

Roles of the Commonwealth and ACT Ombudsman

*Michael Manthorpe PSM**

The Office of the Commonwealth Ombudsman takes complaints about the breadth of Australian Government administration, with the exception of matters pertaining to the Australian Taxation Office and the intelligence community. We also take complaints about several private sectors of the economy (such as private health insurance). Last financial year, we received the second largest number of complaints in the office's 40-plus year history (37 388 complaints that fell within our jurisdiction) — only slightly down from the previous year's record of 38 026.

Growth areas for complaints included the ongoing roll-out of the National Disability Insurance Scheme (NDIS) and student debts incurred under the now defunct VET Fee Help scheme. In absolute terms, we received more complaints about the Department of Human Services than any other agency, although these numbers fell from about 12 500 to about 11 600 compared with the previous year. Complaints about private health insurers and Australia Post also fell, while complaints from overseas students in our capacity as Overseas Students Ombudsman grew.

Complaints comprise the majority of, but not all, contacts made with the office. In the last calendar year we received a record number of contacts (50 237 compared with 47 557 last year) from members of the public. This number swelled towards the end of the year after our announcement that we would examine an aspect of the administration of the Defence Force Retirement and Death Benefits Scheme, which generated over 3000 submissions from veterans.

Over the years, as well as receiving complaints about a wide range of entities, we have also assumed a disparate array of other functions where there is a public interest in independent oversight.

As Defence Force Ombudsman we receive reports about alleged abuse in the Australian Defence Force (ADF), much of which is historical in nature, but each case requires careful, trauma-informed engagement. We make recommendations to the ADF about reparation payments and provide access to counselling or restorative engagement conferences to reportees. We have also commenced periodic 'health checks' of ADF policies and procedures that are aimed at preventing abuse within its ranks and contribute to cultural change. Some of this work is the successor to the Defence Abuse Response Taskforce (DART), which wrapped up some years ago, and some of it is new. I am tremendously proud of the casework that my people do in this space. It helps correct dreadful wrongs committed in the past, and I know that both the Chief of the Defence Force and the Secretary of the Department of Defence value the contribution we make to cultural change in the ADF.

As Immigration Ombudsman we inspect detention facilities, report regularly, make recommendations to the relevant minister about long-term detention cases, and take

* Michael Manthorpe is the Commonwealth Ombudsman. This is an edited version of a speech given at the AIAL Annual General Meeting on 27 November 2019.

complaints about matters such as delays in visa and citizenship decision-making. Sometimes we have an impact in that space; sometimes less so.

As Law Enforcement Ombudsman, we take complaints about the Australian Federal Police (AFP) and other federal law enforcement agencies. We also perform a growing portfolio of inspectorial and reporting roles about the way in which federal and (at times) state law enforcement bodies exercise covert or intrusive powers under Commonwealth legislation. Our work grew in this area in 2018–19 as a result of the passage of the Telecommunications and Other Legislation Amendment Act 2018 (Cth) (TOLA), which was often referred to as the encryption bill. In this general space we stand in the shoes of those who might be complainants but who cannot complain because they do not know about the covert activity to which they are subject. Fundamentally, our job is to examine whether law enforcement agencies are adhering to the detailed requirements of the array of laws that are in place which permit covert or intrusive activities. Increasingly, the Parliamentary Joint Committee on Intelligence and Security and committees that oversee the work of Australian Commission for Law Enforcement Integrity and the AFP are taking a close interest in our reports on such matters.

This year too we commenced work as the National Preventive Mechanism Coordinator, pursuant to Australia's ratification of the Optional Protocol to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).¹ This work, for the first time, brings us into an area of Commonwealth–state relations under the auspices of the United Nations as we seek to progress Australia's implementation of OPCAT. Ratification of OPCAT requires Commonwealth, state and territory governments to put in place appropriate bodies to undertake independent inspections of places of detention. Building on our longstanding immigration detention inspection role, we began work to enhance our methodologies in that setting and to scope how we may undertake inspections of places of detention administered by Defence and the AFP. We have also undertaken extensive engagement with state and territory inspecting bodies and recently released a foundational report about Australia's readiness to implement this important international commitment. I have been engaging directly with attorneys-general and corrections ministers to encourage them to take OPCAT implementation seriously, although there is a long way to go. It is not enough to have merely signed up.

We continue to oversee the *Public Interest Disclosure Act 2013* (Cth) (PID Act) and form part of a wider group of integrity agencies across the Commonwealth. This work connects in interesting ways to debates about the adequacy or otherwise of the Commonwealth's integrity system, media freedom and other topics. I am one of those who thinks that the PID Act, although well intentioned, needs reform to make it work better for agencies and whistleblowers alike and to improve the extent to which its operation provides assurance about the integrity of the overall system.

We play a small but important role in regional capability development in Indonesia, Papua New Guinea, Samoa and the Solomon Islands through programs, funded by the Department of Foreign Affairs, that aim to support the work of ombudsman-like institutions in those countries.

1 GA Res 57/199, 9 January 2003, 57th sess, UN Doc A/RES/57/199 (entered into force 22 June 2006).

As a result of a longstanding arrangement between the Commonwealth and ACT governments, my office also fulfils the role of ACT Ombudsman, which also brings with it a disparate set of functions. I report on these matters to the ACT Legislative Assembly — indeed, it is not widely known that I am an Officer of the Legislative Assembly, even though I am not an Officer of the federal Parliament. In any event, my functions include oversight of freedom of information; support to the ACT's Judicial Council (which takes complaints about the ACT judiciary); a new inspectorial role with respect to the new ACT Integrity Commission; a very active role in overseeing the reportable conduct scheme in Canberra, off the back of the Royal Commission into Institutional Responses to Child Sexual Abuse; a role at Canberra's only prison; as well as more traditional administrative complaint-handling processes. As you can see, the work we do just in the ACT jurisdiction is remarkably diverse, albeit that it consumes just 10 per cent or so of my office's resources.

It is a privilege to occupy the Office of Commonwealth Ombudsman. As an independent oversight agency, we are not subject to direction by ministers or the Parliament, except as stipulated by statute. We report regularly to, and appear before, various parliamentary committees about issues of mutual interest and we have considerable discretion to determine what individual cases or broader systemic issues we examine and report on.

However, being the Ombudsman also brings with it various challenges. Although the office has grown significantly in recent years as government or Parliament has vested more functions in us, the sheer volume of complaints means that we cannot investigate all of them. Even where we do, and although we have strong powers to access material and people to enable us to investigate, under the Ombudsman Act 1976 (Cth) we cannot direct agencies to change administrative decisions or investigate the actions of ministers. Our focus is more on maladministration than policy.

It is undoubtedly the case that in many instances we can achieve a positive outcome for individual complainants — a change in decision by an agency, the removal of a debt, a payment of compensation or reparation, a quick decision when there had been a delay, an apology or even just a plain English explanation of a decision. However, in many instances, a formal investigation may not be the best course of action. Many times, the best assistance we can realistically provide is to refer complainants back to the agency that is subject to their complaint so that the agency has the opportunity to deal with the issue. Even then, in some cases the relevant agency cannot change its decision in relation to a matter because it has in fact upheld the law.

Given all of these operating parameters, I spend a lot of my time contemplating these questions: what is the best we can do, how can we achieve meaningful systemic influence, what can we aspire to achieve for people who seek our help, how will we know when we get there and how might our work contribute in some way to arresting the much-reported slide in public trust in institutions?

In response to these questions, we have sought to take a more strategic approach to allocation of scarce resources to systemic investigations. While we cannot investigate every individual complaint, we can sometimes draw on individual matters to produce reports and recommendations that have systemic impact. During the last year we produced reports on

the administration of the Department of Veterans' Affairs, the Department of Human Services, the Australian Defence Force and the Department of Home Affairs on topics that illustrate this point, and more work is underway pertaining to the NDIS, Defence and others. The report about the Department of Veterans' Affairs, for example, highlighted a particular case of poor treatment of a veteran but in a way that also demonstrated the sort of systemic reform that is needed in that department's systems, legislation and culture. I was pleased that Secretary Cosson agreed with all of our recommendations and apologised to the veteran at the centre of the report.

In another space, we also worked hard with the then Department of Education and Training to identify a systemic remedy for many people who have incurred debts under the VET Fee Help program, and we are now working through the very large caseload of complaints — there are many thousands — to identify which cases are eligible for the remedy: a waiver or remittal of the debt.

Because we are unable to investigate every individual matter that comes to us, we are also stepping up our efforts to gain assurance about the way in which agencies deal with the complainants we refer to them. This has taken the form of increased education and training of complaint-handling areas of major agencies; the commencement of a 'complaint assurance project' where we work with agencies to assess the effectiveness of their complaint-handling activities; the development of 'feedback loops' so that, for certain cohorts of complainants, we seek feedback on the outcome of complaints from agencies when we refer complainants back to them; and we have commenced work to survey complainants and agencies of their experience of dealing with the office. We have instituted a process whereby recommendations we have made in our formal reports in the last two years are followed up to see whether agencies, who usually accept our recommendations, have actually implemented them.

We have also undertaken a re-examination of our performance measures. Among other things, that review concluded that, to be as effective as we can be, we need to build and maintain the confidence of people who contact us; the agencies we oversee; and the Parliament. Ideally, all three of these groups would perceive that we are independent and professional; that our interventions are timely and useful; and that our recommendations are balanced and evidence-based. From next year, we will seek to capture performance information against those broad goals and report accordingly. I can already tell you that by and large the major agencies we oversee recognise the value of our independent oversight; and to the extent we have data (in relation to private health insurance and Defence abuse areas) people who contact us think we do a good job. However, I do not want to overstate that: it is undoubtedly the case that some people who contact us, particularly where we are simply unable to change lawful decisions or government policies to which they might object, feel that we have not helped them.

As our role has expanded, we are also placing a renewed focus on our internal corporate capability to ensure that our internal technology, people, financial, security and property services and settings are supporting all that we do. This year, for example, we have introduced a new wellbeing program for our staff, whose work often requires difficult conversations about confronting subject matter. We have successfully increased the representation of Aboriginal and Torres Strait Islander people in our workforce and we have taken other steps to enhance inclusion. I am very pleased that our annual staff survey results have placed us

in the top quartile of Australian Public Service agencies on staff engagement and wellbeing. So, while our office started as a manifestation of administrative law reform, I am also now the CEO of an agency of 300 people.

For all that, however, the hardest part of the job is the ongoing exercise of judgment. There is no manual that tells an ombudsman how to do this. There are certain laws and policy parameters, but we also operate in a context of considerable ambiguity, discretion and contest.

Sometimes we grapple to find ‘the truth’ in an issue or about a complaint when there are competing arguments and incomplete evidence; or we search for the notion of ‘fairness’ and what it might mean in a given context. In some areas of our work we seek to establish the ‘reasonable likelihood’ of the truth upon which to base a judgment or recommendations. And then there is the matter of limited resources, the fact that we can but make recommendations rather than binding findings, and the implication that, to be as persuasive as possible, we need to maintain, as much as we reasonably can, respectful relationships with the agencies we oversee, yet also demonstrate to complainants that we are doing the best we reasonably can to help them. And we need to do this in an era of hyper-partisanship, where both sides of politics, advocates and commentators like to grab onto your work to push a particular line — it would be easy to take heroic public positions in this job and simultaneously decrease your influence.

External observers, and some complainants, can reach very harsh judgments about the extent to which we call out perceived wrongs; agencies we oversee can be very defensive about even mildly critical findings or recommendations. All I can do is the best I can, calling out issues within the parameters I have described where we see them, sometimes privately, sometimes publicly, in the interests of achieving positive systemic change and upholding the notion of fairness to individual citizens.

I also make the point that, like my predecessor Colin Neave, a modern ombudsman’s office needs to be ‘open for business’. Some commentators worry that we have taken on too many diverse functions and this has diluted or distracted us in some way from our traditional complaint-handling role. I take a different view. I think that as the office’s functions have grown we have been able to secure some additional resourcing and additional rights to be present in a much wider range of debates and discussions than might once have been the case. Handled well, that increases our relevance and ability to exercise influence, often for vulnerable people or people who cannot protect themselves. Not only that, but many of the sorts of complaints that come to us in our traditional Ombudsman jurisdiction arise in parts of the system where merits review (internal or through bodies such as the Administrative Appeals Tribunal) are more likely to produce a positive result for people than anything that we can do.

I am now, in fact, past halfway through my five-year term as Ombudsman. In that time, I think that Jaala Hinchcliffe and I and our dedicated staff have made a wide array of useful contributions to public administration, but there is always more to do. My goal is to pass the office on to my successor, when the time comes, in a spirit of stewardship and in a state where we are well regarded as an active, relevant and useful contributor to systemic oversight in the interests of fairness and integrity.