff, including seconded State Police.

The amendments giving the Ombudsman jurisdiction over the NCA also protect sensitive information by prohibiting the Ombudsman from exercising his or her power to obtain information or documents relevant to a statutory investigation, where disclosure by the NCA would endanger a person's life or create a risk of serious injury.<sup>35</sup> Further, the Ombudsman must not disclose information given to the office by the NCA if the Attorney-General certifies that disclosure would be contrary to the public interest because it would prejudice a person's safety or fair trial, the effectiveness of an NCA investigation or the operations of a law enforcement agency.<sup>36</sup>

### ***Controlled operations***

Also in 2001, the Commonwealth Ombudsman was allocated the task of monitoring and reviewing compliance with controlled operations legislation<sup>37</sup> by the Australian Federal Police (AFP) and the NCA. With the passage of the *Measures to Combat Serious and Organised Crime Act 2001* (Cth), the powers of the AFP and NCA to conduct controlled operations were greatly enhanced, including by:

permitting officers to conduct controlled operations in relation to any "serious Commonwealth offence", not just drug-related offences;<sup>38</sup>

indemnifying officers against civil as well as criminal liability for any acts undertaken in the course of a controlled operation;<sup>39</sup>

extending the immunity from criminal and civil liability to persons other than law enforcement officers who take part in an authorised controlled operation;<sup>40</sup> and

authorizing controlled operations for up to 6 months rather than 30 days.<sup>41</sup>

To provide a counterbalance, additional accountability measures and safeguards were created, including a new monitoring and review role for the Ombudsman. This is modelled on, and largely mirrors, the powers and functions of the NSW Ombudsman in overseeing controlled operations in that State.<sup>42</sup> The NCA and the Commissioner of Police must make quarterly reports to the Minister giving details relating to each controlled operation.<sup>43</sup> The Ombudsman must also be given copies of these reports, and may require additional information about particular controlled operations mentioned in the reports.<sup>44</sup> The Ombudsman must inspect the records of the AFP and the NCA in relation to controlled operations at least once every 12 months; and may inspect the records at any time to ascertain whether the controlled operations provisions are being complied with.<sup>45</sup>

The Ombudsman is then accountable to the Parliament. In addition to detailed annual reports by the Minister,<sup>46</sup> the Ombudsman must report annually to both Houses of Parliament on his or her supervisory function reviewing controlled operations, including comments “as to the comprehensiveness and adequacy of the reports which were provided to the Parliament by that law enforcement agency.”<sup>47</sup>

It is important to note that the Ombudsman’s role does not extend to the investigation of complaints relating to the conduct of controlled operations by the AFP or the NCA. The role is limited to monitoring compliance with the legislative formalities, and in this respect parallels the Commonwealth Ombudsman’s existing role in overseeing the issue of warrants for telecommunications interception.<sup>48</sup>

### **Commentary**

The investigation of complaints against the police “has proved problematical in every jurisdiction”.<sup>49</sup> Although the investigation of complaints is the core function of ombudsmen, complaints against police differ from other areas of ombudsmen’s responsibility in that many complaints involve allegations of criminal behaviour, often with no independent witnesses.<sup>50</sup> The resources required to investigate allegations of criminality are far more demanding than to investigate a bureaucratic delay, for example. It is commonplace to observe that ombudsmen are generally under-resourced,<sup>51</sup> and often unable to investigate complaints against police adequately, particularly complaints involving allegations of significant criminality. Thus, in most cases they rely on police internal investigation and there is no external, independent review of complaints by the ombudsman.<sup>52</sup> As Alan Cameron has noted, there is a “credibility gap inherent in a system which involves police conducting all the investigations, and the Ombudsman being limited to reviewing the results.”<sup>53</sup>

Both the Senate Committee and the Australian Law Reform Commission recommended that police complaints be removed from the Ombudsman’s jurisdiction, because of resource considerations and the serious nature of the complaints.<sup>54</sup> *Boyce v Owen* provides yet another reason to consider this, namely, that technical jurisdictional limitations such as standing can prevent ombudsmen from exercising their reinvestigatory powers even in those few cases in which they choose to do so.

The selection of the Commonwealth Ombudsman to scrutinise the administrative actions of the NCA and to monitor the AFP’s and the NCA’s compliance with

controlled operations legislation is a testament to the office's integrity and high public stature.<sup>55</sup> The Parliamentary Joint Committee on the National Crime Authority had recommended that the Commonwealth Ombudsman should have oversight of controlled operations, partly in order to "reassur[e] the community of the integrity of the system"<sup>56</sup> by providing an independent external source of accountability. However, this contradicted the recommendation of the only Commonwealth parliamentary committee to expressly consider the role of the Ombudsman, which recommended the removal of the analogous role in relation to telecommunication interception warrants from the Ombudsman, on the ground that the function was not appropriate for the Ombudsman.<sup>57</sup>

Further, the conferral of jurisdiction on the Ombudsman to investigate complaints against the NCA goes directly against the recommendation of the Australian Law Reform Commission, which was that complaints against the AFP and the NCA be given to a separate body which would deal both with individual complaints and corruption issues.<sup>58</sup>

As Pearce has observed, an "Ombudsman should not be asked to perform functions just because a government wants to say that they have been entrusted to a body of integrity."<sup>59</sup> The Ombudsman is not the only public office with a reputation for integrity and independence. For example, in Queensland the conduct of controlled operations is approved by the Controlled Operations Committee<sup>60</sup> which is constituted by a retired Supreme Court or District Court judge, the chief executive of the police service and the chief executive of the Crime and Misconduct Commission.<sup>61</sup> The Committee reports to the Minister, and the reports must be tabled in Parliament.<sup>62</sup>

Further, giving the Ombudsman jurisdiction to oversee compliance with the legislative formalities "creates the false impression that the Ombudsman has the power to investigate complaints about action taken under the Act."<sup>63</sup> It also diverts attention and resources away from the Ombudsman's mainstream functions.<sup>64</sup> At a time when ombudsmen are already burdened with more functions than they have the resources to perform, the recent legislative amendments may be yet another example of what Richardson describes as conferring on the office "additional functions without proper thought about the budgetary implications."<sup>65</sup>

### ***Complaints by whistleblowers***

Whistleblowing, or disclosure of protected information in the public interest, is another area of complaints that has been allocated to ombudsmen in some jurisdictions. Last year, Victoria became the fifth jurisdiction in Australia to introduce legislation to protect whistleblowers.<sup>66</sup> The Victorian legislation can be characterized as second generation legislation, in view of the level of detail it prescribes and the strong investigative and monitoring role it accords to the Victorian Ombudsman.

### ***Victoria's Whistleblowers Protection Act 2001***

The *Whistleblowers Protection Act 2001* (Vic) gives the Victorian Ombudsman jurisdiction to investigate disclosures by whistleblowers of improper conduct by public officers and public bodies. Improper conduct is defined to mean corrupt

conduct, a substantial mismanagement of public resources, or conduct involving substantial risk to public health or safety or to the environment that would constitute either a criminal offence or grounds for dismissal.<sup>67</sup> In general, a whistleblower has a choice to disclose improper conduct to the Ombudsman or to the relevant public body (or the Chief Commissioner of Police for disclosures relating to police).<sup>68</sup> If a public interest disclosure<sup>69</sup> is made to the Ombudsman's office, the Ombudsman has a duty to investigate it unless it is trivial, frivolous, vexatious or more than 12 months old.<sup>70</sup> However, the Ombudsman may refer matters to the Chief Commissioner of Police, the Auditor-General, or the relevant public body for investigation, if he or she considers it appropriate.<sup>71</sup> The Ombudsman may request the secondment of police officers or staff of a public body to assist in investigations.<sup>72</sup> The Ombudsman reports the results of his or her investigations either to the responsible Minister or to the head of the public body.<sup>73</sup> If insufficient steps have been taken to implement the Ombudsman's recommendations, the ultimate sanction is to report to Parliament.<sup>74</sup>

If a whistleblower complains to the relevant public body or the Chief Commissioner of Police rather than to the Ombudsman, that body investigates the complaint and the Ombudsman monitors the investigation.<sup>75</sup> The Ombudsman has power to take over an investigation, if the public body refers it to the Ombudsman,<sup>76</sup> if the whistleblower requests it,<sup>77</sup> or if the Ombudsman is not satisfied with the progress of an investigation.<sup>78</sup> A report on the result of the investigation is made to the Ombudsman as well as to the relevant Minister.<sup>79</sup> Thus, the Ombudsman has either primary or supervisory jurisdiction over all complaints made by whistleblowers in Victoria.

The Ombudsman also has a standard-setting role in preparing and publishing guidelines for the procedures to be followed by public bodies in relation to complaints by whistleblowers and their investigation.<sup>80</sup>

### ***Commentary***

The Victorian legislation differs from the legislation in the other four jurisdictions in the primacy which it gives to the Ombudsman as complaint investigator, and the level of detail it prescribes about the conduct of investigations.

In South Australia and New South Wales, the Ombudsman is empowered to receive only complaints relating to maladministration.<sup>81</sup> Complaints about the waste of public money must be made to the Auditor-General,<sup>82</sup> and complaints about police must be made to the relevant police complaints authority.<sup>83</sup> In Queensland, the Ombudsman has no special role in investigating complaints and is not even referred to in the legislation, although clearly he or she would be able to receive complaints from whistleblowers relating to maladministration.<sup>84</sup>

It could be difficult for whistleblowers not wishing to complain to the relevant government agency to identify the correct independent body to whom complaint can be made. The Victorian model has the advantage of simplicity in that virtually all complaints can be made to the Ombudsman. This is also the case in the ACT, where the Ombudsman and the Auditor-General are authorized to receive complaints from any person. However, in the ACT the Ombudsman exercises a residual investigatory jurisdiction – he or she may only investigate if he or she considers “there is no other

proper authority that can adequately or properly act on the disclosure; or that any proper authority that should have acted on the disclosure has failed, or been unable for any reason, to adequately act on the disclosure”.<sup>85</sup> Otherwise, the complaint should be referred to the relevant government agency for investigation.

None of the other four statutes contain any detail about how investigations are to be conducted, or provide for the monitoring of investigations. The Victorian legislation is unique in that regard, and in its provision for the Ombudsman to set standards for government departments and agencies to adopt in their internal dealings with complaints made by whistleblowers. It represents a model which could usefully be adopted in other jurisdictions considering amendment to their legislation.

### ***Complaints of child abuse***

In New South Wales, in a radical extension of the traditional role of ombudsmen, the Ombudsman has been given jurisdiction to investigate cases involving alleged child abuse arising out of the actions of both key public agencies providing services to children and certain private bodies, including private schools and child care centres.

### ***New South Wales child abuse legislation***

In 1998, in response to the Wood Royal Commission’s *Final Report into Paedophilia*, (which reported in August 1997), the New South Wales Parliament conferred on the State’s Ombudsman new and unprecedented powers<sup>86</sup> to investigate allegations of child abuse in the context of the child-related employment screening scheme. Child abuse is broadly defined to include sexual abuse, physical assault, ill-treatment or neglect, and “exposing or subjecting a child to behaviour that psychologically harms the child”.<sup>87</sup> The aim of conferring these powers on the Ombudsman is to overcome the potential “conflicts of interest when agencies investigate child abuse allegations made against their staff.”<sup>88</sup>

The legislation places an “absolute obligation”<sup>89</sup> on the heads of designated agencies to inform the Ombudsman of every allegation or conviction of child abuse made against an employee, and of the disciplinary action or investigation undertaken in response to it.<sup>90</sup> The agencies designated for mandatory reporting are those that provide services to children, such as government schools, area health services, the Department of Community Services, other listed Departments<sup>91</sup> and any public authorities prescribed by regulation. Significantly, the Act also applies to some non-government agencies which provide services to children, specifically private schools, child care centres and residential substitute care services.<sup>92</sup> These agencies must refer to the Ombudsman any allegation of child abuse by an employee, even if there is no suggestion that it took place in the workplace. In addition, all other government agencies must notify the Ombudsman of any allegations or convictions of child abuse by employees if the abuse arises in the course of employment.<sup>93</sup>

The Ombudsman has power to monitor internal investigations of child abuse allegations against employees, including being present at interviews,<sup>94</sup> although he or she does not have to exercise this power. The Ombudsman must receive a copy of all completed reports of investigations, must be informed of what action is proposed following the conclusion of the agency’s investigation, and is entitled to



request any additional documentation relating to investigations at any time.<sup>95</sup> The Ombudsman may even take over the conduct of investigations if he or she so decides. The Ombudsman is also tasked with investigating complaints about the way agencies have dealt with child abuse allegations, and additionally has the power to investigate agencies' complaint handling procedures on his or her own motion.<sup>96</sup>

In addition to monitoring the complaint handling and investigation of agencies, the Ombudsman has power to conduct direct investigations into allegations of child abuse. This applies both to those which have been compulsorily reported and to allegations of which the Ombudsman "otherwise becomes aware".<sup>97</sup> This is an exceedingly wide power to investigate directly whether or not child abuse occurred, as distinct from the disciplinary proceedings taken in response to child abuse allegations.

Significantly, the Ombudsman has power to disclose information received to police officers and other relevant investigative agencies.<sup>98</sup> Although generally the Ombudsman is constrained by secrecy obligations,<sup>99</sup> these do not apply to disclosures relating to child abuse.

The Ombudsman is also given the general function of scrutinizing the systems in place for preventing child abuse, and the systems for handling and responding to child abuse allegations or convictions against employees of designated government and non-government agencies.<sup>100</sup> Part of the Ombudsman's role is to assist agencies to develop standard procedures for responding to allegations of child abuse.

### ***Challenge to the NSW legislation – K's case***

This jurisdiction of the Ombudsman was challenged in the New South Wales Supreme Court in 2000. *K v NSW Ombudsman*<sup>101</sup> involved allegations of child abuse which had been made against "K", a female high school teacher in New South Wales. K denied the allegations, and the NSW Department of Education and Training brought disciplinary proceedings against her. After an inquiry, the charges were found to be "not proven" and were dropped by the Department. The following year, the Ombudsman announced that he was conducting an investigation into both the conduct of the Department in relation to its disciplinary proceedings, and the conduct of K in relation to her former pupil.

K instituted proceedings challenging the Ombudsman's jurisdiction to investigate both the Department and K's conduct. Whealy J held that the Ombudsman clearly had jurisdiction not only to investigate the systems in place in designated agencies for preventing child abuse and responding to allegations of child abuse, but also to investigate the substance of the child abuse allegations, as "the powers conferred on the Ombudsman under s 25G appear in a context of the widest import in relation to the question of child abuse."<sup>102</sup>

### ***Commentary***

While the Ombudsman is investigating the adequacy of internal investigations of child abuse allegations, the focus remains the agency and its administrative

procedures. The Ombudsman's function in scrutinizing agencies' systems for the prevention of and response to child abuse also arguably relates to matters of administration. It is analogous to the oversight roles given to some ombudsmen in recent years, such as in relation to telecommunications interception warrants, whistleblower protection in Victoria, and controlled operations.

However, the power given to the NSW Ombudsman to conduct his or her own independent investigation into whether child abuse did in fact occur represents a drastic departure from the traditional conception of the role of the ombudsman, in three respects. First, it permits the Ombudsman to oversee disciplinary proceedings conducted by agencies, whereas the majority of statutory ombudsmen are precluded from investigating employment-related action such as disciplinary proceedings, promotions and dismissals.<sup>103</sup> Secondly, the Ombudsman's jurisdiction breaks new ground in that it extends to allegations of child abuse made against employees of private sector bodies, such as private schools and child care centres, as well as to volunteers, not just paid employees. Thirdly, the Ombudsman's ability to directly investigate substantive complaints involving the commission of a serious criminal offence represents a rejection of one of the traditional limitations imposed on ombudsmen. In two early cases, one in Victoria and the other in Saskatchewan, courts held that unlawful assaults by prison officers were not able to be investigated by ombudsmen. This was because an assault is not a "matter of administration", since unlawful criminal conduct cannot be authorized, explicitly or impliedly, by an employer. However, the failure of senior prison officers to discipline the offending officer,<sup>104</sup> or the failure to take steps to investigate a complaint to prison authorities<sup>105</sup> would be administrative matters properly within an ombudsman's province of investigation.<sup>106</sup>

Although the NSW Ombudsman's role is investigatory, and he or she has no determinative powers, hence no power to make "findings" of guilt, even the reporting of "opinions" touching individual guilt carries the risk of irreparably damaging individual reputation.<sup>107</sup> In the public mind, indeed even in law, the distinction between a "finding" and an "opinion" can be elusive.<sup>108</sup> Thus, even comments concerning individual culpability can be devastatingly damaging:

Insinuations of personal culpability by a major public investigative body carry great stigma and have the potential to do serious harm to reputations. Given the nature of the claims and the forum in which they are being made here, such reputations may never have the opportunity of being vindicated at a trial. Additionally it is not at all unlikely that such conclusions could interfere with any disciplinary process.<sup>109</sup>

That this is so is underlined by the fact that a number of the cases involving ombudsmen have been brought in order to clear a person's reputation, whether by obtaining an effective acquittal by the ombudsman,<sup>110</sup> or by seeking to prevent the ombudsman from publishing damaging opinions.<sup>111</sup> In a recent case, an ombudsman's conclusion that there was a "reasonable likelihood" that a solicitor had engaged in "unsatisfactory conduct" upset the solicitor sufficiently to cause him to bring proceedings seeking to clear his name, even though the ombudsman decided to take no further action and dismissed the complaint against him.<sup>112</sup> An ombudsman's opinion that a person may have engaged in child abuse, even though not determinative of the issue, would carry even greater stigma and risk of harm.

An additional note of caution is that ombudsmen, unlike courts and tribunals, are not bound by principles of double jeopardy, but have the power to reopen investigations at any time, even after issuing a formal report, where new information comes to hand which suggests the possibility of error in the initial finding.<sup>113</sup> This lack of finality has the potential to have an extremely serious impact on the lives of individuals against whom allegations of child abuse have been made.

Finally, it must be observed that the jurisdiction represents a very significant additional burden on the NSW Ombudsman's office. In 2000-2001 the Ombudsman received a total of 1,379 written notifications and 56 complaints concerning child abuse, but monitored only six investigations.<sup>114</sup> To avoid the problems experienced with police complaints in many jurisdictions, where ombudsmen are given powers which they are unable to exercise in the majority of cases by reason of resource constraints, it is essential that the NSW Ombudsman is granted sufficient additional resources to perform these functions satisfactorily.

### **Avenues of Accountability for Ombudsmen**

Given the additional responsibilities which are being vested in ombudsmen, and their ability to affect individual reputation, the question arises as to what avenues exist to ensure accountability. Although ombudsmen themselves are a means of ensuring accountability of government, they are not immune from such processes. Some mechanisms are freedom of information legislation, judicial review and accountability to Parliament. The application of such accountability processes to ombudsmen has been and continues to be contentious.

#### ***Freedom of information***

There is an ongoing tension between the privacy of investigations by ombudsmen and freedom of information (FOI) legislation. This has been resolved in some jurisdictions, most recently Victoria, by exempting ombudsmen from the requirement to comply with FOI legislation altogether. In other jurisdictions, despite being subject to FOI legislation, many documents prepared by ombudsmen's offices fall within one or more of the specific exemptions to disclosure.

#### ***Recent cases – no secrecy exemption***

All jurisdictions provide that an ombudsman's investigations are to be in private,<sup>115</sup> and prohibit the ombudsman and his or her staff disclosing any information obtained in the course of their duties except in certain narrowly defined circumstances.<sup>116</sup> Despite this, in the seminal case of *Kavvadias v Commonwealth Ombudsman* the Federal Court held that a secrecy provision which is expressed in general terms is not effective to exclude the operation of freedom of information legislation.<sup>117</sup> Thus, in the absence of a specific exemption, ombudsmen are subject to FOI legislation despite their secrecy obligations.

This principle has been reaffirmed in four recent tribunal cases, two in the Commonwealth Administrative Appeals Tribunal,<sup>118</sup> and two in the Victorian Civil and Administrative Tribunal.<sup>119</sup> In the Victorian cases, the Tribunal drew the distinction drawn in *Kavvadias* between the nature of the information to be protected from

disclosure, and the person or office-holder who is prohibited from disclosing information. It affirmed that the secrecy exemption under FOI legislation applies to provisions directed to particular information, rather than to a blanket prohibition on disclosure of information by particular office-holders. Thus, the Ombudsman's secrecy obligations did not exempt him or his staff from their FOI obligations.<sup>120</sup>

### **Brown and Woodford – internal working documents exemption**

In *Brown v Commonwealth Ombudsman*, the Commonwealth Ombudsman was successful in having his draft report (which had been sent to the agency with opportunity to comment) and written submissions in response by the agency's solicitors declared to be exempt from disclosure to the complainant under FOI legislation under the provision exempting "internal working documents".<sup>121</sup> This exemption requires weighing "the public interest in citizens being informed of the processes of their government and its agencies" against "the public interest in the proper working of government".<sup>122</sup>

The Ombudsman submitted:<sup>123</sup>

The fact that investigations are conducted in private enables them to proceed as fairly and efficiently as possible with the Ombudsman forming tentative views about an action subject to investigation and maintaining, revising or discarding those views as further information comes to light. ....

It would defeat the object of this legislative scheme if the Applicant were to gain access to material containing tentative opinions about the investigation up to the point where the draft reports were issued when, on further investigation, those opinions were altered.

The Tribunal concluded that the "proper working of government" required that the Ombudsman be able to reach tentative conclusions in draft reports, then forward them to the agency concerned to give it an opportunity to comment, without fear that such provisional opinions would be disclosed to the complainant or the public. The Tribunal concluded that it would be contrary to the public interest for such tentative criticisms to be disclosed, as "their publication could create a misleading or perhaps unfair impression in the public mind".<sup>124</sup>

In *Woodford*, the VCAT independently concluded that draft letters and interview preparation notes fell within the exemption for internal working documents.<sup>125</sup>

### **Woodford – confidentiality exemption**

In *Woodford*, despite affirming that the Victorian Ombudsman could not claim a general exemption from FOI legislation on account of his or her secrecy obligations, Senior Member Preuss accepted that certain categories of documents were exempt from disclosure. She held that tapes of interviews, notes of interviews and file notes of discussions with interviewees were exempt, on the basis that the information was obtained in confidence.<sup>126</sup> She referred to the combined effect of various statutory provisions as indicating a confidential process,<sup>127</sup> and concluded that "the hallmark of documents relating to investigations conducted by the Ombudsman is confidentiality".<sup>128</sup> She accepted the Ombudsman's argument that the office has always acted on the basis that interviews are conducted in confidence, and that it

would make it extremely difficult for the Ombudsman to obtain full and frank information (without resorting to use of its coercive powers) in the absence of such assurances of confidentiality.<sup>129</sup>

### ***Victorian legislation – Ombudsman exempt from FOI***

Since 19 June 2001, when the *Whistleblowers Protection Act 2001* (Vic) was passed and commenced, the Victorian Ombudsman's office has enjoyed exemption from FOI disclosure for documents which contain information relating to complaints, preliminary enquiries, investigations, reports or recommendations.<sup>130</sup> The exemption is not a reaction to the cases of *Woodford* and *Al Hakim*, as the Tribunal members in both cases noted that the Bill was already before Parliament. Rather, it restores the general exemption from freedom of information legislation that the Victorian Ombudsman had enjoyed from 1987 to 1993, and which, it has been argued, was unintentionally removed by changes to the definition of "agency" in 1993.<sup>131</sup>

A general immunity from freedom of information legislation is not without precedent in Australia. The South Australian Ombudsman enjoys exemption from freedom of information requirements<sup>132</sup> and the NSW Ombudsman in 1990 obtained an exemption for the office's complaint handling, investigative and reporting functions.<sup>133</sup>

### ***Commentary***

These cases highlight the tension between the public interest in openness and accountability of government (which is protected through FOI legislation) and the need for openness and frankness in communications with ombudsmen (which is safeguarded through the secrecy and confidentiality provisions in ombudsman legislation).

The solicitors for Mrs Woodford argued that the public interest demands "the public accountability of the Ombudsman and his processes", as the Ombudsman is a part of government. They argued that "if the Ombudsman was not subject to the provisions of the FOI Act, the whole system of accountability of government was undermined."<sup>134</sup> Similarly, Allars queries whether "ombudsmen deserve the non-negotiable trust of complainants and public servants" or whether there is something anomalous in ombudsmen being exempt "from a mechanism for achieving open government and hence administrative accountability".<sup>135</sup>

The exemptions granted over individual documents in cases such as *Woodford* would exclude a considerable portion of the Ombudsman's file from disclosure, leaving little more than internal file notes, correspondence sent and received and published reports. If the private and confidential nature of the ombudsman process and the need for secrecy to obtain full and frank disclosure of information are more important than accountability to the public, it may be preferable for Parliament to confer on ombudsmen a blanket exemption from FOI legislation, as has been granted in Victoria, New South Wales and South Australia, rather than undermine the philosophy by granting ad hoc exemptions for specific classes of document.

**Availability of judicial review**

If ombudsmen are exempt, or partially exempt, from public accountability through FOI legislation, greater weight falls upon other accountability mechanisms such as judicial review and parliamentary oversight. In all jurisdictions, ombudsmen are immune from civil liability for their actions unless they are done in bad faith.<sup>136</sup> In addition, privative clauses purporting to oust the jurisdiction of superior courts to review decisions of ombudsmen exist in a number of jurisdictions.<sup>137</sup> Contrary to the general tendency to interpret such provisions narrowly so as not to remove significant decisions from the jurisdiction of the courts,<sup>138</sup> privative clauses relating to ombudsmen have been literally interpreted as excluding any proceedings for judicial review, including on the ground of excess of jurisdiction.<sup>139</sup> A very recent Tasmanian case reaffirms that where a privative clause exists, the courts will not review the findings of ombudsmen, except pursuant to the specific statutory procedure which in all jurisdictions allows a superior court to determine questions concerning an ombudsman's jurisdiction.<sup>140</sup> Questions concerning judicial review of determinations also arise in relation to industry ombudsmen, as is illustrated by the *Citipower* case. Queensland has recently made major changes to the Ombudsman's liability, including removing the privative clause and immunity from criminal and some forms of civil liability.

**Queensland legislation – removal of privative clause**

The *Parliamentary Commissioner Act 1974* (Qld) contained a fairly comprehensive privative clause.<sup>141</sup> It provided the Parliamentary Commissioner and his or her staff with immunity from all civil and criminal proceedings, save for acts done in bad faith, and then proceedings could be brought only with leave of the Supreme Court. It further provided that no prerogative writ of any sort would lie against the Parliamentary Commissioner, and gave the Commissioner immunity from giving evidence or producing documents in judicial proceedings.

When in 2001 this legislation was repealed and replaced with the *Ombudsman Act 2001* (Qld), these significant protections were not reenacted. Instead, the new legislation contains a simple clause protecting the Ombudsman and his or her staff from civil liability for acts done "honestly and without negligence."<sup>142</sup>

This alteration was not remarked on by Premier Beattie in delivering the second reading speech, where he emphasized that the new legislation "does not represent substantial changes."<sup>143</sup> However, the Explanatory Notes explain that "the immunity of the Ombudsman and staff from proceedings is less extensive than the current provision and meets concerns expressed by the Scrutiny of Legislation Committee about similar provisions."<sup>144</sup> This new provision is extremely significant, because it renders the Queensland Ombudsman and his or her staff liable to criminal proceedings, civil suit where negligence is alleged, and the full range of judicial review actions for administrative error.

**Scutt case – statutory ombudsmen**

The Tasmanian case of *Anti-Discrimination Commissioner v Acting Ombudsman*<sup>145</sup> is an instructive and unusual example of the need for ombudsmen not only to resolve

grievances brought by members of the public, but also to mediate between government officials at loggerheads. Dr Jocelyne Scutt, the Tasmanian Anti-Discrimination Commissioner, brought proceedings in the Supreme Court challenging the Ombudsman's jurisdiction to investigate and report on complaints made against her. She was investigating two serious matters involving sexual abuse and wrongful dismissal.<sup>146</sup> The government bodies under investigation<sup>147</sup> requested the Director of Public Prosecutions (DPP) to act for them, but Dr Scutt refused to correspond with the DPP, instead addressing all correspondence to the bodies themselves and complaining of no response to her letters (since she did not acknowledge responses from the DPP). The DPP lodged a number of complaints with the Ombudsman about Dr Scutt's conduct.

The Ombudsman reported, finding that some of the DPP's complaints were substantiated but others were not. She found Dr Scutt's refusal to reply to the DPP's correspondence "amounted to a lack of basic manners and observance of basic communication rules" and was discourteous and not good administrative practice.<sup>148</sup> The investigation had concerned the Ombudsman in that "it had revealed a degree of apparent animosity between two very senior officers which she considered to be unproductive and unbecoming".<sup>149</sup>

After the Ombudsman had reported, the Anti-Discrimination Commissioner brought proceedings in the Supreme Court seeking declarations that the Ombudsman did not have jurisdiction to investigate or to report on either matter. The Tasmanian legislation conferred immunity on the Ombudsman and her staff from any civil or criminal proceedings on the ground of want of jurisdiction or any other ground, in the absence of bad faith.<sup>150</sup> It provided a statutory cause of action in the Supreme Court to determine whether "in the course of, or in contemplation of, an investigation, ... the Ombudsman has jurisdiction to conduct the investigation".<sup>151</sup>

Justice Crawford held that, because of the privative clause, he had no power to engage in a general review of the Ombudsman's opinions on administrative law grounds. He had power under the specific statutory procedure to determine only the threshold question of whether the Ombudsman had jurisdiction to conduct the investigation.<sup>152</sup> However, he did accept that the statutory procedure was not, as earlier decisions in other jurisdictions<sup>153</sup> had held, limited to the time when an investigation by the Ombudsman is being contemplated or is currently underway. He accepted that an application may be made to the Court for determination of the Ombudsman's jurisdiction even once the Ombudsman has completed the investigation.<sup>154</sup>

### ***Citipower case – industry ombudsmen***

Industry ombudsmen may also be immune from judicial review actions, even where no immunity is provided for in legislation. In 1999, the Victorian Supreme Court considered a case brought against the Electricity Industry Ombudsman (Vic) Ltd (EIOV) by Citipower, a supplier of electricity against whom the EIOV had awarded compensation to three consumers in respect of damage suffered as a result of an interruption to power supply.<sup>155</sup> Citipower argued that the EIOV had made orders which were beyond power, or, alternatively, were in breach of the EIOV constitution.

The case turned on the construction of the provisions of the EIOV constitution, which formed a contract between the EIOV and its members, electricity suppliers.

Justice Warren held that Citipower was contractually bound to accept a determination of the EIOV and the court should not interfere with the Ombudsman's determination, as the EIOV's jurisdiction to determine complaints arises from the contract constituted by the constitution and voluntarily entered into by the parties. She accepted that some disputes are better decided by non-lawyers or by people with specialist expertise in the particular industry, and "sometimes, it is appropriate that State-appointed judges stay outside disputes of certain kinds which a private domestic tribunal has been appointed to decide."<sup>156</sup> This does not mean that such tribunals are above the law, merely that "the courts will not discourage private organisations from ordering their own affairs within acceptable limits".<sup>157</sup>

However, courts can examine whether private adjudicative bodies such as industry ombudsmen have complied with the terms of their contract. Justice Warren construed the terms of the EIOV constitution and concluded that the EIOV was entitled to proceed to the determinations she made.<sup>158</sup> She emphasized that it was not open to her to substitute his own finding on the facts unless the EIOV's determination was "so aberrant as to be irrational."<sup>159</sup>

### ***Commentary***

Ombudsmen were traditionally seen as an adjunct to Parliament, supplementing citizens' ability to complain to their member of Parliament. Now, increasingly they are becoming a real alternative to courts and tribunals, providing accessible, speedy and low-cost remedies.<sup>160</sup> This is particularly so with private industry ombudsmen, which commonly have the power to make binding determinations of monetary compensation up to a certain amount. Public ombudsmen have no power to enforce their recommendations, to overrule the decisions of government officials, or to compel any action on the part of the relevant individual, department or authority. Nevertheless, they have a number of powers, including report to the Premier or Prime Minister, report to Parliament and publicizing their reports, which are powerful in persuading agencies to act on their recommendations and thus provide an effective remedy to aggrieved individuals.<sup>161</sup> Indeed, a South Australian judge has commented that "it may be expected that those officials and agencies which are subject to [the Ombudsman's] jurisdiction will comply with his recommendations."<sup>162</sup> The ability of reports by ombudsmen to have a dramatic impact on individuals' reputations has already been noted.

In view of the fact that ombudsmen now represent an effective alternative to the courts in the resolution of disputes, it is questionable whether courts should exercise a greater degree of restraint in reviewing the decisions of ombudsmen than they do in relation to other administrators, or indeed whether the ability to appeal to the courts as a last resort can justifiably be excluded, as it has been in some jurisdictions.

In relation to private ombudsmen, the justification appears to be non-intervention with the terms of the contract by which the parties have agreed that dispute resolution by the ombudsman will be final and binding. However, the contract



analysis is flawed in that the individual consumers, who are not parties to the contract and did not choose the terms of the ombudsman scheme, will also be excluded from seeking judicial review of the ombudsman's decisions which directly affect them. Further, the service providers, although they may be parties to the contract establishing an industry ombudsman scheme, are often not in the position of equal parties who have freely chosen to be bound by ombudsmen determinations. This is particularly the case where legislation compels participation in an ombudsman scheme, as it does for example with the EIOV and the Telecommunications Industry Ombudsman. This problem could be ameliorated if the contract establishing a private ombudsman, or legislation requiring the implementation of an ombudsman scheme, gave consumers remedies, for example by providing for arbitration or tribunal or judicial review in the event of a dispute between the ombudsman and a consumer or scheme member.<sup>163</sup>

In relation to public ombudsmen, the justification for the non-availability of judicial review of the ombudsmen's decisions seems to be that judicial review is already available in respect of the decisions of the agency in question, so does not need to be applied a second time to the ombudsman's investigation. Further, ombudsmen are accountable to Parliament, and "this creates at least one avenue whereby any disquiet on any issue within the jurisdiction of the Ombudsman can be properly looked at."<sup>164</sup> Finally, the fact the Ombudsman's power is recommendatory only and has no binding effect is significant in the non-availability of judicial review,<sup>165</sup> despite the authoritative nature of the recommendations. However, the importance ascribed to this last matter may be queried given the potential of ombudsmen's recommendations (particularly in investigating serious matters such as child abuse) to dramatically damage individuals' reputations, a factor which was highlighted by the High Court's decision to review preliminary decisions of the Criminal Justice Commission.<sup>166</sup>

Despite the continuing reticence of the courts to become involved in reviewing ombudsmen's decisions, as demonstrated in the *Scutt* case and the *Citipower* case, some steps are beginning to be taken towards ensuring accountability of ombudsmen for their decisions. One such step has been the removal of the privative clause from Queensland's legislation.

### ***Accountability to Parliament***

Given the ongoing tension in the relationship between ombudsmen and freedom of information, and the cautious steps being taken in a few jurisdictions towards judicial review of ombudsmen, ombudsmen's accountability to Parliament assumes great importance. However, as Snell has observed, "[t]he Ombudsman-Parliament relationship has been riddled with tension and countervailing bouts of attraction and separation".<sup>167</sup> Over the past decade there have been numerous calls both from Ombudsmen and within Parliament for stronger links between ombudsmen and Parliament to ensure the effective performance of their role. Much discussion of the relationship between ombudsmen and the legislature has focused on ensuring the independence and impartiality of ombudsmen by distancing the institution from the executive branch of government, and hence decreasing its dependence on the executive for funding and staff. However, another key facet of the debate is increasing parliamentary oversight and scrutiny of the performance of their functions.

This was a major theme in the recent overhaul of the Queensland Ombudsman legislation.

***Queensland legislation – agent of Parliament subject to oversight by a Parliamentary committee***

Although both Western Australia and Queensland formerly had an ombudsman known by the title “Parliamentary Commissioner for Administrative Investigations”, Queensland was and is unique in Australia in designating the Commissioner an officer of the Parliament.<sup>168</sup> This has carried through into the new legislation. Although the Queensland office is now known by the more familiar title “Ombudsman”, the status as officer of the Parliament has been retained.

In some respects, this is of little more than symbolic significance, as “the Ombudsman’s investigations are not ‘parliamentary investigations’, do not attract parliamentary privilege and are subject to judicial review”.<sup>169</sup> However, the designation as a parliamentary officer has some important corollaries: the Ombudsman is not subject to direction as to the manner of the exercise of his or her functions or the priority given to any investigation;<sup>170</sup> and the Ombudsman has power to investigate matters referred to the office by a member of Parliament or a statutory committee of the Parliament.<sup>171</sup> This underscores the status of the Queensland Ombudsman as a member of the legislative branch of government, separate from the executive.

The Legal Constitutional and Administrative Review Committee of the Queensland Legislative Assembly (LCARC) already had, and will retain, a considerable role in safeguarding the Ombudsman’s independence from the executive. LCARC must be consulted by the executive about the selection and appointment of the Ombudsman,<sup>172</sup> the development of the Ombudsman’s budget,<sup>173</sup> the appointment of a person to conduct a strategic review of the Ombudsman,<sup>174</sup> and on motions to suspend or remove the Ombudsman.<sup>175</sup>

Thus, the Queensland Ombudsman already had considerable independence as an officer of the Parliament, both through the legislative provisions and the scrutiny of LCARC on executive decisions affecting the office. The new legislation balances this independence with measures to increase the accountability of the Ombudsman to the Parliament. It confers on LCARC the roles of monitoring and reviewing the Ombudsman’s performance of his or her functions, examining the Ombudsman’s annual reports and reporting to Parliament on any matter concerning the Ombudsman or any changes to the functions, structures and procedures of the office of Ombudsman the committee considers desirable.<sup>176</sup> This provision had no counterpart in the repealed *Parliamentary Commissioner Act 1974* (Qld). It is directly modelled on the functions the New South Wales Joint Committee on the Office of the Ombudsman has exercised under legislation since 1990.<sup>177</sup>

***Commentary***

Although the symbolic change of making ombudsmen officers of Parliament may or may not be necessary,<sup>178</sup> it seems clear that additional parliamentary involvement with ombudsmen is desirable, whether through scrutiny of appointments,

involvement in the budget, reviewing ombudsmen's reports and exercise of their powers, or a combination of these.

Some form of parliamentary oversight of appointments to the office of ombudsman exists in two jurisdictions apart from Queensland. In South Australia, the parliamentary Statutory Officers Committee has the responsibility to inquire into and report on a suitable person for appointment to the office of Ombudsman.<sup>179</sup> The NSW Joint Committee on the Office of the Ombudsman has a power of veto over appointments.<sup>180</sup> In Western Australia and at Commonwealth level Parliamentary committees have recommended that they be given an advisory role in relation to appointments to the office of Ombudsman, but these recommendations remain outstanding several years later.<sup>181</sup> Parliamentary involvement in, or oversight of, the process of appointments would enhance the perception of independence of ombudsmen from the executive.

It is only in Queensland that a parliamentary committee has a formal statutory role in relation to the development of the ombudsman's budget, despite perennial problems faced by ombudsmen in securing sufficient resources and despite the obvious advantages financial independence from the executive would bring. Budgetary independence has been considered, but not obtained, in other jurisdictions. A Tasmanian parliamentary inquiry is currently considering whether a separate Appropriation Act for, among others, the State Ombudsman's Office is desirable.<sup>182</sup> A recommendation that a parliamentary committee determine the Western Australian Ombudsman's budget remains unimplemented,<sup>183</sup> and a private member's bill introduced by Roger Price MP which would have empowered a parliamentary committee to examine and report on the Commonwealth Ombudsman's budget was not passed.<sup>184</sup>

New South Wales and now also Queensland are the only jurisdictions to confer on a parliamentary committee mandatory functions of monitoring and reviewing the Ombudsman's exercise of his or her duties, including reviewing the annual reports. The Commonwealth's Senate Finance and Public Administration Legislation Committee is responsible for overseeing the performance of the Commonwealth Ombudsman, including reviewing the Ombudsman's reports, but this has no legislative basis and is accorded no special priority, being only one of the Committee's many functions.<sup>185</sup> This function would have become statutorily mandatory had Roger Price's private member's bill passed.<sup>186</sup> The establishment of a committee substantially dedicated to the Ombudsman, as exists in NSW, has no parallel elsewhere in Australia, although the Tasmanian Ombudsman has recently requested the establishment of a separate Ombudsman parliamentary committee,<sup>187</sup> and Roger Price's bill proposed the establishment of a Commonwealth Joint Committee on the Ombudsman in 1996.<sup>188</sup>

Historically, Parliaments have shown little interest in ombudsmen's reports or holding them accountable for the exercise of their functions.<sup>189</sup> The express legislative conferral on LCARC of functions concerning monitoring and review of the Ombudsman's activities is a step towards greater accountability for the Queensland Ombudsman and greater responsibility of Parliament for the institution. This is to be expected to foster heightened interest in the office and its recommendations, and to

enhance the Ombudsman's independence from the executive. As such, it serves as a model for other jurisdictions to consider.

## Conclusion

Despite being described by judges as "a unique institution"<sup>190</sup> and "an idea which had no precise demarcation"<sup>191</sup> and by former Ombudsmen as a "hybrid"<sup>192</sup> or even a "constitutional misfit",<sup>193</sup> public ombudsmen have, over the 25 or 30 years of their existence, acquired a prestigious reputation.<sup>194</sup> At the time of their inception, as Richardson observed, "most Australians had never heard of an Ombudsman, and the few that had were not sure what an Ombudsman was supposed to do."<sup>195</sup> In the intervening period, the institution has grown from obscurity to occupying an essential place in modern society.

This is symbolised by the fact that last year Queensland changed the title of its 28 year old institution from "Parliamentary Commissioner for Administrative Investigations" to "Ombudsman", being "the name by which the office is popularly known in Queensland and the name used in most other comparable jurisdictions."<sup>196</sup> The more recent proliferation of ombudsmen in the private sphere is also testimony to the success of public ombudsmen, and to the attractiveness of the ombudsman style of review to both complainants and the organizations under review.<sup>197</sup> Creyke and McMillan assert that the emulation of public sector ombudsmen's procedures and practices by industry is recognition of the fact that the government standards and public sector models are "best practice".<sup>198</sup>

A final indication of the value accorded to ombudsmen today is the conferral of additional functions and powers on public ombudsmen. Although traditionally ombudsmen were confined to investigating matters of administrative injustice,<sup>199</sup> recent developments have seen ombudsmen acquiring jurisdiction over matters unrelated to administration (such as the NSW Ombudsman's power to investigate allegations of child abuse); and acquiring jurisdiction over private sector bodies (such as private schools, child care centres and foster carers in New South Wales). Ombudsmen are increasingly also being given jurisdiction to monitor or scrutinize the performance of public functions by other agencies (including the handling of complaints by whistleblowers in Victoria), sometimes without having power to investigate complaints in those areas (such as in relation to controlled operations by police and the National Crime Authority).

Although the growth of industry ombudsmen and the expansion of the jurisdiction of statutory ombudsmen are an expression of the confidence parliaments and business have in the institution, greater attention needs to be paid to the accountability mechanisms in place to scrutinise the performance by ombudsmen of these functions. Otherwise, there is a real risk that the very existence of ombudsmen will legitimize public decision-making without providing either accountability or administrative justice for the individual. There may be policy reasons for exempting ombudsmen from FOI requirements, to encourage disclosure of information necessary to conduct investigations. Similarly, the lack of judicial review of ombudsmen's decisions in many jurisdictions may be justifiable on the ground that ombudsmen do not have the power to make final and binding decisions, although their power to damage individuals' reputations is considerable and it is noteworthy

that Queensland has recently moved to increase the accountability of its Ombudsman through the courts by removal of the privative clause. However, if accountability to the public and to the courts is not available, then it is imperative that ombudsmen are made more accountable to parliament, through increased legislative scrutiny of ombudsmen's performance of their duties and greater involvement of parliamentary committees. Finally, unless present resource and operational constraints are remedied, when additional functions are granted to ombudsmen there is a danger of damaging ombudsmen's present enviable reputation by conferring on them functions which they are not able to adequately perform and which will detract from their performance in other areas.

#### Endnotes

- 1 A speech of Mr John Milton for the Liberty of Unlicensed Printing, to the Parliament of England, 1644.
- 2 Kevin Cho, *The Commonwealth Ombudsman* (1980) at i.
- 3 The word ombudsman is not gender-specific in Swedish: Margaret Allars, *Australian Administrative Law: Cases and Materials* (1997) at 307. The Senate Committee also considered that "ombudsman has become a generic, gender-neutral term in English": Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman* (December 1991) ("Senate Report") at [2.24]. I use the word "ombudsmen" as the plural (although it sounds gender-specific) rather than use the singular "ombudsman" as the plural.
- 4 *Ombudsman Act 1976* (Cth); *Ombudsman Act 1974* (NSW); *Ombudsman (Northern Territory) Act 1978* (NT); *Parliamentary Commissioner Act 1974* (Qld) (now the *Ombudsman Act 2001* (Qld)); *Ombudsman Act 1972* (SA); *Ombudsman Act 1978* (Tas); *Ombudsman Act 1973* (Vic); *Parliamentary Commissioner Act 1971* (WA). Since self-government, the ACT also has a statutory Ombudsman: *Ombudsman Act 1989* (ACT).
- 5 This evocative phrase belongs to Rhoda James, *Private Ombudsmen and Public Law* (1997) at 1.
- 6 Prime examples are the Telecommunications Industry Ombudsman [www.tio.com.au](http://www.tio.com.au), and ombudsmen for privatized public utilities such as the Energy and Water Ombudsman Limited (Vic) [www.eiov.com.au](http://www.eiov.com.au), the Electricity Ombudsman of South Australia [www.eiosa.com.au](http://www.eiosa.com.au), the Energy and Water Ombudsman NSW [www.ewon.com.au](http://www.ewon.com.au) and the Tasmanian Energy Regulator [www.energyregulator.tas.gov.au](http://www.energyregulator.tas.gov.au) (all sites last accessed 12 October 2002).
- 7 These include the Australian Banking Industry Ombudsman Ltd [www.abio.gov.au](http://www.abio.gov.au), the Private Health Insurance Ombudsman [www.phio.org.au](http://www.phio.org.au), the Mortgage Industry Ombudsman Scheme [www.miaa.com.au/Ombudsman\\_rules.pdf](http://www.miaa.com.au/Ombudsman_rules.pdf), the Legal Ombudsman in Queensland, in Victoria [www.legalombudsman.vic.gov.au](http://www.legalombudsman.vic.gov.au), in Tasmania [www.justice.tas.gov.au/legal\\_ombu/intro.htm](http://www.justice.tas.gov.au/legal_ombu/intro.htm), and the recently created Retail Grocery Industry Ombudsman [www.mediate.com.au/rgio](http://www.mediate.com.au/rgio) (all sites last accessed 12 October 2002).
- 8 This is a limited Commonwealth, State and Territory cooperative scheme which, if established, will have jurisdiction only over complaints made relating to the operation of the ARIA *Code of Practice for Labelling Product with Explicit and Potentially Offensive Lyrics*. See State, Territory and Commonwealth Censorship Ministers, "Music Industry to Appoint Ombudsman", *Communique*, 8 March 2002, [http://www.ag.gov.au/aghome/agnews/2002newsag/Communique\\_aria.htm](http://www.ag.gov.au/aghome/agnews/2002newsag/Communique_aria.htm) (last accessed 25 August 2002).
- 9 *K v NSW Ombudsman* [2000] NSWSC 771 (1 August 2000).
- 10 *Hannebery v Legal Ombudsman* [1998] VSCA 142 (17 December 1998); *Styant-Browne v The Legal Ombudsman* [2001] 3 VR 132.
- 11 *Boyce v Owen* (2000) 156 FLR 321.
- 12 *Whistleblowers Protection Act 2001* (Vic); *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001); *Al Hakim v Ombudsman* [2001] VCAT 1972 (6 July 2001); *Brown v Commonwealth Ombudsman* [1999] AATA 559.
- 13 *Anti-Discrimination Commissioner v Acting Ombudsman* [2002] TASSC 24 (9 May 2002); *Citipower Pty Ltd v Electricity Industry Ombudsman (Vic) Ltd* [1999] VSC 275 (5 August 1999); *Ombudsman Act 2001* (Qld).

- 14 Prof Kenneth Wiltshire, *Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations)* (April 1998).
- 15 Legal Constitutional and Administrative Review Committee Report No 14, *Review of the Report of the Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations)* (July 1999).
- 16 Sackville J held that section 128 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) amounts to neither an exercise of judicial power in contravention of Chapter III of the Constitution, nor imposition of taxation by the Commonwealth in contravention of section 55 of the Constitution: *Australian Communications Authority v Viper Communications Pty Limited* (2001) 108 FCR 173.
- 17 Ombudsman (Honesty and Accountability in Government) Amendment Act 2002 (SA).
- 18 See Philippa Smith, *Red Tape and the Ombudsman*, Senate Occasional Lecture, 17 April 1998; Phil McAloon "When the Business of Business is Government: The Role of the Commonwealth Ombudsman and Administrative Law in a Corporatised and Privatised Environment" (December 1999) 23 *AIAL Forum* 31; Stephen Free, "Across the Public/Private Divide: Accountability and Administrative Justice in the Telecommunications Industry" (2000) 21 *AIAL Forum* 1; Margaret Allars, "Private Law But Public Power: Removing Administrative Law Review From Government Business Enterprises" (1995) 6 *Public Law Review* 44; Anita Stuhmcke, "Privatising Administrative Law: The Telecommunications Industry Ombudsman Scheme" (1998) 6 *Australian Journal of Administrative Law* 15; Alastair Cameron, "The Ombudsmen: Time for a Jurisdictional Expansion. The Case for Extending the Jurisdiction of the Statutory Ombudsmen to Cover the Exercise of Public Power in the Private Sector" (2001) 32(2) *Victoria University of Wellington Law Review* 549. See also Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, (December 1991) at [4.33]; Senate Standing Committee on Finance and Public Administration, *Contracting Out of Government Services Second Report* (May 1998), Chapter 4.
- 19 *Botany Council v The Ombudsman* (1995) 37 NSWLR 357 at 368 per Kirby P (Sheller and Powell JJA agreeing).
- 20 See Dennis Pearce, "The Commonwealth Ombudsman: The Right Office in the Wrong Place" in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law at the Twenty-Five Year Mark* (1998) 54 at 62.
- 21 Rick 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 Millennium* (2000), 188 at 192.
- 22 Dennis Pearce, op cit, n 20, at 62.
- 23 In Queensland and in South Australia, Ombudsmen have no role in relation to complaints against police, as these are dealt with by other bodies: subsection 7(2) and paragraphs 12(2)(c) and (d) of the *Ombudsman Act 2001* (Qld); subsection 5(2) of the *Ombudsman Act 1972* (SA).
- 24 Section 5 of the *Complaints (Australian Federal Police) Act 1981* (Cth); section 14 of the *Ombudsman (Northern Territory) Act 1978* (NT); section 86L of the *Police Regulation Act 1958* (Vic).
- 25 See section 23 of the *Complaints (Australian Federal Police) Act 1981* (Cth); section 132 and Division 6 of Part 8A of the *Police Act 1990* (NSW); subsection 86N(2) of the *Police Regulation Act 1958* (Vic); subsections 14(1a), (1b), (1c) of the *Parliamentary Commissioner Act 1971* (WA). Under subsection 4(1) and item 45 of Schedule 1 of the *Ombudsman Act 1978* (Tas), the Ombudsman has primary jurisdiction in relation to complaints against police, but the Ombudsman generally requires the complainant to have first exhausted the internal police investigation avenue.
- 26 Although under section 132 of the *Police Act 1990* (NSW) the NSW Ombudsman must refer complaints to the Chief Commissioner of Police for investigation, he or she also has power, if he or she thinks it is in the public interest, to commence an independent investigation, in which case the Commissioner must discontinue his or her investigation: section 156 of the *Police Act 1990* (NSW).
- 27 (2000) 156 FLR 321.
- 28 (2000) 156 FLR 321 at 325.
- 29 Subsection 14(2) of the *Ombudsman (Northern Territory) Act 1978* (NT). Complaints made direct to the Ombudsman must be referred to the Commissioner of Police, presumably so that the initial investigation can be carried out by police, subsection 14(3A) of the *Ombudsman (Northern Territory) Act 1978* (NT).
- 30 (2000) 156 FLR 321 at 328.

- 31 Item 3 of Schedule 3 of the *National Crime Authority Legislation Amendment Act 2001* (Cth) inserted subsection 3(13A) into the *Ombudsman Act 1976* (Cth), which makes the National Crime Authority a prescribed authority for the purposes of section 5 of the *Ombudsman Act 1976* (Cth).
- 32 Section 6A of the *Ombudsman Act 1976* (Cth).
- 33 Section 6 of the *Ombudsman Act 1976* (Cth). Other bodies include the Australian Broadcasting Authority, the Australian Communications Authority, and the Employment Services Regulatory Authority.
- 34 Section 8B of the *Ombudsman Act 1976* (Cth).
- 35 Subsection 9(3) of the *Ombudsman Act 1976* (Cth).
- 36 Section 35B of the *Ombudsman Act 1976* (Cth).
- 37 Controlled operations legislation was introduced in some Australian jurisdictions following the decision in *Ridgeway v The Queen* (1995) 184 CLR 19. It indemnifies law enforcement officers from criminal liability when they are involved in an authorised controlled operation relating to the importation and exportation of narcotics and in doing so would otherwise have committed a criminal offence. The Commonwealth provisions are contained in Part 1AB of the *Crimes Act 1914* (Cth).
- 38 Section 15H of the *Crimes Act 1914* (Cth). “Serious Commonwealth offence” is defined in section 15HB as an offence punishable by imprisonment for a period of 3 years or more and which involves “theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, obtaining financial benefit by vice engaged in by others, extortion, money laundering, perverting the course of justice, bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory, bankruptcy and company violations, harbouring of criminals, forgery including forging of passports, armament dealings, illegal importation or exportation of fauna into or out of Australia, espionage, sabotage or threats to national security, misuse of a computer or electronic communications, people smuggling, slavery, piracy, the organisation, financing or perpetration of sexual servitude or child sex tourism, dealings in child pornography or material depicting child abuse, importation of prohibited imports or exportation of prohibited exports” or similar matters.
- 39 Section 15IA of the *Crimes Act 1914* (Cth).
- 40 Subsections 15I(2) and 15IA(2) of the *Crimes Act 1914* (Cth).
- 41 Subsection 15N(4) of the *Crimes Act 1914* (Cth). However, a certificate must be reviewed by the AAT to remain in force for longer than 3 months, section 15OB.
- 42 Under the *Law Enforcement (Controlled Operations) Act 1997* (NSW).
- 43 See sections 15R and 15S of the *Crimes Act 1914* (Cth).
- 44 Section 15UA of the *Crimes Act 1914* (Cth). See also section 21 of the *Law Enforcement (Controlled Operations) Act 1997* (NSW), which requires the NSW Ombudsman to be notified of each controlled operation or variation thereto, not merely to receive quarterly reports.
- 45 Section 15UB of the *Crimes Act 1914* (Cth). See also section 22 of the *Law Enforcement (Controlled Operations) Act 1997* (NSW).
- 46 Section 15T of the *Crimes Act 1914* (Cth).
- 47 Section 15UC of the *Crimes Act 1914* (Cth). See also section 23 of the *Law Enforcement (Controlled Operations) Act 1997* (NSW). The NSW Ombudsman may also make special reports to Parliament in relation to the inspection of records of law enforcement agencies at any time, section 22 of the *Law Enforcement (Controlled Operations) Act 1997* (NSW).
- 48 Under the *Telecommunications (Interception) Act 1979* (Cth). The NSW Ombudsman performs a similar function under the *Telecommunications (Interception) (New South Wales) Act 1987* (NSW).
- 49 Dennis Pearce, op cit, n 20 at 63.
- 50 Senate Report at [5.54].
- 51 Lack of funding has been a recurring complaint of successive Commonwealth Ombudsmen. In 1991, the Senate Standing Committee on Finance and Public Administration observed that the first four Commonwealth Ombudsmen “were agreed that the resources available to the Office have been and are inadequate”: Senate Report at [6.5]. See also Jack Richardson, “The Ombudsman’s Place among the Institutions of Government – Past, Present and Future” (2001) 8(4) *Australian Journal of Administrative Law* 183 at 190; Alan Cameron, “Future Directions in Administrative Law: The Ombudsman” in John McMillan (ed), *Administrative Law: Does the Public Benefit?* (1992) at 206-207; Philippa Smith, *Red Tape and the Ombudsman*, Senate Occasional Lecture, 17 April 1998.
- 52 See Dennis Pearce, op cit n 20, at 63-64; Senate Report at [5.54]-[5.66].

- 53 Alan Cameron, *op cit*, n 51, at 206.
- 54 Senate Report at [5.66]. The Australian Law Reform Commission recommended vesting of complaints jurisdiction in a new body, to be called the National Integrity and Investigations Commission: Australian Law Reform Commission, *Integrity: but not by trust alone. AFP and NCA Complaints and Disciplinary Systems* (Report No 82, 1996).
- 55 See Dennis Pearce, *op cit*, n 20, at 64.
- 56 Parliamentary Joint Committee on the National Crime Authority, *Street Legal. The Involvement of the National Crime Authority in Controlled Operations*, (December 1999) at [5.51].
- 57 Senate Report at [4.73]. The Committee recommended that the function be given alternatively to the Privacy Commissioner or the Inspector-General of Intelligence and Security.
- 58 Australian Law Reform Commission, *op cit*, n 54.
- 59 Dennis Pearce, *op cit*, n 20, at 64.
- 60 Section 170 of the *Police Powers and Responsibilities Act 2000* (Qld).
- 61 Sections 167 and 168 of the *Police Powers and Responsibilities Act 2000* (Qld).
- 62 Section 172A of the *Police Powers and Responsibilities Act 2000* (Qld). In South Australia, the method of accountability chosen is the traditional one of ministerial accountability to Parliament: senior police officers must provide copies of approvals or renewals for controlled operations to the Attorney-General within 14 days, subsection 3(6) of the *Criminal Law (Undercover Operations) Act 1995* (SA). The Attorney-General must report annually to Parliament, section 5 of the *Criminal Law (Undercover Operations) Act 1995* (SA).
- 63 Dennis Pearce, *op cit*, n 20, at 64.
- 64 Dennis Pearce, *op cit*, n 20, at 64.
- 65 *Op cit*, n 51 at 190.
- 66 The other four are: *Whistleblowers Protection Act 1993* (SA), *Protected Disclosures Act 1994* (NSW), *Whistleblowers Protection Act 1994* (Qld) and *Public Interest Disclosure Act 1994* (ACT).
- 67 Definition of “improper conduct” in subsection 3(1) of the *Whistleblowers Protection Act 2001* (Vic).
- 68 Disclosures concerning certain officials, including local councillors and the Chief Commissioner of Police, may only be made to the Ombudsman. Disclosures relating to Members of Parliament may not be made in the first instance to the Ombudsman, but must be made to the presiding officer of the relevant House of Parliament: section 6 of the *Whistleblowers Protection Act 2001* (Vic). The presiding officer may, however, refer the matter to the Ombudsman for investigation: section 96.
- 69 Under section 24 of the *Whistleblowers Protection Act 2001* (Vic), the Ombudsman determines whether a disclosure constitutes a “public interest disclosure” or not. If disclosure is made to a public body, that body determines whether or not it constitutes a “public interest disclosure”, but if it determines that it does not, the whistleblower may request a redetermination of the issue by the Ombudsman: sections 30, 31 and 32 of the *Whistleblowers Protection Act 2001* (Vic) (disclosures made to public bodies) and sections 35, 36 and 37 (disclosures made to the Chief Commissioner of Police).
- 70 Sections 39 and 40.
- 71 Sections 41, 42 and 44.
- 72 Sections 48 and 49.
- 73 Section 63.
- 74 Section 66.
- 75 Sections 80 and 91.
- 76 Section 73.
- 77 Sections 74 and 85.
- 78 Sections 75 and 86.
- 79 Sections 82 and 93.
- 80 Section 69.
- 81 Under paragraphs 5(4)(a) and (g) of the *Whistleblowers Protection Act 1993* (SA), the Ombudsman may receive complaints relating to a public officer (other than a member of the police force, the judiciary, a Member of Parliament or of a local government body) although complaints alleging illegal activities must be made to police; section 11 of the *Protected Disclosures Act 1994* (NSW).
- 82 Paragraph 5(4)(c) of the *Whistleblowers Protection Act 1993* (SA); section 12 of the *Protected Disclosures Act 1994* (NSW), although disclosures of waste of public money by a police officer are made to the Police Integrity Commission, section 12A, and disclosures of waste of local government money to the Director-General of the Department of Local Government, section 12B.



- 83 Complaints against police may be made in South Australia to the Police Complaints Authority, paragraph 5(4)(b) of the *Whistleblowers Protection Act 1993* (SA); and in New South Wales to the Police Integrity Commission, section 12A of the *Protected Disclosures Act 1994* (NSW).
- 84 Section 10 of the *Whistleblowers Protection Act 1994* (Qld) provides generally that disclosure is to be made to a “public sector entity”, that is, a body with appropriate power to take action on the information disclosed or to provide an appropriate remedy. This would include the Ombudsman in relation to disclosures of maladministration, section 16 of the *Whistleblowers Protection Act 1994* (Qld). Schedule 3 of the Act contains 13 specific examples of the “appropriate entity to receive disclosure”, but does not mention the Ombudsman.
- 85 Section 14 of the *Public Interest Disclosure Act 1994* (ACT).
- 86 The *Ombudsman Amendment (Child Protection and Community Services) Act 1998* (NSW), which was proclaimed to commence on 7 May 1999, inserted a new Part 3A into the *Ombudsman Act 1974* (NSW), entitled “Child protection”. For a more detailed description of the new Part, and a discussion of how the legislation differs from the Wood Royal Commission’s recommendations, see Gareth Griffith, *Child Protection in NSW: A Review of Oversight and Supervisory Agencies*, NSW Parliamentary Library, Briefing Paper 16/2001 at sections 9.5 and 2.3.
- 87 Definition of “child abuse” in subsection 25A(1) of the *Ombudsman Act 1974* (NSW).
- 88 The Hon Mrs Lo Po, Second reading speech on the Ombudsman Amendment (Child Protection and Community Services) Bill (No. 3), *Hansard*, NSW Legislative Assembly, 21 October 1998, p 8742.
- 89 *K v NSW Ombudsman* [2000] NSWSC 771 (1 August 2000) at [67].
- 90 The agency head must inform the Ombudsman within 30 days of becoming aware of the allegation or conviction, subsection 25C(2) of the *Ombudsman Act 1974* (NSW). There is also provision for voluntary reporting by the head of a designated government or non-government agency of information leading to a reasonable suspicion of child abuse by an employee, subsection 25D(1) of the *Ombudsman Act 1974* (NSW).
- 91 The Department of Education and Training, the Department of Health, the Department of Sport and Recreation, the Department of Juvenile Justice and the Department of Corrective Services.
- 92 Definitions of “designated government agency” and “designated non-government agency” in subsection 25A(1) of the *Ombudsman Act 1974* (NSW).
- 93 Section 25I.
- 94 Section 25E.
- 95 Section 25F.
- 96 Subsection 25G(2). In April 2000 the Ombudsman released his first special report relevant to the new child protection jurisdiction, *Handling of Child Abuse Allegations Against Employees: An Investigation into the System Used by the NSW Department of Education and Training*.
- 97 Subsection 25G(1).
- 98 Subsection 25D(2). This subsection also empowers the Ombudsman to disclose information to the Commission for Children and Young People, which, among other things, has established the Child Sex Offender Counsellors Accreditation Scheme which identifies counsellors who can work with people who sexually offend against children.
- 99 Section 34. Section 25H also provides that any laws which restrict the disclosure of information do not apply to this Part.
- 100 Subsection 25B(1).
- 101 [2000] NSWSC 771 (1 August 2000).
- 102 *K v NSW Ombudsman* [2000] NSWSC 771 (1 August 2000) at [80].
- 103 Paragraph 5(2)(d) of the *Ombudsman Act 1976* (Cth); paragraph 5(2)(j) of the *Ombudsman Act 1989* (ACT); item 12 of Schedule 1 of the *Ombudsman Act 1974* (NSW); paragraph (g) of the definition of “administrative action” in subsection 3(1) of the *Ombudsman (Northern Territory) Act 1978* (NT); subsection 13(5) of the *Ombudsman Act 1973* (Vic); item 4 of Schedule 2 of the *Ombudsman Act 1978* (Tas) in relation to actions taken by the Tasmanian Industrial Commission. There are no restrictions on the Ombudsman’s jurisdiction over disciplinary proceedings and other personnel decisions in Queensland, South Australia and Western Australia.
- 104 In *Booth v Dillon (No 1)* [1976] VR 291 Lush J held that an unlawful assault by a prison officer on a prisoner was outside the Ombudsman’s jurisdiction. But because the assault occurred in the presence of senior prison officers, including the prison governor, and nothing was done to discipline the prison officer, the failure to enforce discipline was characterized as a “matter of administration” and hence reviewable by the Ombudsman.

- 105 In *Re Ombudsman for Saskatchewan and Minister of Social Services* (1979) 103 DLR (3d) 695 Noble J held that the Ombudsman had no power to investigate complaints relating to the conduct of a male prison officer towards female prisoners. However, he observed that if the female prisoners had first complained to the prison warden, and no steps were taken by the warden to deal with the complaint, that may be a matter within the province of the Ombudsman.
- 106 Currently, Ombudsmen in only three jurisdictions have power to investigate complaints against police which raise allegations of the commission of a criminal offence: paragraph 14(1)(b) of the *Ombudsman (Northern Territory) Act 1978* (NT); subsection 14(1a) of the *Parliamentary Commissioner Act 1971* (WA); subsection 122(1) of the *Police Act 1990* (NSW).
- 107 *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163 at 174-175 per Einfeld J.
- 108 *Ibid*, at 180-181 per Einfeld J.
- 109 *Ibid*, 171-172 per Einfeld J [31].
- 110 *The Ombudsman v Moroney* [1983] 1 NSWLR 317 at 331 per Moffitt P.
- 111 See *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163 (seeking to restrain publication of an Ombudsman's report which recommended that charges be laid against two ATSIC officers under the *Public Service Act 1922* for misconduct).
- 112 *Styant-Browne & Anor v The Legal Ombudsman* [2001] 3 VR 132.
- 113 In *Boyd v The Ombudsman* [1983] 1 NSWLR 620, the NSW Ombudsman reopened a complaint against a police officer, after having made a formal report finding the complaint was not sustained, after the complainant raised a further consideration which strongly indicated that the police officer had been at fault. The NSW Court of Appeal held that the Ombudsman has power to reopen a complaint, as "[t]he principles regarding finality, in particular those of issue estoppel and res judicata, have no place in investigations [by the Ombudsman]": at 629 per Moffitt P.
- 114 NSW Ombudsman, *Annual Report 2000-2001*, p 41.
- 115 See subsection 8(2) of the *Ombudsman Act 1976* (Cth); subsection 9(3) of the *Ombudsman Act 1989* (ACT); section 17 of the *Ombudsman Act 1974* (NSW); subsection 19(2) of the *Ombudsman (Northern Territory) Act 1978* (NT); paragraph 25(2)(a) of the *Ombudsman Act 2001* (Qld); subsection 18(2) of the *Ombudsman Act 1972* (SA); subsection 23(3) of the *Ombudsman Act 1978* (Tas); subsection 17(2) of the *Ombudsman Act 1973* (Vic); subsection 19(2) of the *Parliamentary Commissioner Act 1971* (WA).
- 116 See section 35 of the *Ombudsman Act 1976* (Cth); section 33 of the *Ombudsman Act 1989* (ACT); section 34 of the *Ombudsman Act 1974* (NSW); section 23 of the *Ombudsman (Northern Territory) Act 1978* (NT); section 92 of the *Ombudsman Act 2001* (Qld); section 22 of the *Ombudsman Act 1972* (SA); section 26 of the *Ombudsman Act 1978* (Tas); section 20 of the *Ombudsman Act 1973* (Vic); section 23 of the *Parliamentary Commissioner Act 1971* (WA).
- 117 *Kavvadias v Commonwealth Ombudsman* (1984) 2 FCR 64.
- 118 *Brown v Commonwealth Ombudsman* [1999] AATA 559 (30 July 1999); *WAJ and Commonwealth Ombudsman and Brown* [1998] AATA 442 (22 June 1998).
- 119 *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) and *Al Hakim v Ombudsman* [2001] VCAT 1972 (6 July 2001).
- 120 Senior Member Preuss noted that this interpretation was consistent with earlier Victorian authority of *Lapidos v Ombudsman (No 1)* (1987) 2 VAR 82 and *Re Horesh and Ombudsman* (1986) 1 VAR 149; *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) at [54]-[56]. See also *Al Hakim v Ombudsman* [2001] VCAT 1972 (6 July 2001) at [37]. See *Kavvadias v Commonwealth Ombudsman* (1984) 1 FCR 80 at 84-85. Similarly, in a recent Queensland case, the Legal Ombudsman, a statutory office-holder whose function is to review complaints against lawyers, has been held to be subject to the *Freedom of Information Act 1992* (Qld): *JLC and Legal Ombudsman; Queensland Law Society and A solicitor (third parties)* (1999) 5 QAR 33.
- 121 Subsection 36(1) of the *Freedom of Information Act 1982* (Cth).
- 122 *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551 at 561 per Beaumont J. See also *Re Kamminga and Australian National University* (1992) 26 ALD 585 at 588.
- 123 *Brown v Commonwealth Ombudsman* [1999] AATA 559 (30 July 1999) at [19].
- 124 *Ibid*, at [26]. In reaching this conclusion, it affirmed the reasoning of Sheppard J in *Kavvadias v Commonwealth Ombudsman* (1984) 2 FCR 64 at 80.
- 125 *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) at [69], [107].
- 126 *Ibid*, at [93], [112], [133].
- 127 "Those provisions include s.10 (requiring the Ombudsman and his officers to take an oath of confidentiality), s17(2) (requiring that investigations be conducted in private), s20 (prohibiting the

- disclosure of information received in the course of investigation), section 29(4) rendering the Ombudsman and his officers not compellable 'in any court or in any judicial proceedings' in respect of any matter coming to his knowledge in the exercise of his functions and s18(3) and (4) enabling the Ombudsman to obtain documents which would be protected in litigation": *ibid*, at [93].
- 128 *Deasey v Geschke* (unreported, 11 November 1984, Hassett J) at 32, quoted in *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) at [94].
- 129 *Ibid*, at [81]-[84], [93].
- 130 Section 114 of the *Whistleblowers Protection Act 2001* (Vic) inserted new section 29A into the *Ombudsman Act 1973* (Vic). Section 119 of the *Whistleblowers Protection Act 2001* (Vic) inserted an identical exemption for the Ombudsman in relation to investigation of complaints against police (new section 86TA of the *Police Regulation Act 1958* (Vic)).
- 131 From 1987, pursuant to Regulation 5(d) of the *Freedom of Information (Exempt Offices) Regulations 1987* (Vic), the Ombudsman was exempt from the *Freedom of Information Act 1982* (Vic). Since the enactment of the *Freedom of Information (Amendment) Act 1993* (Vic) and the former section 17 of the *Public Sector Management Act 1992* (Vic) (later subsection 16(1) of the *Public Sector Management and Employment Act 1998* (Vic)), the Ombudsman came within the definition of "department" and was subject to freedom of information requirements.
- 132 Schedule 2 item I of the *Freedom of Information Act 1991* (SA).
- 133 Section 9 and Schedule 2 of the *Freedom of Information Act 1989* (NSW).
- 134 *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) at [140].
- 135 Margaret Allars, *Australian Administrative Law: Cases and Materials* (1997) at 338-339.
- 136 Section 33 of the *Ombudsman Act 1976* (Cth); section 31 of the *Ombudsman Act 1989* (ACT); section 35A of the *Ombudsman Act 1974* (NSW); subsections 31(1) and (2) of the *Ombudsman (Northern Territory) Act 1978* (NT); section 93 of the *Ombudsman Act 2001* (Qld); subsection 30(1) of the *Ombudsman Act 1972* (SA); subsections 33(1) and (2) of the *Ombudsman Act 1978* (Tas); subsections 29(1) and (2) of the *Ombudsman Act 1973* (Vic); subsections 30(1) and (2) of the *Parliamentary Commissioner Act 1971* (WA).
- 137 Subsection 31(3) of the *Ombudsman (Northern Territory) Act 1978* (NT); subsection 33(3) of the *Ombudsman Act 1978* (Tas); subsection 29(3) of the *Ombudsman Act 1973* (Vic); subsection 30(3) of the *Parliamentary Commissioner Act 1971* (WA).
- 138 Robin Creyke and John McMillan, "Administrative Law Assumptions ... Then and Now" in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law at the Twenty-Five Year Mark* (1998) 1 at 33.
- 139 *Alice Springs Town Council v Watts* (1982) 18 NTR 1. In New South Wales, two decisions have held that a provision which excluded liability for civil or criminal proceedings should be interpreted as also excluding judicial review proceedings: *Ainsworth v The Ombudsman* (1988) 17 NSWLR 276 at 288 per Enderby J; *Commissioner of Police v Ombudsman* (unreported, NSWSC, Sackville AJ, 9 September 1994). This approach is in direct conflict with the weight of authority on ouster clauses.
- 140 Section 35B of the *Ombudsman Act 1974* (NSW); section 30 of the *Ombudsman (Northern Territory) Act 1978* (NT); section 17 of the *Ombudsman Act 2001* (Qld); section 28 of the *Ombudsman Act 1972* (SA); section 32 of the *Ombudsman Act 1978* (Tas); section 27 of the *Ombudsman Act 1973* (Vic); section 29 of the *Parliamentary Commissioner Act 1971* (WA). The procedure in the Commonwealth and ACT legislation is broader, allowing the court to determine any question relating to the exercise of a power or performance of a function by the Ombudsman: section 11A of the *Ombudsman Act 1976* (Cth); section 14 of the *Ombudsman Act 1989* (ACT).
- 141 Subsection 29(3) of the *Parliamentary Commissioner Act 1974* (Qld).
- 142 Section 93 of the *Ombudsman Act 2001* (Qld).
- 143 Hon Peter Beattie, Second reading speech on the Ombudsman Bill, Queensland Legislative Assembly, *Hansard*, 16 October 2001, p 2823.
- 144 Explanatory Notes to the Ombudsman Bill 2001, p 3.
- 145 [2002] TASSC 24 (9 May 2002) .
- 146 The first, A 's case, alleged discrimination by the Director of Public Prosecutions and the Department of Justice and Industrial Relations and failings in the criminal justice system in deciding not to prosecute in a case involving sexual abuse of a disabled child. The second, B's case, involved a trade union secretary who alleged he was fired after giving evidence to a parliamentary committee in his private capacity.

- 147 The Department of Justice and Industrial Relations in the first case, and the Speaker of the House of Assembly and the President of the Legislative Council in the second case.
- 148 *Anti-Discrimination Commissioner v Acting Ombudsman* [2002] TASSC 24 (9 May 2002) at [35]. See also at [40], [59].
- 149 *Ibid*, at [56].
- 150 Section 33 of the *Ombudsman Act 1978* (Tas).
- 151 Section 32.
- 152 *Anti-Discrimination Commissioner v Acting Ombudsman* [2002] TASSC 24 (9 May 2002) at [85].
- 153 *Alice Springs Town Council v Watts* (1982) 18 NTR 1 at 6; *Commissioner of Police v The Ombudsman* (unreported, Sackville AJ, 9 September 1994). It is worth noting that in *Booth v Dillon (No 2)* [1976] VR 434 the Victorian statutory procedure was used after the Ombudsman had completed the investigations.
- 154 *Anti-Discrimination Commissioner v Acting Ombudsman* [2002] TASSC 24 (9 May 2002) at [68].
- 155 *Citipower Pty Ltd v Electricity Industry Ombudsman (Vic) Ltd* [1999] VSC 275 (5 August 1999).
- 156 *Ibid*, at [24], citing *AFL v Carlton Football Club Pty Ltd* (1998) 2 VR 546 at 549 per Tadgell JA.
- 157 *AFL v Carlton Football Club Ltd* (1998) 2 VR 546 at 549 per Tadgell JA.
- 158 *Ibid*, at [29].
- 159 *Ibid*, at [30], citing *Australian Workers' Union v Bowen (No. 2)* (1948) 77 CLR 601 at 630; *AFL v Carlton Football Club Ltd* (1998) 2 VR 546 at 559.
- 160 See Rhoda James, *Private Ombudsmen and Public Law* (1997) Dartmouth, Aldershot at 3-4; Anita Stuhmcke, "The relevance of Industry Ombudsmen" (March 2002) *Law Society Journal* 73 at 74.
- 161 This was emphasized by Einfeld J in *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163 at 168.
- 162 *Salisbury City Council v Biganovsky* (1990) 54 SASR 117 at 120 per Mullighan J.
- 163 In relation to the EIOV, clause 6.4 of the EIOV constitution provides in part "Where there is a dispute between the Ombudsman and a member about the effect of the law or of regulatory instruments, the Ombudsman may refer the matter to the Office of the Regulator-General, Senior Counsel or the courts for determination or authoritative advice, as the case may be, at the member's expense." However, this is a narrow provision, limited to disputes over questions of law, and would not apply to many disputes.
- 164 *Lpidos v Ombudsman (No 1)* (1987) 2 VAR 82 at 91, quoted in *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) at [148].
- 165 *Woodford v Ombudsman* [2001] VCAT 904 (31 May 2001) at [148]; *Botany Council v Ombudsman* (1995) 37 NSWLR 357 at 368-369 per Kirby P (Sheller and Powell JJA agreeing).
- 166 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.
- 167 Rick 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 Millennium* (2000), 188 at 197.
- 168 Subsection 5(1) of the *Parliamentary Commissioner Act 1974* (Qld).
- 169 Legal Constitutional and Administrative Review Committee Report No 14, Review of the *Report of the Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations)* (July 1999) at 1 (footnote 6).
- 170 Section 13 of the *Ombudsman Act 2001* (Qld).
- 171 Paragraph 12(a)(i) of the *Ombudsman Act 2001* (Qld). Other Ombudsmen, who are not technically "officers of Parliament", also have this power: see section 14 of the *Ombudsman Act 1972* (SA); section 16 of the *Ombudsman Act 1978* (Tas); section 16 of the *Ombudsman Act 1973* (Vic); section 15 of the *Parliamentary Commissioner Act 1971* (WA).
- 172 Paragraph 59(1)(b) (formerly subsection 5(6) of the *Parliamentary Commissioner Act 1974* (Qld)).
- 173 Subsection 88(3) (formerly subsection 31(3)).
- 174 Subsection 83(6) (formerly subsection 32(5)).
- 175 Under the new legislation, LCARC's consultative role in relation to suspension of an Ombudsman is strengthened slightly. Formerly, LCARC had to be consulted only if the Premier wished to suspend the Ombudsman when the Legislative Assembly was in session, otherwise the Governor in Council had power to suspend him or her provided the Premier had accorded the Ombudsman an opportunity to respond to a statement setting out the reasons for the proposed suspension: section 6 of the *Parliamentary Commissioner Act 1974* (Qld). Under the new legislation, a majority of non-Government members of LCARC must agree to a removal or

- suspension whether or not the Legislative Assembly is in session: paragraphs 67(3)(d) and 68(3)(d).
- 176 Section 89.
- 177 Section 31B of the *Ombudsman Act 1974* (NSW).
- 178 In 1991, the Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, (December 1991) at [8.15] rejected the need to make the Ombudsman an officer of the Parliament. In 1997, a different parliamentary committee recommended a Parliamentary review to consider the issue, as well as other ways of strengthening the office of Ombudsman: Joint Standing Committee on Foreign Affairs, Defence and Trade, *The Human Rights and Equal Opportunity Commissioner and the Commonwealth Ombudsman: Report on Public Seminars 20 and 25 September 1996* (March 1997) at [2.15]. Some Commonwealth Ombudsmen have urged making the Ombudsman an officer of the Parliament: Philippa Smith's evidence to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *The Human Rights and Equal Opportunity Commissioner and the Commonwealth Ombudsman: Report on Public Seminars 20 and 25 September 1996* (March 1997) at [2.8]; Dennis Pearce, op cit, n 20 at 68; Jack Richardson op cit, n 51 at 190.
- 179 See Legal Constitutional and Administrative Review Committee Report No 14, *Review of the Report of the Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations)* (July 1999) at 14.
- 180 Section 31BA of the *Ombudsman Act 1974* (NSW).
- 181 Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, (December 1991) at [8.32]; Western Australia, *Commission on Government: Report no 3*, Perth, April 1996, pp 132-133.
- 182 The inquiry is being conducted by the Joint Select Committee on Working Arrangements of the Parliament, but has yet to report. The Committee's terms of reference are available at: [www.parliament.tas.gov.au/ctee/wparl.htm](http://www.parliament.tas.gov.au/ctee/wparl.htm) (last accessed 1 October 2002).
- 183 The Western Australia Commission on Government recommended in April 1996 that the then proposed Legislative Council Public Administration Committee determine the budget for the Office annually with "due consideration of any advice from the Treasurer": Western Australia, *Commission on Government: Report no 3*, (April 1996), pp 132-133.
- 184 Proposed new paragraph 29C(1)(c) of the *Ombudsman Act 1976* (Cth), which was to be inserted by clause 4 of the Ombudsman Amendment Bill 1996.
- 185 Dennis Pearce, op cit, n 20, at 67.
- 186 Proposed new subsection 29C(1) of the *Ombudsman Act 1976* (Cth), which was to be inserted by clause 4 of the Ombudsman Amendment Bill 1996.
- 187 Submission to the Joint Select Committee on Working Arrangements of the Parliament, cited in Legal Constitutional and Administrative Review Committee Report No 14, *Review of the Report of the Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations)* (July 1999) at 14.
- 188 Proposed new section 29A of the *Ombudsman Act 1976* (Cth), which was to be inserted by clause 4 of the Ombudsman Amendment Bill 1996.
- 189 See Jack Richardson, op cit, n 51, at 188.
- 190 *Ainsworth v The Ombudsman* (1988) 17 NSWLR 276 at 283 per Enderby J.
- 191 *Booth v Dillon (No 1)* [1976] VR 291 at 295 per Lush J.
- 192 Jack Richardson, op cit, n 51, at 186.
- 193 Dennis Pearce, op cit, n 20, at 72.
- 194 *Ainsworth v The Ombudsman* (1988) 17 NSWLR 276 at 284.
- 195 Jack Richardson, op cit, n 51, at 184.
- 196 Explanatory Notes to the Ombudsman Bill 2001, p 7.
- 197 See Dennis Pearce, op cit, n 20, at 59.
- 198 Robin Creyke and John McMillan, "Administrative Law Assumptions ... Then and Now" in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law at the Twenty-Five Year Mark* (1998) 1 at 25-26. See also Anita Stuhmcke, "Privatising Administrative Law: The Telecommunications Industry Ombudsman Scheme" (1998) 6 *Australian Journal of Administrative Law* 15 at 25.
- 199 See *Glenister v Dillon* [1976] VR 550 at 551 per Gillard J; International Ombudsman Institute website: <http://www.law.ualberta.ca/centres/ioi/brochure.htm> (last accessed 20 August 2002).