

Week 3: CHAPTER 5 – Non-Judicial Review: Ombudsman, FOI and Right to Reasons

- Both the ombudsman and FOI systems may be useful in obtaining information that maybe necessary to determine whether to pursue formal review option

The Ombudsman¹

- A measure adopted from the 1970s to meet, or arguably to head off, demands for more general access to information held by official agencies and for wider opportunities for review of government actions, beyond courts and the tribunals
- Created at federal level and in all states and territories – have a wider briefing than that of investigating individual complaints of injustices – they are concerned with remedying maladministration more generally
- The **Ombudsman Act 1976 (Cth)** also confers six specialist roles on the Ombudsman
 - I. Defence Force Ombudsman, to investigate action arising from the service of a member of the Australian Defence Force;
 - II. Immigration Ombudsman, to investigate action taken in relation to immigration administration (including monitoring immigration detention);
 - III. Law enforcement Ombudsman, to investigate conduct and practices of the Australian Federal police and its members;
 - IV. Postal Industry Ombudsman, to investigate complaints about Australia Post and private postal operators registered with the Postal Industry Ombudsman Scheme;
 - V. Overseas Students Ombudsman, to investigate complaints from overseas students about private education providers in Australia; and
 - VI. Private Health Insurance Ombudsman, to investigate complaints from people covered by private insurance provider (from 2015)
- The Commonwealth Ombudsman is also the Australian Capital Territory Ombudsman – the role is performed under **The Ombudsman Act 1989 (ACT)** – and its funded under the services agreement between the Commonwealth Ombudsman and the Australian Capital Territory Government

Grounds for Investigation

- The Ombudsman is a different institute to the courts and tribunals
- They can initiate enquiries of their own accords into suspected injustices, independently of any individual complaints, or they can choose to combine any number of complaints into a single investigation

¹ May be an interim step: access to information to then decide to/go to AAT or judicial review. No CL right to reason. But statutory provisions AAT/ADJR to obtain written statement from decision maker *Public Service Board of NSW v Osmond*.

- Governments can also refer cases or inquiries often of a politically sensitive character to Ombudsmen
- In 2005, the Federal Government asked the Ombudsman to take over an investigation of the second most-publicised case of wrongful immigration detention into the wrongful detention and deportation of Vivian Alvarez – following that of Cornelia Rau
- The increasing use of the Ombudsman to deal with controversial cases runs the risk of transforming their role into that of a political fixer for the government
- The Ombudsmen are not obliged to pursue individual complaints, even if it falls within their jurisdiction – nor do the complaints have a right of hearing or any control over how the investigation or adjudication on their case is conducted
- Grounds for Investigation include:
 - Unreasonable, unjust, oppressive or improperly discriminatory decisions;
 - Decisions based either wholly or in part on mistake of law or fact;
 - Decisions based either wholly or in part on improper motives, irrelevant grounds or irrelevant considerations;
 - No reason having been given for a decision; and
 - Otherwise wrong decisions (see **Ombudsman Act 1976 (Cth) s15**)
- The Ombudsman role is not to make decision anew as if the Ombudsman were in the decision maker's shoes, but merely to determine whether the original decision was unreasonable

Jurisdiction

- Has limited jurisdiction – which is set out under **Ombudsman Act 1976 (Cth) s 5(2)**
- Ministers are exempted, but not those making a recommendation to them, courts and tribunals as well as the Royal Commission are exempted – furthermore, employment decisions relating to public sector workers are also excluded

Glenister v Dillon [1976] VR 550

The Victorian Supreme Court differentiated between administrative, judicial and legislative functions and ruled that the Ombudsman had no jurisdiction to investigate complaints about the Crown Solicitor's failure to bring two people to trial. That, the court held, related to the judicial arm of government

Booth v Dillon [1976]

The Victorian Supreme Court held that matters of policy were outside the Ombudsman's jurisdiction, which was restricted to specific decisions or failures to act. Therefore, rules relating to whether young prisoners be required to sleep in dormitories or individual cells were said to be policy issues, not administration.

Standing and discretion

- Unlike the courts and tribunals, there is no *locus standi* (standing) requirement for complaints to the Ombudsman
- Any person, including a non-citizen, a company and an unincorporated association, can make a complaint – they can do so even if they are not a “person aggrieved” by the conduct complained of
- Ombudsman has a discretion to refuse to proceed, and one ground for exercising that discretion is that the complainant does not have a sufficient interest in the subject matter – other grounds are:
 - The complainant is vexatious, frivolous or not in good faith
 - Alternative remedies are available;
 - An investigation is not warranted in all circumstances; and/ or
 - Complaints relating to the commercial activities of a department could be more conveniently or effectively dealt with by another agency, for example **Telecommunications Industry Ombudsman (Ombudsman Act 1976 (Cth) s6)**

Procedures

- Complaints don't need a particular form, at the state level they don't need to even be in writing
- Complainant will ordinarily be required to pursue their cause with the department or agency involved and to exhaust that avenue first before the Ombudsman will proceed
- No fees no *locus standi* requirement and legal representation is not necessary – complainant has no control over the investigation is conducted – no right to participate in hearing and no right to obtain report
- Generally required to conduct investigation in private but has power to enter premises and inspect documents, require the production of documents and require answers under oath²

Advantage

Informal, Free, Easy
Flexible redress and systemic approach
No Strict Standing Rule- open standing

Disadvantage

Discretionary: not to undertake investigations.
No control by applicant: not even consulted.
No binding decisions in favour of applicant/recommend to rectify an issue.
Starved of resources to investigate
High level of dissatisfaction

Powers, recommendations and reports

² Ombudsman does NOT put self in the shoes of the decision-maker May/not respond to individual complaints but has a more general brief

- The greatest limitation on the Ombudsman is that they have no determinative powers but can only make recommendations to the agency concerned
- When a recommendation is not followed, the Ombudsman can make a report to the government or parliament and seek media attention

Chairperson ATSIC v Commonwealth Ombudsman (1995)

Demonstrates that the Ombudsman cannot make definite findings of guilt against an office holder and must inform an effected official of all the grounds of criticism before publishing an adverse report.

This case demonstrates that the actions of the ombudsman are subject to judicial review, whether by way of **Administrative Decisions (Judicial Review) Act 1977 (ADJR Act)** or by reference by the head of an agency (under s11 A of the **Ombudsman Act**) or by reference by the Ombudsman to the Federal Court.

Appointment and Removal

- Section 28 states that an Ombudsman may only be removed or suspended from office by the Governor General “on ground of misbehaviour or physical or mental incapacity”, and subject to approval by each house of parliament

Freedom of Information

- It creates a form of open standing to apply for access to documents and to challenge any refusal to provide access
- Section 11 **Freedom of Information Act 1982 (Cth) (FOI Act)** states

Right of access

(1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:

- (a) a document of an agency, other than an exempt document; or
- (b) an official document of a Minister, other than an exempt document.

(2) Subject to this Act, a person's right of access is not affected By:

- (a) any reasons the person gives for seeking access; or
- (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

- Both state and federal level, FOI laws may provide viable avenues for seeking relevant information needed to clarify, publicly expose or challenge and adverse decision by a Minister, government department or agency
 - The key changes to the FOI regime included:
 - A new objects section (s 3) which declares that it is the intention of the Parliament “to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource”
 - Introduction of a new single form of public interest that is weighted toward disclosure; and
 - Information commissioner guidelines must be applied
- Important changes to the FOI request process included:

- An FOI request can now be sent by email to an agency (such as the ATO) or Minister, as well as posted or hand delivered;
- If an agency or Minister cannot meet the 30 day time limit for processing a request, they are expected to approach the Information Commissioner (IC) for an extension of time;
- Agencies must publish on their website details of information that has been released in response to FOI requests;
- The IC can provide advice and assistance to the public about making FOI requests; and
- Applicants denied access can seek review internally or via the IC, with further review available from the AAT and the federal court
- For the public interest s 11B of the FOI lists factors favouring disclosure and factors that are irrelevant
- Factors favouring = promoting effective oversight of public expenditure and allowing a person access to their own personal information
- Factors that cannot be considered include potential loss of confidence in, or embarrassment to the government, and the seniority of the author of a document, misunderstanding in documents,
- The main barriers to access remains the long list of exemptions such as crucial political agencies, including the field of intelligence