

been the top office-bearers of the Consumers Association. It is not surprising therefore that the Business Council sees Cashman's involvement in the revival of the class actions brief as a worry for business, as the council's latest bulletin puts it, "the perception that the current push for class actions has at least some undercurrent of this quasi political agenda".

*the new push.* The Business Council also weighed in with its July bulletin, which carried a story entitled 'Class Actions — The New Push'. Citing concerns about cost, the Business Council article pointed to a number of other mechanisms available to meet consumer concerns including small claims tribunals, consumer affairs agencies, increased media involvement in identification and redress, and recent amendments to the Trade Practices Act enabling the Trade Practices Commission to seek representative compensation on behalf of identified persons.

The Business Council bulletin's support for the trade practices amendments incorporating a form of representative action seems strange given the broad thrust of the Business Council's argument that reforms of the representative procedure to allow more people to seek redress are unnecessary. This is especially so because the ALRC's proposed reform is a private rather than public sector option.

*'nude vicar class actions shock horror'.* Probably the high point of press reaction came in a story in the *Sunday Telegraph* (16 August 1987), reporting that

The Commission's tentative proposals have sent shock waves through the business community which believes they have huge implications for the economy.

The *Sunday Telegraph* story suggested that, if class actions were introduced in Australia as proposed by the ALRC

respondents to a consumer survey might be sued for criticising a product unfairly. The potential for costly and divisive law suits would be endless.

After quoting comments from Messrs Gardini and Allen expressing fears that the deterrent effect of class actions on 'decent business' would be so strong that they would be afraid to try new products or practices, the article concluded

In the US, the Washington Post recently forecast the legal situation getting so out of hand that all the swimming pools would have to be drained because of the possibility of drowning.

*favourable press.* Earlier this year the *Insurance Record* (Jan-Feb) reported an address by Andrew Roman, a Canadian expert on multiparty litigation retained by the ALRC as a consultant on its reference. An editorial commented:

So, at the moment, there is no great pressure being brought to bear for legislation to allow class actions. However, the need is pressing. . . . We are still unsure about the long term effects of many of the chemicals we consume or use and, somewhere among the major products, there is a time bomb ticking away. When it explodes our legal system must be ready.

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two extensions to the nsw ombudsman's powers to investigate police

. . . Dare we permit people to have some say about how they are policed? . . . F

all your constitutions and all your beautiful concepts it's what happens on the street between the police and the people that determines how free and equal your people are. . .

Former US Attorney-  
General Ramsey Clark,  
*Address*, International Conference on  
Civilian Oversight of  
Law Enforcement 1985.

*introduction.* On 3 September 1987 NSW Ombudsman George Masterman QC announced his resignation, nine months before the end of his seven year term. Mr Masterman earned a reputation as an outspoken critic of Government secrecy and of corruption in the police force, which led to clashes with the Wran Government and the NSW Police Association. However 'relations with the Government appeared to thaw in recent years'. (*Canberra Times* 4 September 1987) 'It's a good time to go. . . the office is in very good shape' Mr Masterman said. He stated that he was pleased with the new police complaints system and recent acceptance of his recommendations, believing 'NSW now has both a fair and credible system of review of complaints against police'. (*CT* 4 September 1987) This article examines two areas of the Ombudsman's powers to investigate police which were recently extended by parliament.

*background.* Under the Police Regulation (Allegations of Misconduct) Act, which came into force in February 1979, the office of the Ombudsman could oversee complaints made against police but had no independent powers of investigation. It was limited to a 'paper review' of internal police investigations. In a Report to parliament in 1982, Mr Masterman presented two options. Either give the Ombudsman adequate powers to investigate complaints against police or 'abolish

the present role' so that 'the dangerous charade likely to deceive members of the public into believing that there is a public watchdog . . . with effective powers when there is not' no longer exists. At the end of 1983, the Wran Government introduced new legislation strengthening the Ombudsman's capacity to review complaints against police.

*police reaction.* The police have resisted 'every inch of the way'. (*Sydney Morning Herald* 14 July 1987) For example the Police Association has accused the Ombudsman of pursuing 'trivial and vexatious complaints', (*SMH* 26 May 1987) and of 'delays and a backlog of inquiries'. (*Northern Star* 1987) The Police Minister Mr Paciullo said 'I am worried that the system is being abused and that it is affecting the ability of police to carry out their duties'. (*SMH* 26 May 1987.) At the annual Police Conference in May 1987, the Association unanimously passed a motion to abolish the present internal system and create 'an independent police complaints authority' with power to 'receive, conclude, reject or investigate all complaints against police'. (*CT* 27 May 1987.)

*present system.* In 1986/87, 2 010 complaints were finalised. Any complaint against a member of the NSW police force now involves two stages. The Ombudsman's office must be notified as soon as practicable of all complaints, where they are vigorously screened. The complaint may be declined (52.1% in 1986/87), discontinued (6.9%) or conciliated (10.8%). The complaint is investigated in the first instance by the police Internal Affairs Branch or other assigned police officers. The Ombudsman monitors progress and keeps the complainant informed. The Commissioner of Police

reviews the investigation and decides what action is necessary.

On completion of the initial police investigation, the Ombudsman reviews the matter and decides if the complaint is sustained (1.9%), not sustained (4.4%) or no action is deemed (21%). Under the legislation introduced in November 1983, where there is a substantial conflict of evidence and the Ombudsman is unable to determine whether or not the complaint is sustained, the office may carry out its own re-investigations.

Under the 1983 legislation, the staff who carry out the further investigations are plain clothes police officers seconded to the office. They have broad powers to investigate and to conduct a private hearing. Following this, the Ombudsman makes a final decision as to whether the complaint is not sustained (.7%) or is sustained (1.5%). In certain circumstances a report to parliament may be made.

The Ombudsman's office currently has nine seconded police officers amongst its investigative staff of 34. (*Daily Telegraph* 20 August 1987. They have dealt with claims of corruption including bribery, inappropriate use of arrest powers, junior officers' complaints against senior officers and tow-truck rackets. (*Special Report* August 1987) In 1978/79 there were 244 complaints. In 1985/86, 1 731 complaints concerned police out of a total of 4 805 received by the office. (Ombudsman of NSW *Annual Report* 1985/86)

*delay in police investigations.* As Mr Masterman pointed out in January 1987, ('The Investigator' *Newsletter*) it is not uncommon for the initial police investigation to take over 12 months even though the matter may be relatively simple. He expressed concern

in Annual and three Special Reports to parliament about the delay, detailing the chronology of gross delay in particular matters. 'I believe that delay not only upsets complainants, it also compromises the investigation — evidence may be lost, memories fade and witnesses, even the complainant, disappear. The Ombudsman can re-investigate a report about police but only after the Police Department has finished. . .' (*Newsletter* 1.87.)

He recommended that the legislation be amended to specify a maximum period of 90 days for the police investigation, after which the Ombudsman could take over. It was noted that a period of 42 days currently exists in Western Australia.

In a media release dated 10 April 1986, the then Premier said 'The Premier Mr Neville Wran and the Minister for the Police Mr Paciullo are sympathetic to the recommendations . . . concerning time limitations for police investigations of complaints against the police . . . It is agreed that the legislation should be amended.'

In one of the last Acts passed in the Autumn 1987 session of the NSW Parliament, the police regulations were amended to provide that where the Police Commissioner has not completed an investigation of a complaint within 180 days of notification of a decision to investigate, then, unless the Ombudsman agrees to extend the time, the office can investigate the complaint itself.

*civilian investigators.* The present legislation requires in effect that all re-investigations be conducted by the Ombudsman's seconded police officers. Mr Masterman has repeatedly argued in Annual and Special Reports to parliament that this is undesirable and that civilian investigators should ab-

be allowed to participate in the re-investigation of complaints against police. He emphasises that the seconded officers are of an extremely high calibre, effective, credible and vigorous investigators and of value due to their experience of the NSW police force. However civilian investigators, especially former police from interstate or overseas or people with specialized experience, would supplement such a system and enable enquiries to be conducted more expeditiously and economically.

In response to the *Special Report* on 'The First Three Years of the NSW Police Complaints System' released in August 1987, NSW Premier, Mr Barrie Unsworth indicated that the Government was 'giving active consideration to allowing civilian investigations.' (*Press Release* 14 August 1987) Shortly afterwards, Mr Masterman's 'mix' of police and civilian investigators was approved by Cabinet in the face of strong criticism from police representatives. (*Sun* 3 September 1987, *DT* 20 August 1987)

*a successor?* Commenting on the Ombudsman's resignation, Mr Unsworth said that Mr Masterman had made significant improvements to the nature of Government and would be particularly remembered for his work in dealing with complaints against police. (*CT* 4 September 1987) The question that John Slee, the *SMH*'s legal writer, asked is 'do Mr Unsworth and his Government . . . have the courage to appoint as successor to Mr Masterman a person as committed to it as he has been?' (*SMH* 14 July 1987)

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## sentencing

A well-written life is almost as rare as a well-spent one.

Thomas Carlyle, *Essays*

*three discussion papers.* The ALRC has released three Discussion Papers dealing with proposals for reform of the sentencing process. Discussion Paper 29, *Sentencing: Procedure*, suggests principles to guide the courts in the imposition of punishment in accordance with specified goals. Discussion Paper 30, *Sentencing: Penalties*, proposes a new penalty structure. Discussion Paper 31, *Sentencing: Prisons*, looks at the need for a prison system in the Australian Capital Territory and suggests guidelines for regulating prisons. When releasing the first of the documents, the Commissioner-in-charge, George Zdenkowski, said

While the criminal justice system attributed great importance to procedures necessary for the determination of guilt or innocence, it neglected procedures for the determination of punishment. Australia's system of punishment is arbitrary and operates haphazardly and inconsistently. For example, the courts should not be able to increase sentences just because they see the particular crime as prevalent in the community. To do so is unjust. Merely because a person is convicted for such an offence does not mean he or she should be punished for the crimes of others. There is an urgent need for Australia to develop its own modern punishment system reflecting Australian values relevant to the 21st Century.

*sentencing procedures.* DP 29 discusses sentencing goals, procedures and general principles to guide sentencing