AUSTRALIAN OMBUDSMEN AND HUMAN RIGHTS

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On 1 January 2007, the Victorian Ombudsman was granted the power to enquire into whether an administrative action of a public authority is incompatible with a human right. This express human rights mandate transforms the Victorian Ombudsman from a classical ombudsman into a human rights ombudsman. It is the first time that any Australian government has given a classical ombudsman a legislative mandate to perform an oversight role with respect to human rights protection. This paper explores this development. It notes that all Australian ombudsmen currently address human rights violations.

Internationally, the role of the ombudsman is increasingly being applied to the protection and promotion of human rights, with around 50 per cent of national level ombudsman offices around the world today having an express human rights protection mandate.[1]

The development of the modern ombudsman office in Australia is unique. Until recently the development of a specific and explicit human rights mandate for Australian public law ombudsmen had not occurred in any Australian jurisdiction. This changed on 1 January 2007, when the Victorian Government conferred an express human rights mandate upon the Victorian Ombudsman, creating the first sub-national human rights or hybrid ombudsman (Reif 2004, 2-11, 393) in Australia.

The Victorian Ombudsman thus joins the 50 per cent of world ombudsman institutions which may be categorised as human rights ombudsmen. A human rights ombudsman is one who protects and promotes the human rights of individuals and also performs the traditional classical ombudsman role of monitoring the administrative decision-making of government agencies to ensure it is reasonable and fair. Human rights ombudsmen are thereby essentially different from classical ombudsmen even though such ombudsmen may deal with human rights in their role of promoting administrative fairness (Reif, 2004, 87). Human rights ombudsmen span a spectrum with some being closer to the classical ombudsman at one end and the others being more akin to pure human rights commissions at the other (Reif, 2004, 8, 11).

Currently, the implementation of the human rights mandate by the Victorian Ombudsman positions that Office at the classical ombudsman end of the spectrum. This addition of an express human rights mandate to a pre-existing Australian classical ombudsman marks a new focus for government with respect to ensuring that administrative decision-making with respect to the delivery of government services is carried out in accordance with human rights principles. This paper suggests that the Victorian Ombudsman human rights model demonstrates that express human rights protections by ombudsmen may be embraced without compromising the ability to act independently to redress defective government decision-making.

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The Victorian Ombudsman

Until 1 January 2007 the Victorian Ombudsman was a classical ombudsman. The *Victorian Charter of Human Rights and Responsibilities Act 2006* ('*the Charter*') transforms the Victorian Ombudsman into a hybrid ombudsman institution or perhaps, more accurately, into a sub-national human rights institution. The *Charter* is legislation which protects the human rights of all people in Victoria and aims to 'ensure that when the government makes laws and delivers services, it does so with civil and political rights in mind' (Victorian Ombudsman Fact Sheet 16). Public authorities are obliged to act in a way which is compatible with human rights set out in the *Charter* and must give relevant human rights due consideration during their decision making.

Under the *Charter* the Victorian Ombudsman has the power to enquire into whether an administrative action is incompatible with a human right. As a public authority the Office of the Ombudsman itself is also required (after 1 January 2008) to act compatibly with the *Charter*. The *Charter* protects 20 selected human rights of a civil and political nature (and therefore does not include important economic, social and cultural rights such as education, health and housing), which can be grouped under four key principles: Freedom, Respect, Equality and Dignity. In the 2009 Annual Report the Ombudsman observed that key specific rights at issue under the *Charter* for complainants to its office were: section 8, recognition and equality before the law; section 17, protection of families and children; and section 21, the right to liberty and security of the person (Annual Report, 2009, 51).

The specific mandate given by the *Charter* allows the Office to investigate whether an 'administrative action' (as defined in section 2 of the *Ombudsman Act 1973* (Vic)) is incompatible with human rights with respect to matters that the Ombudsman may conduct on his or her own motion as well as inquiries or investigations initiated as the result of a complaint (*Ombudsman Act 1973* s 13(1A)). In practice, the application of the *Charter* may loosely be characterised as a second stage inquiry - as the Victorian Ombudsman receives a complaint against an 'administrative action' (such as a decision or act of a government authority) and then assesses that act against the *Charter* (Carden, 2008, 13). The assessment against the *Charter* includes considering 'any reasonable limitation on applying the rights as part of the administrative action' (Fact Sheet 16).

Examples of human rights case studies in the 2009 Victorian Ombudsman Annual Report[2] confirm this process of first receiving a complaint concerning an 'administrative action' and secondly assessing the administrative action against the rights as set out in the *Charter*. This approach indicates that the Victorian Ombudsman's Office is proceeding cautiously with the implementation of its human rights mandate, as the practical application of the *Charter* is one which draws heavily upon the Victorian Ombudsman's experience as a classical ombudsman. Reliance is upon the rubric of assessing the correctness of the administrative action.

In this sense the approach of the Victorian Ombudsman to human rights is to apply the *Charter* within a framework of administrative norms. The Office does not currently give priority to either domestic human rights norms or international human rights norms in addressing the issue of compliance with the *Charter*. The *Charter* is based on fundamental human rights protected in international human rights law and is modelled on the International Covenant on Civil and Political Rights ('ICCPR') (Explanatory Memorandum, 2006 p1). Australia is a signatory of this treaty. As yet the Victorian Ombudsman has not publicly referred to international human rights norms in the domestic monitoring of the *Charter*. In the Australian context, where the signing and ratification of international treaties does not translate into domestic law unless explicitly referred to by legislation, the approach of the Victorian Ombudsman is appropriate and in keeping with its roots as a classical ombudsman.

It is undeniable that the *Charter* imposes new obligations and a new way of working with government upon the Victorian Ombudsman. The expectation is that the involvement of the Victorian Ombudsman in the promotion and protection of the 20 rights identified in the *Charter* will shift the planning and delivery of government services to a decision-making culture which will include the consideration of human rights (Carden, 2008). The *Charter* principles transform the nature of investigation into an 'administrative action' which the Victorian Ombudsman undertakes – allowing the Office to apply not only norms of what may be reasonable in an administrative law context to improve government decision-making but also to potentially incorporate human rights principles to promote fairness and justice. The additional step of testing the administrative action of the government decision maker against the *Charter* should promote a culture of valuing human rights across government.

The other Australian classical ombudsmen and human rights

The Victorian Ombudsman's Office was one of eight classical ombudsman offices created by successive Australian governments throughout the 1970s.[3] Express reference to the protection and promotion of human rights has never constituted part of the role of the other seven. Despite the structural limitations of the role of the classical ombudsman, there is forceful international commentary to the effect that along with human rights commissions and specialized institutions, both classical and human rights (or hybrid) ombudsmen may be categorised as national human rights institutions (Reif, 2004, 81).

This, of course, is not how we normally view the ombudsman, as classical Australian ombudsmen are creatures of administrative law and the function of administrative law is not one of protecting civil, political, social, economic or cultural human rights, but rather administrative law actions more commonly related to traditional rights such as the right to quiet enjoyment of property, to access to the courts and, more commonly, to rights established by statute – pensions, licences and income support, and process rights such as the right to an unbiased hearing (Creyke 2006, 104).

Support for the argument that classical ombudsmen do address human rights violations is reinforced by the observation that Australian ombudsmen deal with complaints concerning government decision-making in areas which are frequently the subject of human rights debate and analysis. Such areas include: immigration policing, social security and the impact of government policy and decision-making upon the most vulnerable in society.[4]

Annual Reports of each Australian ombudsman[5] confirm that the highest volume of individual complaints concern government departments which are more likely to engage in human rights breaches, such as prisons, social services, child welfare, mental health institutions, immigration services and the military (Reif 2000, 20).[6] Case studies in Annual Reports of Australian classical ombudsmen confirm that each office deals with human rights breaches such as: denial of education subsidies (Northern Territory Ombudsman 2008-2009, 30); denial of housing (Northern Territory Ombudsman 2008-2009, 32); denial of payment of reimbursement for medical treatment (Northern Territory Ombudsman 2008-2009, 33); access to education (Victorian Ombudsman 2008-2009, 16; Queensland 2008-2009, 24; Tasmania 2008-2009, 54-55); denial of access to information concerning children (South Australia Ombudsman 2008-2009, 14); access to medical services in prison (Tasmania 2008-2009, 40; Western Australia 2008-2009, 31; Tasmania 2008-2009, 46); child abuse (NSW 2008-2009, 39) and incorrect allegation of debt for public housing (ACT 2008-2009, 16).

Such case studies show that ombudsmen deal with civil, economic, cultural and social human rights breaches by government decision-makers. It follows that the jurisdiction of classical ombudsmen must, at least to a modest degree, protect and promote human rights. Indeed these snapshots of human rights infringements highlight the fact that the provision by

government of fundamental financial health and infrastructure support means that if error is made or a decision is unreasonable the consequences for the individual may be 'profound' (Creyke 2006, 105).

Complaints to an Australian classical ombudsman may also be within jurisdiction and be about human rights but cannot be referred to a human rights institution - as one may not exist - or the human rights issue may be intertwined with a maladministration complaint (Reif 2000, 20). Thus, despite the absence of an express human rights mandate, protection of human rights eventuates from the obligation classical ombudsmen may have to deal with human rights issues as part of their investigation into maladministration.

For example, one case from the Commonwealth Ombudsman involved Mr A, an Iranian citizen who was detained with his daughter in Baxter Immigration Detention Centre ('IDC'). Mr A had been deceived into allowing Department of Immigration and Citizenship ('DIAC') staff to take his daughter from the IDC. The Ombudsman determined that DIAC had proceeded with the removal contrary to its own legal advice; that the removal had wrongly been recorded as taking place with the custodial parent's consent and that DIAC had ignored advice that Mr A and his daughter should be transferred from the IDC due to previous allegations of assault. The Ombudsman recommended that DIAC assist with the daughter's migration to Australia to be reunited with her father and that an apology be given to Mr A who had been granted a permanent protection visa in April 2008. The Ombudsman recommended DIAC undergo internal review. The Ombudsman's report was accepted by the Minister who remarked that 'the report was most disturbing and highlighted the adverse impact of long term detention on both the physical and mental health of detainees like Mr A and his child'. The Minister noted that the policy of government is not to hold children in IDCs (Commonwealth Ombudsman 2008-2009, 91).

This case study reveals the impact a classical ombudsman may have upon a human rights issue. It also illustrates how the Commonwealth Ombudsman may be categorised as a 'human rights institution'. In the above case study of the Department of Immigration and the Commonwealth Ombudsman it is the jurisdiction over maladministration which gives the Office authority to deal with the complaint. The case study shows that both the Australian Human Rights Commission and the Commonwealth Ombudsman have a human rights intersection. Across all levels of government in Australia the jurisdiction of each human rights institution and each ombudsman is clearly articulated in its legislation. In addition there are operational understandings amongst the institutions which result in case referral between institutions.

In terms of jurisdiction, there are instances where a classical ombudsman is required to take human rights into account in investigating a complaint due to the legislative framework of the government department. For example, the New South Wales Ombudsman has the role of promoting improvements in the delivery of community services. In 2004 the Office reported an investigation into homeless people and the provision of a safety net through the Supported Accommodation Assistance Program ('SAAP') agencies. As the inquiry was conducted under the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW) *('CS CRAMA')*, the Ombudsman inquiry had regard to the principles set out in that Act including under s 11(3)(2)(c) that a 'service provider is to promote and respect the legal and human rights of a person who receives a community service…'. SAAP agency standards encompass principles which include 'upholding legal and human rights' (NSW Ombudsman 2004, 27), meaning that the Ombudsman must necessarily examine such issues in determining whether administrative behaviour is reasonable. Similarly, in 2009, the NSW Ombudsman reported that needs of individuals in Department of Ageing, Disability and Home Care ('DADHC') residential centres were not identified or met. As this report was carried out under the same legislation, the findings of the ombudsman had reference to the 'important human rights that underpin disability services legislation and standards and

DADHC policies' (see: 'Review of individual planning in DADHC large residential centres: Summary report June 2009').

In addition to individual complaints, Australian classical ombudsmen may use their own motion power to advance human rights protection,[7] to suggest systemic change and policy improvement which aims to prevent recurring indignity and unfairness.[8]

Professor John McMillan, the former Commonwealth Ombudsman, isolated this function in a recent speech on the role of Australian ombudsmen in human rights (McMillan 2009):

> [Human] Rights are better protected when the culture of government agencies is sensitised to this need. Ombudsman's offices can work towards that objective in three ways.
>
> The first is by promoting systemic change in agencies when problems are identified. Individual case investigation, backed up by own motion reports on selected topics, is an effective means of stimulating systemic change. The individual cases provide an example of what has gone wrong and must be improved. They shine a light on worrying defects in the administration of an agency. The own motion reports are a way of highlighting recurring problems and making recommendations for change.

The Victorian Ombudsman's Office views its pre-*Charter* and post-*Charter* own motion major public reports as being relevant to human rights protection (Carden 2008 14). Indeed the express human rights mandate granted by the *Charter* is retrospectively utilised to confirm human rights outcomes on the implementation of the Office's recommendations by government authorities (Victoria Ombudsman, 2010).

Such comparison as to the use of own motion powers between Australian human rights and classical ombudsmen also reveals differences. The Victorian Ombudsman acknowledges that the *Charter* brings additional obligations. For example, in relation to the *Conditions for Persons in Custody* report (July 2006) which predates the *Charter,* Mr Brouwer notes that '[S]ince this report was released the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) came into force in January 2007. The Charter provides an additional challenge to ensure that conditions in custody meet proper standards, by requiring that persons in custody are protected from torture and cruel, inhumane or degrading treatment' (Victorian Ombudsman, 2010, 14). Clearly, an express human rights mandate will allow for more specific articulation of such policy considerations than what can be seen at the level of the classical ombudsmen.

Conclusion

Given the recent creation of the Victorian Ombudsman as Australia's first sub-national human rights ombudsman, it is timely to note that the Australian ombudsman institution, generally a creation of the executive arm of government, deserves much closer scrutiny with respect to the role it does and may play in the protection and promotion of human rights.

It is not suggested that ombudsmen be viewed as a panacea for all human rights ills. Indeed, the institution has been criticised for its capacity to handle some areas of complaint and is hindered by the legislative requirements under which it operates (Walton & Kennedy 2006, 6-8). Two significant criticisms of the institution performing a human rights role should be noted. The first is the warning that human rights may be diminished when democratic deficiencies are cured by anti-democratic devices (Campbell, 2006, 320). This observation includes the possibility that ombudsmen will disempower the individual as the most that an administrative body may do is establish that a procedural right has been breached (Bailey 1999, 6). This administrative function disempowers the individual as it fails to establish a right – such as an economic right to a pension. The second significant criticism is the assumption referred to earlier that ombudsmen offer an alternative to courts in that they serve the most vulnerable members of society. Empirical studies, both in Australia and

internationally, have shown that the demographic of ombudsmen clients tend to include both middle-class and advantaged clients (Roosbroek & Waller 2008).

Such criticism is outweighed by the benefits ombudsmen offer to the promotion and protection of human rights. In their practical operation ombudsmen will, in comparison with the court system, be relatively uninhibited by issues which restrict access to justice, such as time and expense. Ombudsmen are also flexible and adaptive, meaning that they are able to adapt as required to human rights services (Commonwealth Ombudsman, Annual Report 2004-2005) and are responsive to the changing government provision of services. McMillan gives the example of the ability of the ombudsman model to investigate private firms which increasingly administer government programs, citing prisons, the postal service, assistance to job seekers, and detention centres as examples of where this occurs (2009, 8). The ombudsman can therefore hold the private service provider accountable to the same standards as government.

There are also community wide advantages to a non-litigious supplement to litigation based human rights protection. The existence of the ombudsman institution diffuses an individualistic and litigation focused culture. Ombudsmen embed a right to complain about government within Australia culture. Together Australian ombudsmen offices receive over 500,000 complaints each year about national and state government agencies and large businesses (McMillan, 2009, 7). More narrowly, the advantage for the individual is that courts may not always provide the optimal solution for their protection. Often the right human rights response may need to be practical and enable small issues to be resolved. For example, issues such as access to women's hygiene products while in immigration detention may not be suitable for courts but are fundamental for dignity and equality and can be addressed by ombudsmen.

There are therefore distinct advantages in reforming the classical ombudsman institution so as to further use ombudsmen to promote and protect human rights. The ombudsman institution straddles both legal and moral concepts and takes into account wider values, rights, and questions of law and administrative practice which render the institution much more than simply a complaints office. It is generally accepted that Australian ombudsmen are closely associated with safeguarding the rule of law and democracy.

Australian ombudsmen are in the unique position of, over three decades, having successfully facilitated the protection of administrative law rights and having acted to ensure that Australians will be treated with dignity by government agencies. While interest should increase with respect to exploring and expanding the capacity of Australian ombudsmen with respect to the protection and promotion of human rights, there is a need for caution. Greater protection of human rights must not undermine the current ability Australian classical ombudsmen have to provide redress for administrative deficiency. Resourcing an extended human rights role and the extent to which it will influence the efficacy of the maladministration/complaint-handling focus of an ombudsman's office are therefore critical issues going forward.

BIBLIOGRAPHY

Peter Bailey, 'Implementing human rights – the way forward' (1999) 5(2) *Australian Journal of Human Rights* 31 Available: austlii.edu.au [2009, November 19]

Bruce Barbour, 'Actions speak louder than words: An Ombudsman's office and children', IOI World Conference Stockholm Sweden, Workshop 4: Protecting the Particularly Vulnerable', Thursday June 11, 2009

Tom Campbell, 'Human Rights Strategies: An Australian Alternative' Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone (eds), Ashgate Publishing 2006

Jo Carden, 'The Charter and Government: A New Approach to Serving the Public' February 2007

Jo Carden, 'Ready for Rights: Human rights and the role of the Victorian Ombudsman' APOR Conference, March 2008

Commonwealth Ombudsman, *Lessons for Public Administration: Ombudsman Investigation of Referred Immigration Cases*, August 2007, Report 11/2007

Robin Creyke, 'The Performance of Administrative Law in protecting Rights' in *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia*, Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone (eds), Ashgate Publishing 2006

John McMillan, 'The Role of the Ombudsman in Protecting Human Rights' Address by Prof John McMillan, Commonwealth Ombudsman, to conference on 'Legislatures and the Protection of Human Rights' University of Melbourne, Faculty of Law, 21 July 2006

John McMillan, 'The Ombudsman's Role in Human Rights Protection – An Australian Perspective' Paper to the 11th Asian Ombudsman Association Conference, Thailand, 2-5 November 2009

Dennis Pearce, 'The Jurisdiction of Australian Government Ombudsmen' in Matthew Groves (ed) *Law and Government in Australia*, The Federation Press, 2005

Anna-Elina Pohjolainen, *The Evolution of National Human Rights Institutions – The Role of the United Nations,* Danish Institute for Human Rights, 2006

Linda C Reif, *The Ombudsman, Good Governance and the International Human Rights System*, Martinus Nijhoff Publishers, 2004

Michael Walton and Dr Michael Kennedy, Submission of the New South Wales Council for Civil Liberties to the ten year review by the 'Ombudsman and Police Integrity Commission Committee of the NSW Parliament of the Police Oversight System in NSW', 15 May 2006

NSW Ombudsman, Media Release, 26 October 2003

NSW Ombudsman, *Assisting homeless people – the need to improve their access to accommodation and support services*, Final report arising from an inquiry into access to, and exiting from, the Supported Accommodation Assistance Program, May 2004

Parliamentary Commissioner of Administrative Investigations, 30 August 2006

Victorian Government, Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) p1

Victorian Government Submission to the National Human Rights Consultation dated 9 June 2009

Victorian Ombudsman Fact Sheet 16

Victorian Ombudsman, *Ombudsman's recommendations – Report on their implementation*, February 2010, Victorian Government

Western Australian Ombudsman, *Report on Deaths in Prisons*, 15 December 2000

Western Australian Ombudsman, *Disability Access and Inclusion Plan* (DAIP) 2007-2010, 20 June 2008

Endnotes

1 The proliferation of human rights ombudsman institutions is detailed in Linda C Reif, *The Ombudsman, Good Governance and the International Human Rights System* 2004).

2 The three case studies provided concern: a prisoner who was moved naked through custodial facilities (2009, 52-53); a complaint by a blind woman concerning a taxi driver who had refused to carry her guide dog unless it was wearing a muzzle (2009, 51); and a prisoner who complained about lack of access to bail application forms while in custody (2009, 53).

3 All of the state ombudsmen were established in the 1970s: Western Australia - 1971; South Australia - 1972; Victoria - 1973; Queensland - 1974; New South Wales - 1974; Northern Territory – 1977; Tasmania – 1978; and the Australian Capital Territory – 1983. The relevant legislation is: *Ombudsman Act 1989* (ACT); *Ombudsman Act* 1974 (NSW); *Ombudsman Act 2009* (NT); *Ombudsman Act 2001* (Qld); *Ombudsman Act* 1972 (SA); *Ombudsman Act* 1978 (Tas); *Ombudsman Act 1973* (Vic); *Parliamentary Commissioner Act 1971* (WA). The Office of the Commonwealth Ombudsman was established in 1977 by the *Ombudsman Act 1976* (Cth).

4 By way of example, the Commonwealth Ombudsman is also the Immigration Ombudsman and the New South Wales Ombudsman's brief covers caring for the vulnerable through reviewing deaths of certain children, overseeing investigations into employment related child protection, dealing with complaints about the care and protection of children by community services (Barbour 2009, 3).

5 There are jurisdictional variations, for example, in Queensland the Ombudsman cannot investigate a member of the police service if the action is operational and the South Australian Ombudsman has no jurisdiction over police. The government decision making areas excluded from ombudsman investigation are limited, for example, judges and members of parliament are excluded.

6 The 2008-2009 Annual Report of the South Australian Ombudsman records most complaints made were about the Department of Correctional Services (41.2% of all complaints); in the same period, those made to the Victorian Ombudsman were in the area of Justice (26% of all complaints); the NT Ombudsman received the most complaints against police (63%); the Tasmanian Ombudsman against Justice (33% of all complaints); the Western Australian Ombudsman against Corrective Services (22%); the Queensland Ombudsman received almost double the number of complaints about Corrective Services as it recorded against Child Safety (the state agency most complained about excluding Corrective Services); the NSW Ombudsman received most complaints with respect to the NSW Police Force; the Australian Capital Territory Ombudsman received the highest complaint numbers with respect to Housing; and the Commonwealth Ombudsman received the largest number of complaints with respect to Human Services, which incorporates Centrelink and Child Support.

7 For example section 15 of the *Ombudsman Act 1976* (Cth) provides that an own motion report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory.

8 For example, in 2008-2009, the Queensland Ombudsman examined the handling of prisoners by Queensland Corrective Services and recommended that prisoners be made aware of their rights with respect to prison transfers (Queensland Ombudsman 2008-2009, 50-51).