

**HAVING A FEDERAL OMBUDSMAN**

Mr. Jack Richardson

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International Ombudsman Institute  
Room 238 Weir Library, Faculty of Law  
University of Alberta, Edmonton, Alberta, T6G 2H5, Canada.

## I. HAVING A FEDERAL OMBUDSMAN

### Provincial and State Ombudsmen

The concept of the Ombudsman originating in Sweden in 1809 was almost entirely confined to Europe until 1962 when New Zealand became the first Commonwealth country to appoint an Ombudsman. Canada and Australia, availing themselves of the New Zealand precedent, followed suit. In Canada in 1967 Alberta was the first, to be followed shortly afterwards by New Brunswick and Quebec. Now nine of the ten provinces have Ombudsmen but there is not yet a federal Ombudsman.<sup>1</sup>

Western Australia was the first Australian state to appoint an Ombudsman. The Parliamentary Commissioner Act 1971 setting up the office called the Ombudsman the Parliamentary Commissioner for Administrative Investigations, a title adapted from the United Kingdom where the Westminster Parliament created the office in the Parliamentary Commissioner Act 1967. Four of the remaining five states created Ombudsmen before the Australian federal Parliament, known as the Commonwealth Parliament, passed the Ombudsman Act 1976 establishing the office of Commonwealth Ombudsman.<sup>2</sup>

Australia's smallest state - our equivalent to Prince Edward Island - appointed an Ombudsman in June 1979. The Tasmanian Ombudsman in fact operates as a delegate for the Commonwealth Ombudsman<sup>3</sup> Australia remains the only federal country with a national Ombudsman and it would be less lonely for him if there were to be a counterpart Canadian

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<sup>1</sup>For the introduction of the Ombudsman to Canada, see Ulf Lundvik 'The Ombudsmen in the Provinces of Canada' published by the International Ombudsman Institute.

<sup>2</sup>The Ombudsman Act 1976 came into being in the context of several major reforms in federal public administration after consideration by two expert committees - the Commonwealth Administrative Review Committee in 1971 and the Committee on Administrative Discretions in 1973.

<sup>3</sup> Australia's largest territory, the Northern Territory, has had an Ombudsman since 1978. For awhile the Commonwealth Ombudsman exercised jurisdiction over the Northern Territory but it introduced its own Ombudsman upon the grant of self-government in 1978.

federal Ombudsman.

### From Sweden to Westminster

Sweden has a host of Ombudsmen beginning at the local level and there are also Ombudsmen with specialist functions. At the pinnacle there are four Ombudsmen, the Justitieombudsmen, one of whom is Chief Ombudsman and all of whom are officers of the Riksdag. As for Americans with their anti-trust laws, so the entire population of Sweden and officialdom at all levels has grown up with the idea of having public agents to do battle with officialdom against claimed excesses of governmental power. The Swedish model has proved adaptable to quite different conditions in various parts of the world and the novelty of the concept has not caused any particular difficulties in either Canada or Australia.

In both our countries there are probably many members of the public with little or no knowledge of what Ombudsmen do. Yet the volume of complaints received by Ombudsmen shows a substantial public demand usually increasing as the process of education continues. Last year<sup>4</sup> over 20,000 people approached the offices of the Commonwealth Ombudsman. Viewed quantitatively no other institution for the external review of official action would have anything like that amount of direct contact with members of the public.

### Ombudsmen and Members of Parliament

In Canada and Australia, as in Sweden, members of the public have direct contact with the Ombudsman. In the United Kingdom the Ombudsman may only investigate complaints referred to him by Members of the House of Commons. This is partly because of fears held at first that the new institution would erode the traditional function of Members of Parliament of taking up constituent's complaints with the government. A further reason related to the size of the population was that if members of the public had direct access to the Ombudsman he would be deluged with complaints. In France the Mediateur, who has operated since 1978, also receives complaints only through Deputies and Senators.

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<sup>4</sup>1 July 1984 to 30 June 1985.

One problem about complaints having to be channelled through Members of Parliament is that if the Member does not choose to use the Ombudsman his constituents are, for all practical purposes, denied access to the Ombudsman.

Experience in Canada and Australia has not demonstrated any substantial competition as between members of legislatures and Ombudsmen though probably in every jurisdiction there are some legislators reluctant to use the Ombudsman. Of course, if a constituent is not complaining about official actions but seeks something else such as support or preferment, there is no point in approaching the Ombudsman. On the other hand, if the complaint is in the nature of a grievance about an official administrative action, the chances are that the Member of Parliament acting on behalf of a constituent will, in the end, gain more from approaching the Ombudsman than contacting the relevant Minister. The Ombudsman has at his disposal the vital powers of being able to summon witnesses and require the production of information. Ombudsmen customarily say that their role complements the role of Members of Parliament.

Australia has a population of sixteen million. The functions of central government are not less than those of the Canadian central government. It has proved possible for our office to handle the volume of complaints received directly from the Australian population though not without taking some measures which recognize the substantial size of the population served, the large geographical area of Australia and the federal system of government. A few months ago members of the Select Committee of the House of Commons on the Parliamentary Commissioner for Administration visited Australia and observed the operations of offices of the Commonwealth Ombudsman. It had a particular interest in members of the public having direct access to the Ombudsman and the handling of complaints by the oral process.

#### Jurisdiction of the Ombudsman

The area of activity common to all Ombudsmen in Canada and Australia is the investigation of administrative actions of officials who participate in the executive government of their country, provinces or states. The usual position is for an Ombudsman Act to define jurisdiction in terms of departments, corporations, boards and other authorities of the

executive government. In some instances the authorities over which the Ombudsman has jurisdiction are specified by name,<sup>5</sup> in others, as for the Commonwealth Ombudsman, they are identified by general description. It is also usual for Ombudsman Acts to exclude from investigation various kinds of action even though they are part of executive government. The most common exclusion in Canada and Australia is the action of a Minister, the theory apparently being that Ministers are responsible to Parliament under the Westminster system and this should be sufficient. The Ombudsman will take up where they leave off, that is to say, the Ombudsman will investigate public grievances about actions of departments for which the Minister can hardly be held to be responsible politically in any real sense.

#### Reasons for having Ombudsmen in Canada and Australia

The 'Federal Ombudsman Background Document' prepared for the 1985 Canadian Bar Association annual meeting quotes from the judgement of Chief Justice Dickson of the Supreme Court of Canada in British Columbia Development Corporation v Friedman,<sup>6</sup> a decision gratifying to Canadian and Australian Ombudsmen. The judgement of the Chief Justice identified two factors as providing cause for the creation of an Ombudsman. The first is the growth in size and complexity of government in both qualitative and quantitative terms leading to the emergence of the modern welfare state with intrusions into the lives of individuals hardly dreamt of in the nineteenth century. Second are the limitations of traditional avenues of external review, in particular the courts. The limitations may be substantive as for example the absence of a legal remedy. They may be also procedural, for example, average citizens shrink from becoming litigants for various reasons not the least of which is the potential cost.

There is a third factor, partly related to the first. A concomitant of the social and economic developments which have occurred in Canada and Australia is a steadily increasing demand for the institutions of government to render themselves accountable not only to the

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<sup>5</sup>The Ombudsman Bill C-43 of 1978 to provide for a Canadian Ombudsman listed subject government institutions in a schedule.

<sup>6</sup>November 1984

community at large which they are supposed to serve but also to individuals and individual groups in the community. Ministerial accountability can no longer satisfy that demand even if it might have done in the nineteenth century. The process has been fostered by enormous developments in communications, including radio, television and satellite to give public exposure of the institutions and activities of government. The extent of bureaucratic power has become generally known.

#### Why a federal Ombudsman

Before federation separate provinces in Canada and separate colonies in Australia exercised the functions of government. Federation brought into being national government but with limited legislative powers. In Australia most of the founders did not foresee an ascendant Commonwealth and it was suggested originally that the cost to each citizen of running a Commonwealth government would be less than the cost of a dog licence. In Canada the authors of the British North America Act planned a stronger central government than the Constitutional founders in Australia,<sup>7</sup> still the events of the twentieth century have vastly expanded the demands on central government beyond the original conceptions of federation in both Canada and Australia. Many factors have contributed - the development of industry, trade and commerce on a national and international scale, the emergence of Canada and Australia as international states in their own right, the evolution of national defence, and the assumption of responsibility for the provision of social security benefits. In both countries, judicial interpretation, on the whole favourable to central government, and the wielding of extensive powers of taxation have also led to the undoubted predominance of the central component of

<sup>7</sup>For example, the vesting in the Canadian Parliament of the power to regulate trade and commerce without qualification and the power given it to disallow provincial statutes (Constitution Act, 1867 s92.2). Nevertheless today the Canadian federal government is less dominant in the federation than the Commonwealth government in Australia. Leaving aside the existence of the two cultures, for the most part the difference seems to turn on the nature of federal provincial fiscal arrangements. For Australia see footnote 20 infra. In Canada tax collection agreements provide for abatements of federally imposed corporate income and personal income tax with the federal government being the collector of tax on behalf of most of the provinces. Abatement is a reduction in tax and not a grant. Nevertheless primacy in taxation rests with the Canadian government and it can achieve federal policies in making grants to the provinces.

government in the federal system. Central power, of course, extends over the whole of the land and the institutions of review in the provinces are not at the same time appropriate institutions of review of federal power.

#### Federal legislative powers in Canada and Australia

Comparison of the legislative powers of the Commonwealth Parliament with those of the Parliament of Canada will show that there are principal legislative powers common to each affecting the day to day lives of the community.

Under the Australian Commonwealth Constitution which has operated since<sup>8</sup> 1 January 1901 specific subjects of legislative power are vested in the Commonwealth Parliament,<sup>9</sup> but unlike Canada residual legislative powers are retained by the states.<sup>10</sup> Again, unlike Canada, most of the distributed legislative powers are not exclusive powers to either the Commonwealth or the states but concurrent.<sup>11</sup> However where a law of a state is inconsistent with a law of the Commonwealth, the Commonwealth law prevails and the state law is invalid to the extent of the inconsistency.<sup>12</sup> This is known in Australia as the doctrine of paramountcy of Commonwealth law and it means that any law of the Commonwealth enacted pursuant to a head of legislative power can completely displace state law. The Commonwealth Parliament has taken extensive advantage of the position to occupy whole areas of government to the exclusion of the states, for example, marriage and divorce<sup>13</sup> and bankruptcy and insolvency.<sup>14</sup>

Principal subjects of Commonwealth legislative power for which there are approximate equivalents in the Constitution Act of Canada include the following:

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<sup>8</sup>The Constitution is contained in the Commonwealth of Australia Constitution Act passed by the Imperial Parliament on 9 July 1900.

<sup>9</sup>Most, but not all, the heads of power are specified in Constitution s.51.

<sup>10</sup>Constitution sections 106 and 107

<sup>11</sup>A few Commonwealth powers are expressed to be exclusive, eg the power to impose customs and excise duties made exclusive (Constitution s90) whilst other powers by their description are exclusive eg the legislative power (Constitution s51 (iv) with respect to borrowing money on the public credit of the Commonwealth and the power under s122 to make laws for the government of Commonwealth territories.

<sup>12</sup>Constitution s109

<sup>13</sup>Constitution s51 (xxi) and (xxii)

<sup>14</sup>Constitution s51 (xvii)

Australia

1. Interstate and overseas trade and commerce -s51(i)and 90
2. Taxation -s51 (ii) and 90
3. Postal, telegraphic, telephonic and other like services ( includes radio and TV) -s51 (v)
4. Defence -s51(vi)
5. Quarantine -s51(ix)
6. Fisheries beyond territorial limits -s51(x)
7. Banking, except intra-state banking -s51(xiii)
8. Copyrights, patents, design and trade marks -s51 (xviii)
9. Marriage and divorce -s51 (xxi) and (xxii)
10. Invalid and old age pensions and various other social security benefits including unemployment, pharmaceutical, medical and hospital benefits -s51 (xxiii) and (xxiiiA)
11. People of any race -especially Aborigines -s51 (xxvi)
- 12.Immigration and emigration -s51 (xxvii)
13. External affaires -s51 (xxix) and (xxx)

Canada

1. Regulation of trade and commerce -s91.2, 91.10 and 91.13
2. Taxation -s91.3
3. Postal services -s91.5
4. Defence -s91.7
5. Quarantine -s91.11
6. Sea coast and inland fisheries -s91.12
7. Banking and savings banks -s91.165 and 91.16
8. Patents and copyrights -s91.21 and 91.22
9. Marriage and divorce -s91.26
10. Old age pensions and supplementary benefits -s94A and unemployment insurance -s91.2A
11. Indians -s91.24
12. Naturalization and aliens -s91.25 and immigration -s95
13. Treaty obligations -s132

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<sup>15</sup>This footnote should be read before the table which compares Australia and



The Commonwealth Parliament also has some legislative powers which the Canadian Parliament does not specifically possess. One is a power to legislate with respect to conciliation and arbitration for the settlement of interstate industrial disputes. By favourable judicial interpretation and the ease with which it is possible to create an interstate industrial dispute federal industrial power has become more significant in Australia than state industrial power.

The Commonwealth Parliament may also legislate on the subject of foreign corporations and Australian trading or financial corporations.<sup>16</sup> Recent decisions of the High Court have turned the corporations power, originally very narrowly construed, into a growth power. The Commonwealth Parliament can regulate not only the trading and financial activities of Australian trading and financial corporations but probably also their non-trading and non-financial activities.<sup>17</sup>

Another growth power is the external affairs power already mentioned. Under it the Commonwealth Parliament may legislate to carry out fully within Australia any bona fide international commitment or understanding.<sup>18</sup>

It must, of course, be remembered that the Commonwealth Parliament does not possess a residual legislative power.

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<sup>15</sup>(cont'd) Canada. "I believe that federal control of railways, road transport, radio, television and potentially telephones rests on the peace and order and good government power of the Canadian Parliament rather than specific heads of power enumerated in s91 leaving local systems within provincial jurisdiction, at least unless there is a declaration under s92 (10)(c) of the Constitution Act. There is no equivalent power in federal Australia and in the absence of a residual legislative power all laws have to be sustained under a specific head of legislative power. However the interpretation of a Commonwealth head of power is not to be read in the light of any exclusive state powers as in Canada, because there are none expressed in the Australian Constitution. This is conducive to a more expansive interpretation of the federal powers."

<sup>16</sup>Constitution s51 (xx)

<sup>17</sup>The power opens up new vistas for the exercise of economic controls and now more than compensates for a narrow and artificial construction of the interstate and overseas trade and commerce power.

<sup>18</sup>In the Tasmanian Dams case (1983 46 ALR 625) the High Court of Australia held that the external affairs power allowed the Commonwealth Parliament to prevent the state of Tasmania from constructing a hydro-electric dam in a wilderness area. The Commonwealth prohibited the building of the dam under the World Heritage Properties Conservation Act 1983 enacted to allow full Australian subscription to the UNESCO Convention for the Protection of the World Cultural and National Heritage.

The national Parliaments of both countries make financial grants both unconditional and conditional to the provinces and the states.<sup>19</sup>In practise the Commonwealth has been able to utilize its taxation powers and grants power to give it almost complete financial ascendancy over the states.<sup>20</sup> In the social security field the provision of social security benefits is virtually a Commonwealth monopoly. Canadians understand better than I the extent of Canadian federal influence both in taxation, social security, trade and commerce and communications. It is not as dominant as in Australia but nonetheless extensive.

The conclusion to be drawn from the comparison of the legislative powers of the national Parliaments of Canada and Australia is that each has a legislative role of much more significance than any province or state of the federal system. Ombudsmen are now well ensconced in nine of the ten Canadian provinces and all six of the Australian states. A fortiori there should be a federal Ombudsman in Canada as in Australia.

#### Jurisdiction of the Commonwealth Ombudsman

In 1977 the Love Committee on the concept of the Ombudsman suggested a schedule of organizations to be included in a Canadian Ombudsman's jurisdiction. Bill C-43 of 1978 which was intended to provide an Ombudsman for Canada also listed in a schedule the subject government institutions.

In Australia the jurisdiction of the Commonwealth Ombudsman is conferred in general terms on departments of the Australian Public Service and prescribed authorities. A prescribed authority is defined to include a corporate or unincorporated body established under an enactment for a public purpose. A prescribed authority may be removed from the ambit of the

<sup>19</sup>Constitution s96 in Australia

<sup>20</sup>Although the states may legally impose income tax they do not do so because of a Commonwealth legislative scheme under which the Commonwealth imposes substantial rates of income tax uniformly throughout the Commonwealth leaving little taxable capacity left over for the states to utilize. It then makes grants of financial assistance to the states out of the income tax revenues in effect on the condition that a state will not in itself impose income tax. If a state fails to co-operate its residents would still have to pay Commonwealth income tax at the same rates as residents of other states. Commonwealth reimbursement grants give the states more revenue than they raise from their own sources of taxation. Further the states are prohibited by section 90 of the Constitution from imposing customs and excise tax. These taxes were the principal sources of revenue before 1900.

Ombudsman by regulations made by the executive government, the regulations being subject to disallowance by either the Senate or the House of Representatives. Most of the departmental, agency and propriety corporations of the crown in Canada and a good many of the federal commissions, boards and councils would, in Australia, fall within the Ombudsman's jurisdiction to investigate complaints about them. The principal exceptions to jurisdiction are some trading corporations including the government-owned airlines and the Commonwealth trading bank group. On the other hand the export marketing boards, the Reserve Bank and the Australian Broadcasting Corporation are subject to the Ombudsman. There is not much logic about it all.

The Ombudsman Act 1976 came into operation on 1 July 1977, ie eight years ago. Since then the Commonwealth Ombudsman's authority has increased.

#### Australian Federal Police

Each state and the Northern Territory has its own police force. There is also the Australian Federal Police which has responsibility throughout Australia for investigating crimes about federal laws and protecting Commonwealth property as well as providing a traditional force in the Australian Capital Territory.

The Complaints (Australian Federal Police) Act 1981 provides for the investigation of complaints from members of the public about actions of the Australian Federal Police. The investigation of a complaint in the first instance is in the hands of an Internal Investigation Division of the AFP which reports both to the Ombudsman and the Commissioner of Police. The Ombudsman monitors the police investigation and if he is dissatisfied with the outcome can direct further enquiries or assume the investigation role himself. The Act came into operation on 1 May 1982. The jurisdiction is sensitive but so far has worked pretty well.

#### Freedom of Information

The Australian Parliament passed a Freedom of Information Act in 1981 which came into effect on 1 December 1982. If a government agency to which the FOI Act applies refuses a request for documents the aggrieved member of the public may seek review of the decision

either by the Administrative Appeals Tribunal of the Commonwealth or the Ombudsman. The AAT consists of judges, lawyers and laymen. It may be constituted by a single member but in more significant cases it usually consists of three members. The AAT may dispose of the matter by its own decision whereas the role of the Ombudsman is to make a recommendation to the agency as distinct from a decision. In 1983 the Senate persuaded the government to agree to a Freedom of Information Amendment Act which gave to the Ombudsman an additional role of representing applicants seeking review before the AAT. The role is controversial.

As yet there is no specific privacy Act in Australia and hence there is not a Privacy Commissioner. The Australian Law Reform Commission has recommended that there be privacy legislation and a separate Commissioner but there is no legislation in the offing.

#### Defence Force Ombudsman

In 1983 the Parliament amended the Ombudsman Act 1976 to vest in the Commonwealth Ombudsman the office of Defence Force Ombudsman. The function of the Defence Force Ombudsman is to investigate, either when a complaint is made, or of his own motion, administrative actions connected with a person's service in the Defence Force. The Act is flexible enough to allow dependants of service members also to lodge complaints. The Defence Force Ombudsman has subsumed existing jurisdiction of the Commonwealth Ombudsman to deal with complaints by veterans about repatriation and other benefits available to former members of the Defence Force. Complaints from members of the armed forces may raise almost any matter relating to their service including promotion, transfer and discharge. The few exceptions to jurisdiction include matters of military discipline and the award of honours to individual members of the Defence Force. Before approaching the Defence Force Ombudsman a member of the Defence Force, unless there are special circumstances, must first exhaust well-established avenues of internal redress. Complaints tend to be complex and have frequently raised important questions of principle and practice in the settling down stages of the jurisdiction. The jurisdiction of the Commonwealth Ombudsman in the capacity of Defence Force Ombudsman is likely to lead to a considerable volume of work.

### Sources of complaint

Anyone may complain to the Commonwealth Ombudsman. In contrast to the views of the Love Committee and Bill C-43 the Ombudsman Act has an extra-territorial operation. It has not resulted in a flood of complaints from overseas, for example, from disappointed applicants wishing to emigrate to Australia although this is due in large part to ignorance about the Ombudsman abroad. A complainant may be a corporation.

A person may complain on behalf of someone else and Members of Parliament frequently lodge complaints on behalf of their constituents. In recent years, as the facilities of Ombudsmen have become better known and understood professionally, lawyers and accountants have made increasing use of the office on behalf of their clients.

Some of the principal areas of executive government activity for which there are counterparts in Canada and about which we receive many complaints are as follows.

### Social security payments

The Department of Social Security has the statutory responsibility of providing payment of a wide range of social security benefits including age, invalid and widows' pensions, unemployment and sickness benefits and family and handicapped children's allowances. For the purpose the Director-General of Social Security has full statutory powers to assess qualification for benefit and apply the various conditions such as a means test applicable to particular benefits. Complaints to the Ombudsman cover virtually all aspects of the administration of the legislation, eg, the wrongful refusal of a benefit, an insufficient rate of payment, delay in receiving payments and wrongful termination of benefits. About 30% of the annual federal budget for the ordinary annual services of the government is expended on social security benefits. Since administration is in the hands of a statutory official and not the Minister this area of government provides an excellent illustration of the great extent of bureaucratic power in modern government.

## Health

A Health Insurance Commission administers a national scheme for the payment of hospital and medical benefits known as Medicare set up by the National Health Act 1983. In addition to entitlement to basic medical and hospital benefits a citizen may elect to participate in a scheme providing a more liberal scale of benefits. Thus the Health Insurance Commission operates a scheme known as Medibank Private and there are also private hospital and medical benefit funds in competition with it. The Commission's activities are subject to the Ombudsman's jurisdiction. Complaints cover such matters as disallowance of claims for refunds of hospital and medical expenses, retention of original accounts and receipts and the denial of benefits. We also receive complaints from medical practitioners under investigation for suspected fraud or over-servicing.

## Taxation

The Australian Taxation Office is under the control of a statutory office holder, the Commissioner of Taxation.

Tax avoidance has been a burning issue in Australia over the last few years and the Commissioner, with the blessing of the government and some new taxation laws directed against tax avoidance, has pursued an aggressive policy of taxation recovery. Amendments to the taxation law to catch major tax avoidance schemes inevitably affect ordinary taxpayers. The number of taxation complaints to the Commonwealth Ombudsman has increased greatly.

There are well established mechanisms for review of taxpayer objections including resort to Taxation Boards of Review and the courts. The Commonwealth Ombudsman's office will not involve itself where it is obviously appropriate for a taxpayer to use the long-established institutional machinery but a wide range of complaints come to us nevertheless. For example, much use is now made by the Commissioner of statutory provisions for the imposition of penalty tax which may be as high as 200% for tax avoided by concealment or failure to disclose all sources of income. In practice, relief against the imposition of penalty tax, for example on the ground that the Commissioner is abusing his discretionary power, is

obtainable if at all only through making complaint to the Ombudsman. Other taxation complaints investigated include delay in the issue of assessments, putting taxpayers to unnecessary expense by answering requests in respect of which information has already been provided, and discriminatory and unreasonable investigation of a taxpayer's affairs.

Astonishing delays in the hearing of appeals by Boards of Review has also directed a substantial volume of business to the Ombudsman's office. If an alternative remedy is not readily available obviously it is an enticement to an Ombudsman to take on the case himself. Currently we are in a position that we could be overwhelmed by the volume of taxation work if we were to perform a supplementary role to a Board of Review.

### Immigration

Canada and Australia have maintained active immigration programmes since World War II and the substantial part of the population of each country comprises persons who were born overseas. Existing intake policies in Australia are very restrictive and the Department of Immigration and Ethnic Affairs is always on the lookout to minimize circumvention of the policies it administers. It is not surprising therefore that migration complaints comprise a large percentage of complaints coming to the Commonwealth Ombudsman. They may cover such matters as refusals by the Department to grant migration status, to issue entry permits whether temporary or otherwise and to recognize refugee status. Deportation procedures also provide a fruitful source of complaint.

Our experience is that migrants frequently are not aware of their rights and obligations as members of the Australian community or how they should deal with various government authorities.

### Foreign Affairs

The Department of Foreign Affairs deals with the issue of passports and there are frequent complaints about delay, mostly arising now from more stringent rules about identification. The Ombudsman also receives complaints from persons overseas, usually but not necessarily Australians, about their treatment by Foreign Affairs offices abroad. Complaints

are also received alleging failure by the Department to institute sufficient enquiries about Australians overseas who cannot be located.

#### The Post Office

As in Canada the postal service is in the hands of a statutory corporation known as Australia Post. There is considerable community dissatisfaction about the standard of the postal service especially the lengthy delays which sometimes occur in obtaining successful transmission of postal articles. There is not a lot the Ombudsman can do about the general level of performance of Australia Post. Nevertheless where there are particular instances of failure in performance these can sometimes be investigated with success. There are other complaints associated with the delivery of mail which may be the subject of investigation for example, a refusal to pay compensation for loss or damage of a postal article. Other complaints relate to the location of letterboxes, misdirection of mail, the transmission of offensive mail and the growing amount of junk mail placed by Australian Post in letterboxes.

#### Trade and Industry

The Commonwealth Ombudsman receives a wide variety of complaints about economic matters. Some deal with the imposition of custom duties, for example, goods being denied duty-free entry, wrong classification of goods for duty purposes, goods subjected to duty contrary to advice given following analysis of samples made in advance of importation and wrong or misleading advice given as to liability to duty. Other customs complaints relate to the treatment of persons coming into Australia as, for example, requiring submission to personal search.

Within Australia complaints have come from Official Receivers and manufacturing companies which have closed allegedly because of government reductions in tariffs on imported goods entitling the local companies to structural adjustment. A complaint may be that compensation was denied or was insufficient.

The Commonwealth is the biggest single purchaser of goods within Australia and complaints are received from unsuccessful tenderers. In this area cases have occurred of



defective processing of tenders leading to the lowest tender being wrongly rejected. Other complaints have related to the security of the various tender systems.

Complaints also come in from time to time about the actions of the various export marketing boards, a usual complaint being the imposition of unreasonable or discriminatory controls at places of production.

#### Transport and communications

Air navigation is under exclusive federal control. All commercial air operations are also subject to federal control through an elaborate licensing system and most significant airports are either federally owned or controlled. Complaints about aviation may concern the grant and suspension of pilot training and aerial work licenses, refusals to grant licences for additional operators, departmental harassment of charter operators and flying schools, use of federal power to contain land use on perimeters of airports, antiquated air training programmes and inappropriate air safety regulations.

Railways in Australia are part national and part state and there are also intersystem arrangements between the Commonwealth and the states. Complaints may concern conditions of contract of carriage of both passengers and goods, unnecessary noise created by operations, and railway planning without proper regard to social, economic and community interests.

The Australian Broadcasting Corporation is subject to the Commonwealth Ombudsman and there have been many complaints about radio and television programmes including complaints about their quality, disposition and unwarranted intrusions and attacks on the reputations of private persons. The ABC challenged the Ombudsman's jurisdiction to deal with programme matters but it has yet to institute legal proceedings. The recent decision of the Supreme Court of Canada in British Columbia Development Corporation v Friedmann would be a persuasive precedent in favour of the Ombudsman if litigation occurs.

#### Complaints oral and written

The Ombudsman Act drafted in 1976 provided for complaints to be made in writing. Most Ombudsman offices also insist on complaints being in writing. A distinctive feature of the

Commonwealth Ombudsman's office was the development in 1978 of a policy allowing complaints to be made orally by persons either over the telephone or in person by attendance at an Ombudsman office. Many complaints to Ombudsmen, though important to the complainant, are quite minor when viewed administratively. Also on occasions a matter may be too urgent to deal with in writing, for example, a person about to leave Australia but still waiting to receive a passport. If a matter is minor or simple it is a waste of money to require the opening of files both in the Ombudsman's office and the subject Commonwealth agency which is almost invariably must happen when a complaint is expressed in, or reduced to, writing. With telephone access to the office persons may complain when to write would be too much for them because of their circumstances including lack of education or being a recent migrant. Further, it soon became apparent that the Commonwealth Ombudsman's office staff would have to be far greater if all complaints were to be in writing and handled on a written footing. Each year has seen a substantial rise in the number of complaints received and handled orally. In 1983/84 we received 2636 written complaints within jurisdiction and 7464 oral complaints within jurisdiction under the Ombudsman Act. (We also received 417 written complaints and 5021 oral complaints which were out of jurisdiction.) In the same year about 35% of written complaints and 40% of oral complaints were resolved totally or partly in favour of the complainant.

All the major departments and statutory authorities which are heavily involved in day to day dealings with members of the public have nominated contact officers both in central office and in their regional offices in the states with whom Ombudsman staff are in contact in handling complaints orally. The contact officers are also available in handling written complaints though the level that these may reach may be eventually well beyond their capacity to resolve.

One result of developing the oral complaint system, which was accorded specific statutory recognition in 1983, has been a trend for written complaints to be both more serious and complex.

## Organization of the Commonwealth Ombudsman's Office

Canberra is the seat of federal government and all the departments now have headquarters in Canberra. Accordingly our central office is also in Canberra. However, since Australia is a federation and of large geographical size,<sup>21</sup> from the outset we decided to maintain branch offices in the mainland capital cities, Sydney, Melbourne, Brisbane, Perth and Adelaide carrying decentralization as far as we could. In Tasmania and the Northern Territory the state and territory Ombudsmen act as delegates for the Commonwealth Ombudsman. The state branches have made it possible to maintain the system of oral complaints throughout the Commonwealth and the state branches also investigate written complaints especially where there is some local connection material to the complaint.

In Western Australia and Queensland we share facilities with the state Ombudsman including a common telephone number. Complainants in outback areas of Western Australia, Queensland and New South Wales may contact our offices under the so-called 'inwatts' telephone system in which it costs the price of a local call to ring us.

There are in addition to the Commonwealth Ombudsman three Deputy Commonwealth Ombudsmen, each of them a statutory office holder but they exercise their powers under delegation from the Ombudsman. One is also the Deputy Ombudsman (Defence Force) and another the Deputy Ombudsman for freedom of information matters.<sup>22</sup>

### Commonwealth/State arrangements

There are various kinds of Commonwealth/State arrangements in Australia, one is for the joint development with Victoria and New South Wales of the border cities of Albury and Wodonga under the auspices of the Albury-Wodonga Development Corporation. The Corporation had three distinct legal entities, one Commonwealth and the other two state. Another Commonwealth/State arrangement is for the exploitation of Australia's off-shore oil petroleum resources whilst another one deals with the utilization of the waters of the Murray River which separates Victoria from New South Wales and runs into South Australia. The

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<sup>21</sup> 3,000,000 square miles

<sup>22</sup> Australia deliberately did not adopt the Swedish example of having a Chief Ombudsman and three other Ombudsmen.

headwaters are affected by a Commonwealth-owned hydro-electric scheme. Arrangements exist with some but not all of the states to provide an Ombudsman umbrella cover where a complaint is about a shared Commonwealth/State activity. Our office has shared investigational responsibility with some state Ombudsmen. For example, arrangements with the state Ombudsmen of New South Wales and Victoria for complaints about actions of the Albury-Wodonga Development Corporation in its various guises.

### Remedies

An Ombudsman should be free to recommend any appropriate remedy after making a finding of defective administration. A remedy may be simply an apology: it may also be for a change in a decision. Some Ombudsman offices stop short of recommending the payment of compensation to a complainant who has suffered detriment from an official action but our office has adopted a quite different stance and we are frequently making recommendations involving payments to complainants.

It can be difficult because although some government agencies have their own funds out of which they can make payments eg the statutory corporation Telecom which provides Australia's telephone services, this is not true of most government departments. Where a recommendation is made to a department it usually has to obtain covering approval from the Department of Finance for the making of an act of grace payment. We have recommended financial redress in a wide range of matters including compensation eg for a lowest tenderer to the government who, through administrative error, was not awarded the contract, for a complainant immigrant who was wrongly advised that his personal yacht would be admitted to Australia duty-free upon his migration and for a veteran who, because of unreasonable delay in arranging settlement under a veterans home loan scheme, had to obtain bridging finance at a much higher rate of interest. On occasions we have also recommended the inclusion of an amount to take account of inflation or deprivation of use of money in a matter where the original source of grievance occurred a long time ago. It would be wrong in principle to restrict an Ombudsman in the scope of the recommendations at his disposal.

Although it is a primary role to investigate complaints from the public alleging defective administration on the part of a government institution, the Ombudsman Act recognizes that the Ombudsman has a wider charter. The Ombudsman may, if he chooses, initiate an investigation of his own motion. Besides, the Ombudsman Act is a measure which enables the Ombudsman through the process of accountability to obtain improvements in primary decision-making and to make government institutions more sensitive and adaptive to the needs of the public. Accordingly, remedies may include recommendations not specifically of benefit to complainants but made in the interests of improving administrative practises and procedures within a subject agency in the light of deficiencies which investigations have identified. In practice, agencies have shown themselves to be receptive to recommendations of this kind.

#### Secrecy and Confidentiality

The Australian Ombudsman Act provides for an investigation to be in private and there are statutory prohibitions upon the Ombudsmen and staff from releasing information gained in the course of an investigation unless it is for purposes connected with the performance of functions under the Ombudsman Act. Canadian Bill C-43 of 1978 contained analogous provisions except that the Ombudsman was to be empowered to hold a public hearing if he considered it appropriate. <sup>23</sup>

Although the Ombudsman office in Australia has been precluded from adopting a public stance on an investigation, other than of course in making a report to Parliament, no such restrictions apply to a complainant or the department which receives an Ombudsman's report. We experienced some misuse of our reports in earlier years and occasionally a Minister gave a wrong impression in Parliament of a particular investigation. Some complainants, critical of the results of an investigation, have been able to obtain favourable press publicity. In 1983 the Ombudsman Act was amended to allow the Ombudsman to disclose information and make public statements with respect to an investigation if, in his opinion, it was in the public

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<sup>23</sup>Clause 17

interest to do so. It has proved to be a change beneficial to our office.

The Commonwealth Ombudsman is not only an alternative avenue of review against government agencies refusing to release information under the Freedom of Information Act 1981. He is also subject to the operation of the Act himself which is a highly unusual state of affairs. The FOI Act, as interpreted by the Federal Court of Australia, has had a dramatic affect on the confidentiality and secrecy provisions of the Ombudsman Act. The Court has held<sup>24</sup> that the provisions of the Ombudsman Act regarding privacy of an investigation and prohibiting disclosure of information surrender to the overall policy of making information available under the FOI Act. This was not an intended effect of the Act and we are currently concerned to have ourselves removed as a subject agency in respect of our investigations. Of course it is possible to take a completely different approach to the Ombudsman's operations and place them almost entirely in the public arena. In Sweden for instance any person, including representatives of the media, may be present at the Ombudsman's office to examine complaints upon their receipt. One consequence is however that some people do not complain to the Ombudsman.

#### Ombudsman and Parliament

The Commonwealth Ombudsman is appointed for a fixed term by the Governor-General the decision being, in effect, a Cabinet decision. He is not an officer of Parliament whereas I believe it would engender closer and beneficial contact with individual Members of Parliament if he were. This is in contrast to Sweden where the Riksdag elects the Ombudsmen and Ombudsmen are known as Parliamentary Ombudsmen. Practice varies - in Australia all Ombudsmen are appointed by the government but in two states they have an explicit association with Parliament.<sup>25</sup> Canadian Bill C-43 followed earlier precedent of having the Ombudsman appointed by a Commission under the Great Seal after approval of the

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<sup>24</sup>Kavvadias v Commonwealth Ombudsman (1984) 52 ALR 728 and (1984) 54 ALR 285

<sup>25</sup>Queensland and Western Australia where the Ombudsmen are called Parliamentary Commissioners for Administrative Investigations.

appointment by resolution of the Senate and House of Commons.<sup>26</sup>

There is a controversy amongst Ombudsmen internationally as to whether there should be select parliamentary committees on the Ombudsman. In Britain there is a Select Committee on the Parliamentary Commissioner for Administration appointed under a standing order of the House of Commons which examines the reports of the Commissioner. The Committee has the usual powers to send for persons, papers and records and generally being highly supportive of the Ombudsman. It has not hesitated to call before it the most senior Westminster officials who have been reluctant to give effect to the Ombudsman's recommendations. The Committee is also active in considering the Parliamentary Commissioner's annual and special individual reports.

There are Select Committees on the Ombudsman in some Canadian provinces - Alberta, New Brunswick and Ontario. The Select Committee of the Legislative Assembly of Ontario has featured prominently in the affairs of the provincial Ombudsman. It also has power to make general rules to guide the Ombudsman in performing his statutory functions.

Proponents of Select Committees see in them the possibility of assisting the Ombudsman in obtaining implementation of his recommendations and to make the Ombudsman's operations better known to members of Parliament. They may also take an Ombudsman's investigations further by requiring subject agencies to respond to further questioning about its administrative practices and so forth.

On the other hand Select Committees may expose the Ombudsman to the risk of interference in his freedom to investigate a complaint according to his own discretion. They also have a potential for interference in the day to day operations of the Ombudsman including budgetary expenditure and to impose insufficiently considered guesses on the results of an Ombudsman's investigation.

The need for a Select Committee to assist the Ombudsman in gaining acceptance of his recommendations varies according to jurisdiction. In Australia if a government agency is

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<sup>26</sup>Clause 25

reluctant to accept the Ombudsman's recommendations he can make a report to the Prime Minister. The Prime Minister has to date backed the Ombudsman on the few occasions it has been necessary to report to him. A further step after reporting to the Prime Minister is to make a report to the Parliament. It is at this stage that a Select Committee could be of use. In Britain if the Parliamentary Commissioner does not gain acceptance of his recommendations by an agency his next course of action is to report directly to the Parliament without any intermediate avenue being open to him. The Canadian Bill C-43 provided that if the government institution failed to respond to the Ombudsman he could make a report to the appropriate Minister and afterwards, in the event of not gaining satisfaction he could make a special report to the Parliament.<sup>27</sup>

The Commonwealth Ombudsman submits a copy of the report to the government institution and to the appropriate Minister as well. Experience is that there is a distinct advantage in being able to report to the Prime Minister.

#### The Ombudsman, law and lawyers

In common with most Ombudsmen the Commonwealth Ombudsman has executive powers of entry to premises, to summon witnesses and require production of documents. Such powers are essential. A person is not excused from answering a question or furnishing information on the ground that it might tend to incriminate him but the information is not admissible in evidence in other proceedings.<sup>28</sup> It is no defence to production or discovery of a document that it would be a privileged document in legal proceedings.<sup>29</sup>

Some Ombudsman Acts state that the Ombudsman should not undertake an investigation if a complainant has or had the right to have the action complained about reviewed by a court or some other tribunal with the power to make a decision. In some Acts Ombudsmen are altogether precluded from investigating where a court could be seized of the

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<sup>27</sup>Clause 20

<sup>28</sup>Canadian Bill C-43 Clause 18(4) was similar.

<sup>29</sup> Clause 19 of Bill C-43 provided that the Crown could object to production or discovery whereupon the Ombudsman was at liberty to apply to the Federal Court of Canada for determination of the matter.



matter. Others provide the Ombudsman with a residual discretionary power to undertake an investigation notwithstanding the availability of an alternative remedy. In some countries the discretion is severely restricted as in some Canadian provinces.<sup>30</sup>

The Australian Ombudsman Act draws a distinction between a complainant who has exercised a right of review and one who has not. In the former instance the Ombudsman is not to investigate unless he is of opinion that there are special reasons why he should.<sup>31</sup> Where the complainant has not exercised the right of review there is no general prohibition operating on the Ombudsman but the Ombudsman may decide not to investigate the action if he is of opinion that it is reasonable for the complainant to exercise the right.<sup>32</sup> These two provisions seem to us to be about right although I have no doubt that some Ombudsmen would feel too exposed by them.

The existence of a remedy in a court is one thing: the ability of an erstwhile litigant to use it may be quite another. Australian experience is that most private citizens not entitled to legal aid are deterred from seeking enforcement in a court of what they believe to be their rights against the Commonwealth because of the fear of heavy cost, particularly in the event of loss. The Commonwealth has vast legal resources which it will not hesitate to employ if it thinks there may be an issue of principle at stake or on occasions even if there is not one. The Commonwealth may pursue a remedy at law without regard to the economic cost. We are prepared to have regard to expense especially where a person is complaining about a matter vital to his livelihood or wellbeing or if failure in a court would seriously affect his standard of living. Some complainants by reason of age or health are also in no position to litigate.

The establishment of facts may also be a relevant circumstance in considering whether we should investigate a complaint or not. Courts work according to the processes of discovery and rules of evidence. The result may be that a complainant, suing in the court, will lose because all the relevant facts are not before the court or helpful evidence is not admissible. An

<sup>30</sup>For an account of the different provisions in the Provinces see Ulf Lundvik 'The Ombudsmen in the Provinces of Canada'.

<sup>31</sup>S 6(2)

<sup>32</sup>S 6(3)

Ombudsman investigation stands a chance of revealing further facts and information, whether admissible in a court or not, which could produce a remedy for the complainant where he would fail in a court through insufficient evidence.

Another consideration is whether a right of review in a court is real and substantial and affords a complainant a reasonable opportunity to obtain relief commensurate with the kind of remedial action which the Ombudsman might recommend in the event of making a finding of defective administration. The mere right to institute legal proceedings in a court may not be the equivalent to a right of review by the Ombudsman. Thus if a complainant were to sue in a court to recover damages from the Commonwealth for breach of statutory duty and the court were to hold that although there was a breach of duty the government was not liable to the complainant in damages, the complainant would not have a satisfactory alternative right of review.

Australian lawyers advising clients about the possibilities of obtaining legal redress against the Commonwealth government advise not only as to the prospects of succeeding on issues of law but also as to the strength of a case on the available evidence and the potential cost of litigation. Rather than sending a client away empty-handed legal advisors now should be taking into consideration the prospects of being able to utilize the services of the Ombudsman. On occasions our office has been asked to investigate a complaint and we have suspected it to be a fishing expedition in order to see if the Ombudsman investigation will produce sufficient evidence to justify the institution of legal proceedings. Whilst we are on guard against resort to the Ombudsman's office for other purposes, concealment of all the available evidence about an administrative action which is the subject of complaint is no longer a proper role for the Commonwealth even if it ever was. There is a long way to go in educating lawyers about the possible use of the Ombudsman but in Australia more firms are now making complaints on behalf of their clients than was the case a few years ago.