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THE OMBUDSMAN AND THE RULE OF LAW

John McMillan*

Revised version of a paper presented at ANU Public Law Weekend, Canberra, 6 November 2004.

'If the courts do not control these excesses, nobody will'[1]

'[T]he courts are the only defence of the liberty of the subject against departmental aggression'[2]

'[O]fficers or departments of central government … are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge'[3]

'In the area of refugee law, the Australian judiciary can, quite patently, be the last bastion against executive tyranny for the dispossessed and the reviled. At risk is life, liberty and the Rule of Law – not just for the refugee, but for all of us'[4]

'The rule of law is a dry and dusty concept. … Independent courts, operating according to law, in accordance with fair procedures and resistant to political or public pressure – these are more important to a free society, than democracy'[5]

'Section 75(v) of the Constitution [is] the means by which the rule of law is upheld throughout the Commonwealth'[6]

Introduction

There can be no doubting the role played by the judiciary in upholding the rule of law in Australia. The political and social history of Australia is replete with examples of landmark instances in which courts have confined the legislature to its constitutional competence and have brought unlawful executive action under control. Bedrock principles that ensure both procedural and substantive fairness in the exercise of governmental power owe their origin to judicial initiative. The development over three decades of a vibrant system of Australian administrative law is studded with instances of judicial creativity and achievement.[7]

This paper does not question the reality and importance of that judicial role. The issue taken up is not whether we have misconstrued the judicial role, but whether we have mis-stated the way that accountability operates and the rule of law is upheld in the Australian legal system. I will develop this point by looking at the Ombudsman's contribution to protecting the rule of law. The same point could as effectively be made by instead looking at a similar contribution made by administrative tribunals – or, for that matter, the media, regulatory agencies, and numerous other non-judicial bodies and processes. In summary, the theme of this paper is that we need to realign the way we portray and understand accountability and the rule of law in Australian law and government.

* *Commonwealth Ombudsman.*

The quotations given earlier set the context for this paper in presenting a view of the judicial role that, while tendentious, is reflected strongly in Australian legal discourse. Whether it is a mainstream view, it is certainly one that is fashionable and deeply-rooted. As the quotations illustrate – and there are many others of similar tone – it is a view that is consistent both over time and across authors. This view of the judicial role is reinforced in other ways. References to the 'rule of law' in legal judgments are now frequent, especially in recent years.[8] Law journal articles on administrative law display an overriding emphasis on the importance of judicial power. Even where a topic is distinctly open to a non-judicial perspective – for instance, whether government agencies should be bound to honour their advice[9] – the usual approach in legal scholarship is for the discussion to look only at doctrines that could be enforceable in the courtroom.

If the theme of this paper is correct – that there is an imbalance in the way that accountability and rule of law issues are addressed in Australian public law – larger issues arise, that are taken up at the end of this paper. Two in particular are whether legal scholarship on the protection of individual rights is wrongly focussed, and whether traditional thinking about the separation of powers needs adjustment. First, though, it is useful to look at different ways in which the office of Ombudsman can make a solid contribution to advancing the rule of law. The analysis begins with a brief discussion of the meaning and scope of the rule of law.

The rule of law

Discussion of the rule of law typically acknowledges that it is a protean concept, invoked for effect as much as for meaning. There is, nonetheless, some common ground.[10]

The focus of the rule of law is upon controlling the exercise of official power by the executive government. The foundational principle is that agencies and officers of government, from the Minister to the desk official, require legal authority for any action they undertake, and must comply with the law in discharging their functions. Government is not above the law, but is subject to it. This contrasts with the position of members of the public: they too are subject to the law, but are free to engage in any activity that is not specifically prohibited. Unlike government, individuals need not point to a source of law in order to move and operate in the world.

Because of that essential difference between government and the governed, the relationship between the two is a key element of the rule of law. This is borne out in many areas of law. One such area is the principles of statutory construction, which require government to have express statutory authorisation – 'a clear expression of an unmistakable and unambiguous intention'[11] – for activities that are coercive, punitive, intrusive or threatening in nature. To like effect are legal doctrines that allow any member of the public aggrieved by government action to institute proceedings for declaratory, injunctive and compensatory remedies. Administrative law plays a similar role, by prescribing as a condition of the validity of executive action that it is authorised, performed by an authorised officer, made for an authorised purpose, not based on impermissible considerations, and takes account of the adverse impact that official action can have on those to whom it applies.

Some definitions of the rule of law go much further, and stipulate minimum standards of fairness and justice that legal rules must conform to. It is unnecessary in this paper to enter that debate. Suffice to say that the rule of law, on any definition, is concerned at one level or another with safeguarding individual liberty and integrity against government oppression.

For that safeguard to be a reality there must be a legal mechanism by which the rule of law can be upheld. Specifically, there must be a forum to which disputes can be taken about the validity of government action. The forum – or dispute resolution body – must have sufficient independence, integrity and professionalism that it can reach an unbiased decision that will

be accepted by others and implemented. Support and respect for the dispute resolution body should permeate government and society.

The body that best fits that description is, unquestionably, the judiciary. In the exercise of judicial power, courts are able to reach a conclusive finding on any issue of law.[12] There is a duty upon others, also enforceable by judicial order, to respect and implement a judicial decree. Moreover, there is a strong tradition in Australia of judicial independence and impartiality, bolstered at the federal level by the constitutional separation of powers. Not surprisingly, most rule of law theory is heavily focussed – at times exclusively so – on the role of courts. Discussion of the rule of law in Australian legal and academic circles often has more to say about the role of courts than about the true focus of the doctrine, which is the behaviour and thinking of governments.

Are courts the only mechanism that fulfils rule of law objectives? And, in terms of practical steps to safeguard the rule of law, are there gaps that courts and judicial power cannot fill?

The ombudsman contribution to upholding the rule of law

The following discussion will point to ways in which the office of Ombudsman plays a forceful role in safeguarding the rule of law in Australia. There are admittedly distinct limitations on the role, meaning that the Ombudsman can only ever complement and not supplant the judicial role. As is well-known, the Ombudsman cannot make a declaration of invalidity, and must rely on recommendation, persuasion and publicity to effect change.[13] Nor can the Ombudsman injunct an agency, command action, or award compensation for defective administration. There are also significant jurisdictional limitations on what the Ombudsman can investigate: notable exclusions are Ministerial actions and decisions, the conduct of security intelligence bodies such as ASIO, and employment action in the public service.[14]

Those limitations are important, but they too easily assume centre-stage in discussion of what the Ombudsman is able to do. Following are some aspects of the Ombudsman's role that can contribute to safeguarding the rule of law.

Dealing with complaints against government

Ombudsman offices have now been established for thirty years in Australia, handling complaints against every tier of government – national, State, Territory and local. The number of complaints handled each year is an impressive total. The Commonwealth Ombudsman, for example, received 17,496 complaints and 9,036 other inquiries in 2003-04[15] (the respective totals for the previous year were 19,850 and 11,178). Across Australia, the public sector Ombudsmen receive in excess of 60,000 complaints each year against government.

That total is important in its own right, as an indication of the frequency with which people turn to the Ombudsman for assistance and the number of queries and grievances against government that are addressed each year. In jurisprudential terms the total is significant in another way. It signifies that, through the mechanism of the Ombudsman, the notion is now embedded in Australia that people have a right to complain against government, to an independent agency, without hindrance or reprisal, and to have their complaint resolved on its merits according to the applicable rules and the evidence. Acceptance of this notion permeates both popular thinking and the practice of government.

From a rule of law perspective, complaint handling by the Ombudsman bolsters the notion that government is bound by rules, and that there can be an independent evaluation of whether there has been compliance with the rules. Government accountability and the right to complain go hand in hand. That this notion is taken for granted in Australia should not

overshadow the importance of the fact that it can be taken for granted. The example of other countries in which the struggle for democracy is still vigorous provides a reminder that public disagreement with government decisions is a disputed right in many parts of the world. Recognition of the right can be an important marker of whether democracy and the rule of law are being practised.

Another sign of institutional acceptance of the right to complain in Australia is the spread of the Ombudsman model in the private sector. Major utilities and public services are subject to oversight by – to name a few – the Telecommunications Industry Ombudsman, Banking and Financial Services Ombudsman, Energy and Water Ombudsman (NSW and Victoria), Private Health Insurance Ombudsman, Public Transport Industry Ombudsman (Victoria), and (soon) a Postal Industry Ombudsman. In the last year alone, proposals have been made by parliamentary committees, political leaders and public commentators for the creation of an aviation ombudsman,[16] children's ombudsman,[17] small business ombudsman,[18] aged-care ombudsman,[19] media ombudsman,[20] arts ombudsman,[21] franchising ombudsman[22] and sports ombudsman[23].

The spread of the Ombudsman model internationally over the last thirty years has been just as great. Whereas fewer than 20 jurisdictions had an Ombudsman in 1970, over 100 countries have now established an office by one name or another. It is perhaps the fastest growing (or widely copied) institution in the modern era. Viewed in that light, the establishment of a large number of Ombudsman offices in Australia is part of a global trend that crosses political, cultural and language barriers.

Resolving legal issues

The rule of law is especially concerned with whether there is legal compliance by government. Ostensibly this is the only issue of concern to a court undertaking judicial review. What of the Ombudsman?

Before that question is addressed specifically, it is useful to place it in context, by recalling that issues of law, fact, procedure, discretion and judgment often shade imperceptibly into each other. A study of judicial review cases undertaken by the author and a colleague showed that two of the legal grounds most likely to be argued by applicants and accepted by courts were failure to take a relevant consideration into account and breach of natural justice.[24] While those are legal errors that can invalidate a decision, they are also administrative shortcomings that are not unlike the errors that are routinely the focus of Ombudsman investigations. A similar observation holds true for immigration cases in Australian courts, in which probably the single most common line of attack by applicants is against the analysis of evidence by tribunals in their reasons for decision.

Turning more specifically to the Ombudsman's role in ensuring legal compliance, it is undoubtedly the case (as noted later in this paper) that complaints to the Ombudsman are more about matters of administrative style and fact-finding than about legal errors. Nevertheless, the law is never far from the sphere of investigation. This point was made in my annual report for 2003-04 in relation to debt recovery by Centrelink, which was the largest single source of complaints for that year. After observing that legislation authorised Centrelink to recover debts, the report observed that '[t]he focus of our concern is that debt recovery policies and procedures developed and implemented by Centrelink are not only authorised by those laws, but also have regard to the position of special needs of Centrelink customers and are not heavy handed'.[25]

The same point can be illustrated many times over, in relation to taxation, immigration, child support, law enforcement and countless other areas. A common cause of the complaints that people have against government is that legislative schemes of entitlement and

regulation are nowadays detailed, complex, specific and sometimes rigid and harsh. The rule of law is as much concerned with explaining to a person why an adverse decision was made and is unimpeachable as it is with examining whether a decision was legally proper. A chief responsibility of the Ombudsman's office is to discharge that mixture of functions in an integrated fashion.

There are occasions too when the office plays a role that is indistinguishable, at least as to the result, from the role played by courts. A recent example was action taken by my office to ensure payment of the $600 child bonus family payment to some parents who were eligible but had not received the payment.[26] The Department of Family and Community Services had initially taken the view that some parents were not eligible at that stage because of the terms of the family assistance legislation. My office had a different view as to how the legislation should be construed, and this view was ultimately accepted by the Department. Significantly, too, the legal entitlement enforced in this example resulted in a payment to a large number of people, and did not require initiation of legal proceedings by any one or more of them.

As that example illustrates, the Ombudsman is often well-placed to resolve legal issues affecting a large number of people, in circumstances where cost, complexity or lack of information inhibit the commencement of legal proceedings.[27] Another recent example is of action taken by an ACT government agency to repay a camera detected speeding penalty to approximately 470 motorists, when doubts about the adequacy of traffic warning signs were raised by my office in the course of an own motion investigation into traffic infringement notices.[28]

A different facet of the legal compliance role the Ombudsman can play is in drawing attention to gaps and anomalies in the legal framework. An example taken once again from the annual report for 2003-04 concerns an aspect of the migration legislation that can result in unfair and unreasonable consequences for individuals.[29] The problem exposed was that a student studying in Australia may not, for reasons beyond their control, be able to meet the time limit for renewing their student resident visa, and unavoidably will have to leave the country to lodge a fresh visa application. We took the issue up with the Government, which agreed to legislative change affecting 19 visa subclasses that came into operation in December 2004.

Other accountability functions of the Ombudsman

The traditional and still the core function of the Ombudsman is to investigate, on complaint or of the Ombudsman's own motion, whether there has been defective administrative action. Over the years a number of other functions have been conferred on the office that are significant from a rule of law perspective.

Many Ombudsmen in Australia have been designated with a special role under whistleblower protection and freedom of information legislation. The thrust of both legislative schemes is to ensure transparency and accountability in government: whistleblower protection does so by providing legal protection to a person who discloses information about unlawful or improper official action; and freedom of information does so by providing a right of public access to government documents. My own office (in its guise as ACT Ombudsman) has a lead role under the *Public Interest Disclosure Act 1994* (ACT) as a 'proper authority' to which protected disclosures can be made and investigated (s 13).[30] Freedom of information legislation also makes special mention of the Ombudsman's role in investigating complaints about denial or processing of FOI requests.[31] The office has always proclaimed a special interest in FOI matters, which has included the conduct of own motion investigations into FOI administration by Commonwealth agencies.[32]

Another example of a special role discharged by the Commonwealth Ombudsman is under the new anti-terrorism legislation. That legislation confers powers that enable joint action by the Australian Security Intelligence Organisation and police to enter and search property and to detain people for questioning.[33] The legislation precludes judicial review of the exercise of those powers, while expressly preserving the role of the Ombudsman and the Inspector-General of Intelligence and Security in investigating complaints against (respectively) the police or ASIO.[34] My own office has developed protocols with other agencies to ensure that a detainee can contact the office's Law Enforcement Team 24 hours throughout the day.

One of the more significant but less known roles of the Ombudsman is to monitor compliance by the Australian Federal Police and the Australian Crimes Commission with legislation authorising telecommunications interception and controlled operations.[35] Police activity of that nature can only be undertaken in accordance with tightly-written statutory requirements that impose specific and demanding obligations upon police concerning authorisation of the interception or entrapment activity, the duration of the activity, preservation and destruction of records, and reporting to ministers and the parliament. The rigorous legislative code can be traced to concerns expressed by courts, royal commissions and members of the public generally about unlawful telephone interception and police entrapment.[36]

Judicial review of police compliance with these statutory requirements is still an option, but in practice will be intermittent and fractional. Instead, the legislation confers upon the Ombudsman a more systematic role of periodically inspecting the police records to ensure compliance with the legislation and to report the findings to the Minister and the Parliament. My own experience is that compliance auditing of this kind is a highly effective and low cost mechanism for ensuring strict compliance with statutory procedures that are grounded in the ideals of rule of law and rights protection. Importantly, too, I have seen how the systematic nature of this oversight has induced a culture of compliance within the law enforcement agencies; this is now anchored in the development of internal procedures for rigorous quality assurance and legal compliance, and in active support shown by senior law enforcement managers for the Ombudsman's oversight role.

Four other examples from the past year illustrate how the legal compliance and monitoring role of the Ombudsman is developing and poised for further expansion. First, on the recommendation of the Senate Standing Committee on Scrutiny of Bills, my office recently undertook a sample audit of the use by the Australian Taxation Office of its entry and search powers.[37] It is likely that this audit will be done periodically. Secondly, an own motion investigation of change of assessment decisions by the Child Support Agency looked *inter alia* at the criteria applied by decision-makers in calculating parental income.[38] An interesting (and disquieting) finding was that there are regional differences in the criteria being applied, meaning that on the same facts a parent's liability or entitlement under the child support legislation can potentially vary according to the State in which the parent lives. Thirdly, legislation enacted in 2004 requires annual inspection by the Ombudsman of the records of the Building Industry Taskforce, concerning its exercise of coercive powers to inspect building and industrial activity in Australia.[39] A recent decision of the Federal Court, warning that the notices issued by the Taskforce requiring the production of documents must not be 'foreign to the workplace relations of civilised societies, as distinct from undemocratic and authoritarian states', is a reminder of the need for effective oversight of the exercise of coercive powers.[40] Finally, the *Surveillance Devices Act 2004* (Cth) confers a new role on the Ombudsman of inspecting the records that law enforcement authorities are required to compile when using surveillance devices in criminal investigations and the location and safe recovery of children.[41]

Adapting to change

A perpetual challenge for all administrative law bodies is to adapt their function to cope with changes in the structure of government and the delivery of public services. The change that has attracted considerable attention and comment in recent years is the corporatisation, privatisation and contracting out of government functions and service delivery.[42] The statutory jurisdiction of administrative law bodies was mostly devised in an earlier age when there was a sharper distinction between the public and private sectors. The jurisdictional concepts embodied in legislation have not kept pace with changes in government, and in varying degrees constrain administrative law review bodies from reviewing administrative conduct that was formerly within jurisdiction. Many critics have complained that this has undermined accountability and the rule of law.

Administrative tribunals have probably had the least room to move in adjusting to this change. The decisions that are reviewable by tribunals are specified in legislation; outsourcing the function will sometimes remove the function from a tribunal's jurisdiction.

Judicial review has had mixed fortunes. On the one hand, courts exercising common law jurisdiction have been prepared on occasions to apply judicial review principles (notably natural justice) to decision-making by non-government bodies.[43] There was, on the other hand, considerable caution displayed by the High Court in *Neat Domestic Trading Pty Ltd v AWB Ltd*[44] in holding that a public law remedy did not lie against a non-government body exercising a statutory veto on wheat export (in place, essentially, of a function formerly discharged within government). There has similarly been a reluctance by courts to sanction judicial review of government decision-making that is commercial in nature.[45]

The Ombudsman has often drawn critical attention to the impact that recent trends in the changing structure of government have on the limited jurisdiction conferred by the *Ombudsman Act 1976* (Cth) s 5 to investigate complaints against a 'department' or 'prescribed authority' (essentially, a body established by legislation for a public purpose).[46] The difficulties are real, and legislative amendment to close the growing gap in the Ombudsman's jurisdiction has been recommended by the Administrative Review Council and the Joint Committee of Public Accounts and Audit[47] and accepted by the Government.

Even so, there has been more adaptation of the Ombudsman's role than the public debate might suggest. This is significant in rule of law terms in showing that in some respects at least the Ombudsman has greater flexibility than other administrative law agencies to extend accountability principles to non-government activity. One example of this point is that a private company manages immigration detention facilities, but that does not absolve the Department of Immigration from its responsibility to respond to an Ombudsman complaint about the operation of a detention facility. Another example is the own motion investigation undertaken by my office in 2003 of complaint handling in the Job Network.[48] The jurisdictional focus of that investigation was the Department of Employment and Workplace Relations, but the purpose of the investigation was to ensure that the non-government contracted service providers – who essentially are discharging a public function – adhere to accepted public sector standards in complaint handling.

Another trend in government to which I drew attention in the annual report for 2003-04 is the use (seemingly, a growing use) of executive power rather than legislation to establish schemes of entitlement and assistance.[49] Two examples are the General Employee Entitlements and Redundancy Scheme (GEERS) administered by the Department of Employment and Workplace Relations, and an executive scheme for disaster assistance administered by Centrelink. Decisions made under an executive rather than statutory scheme are not subject to review by a tribunal or under the ADJR Act. Nor is there is a right to obtain a statement of reasons under the ADJR Act. And yet the executive decisions are indistinguishable, in nature and importance for those affected, from social support decisions made under legislation.

The only avenue of administrative law review still available to a person aggrieved by action taken under an executive scheme is a complaint to the Ombudsman. This right has proved important, including from a rule of law perspective. To take one example, in 2003-04 my office received roughly 120 complaints about decisions made under the GEERS scheme. Issues that we took up with the Department (with a favourable reception) were denials of natural justice in decision-making, inadequate statements of reasons, inadequate investigation upon internal review of decisions, and inadequate notification of the scheme to those eligible to apply under it.[50]

Finding a remedy for governmental error

A standard comment made about the Ombudsman, in legal literature in particular, is that its effectiveness is undermined by its absence of determinative powers. The description 'toothless tiger' is often applied.[51]

There is no denying that that restriction inhibits the ability of the Ombudsman to provide relief as easily or assuredly as a court or tribunal could. Recognising that point, the office will often suggest to a complainant that an issue in dispute can more appropriately be addressed in judicial or tribunal review; sometimes the office will decline to investigate on that basis.[52] Nevertheless, the significance of this restriction in evaluating the effectiveness of Ombudsman review is too easily overstated.

Examples given earlier in this paper illustrate that agencies are prepared to accept a reasoned argument that a decision or agency practice is contrary to law and should be altered. Indeed, nearly all formal recommendations made by the Ombudsman are accepted by agencies;[53] my experience is that there is a similarly high rate of acceptance of other suggestions and less formal recommendations. Even in urgent situations where a coercive judicial remedy might be thought more appropriate, there is a preparedness by agencies (as to some decisions at least) to accede to an Ombudsman request that implementation of a decision be deferred pending investigation of a complaint. For example, on a number of occasions the Defence Force has accepted an Ombudsman request to suspend impending executive action to discharge a member of the Defence Force until completion of an investigation. Another recent example was a decision by a maritime authority to defer demolition of a structure that was the subject of a heritage dispute until a fuller investigation could be conducted.

A further point as to remedies is that the Ombudsman style of investigation, resting largely on inquisitorial method and consultation with agencies, is amenable to resourcefulness in deciding how best to resolve a problem. Not infrequently the difficulties that people encounter with government can be approached from different angles: the remedy that will satisfy a person is not necessarily the remedy they had in mind in lodging a complaint. A foremost example of this point is that compensation for administrative error is a remedy commonly adopted under the government-approved scheme for Compensation for Detriment Caused by Defective Administration (CDDA). The Ombudsman's office played a key role in the development of this scheme, which currently provides that a recommendation by the Ombudsman for payment of compensation is a sufficient basis for making a payment.[54]

A recent example of a payment made under the scheme illustrates the flexibility it offers for finding a fitting remedy for governmental error. An agency had declined on legal and administrative grounds to discharge a debt owed to the agency by a member of the public. Later, the agency accepted that an administrative lapse played a part in the debt being incurred, and the agency agreed to make a CDDA payment to the person of an equivalent amount, thus effectively extinguishing the debt.

The same flexibility can be used in other areas to circumvent legal obstacles. For example, a vexed administrative problem is whether a decision can be re-made if it appears there was a legal or factual error in the original decision. The law on this topic is not altogether clear or easy to apply, resting as it does on concepts such as whether the allegedly defective decision was a nullity, was infected by jurisdictional error, or was a decision without legal effect under the statute under which it was purportedly made.[55] Although the Ombudsman's office has to work within that doctrinal framework, we are often in a position to prompt an agency to approach the legal problem in a different way. I gave a couple of examples in my 2003-04 annual report of how we had persuaded an agency to take executive action to revise an obvious error or misnomer in a person's application, so as to validate the intent of the applicant and the legislation.[56] This effectively circumvented the problem initially raised by the agency, that it lacked statutory authority to revise its initial decision to reject the person's application.

It is important also to remember that the problems people have with government are more commonly about procedural justice than about the substantive correctness of decisions.[57] The prevalent issues raised in complaints to the Ombudsman are matters such as delay, misleading advice, inexplicable reasons, lost paperwork and discourtesy. Rarely will the remedy for such a grievance be the reversal of a decision by a determinative decree, or a declaratory, mandatory or injunctive order of the kind granted in judicial review. Oftentimes the more appropriate and accepted remedy is an explanation or an apology. Those remedies do not find a niche in rule of law theory, but nor should their importance be overlooked in evaluating how to civilise a system of government and make it attuned to its accountability and responsibility to the public.

Other steps in legal compliance

I have noted elsewhere that the effectiveness of judicial review of administrative decision-making rests in part on a blend of faith and assumption.[58] The reason is that we have scant empirical data or scientific understanding as to what happens after a court reaches a finding that a government decision is invalid. There is no published record to which one can turn to find the ultimate outcome; there is no procedure for reporting what occurs following a court decision; nor does any official have the function of monitoring the outcome of a court decision to ensure it is implemented as between the particular parties or that its principles are applied in other similar cases considered by the agency.

The situation is probably not as dire on the ground as that observation suggests. Two empirical studies undertaken jointly by the author with Professor Creyke revealed both a high level of support among executive officers for court and tribunal review of decision-making, and a high rate of implementation of court decisions both in individual cases and across the board.[59] However, the studies also showed that there is room for improvement in agency processes in implementing the lessons to be learnt from external review. One is left too with the fact that there is a lack of institutional mechanisms for ensuring that judicial review fulfils the rule of law benefits that are often claimed for it.

The Ombudsman model is more attuned to this issue. It is conventional for the office to define its role as one concerned as much with systemic problems in public administration as with transitory malfunctions in administrative decision-making. It is normal for the office to follow through and examine whether recommendations have been implemented and assurances have been honoured. Particularly through own motion investigations and publications on decision-making,[60] the office has both a functional and educative role in improving public administration, including legal compliance.

Of special importance has been the role of the office over three decades in stimulating the creation within agencies of internal complaint handling units.[61] Many of these units (such as ATO Complaints) are well-resourced and professional units that handle a substantially larger number of inquiries than the Ombudsman's office. This development is significant in rule of law terms. The integration of these units with the program work of the agencies, and the sponsorship and support the units often receive from agency management and the legal section, are influential in ensuring that within the agency there is a higher level of transparency, responsiveness, objectivity and legal compliance than might otherwise be the case.

A final point worth making has to do with the composition of Ombudsman offices. A criticism sometimes made of judicial review is that the sense of justice and community values that it imparts is at risk of being culturally specific. There is a high proportion of males holding judicial office, and a comparable narrowing in other qualifications for judicial appointment. The same narrowing trend has been occurring in appointments to some tribunals.[62] To my mind, a particular strength of Ombudsman offices is the diversity of qualifications, skills, experience and gender of the staff. The staffing profile of my office in June 2004 was 57 women and 35 men, including 22 men and 19 women in the executive level and SES band. Without labouring the point, my own experience is that the perspective the office brings to issues of legal compliance and government accountability reflects the diversity of the staff composition and is all the better for it.

A new context

An underlying premise of this paper is that legal scholarship too often presents a mistaken view of how accountability operates and the rule of law is upheld in the Australian legal system. The argument could stop there, with a call for a different presentation in legal writing. But deeper questions can be posed about how we define accountability and the rule of law in the contemporary setting of Australian government. Two issues taken up in the following discussion concern the mechanisms for human rights protection, and the constitutional placement of Ombudsman offices and other integrity institutions.

Human rights protection in the Australian legal system

There is a growing emphasis in Australia on improving the legal mechanisms for human rights protection. A common strain in academic legal discourse is that we need to develop a fresh approach to this challenge. Options often mentioned are the enactment of a bill of rights, incorporation of international human rights principles into Australian domestic law, and giving greater prominence to a human rights dimension in judicial review principles and constitutional doctrines. The argument for better human rights protection is often framed as an argument for enhancing respect for the rule of law.

Without entering that general debate about whether there is adequate protection of human rights in Australia, I would observe that the proponents for greater protection frequently overlook the established and effective human rights role currently played by Ombudsman offices and other elements of the administrative law system. The metres of books about human rights on law library shelves rarely mention the Ombudsman as a human rights agency. The focus overwhelmingly is upon bills of rights, courts and international instruments. Yet, an implicit theme in this paper is that complaint investigation by the Ombudsman is directly concerned with human rights issues, in areas as diverse as law enforcement, withdrawal of social security benefits, detention of immigrants, treatment of young children, imposition of taxation penalties, and the exercise of government coercive power. Furthermore, both symbolically and at a practical level, the Ombudsman's office captures what is arguably the most fundamental of all human rights, namely the right to complain against and to challenge the government in an independent forum.

Recent developments in the Australian Capital Territory on the human rights front illustrate my concern. In 2004 the Legislative Assembly of the ACT enacted the *Human Rights Act 2004*. It is doubtless true that the Act has an important potential to direct attention to human rights criteria in ACT law and government. Yet there is a discernible risk that the legal effect of the new statute will be overstated. For example, I disagree that the ACT is 'the first Australian jurisdiction to formally incorporate rights into its legislation'.[63] There are countless examples of statutes enacted decades earlier that formally protect the rights of members of the public in their dealings with government: an apt example is the large body of Commonwealth and State anti-discrimination and human rights legislation that establishes a procedure for complaint investigation and adjudication applying human rights criteria that are not dissimilar to those in the ACT Human Rights Act.[64] Most features of that Act – such as the obligation cast on legislative scrutiny bodies and executive agencies to have regard to the rights listed in the Act – have a parallel in established elements and doctrines of Australian public law. Perhaps the main innovation in the ACT statute is the jurisdiction it confers on the Supreme Court to make an advisory declaration that an ACT statute is inconsistent with one of the rights declared in the Act (s 32).

To overstate the change wrought by the Act is at the same time to understate the efficacy of the established mechanisms for human rights protection in the ACT. A deficiency of that kind preceded the enactment of the Human Rights Act, in the report in 2003 of the Bill of Rights Consultative Committee. In evaluating the existing mechanisms to protect human rights in the ACT, the Committee made no mention of the ACT Ombudsman or of administrative law.[65] There is a worry that that misrepresentation of the present public law system will be compounded. For example, a recent article on the ACT statute foreshadows that it will 'encourage a culture of respect for rights within [the] branches of government', but warns that '[t]he considerable effort which it takes to comprehensively change public service and executive government culture to one that is conscious and respectful of human rights should not be underestimated'.[66]

Assessments of that kind carry little weight unless there is solid empirical evidence to substantiate them. My own view is that the limited empirical evidence that is available suggests that institutions such as the Ombudsman, together with other innovations in administrative law and government, have had a marked impact over three decades in developing a new culture in public administration that is more attuned to the rights of members of the public.[67] If so, those innovations – which are now strongly rooted in Australian public law – deserve more attention in any discussion about enhancing respect for the rule of law in Australia.

The integrity branch of government

In a recent address Chief Justice Spigelman of the NSW Supreme Court proposed that we should recognise 'an integrity branch of government as a fourth branch, equivalent to the legislative, executive and judicial branches'.[68] The same argument has been made by an American constitutional scholar, Professor Ackerman, that 'a separate "integrity branch" should be a top priority for drafters of modern constitutions'.[69]

This idea may seem novel to anyone schooled in the trinitarian separation of powers, but the developments in Australian law and government over the past thirty years are sufficiently momentous to raise questions about the durability of constitutional models and thinking that date from a far earlier age.

There are now a great many independent statutory agencies that perform an important accountability and integrity function in the legal system. The list includes Auditors-General, ombudsmen, administrative tribunals, independent crime commissions, privacy commissioners, information commissioners, human rights and anti-discrimination

commissions, public service standards commissioners, and inspectors-general of taxation, security intelligence and military discipline. The function they discharge embraces legal compliance, good decision-making and improved public administration. But the shared concern of these agencies goes further to embrace institutional integrity. Chief Justice Spigelman explains:

> Institutional integrity goes beyond a narrow concept of illegality to encompass at least two additional considerations. First, the maintenance of fidelity to the public purposes for the pursuit of which an institution is created. Secondly, the application of the public values, including procedural values, which the institution was expected and/or required to obey.

This focus on fidelity to purpose and on applicable public values … distinguish[es] the integrity function from other governmental functions, including most executive, legislative and judicial decision-making, which are concerned with the quality of outcomes.

The constitutional practice in Australia has been to classify these accountability or integrity agencies as being part of the executive branch of government. When the classification seems strained, unsatisfactory hybrid categories such as 'quasi-judicial' have been coined (more particularly for adjudicative tribunals). But is the tension now too great?

It is misleading to classify many of these agencies as 'executive'; both their independence and the watchdog role they play in government differentiate them from other agencies in the executive branch. The alternative, as Chief Justice Spigelman suggests, is to re-think their classification by taking stock of the enormous change that has occurred in the framework of government. It is premature to spell out a new constitutional philosophy of government, but a few pointers may help.

The conventional way of altering the structure of government is to embody the change in a constitutional document. That is not a promising option as regards the framework of national government, because of the difficulty of formal constitutional change under the referendum procedure in Constitution s 128. The difficulty is not so great at the State level. Already, for example, in Victoria, the Ombudsman, Auditor-General and Electoral Commissioner are recognised in the Constitution.[70]

Transformation of the structure or conventions of government can be achieved as well by non-constitutional means. In Queensland, the Ombudsman, Auditor-General and Crime and Misconduct Commission are grouped together as an integrity branch for the purposes of their appearance before parliamentary estimates committees.[71] Statutory requirements – on matters such as parliamentary oversight, annual reporting, and appointment and removal of statutory office holders – also play a role in characterising an agency within the structure of government. An example in point is the NSW *Ombudsman Act 1974* that establishes a joint committee of both houses of the legislature, called the Committee on the Office of the Ombudsman and the Police Integrity Commission. The functions of the Committee include the exercise of a power of veto over the proposed appointment of a person as Ombudsman, the examination of the reports of the Ombudsman, and monitoring and keeping the legislature informed on the operations of the Ombudsman.[72]

The terminology and classifications that are used in describing a system of government are also an important element of that system. Here it is noteworthy that the concept of 'integrity' is increasingly being used both to describe and to evaluate the health of governmental systems. One example is the inaugural 'Global Integrity Report' prepared in 2004 by the Washington-based Centre for Public Integrity. Interestingly, the Ombudsman framework in Australia was an influential factor in Australia being ranked third among 25 democracies on the index.[73]

Another relevant Australian development was the publication in 2004 of a National Integrity System report by an Australian Research Council funded project conducted jointly over five years by Transparency International Australia and Griffith University's Key Centre for Ethics, Law, Justice and Governance.[74] The report was the first such attempt to 'map' a single country's integrity system. A large number of recommendations were made for improving Australia's integrity framework, including the creation of a national independent statutory authority to investigate and prevent corruption and misconduct, and also to promote integrity and accountability in government; the creation in each Australian jurisdiction of a governance review council, including representatives of agencies such as the Ombudsman, Auditor-General, public service head, parliamentary standards commissioner, and community representatives; the creation of a parliamentary committee to oversight the core integrity institutions; the imposition of a statutory duty on public sector agencies to prepare an organisational code of conduct; the creation of better consultative and other links between the core integrity institutions; and the development of accredited training on integrity, accountability and ethics requirements in public and private sector agencies.

Those proposals illustrate the fertile possibilities for conceiving of 'integrity' as a function or even a branch of government. As a concept it does not replace more traditional legal concepts such as the rule of law and separation of powers in defining the fundamentals of the system of law and government. On the other hand, the emergence of novel concepts and ways of looking at government are a reminder of the need for traditional concepts to be revisited from time to time to take account of other changes in government and society.

Endnotes

1 *Paradise Projects Pty Ltd v Gold Coast City Council* [1994] 1 Qd R 314 at 321 per Thomas J.
2 *Dyson v Attorney-General* [1912] 1 Ch 158 per Farwell J.
3 *Inland Revenue Commissioners for National Federation of Self-Employed and Small Businesses* [1982] AC 617 at 644 per Lord Diplock. Note also the observation of Lord Roskill (at 663) that the role of the UK Parliamentary Commissioner was 'to redress administrative wrongs, not remediable in the courts'.
4 M Crock, 'Refugees in Australia: of Lore, Legends and the Judicial Process', Paper to the Judicial Conference of Australia, Seventh Colloquium, 30 May 2003 (www.jca.asn.au).
5 M Costello, 'Don't blame the courts for Bali trip-ups', *The Australian*, 27 August 2004 at 13.
6 *Re Carmody; Ex parte Glennan* (2000) 173 ALR 145 at [2-3] per Kirby J. Gaudron J observed similarly in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [68] that s 75(v) 'provides the mechanism by which the Executive is subjected to the rule of law'. Cf Gleeson CJ in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 noting of s 75(v) only that 'It secures a basic element of the rule of law'.
7 For examples see the entries on 'Administrative Law' and related topics in T Blackshield, M Coper & G Williams, *The Oxford Companion to the High Court of Australia* (2001).
8 For example, High Court cases between 2000 and 2004 that mention the rule of law include *Fejzullahu* (2000) 74 ALJR 830, *Carmody* (2000) 173 ALR 145, *Coal and Allied* (2000) 203 CLR 194, *Enfield* (2000) 199 CLR 135, *Jia* (2001) 205 CLR 507, *Yusuf* (2001) 206 CLR 323, *Patterson* (2001) 207 CLR 391, *Allan* (2001) 208 CLR 167, *Plaintiff S157/2002* (2003) 211 CLR 476, *Eastman* (2003) 198 ALR 1, *Palme* (2003) 201 ALR 327, *Dossett* [2003] HCA 69, *Appellant S395/2002* (2003) 203 ALR 112, *Behrooz* [2004] HCA 36, *Electrolux* [2004] HCA 40, *Al-Kateb* [2004] HCA 37. See also the more frequent treatment of the issue in legal papers, below n 10.
9 This topic is invariably addressed as one to be resolved by the development of a public law doctrine of estoppel. Providing a remedy for incorrect agency advice is a major focus of ombudsmen, as illustrated by some own motion reports of the Commonwealth Ombudsman: *Issues Relating to Oral Advice: Clients Beware* (1997), *Balancing the Risks* (1999), and *To Compensate or not to Compensate* (1999).
10 Contemporary essays discussing the rule of law include K Mason, 'The Rule of Law' in P Finn (ed), *Essays on Law and Government*, Vol 1 (Law Book, 1995) 114; D Dyzenhaus (ed), *Recrafting the Rule of Law: the Limits of Legal Order* (1999); C Saunders & K Le Roy, *The Rule of Law* (Federation Press, 2002), M Gleeson, 'Courts and the Rule of Law', in Saunders & Le Roy, ibid; Spigelman CJ, 'Rule of Law: Human Rights Protection', Conference Address, 10 Dec 1998.
11 *Coco v R* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.
12 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
13 *Ombudsman Act 1976* (Cth) ss 12(3), 15, 16.
14 *Ombudsman Act 1976* (Cth) s 5(2).
15 Commonwealth Ombudsman, *Annual Report 2003-04* at 15.

16 House of Representatives Standing Committee on Transport and Regional Services, *Making Ends Meet: Regional Aviation and Island Transport Services* (2003) at 207.
17 Senate Community Affairs Committee, *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children* (2004) at [8.146], [8.167].
18 A Gome, 'Labor names its targets', *Business Review Weekly*, 19 February 2004 at 38 (policy proposal by ALP).
19 S Maher, 'Latham plans 3000 more aged beds – Election 2004', *The Australian*, 2 October 2004 (election policy proposal by ALP).
20 M Wenham, 'Premier gives the media a bad review', *The Courier-Mail*, 1 October 2004.
21 J Rankin-Reid, 'Warning bell: A vision ignored at our peril', *The Sunday Tasmanian* 3 October 2004.
22 P Switzer, 'An Ombudsman would ensure fair play for all', *The Australian* 7 Sept 2004.
23 R Messenger, 'Sports Drug Agency "incompetent"', *Canberra Times*, 23 March 2004 at 3.
24 R Creyke & J McMillan, 'Judicial Review Outcomes – An Empirical Study' (2004) *Aust Jnl of Admin Law* 82 at 97. In the nearly 300 cases analysed in this study, failure to consider relevant matters was argued in 48.3% of cases and upheld in 35.3%, and breach of natural justice was argued in 38.5% and upheld 34.2%. The more common ground was error of law (including misinterpretation of legislation) which was argued in 49.3% and upheld in 42.3% of cases.
25 Commonwealth Ombudsman, *Annual Report 2003-04* at 39.
26 See Commonwealth Ombudsman, 'Families should get $600 per child bonus payment sooner', Press Release, 2 August 2004 (www.ombudsman.gov.au).
27 For other examples see D Pearce, 'The Ombudsman and the Rule of Law' (1994) 1 *AIAL Forum* 1.
28 This will be reported in the 2004-05 annual report of the ACT Ombudsman. A similar example is given by the Queensland Ombudsman in his *Annual Report 2003-04* at 17 of action taken by a local council at the Ombudsman's instigation to repay to residents more than $53,000 in licensing fees that had been imposed without legal authority.
29 Commonwealth Ombudsman, *Annual Report 2003-04* at 51.
30 The role of Ombudsman offices in whistleblower protection legislation is discussed in NSW Ombudsman, *Adequacy of the Protected Disclosures Act to Achieve its Objectives,* Issues Paper (2004).
31 See *Freedom of Information Act 1982* (Cth) s 57. The FOI Act as originally enacted conferred a larger role on the Ombudsman, which included an advocacy role in the Administrative Appeals Tribunal on behalf of FOI applicants (Pt VA). These provisions of the Act were later repealed at the Ombudsman's suggestion because the function was not separately resourced. In Queensland the function of Information Commissioner is conferred on the Ombudsman: *Freedom of Information Act 1992* (Qld) s 61(2). See also the annual audit of FOI reporting by agencies conducted by the NSW Ombudsman, eg, *Audit of FOI Annual Reporting 2002-2003.*
32 Commonwealth Ombudsman, *Needs to Know: Own Motion Investigation into the Administration of the Freedom of Information Act 1982 in Commonwealth Agencies* (1999). The office is currently conducting another own motion investigation, from which results should be published in early 2005.
33 See *Australian Security Intelligence Organisation 1979* (Cth) Div 3.
34 *Australian Security Intelligence Organisation 1979* (Cth) ss 34E, 34F (preserving Ombudsman's role), s 34X (excluding judicial review).
35 See *Telecommunications (Interception) Act 1979* (Cth) s 84, *Crimes Act 1914* (Cth) Part 1AB. A 'controlled operation' is a covert police operation, to obtain evidence of criminal conduct, that involves police engaging in conduct that might itself be unlawful were it not authorised under a controlled operations certificate (eg, drug importation).
36 Telephone interception legislation was enacted following incidents such as the '*Age* tapes' and the Stewart Royal Commission into Unlawful Telephone Interception: see E Whitton, *Can of Worms* (1986, The Fairfax Library) at 158 ff. The controlled operations legislation followed the decision of the High Court in *Ridgeway v R* (1995) 184 CLR 19, in which the High Court condemned police entrapment activity undertaken without a statutory basis.
37 Commonwealth Ombudsman, *Use of Access Powers by the Australian Taxation Office* (2004).
38 Commonwealth Ombudsman, *Child Support Agency Change of Assessment Decisions - Administration of Change of Assessment Decisions Made on the Basis of Parents' Income, Earning Capacity, Property and Financial Resources*, Report No 1 of 2004.
39 *Workplace Relations Act 1996* (Cth) s 88AI.
40 *Thorson v Pine* [2004] FCA 1316 at [40] per Marshall J.
41 *Surveillance Devices Act 2004* (Cth) s 55.
42 Eg, see two reports by the Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38 (1995), and *The Contracting Out of Government Services*, Report No 42 (1998).
43 Eg, *R v Panel on Take-overs and Mergers; ex parte Datafin plc* [1987] 1 QB 815. Cf *Forbes v New South Wales Trotting Club* (1979) 143 CLR 242 (per Gibbs and Murphy JJ), and *Dorf Industries Pty Ltd v Toose* (1994) 127 ALR 654, 666. Generally, see M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) Ch 3.
44 (2003) 198 ALR 179. See A Buckland and J Higgison, 'Judicial Review of Decisions by Private Bodies' (2004) 42 *AIAL Forum* 37.

45 Eg, *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164; *Australian National University v Burns* (1982) 43 ALR 25. Cf *MBA Land Holdings Pty Ltd v Gunghalin Development Authority* [2000] ACTSC 89.
46 See A Stuhmcke, 'Privatisation and Corporatisation: What Now for the Commonwealth Ombudsman?' (2004) 11 *Aust Jnl of Admin Law* 101; and K Del Villar, 'Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsmen' (2003) 36 *AIAL Forum* 25.
47 Administrative Review Council, *The Contracting out of Government Services*, Report No 42 (1998) Ch 4; Joint Committee of Public Accounts and Audit, *Contract Management in the Australian Public Service*, Report 379 (2000).
48 Commonwealth Ombudsman*, Own Motion Investigation into Complaint Handling in the Job Network* (2003).
49 Commonwealth Ombudsman, *Annual Report 2003-04* at 89.
50 Ibid at 65.
51 To like effect is the distinction drawn by H Schoombee, 'Administrative Law: Choice of Remedies' (1995) 6 *AIAL Forum* 9: 'One of the first questions to be considered is whether recourse should be had to "sharp-edged remedies" such as review or appeal, or whether "softer" remedies such as the Ombudsman … should be utilised'.
52 See *Ombudsman Act 1976* (Cth) s 6(3).
53 Eg, Commonwealth Ombudsman, *Annual Report 2003-04* at 15, noting that all but one of 31 formal recommendations in reports were accepted that year. Agency preparedness to change decisions after administrative law review was also confirmed in a study of judicial review cases undertaken jointly by the author, which found that close to 80% of favourable judicial review decisions were followed by a reversal of the original agency decision: Creyke and McMillan, above n 24 at 87.
54 Clause 21 of the CDDA guidelines, available on the website of the Department of Finance and Administration. See also the Ombudsman's own motion report, *To Compensate or Not to Compensate: Own Motion Investigation of Commonwealth Arrangements for Providing Financial Redress for Maladministration* (1999).
55 Eg, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597. See also the Full Federal Court decisions in *Comptroller-General of Customs v Kawasaki* (1991) 103 ALR 661, and *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2004) 204 ALR 55.
56 Commonwealth Ombudsman, *Annual Report 2003-04* at 87.
57 See J Howieson, 'The Justice of Court-Connected Mediation' *VCAT Mediation Newsletter*, No 6 (Nov 2002) 24: 'psycho-legal researchers have … identified that it is *procedural justice* (the perception that the procedure is fair), rather than *distributive justice* (the perception that the outcome is fair), that is the most important factor in shaping disputants' overall perceptions of fairness, and in determining disputants' satisfaction with legal dispute resolution procedures'.
58 Creyke and McMillan, above n 24 at 82. See also R Creyke and J McMillan, 'Executive Perceptions of Administrative Law – An Empirical Study' (2002) 9 *Aust Jnl of Admin Law* 163.
59 Ibid.
60 Eg, Commonwealth Ombudsman, *A Good Practice Guide for Effective Complaint Handling* (2nd ed, 1999). Manuals on effective decision-making published by State Ombudsmen include: *Good Conduct and Administrative Practice* and *Effective Complaint Handling*, published by the NSW Ombudsman (www.nswombudsman.gov.au); *An Easy Guide to Good Administrative Decision-Making*, published by the Queensland Ombudsman (www.ombudsman.qld.gov.au); and *The Ombudsman's Guidelines for Conducting Administrative Investigations*, published by the WA Ombudsman (www.ombudsman.gov.au).
61 See also Administrative Review Council, *Internal Review of Agency Decision Making*, Report No 44 (2000).
62 Eg, the annual reports of the Refugee Review Tribunal (RRT) and Migration Review Tribunal (MRT) for 2002-03 showed that 56% of RRT members and 72% of MRT members had a degree in law; 78% of the 18 new members appointed to the RRT in 2003 had a degree in law.
63 C Evans, 'Responsibility for Rights: The ACT *Human Rights Act*' (2004) 32 *Fed L Rev* 291 at 309.
64 For example, the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) confers a right to complain about breach of one of the standards in many of the leading international human rights conventions, that are contained in Schedules to the Act (such as the International Convention on Civil and Political Rights).
65 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003) 30-32.
66 Evans, above n 63 at 300.
67 That was the clear conclusion in two empirical studies I jointly undertook: see two articles by Creyke and McMillan, above n 24 and n 54. The annual reports of the Commonwealth Ombudsman also describe the steps taken by agencies to improve their systems in response to complaints from members of the public. Similarly, for an explanation of how the creation of an accountability and integrity framework within the executive branch of government transformed the Queensland Police Service (in the view of the Queensland Ombudsman) 'from a corrupt institution at the highest levels to a professional and respected organisation' see D Bevan, 'Queensland's Public Accountability Framework: Effective Regulation or Effectively Over-Regulated?' in M Barker (ed), *Appraising the Performance of Regulatory Agencies* (AIAL, 2004) 228.
68 The Hon J J Spigelman, 'Jurisdiction and Integrity', Second Lecture in the 2004 National Lecture Series of the Australian Institute of Administrative Law.
69 B Ackerman, 'The New Separation of Powers' (2000) 113 *Harv L Rev* 633 at 694.

70 *Constitution Act 1975* (Vic) ss 94A, 94E, 94F. A similar proposal was made in Queensland by the Queensland Constitutional Review Commission for constitutional recognition of certain statutory office holders, but this recommendation was not accepted by the Government: see Legal, Constitutional and Administrative Review Committee, *The Queensland Constitution: Specific Content Issues*, Report No 36 (2002) 48-53.

71 Generally, see Bevan, above n 67.

72 *Ombudsman Act 1974* (NSW) ss 6A, 31B, 31BA. See also in Queensland the *Ombudsman Act 2001* s 89, which confers an oversight role on a parliamentary committee; and the *Public Sector Ethics Act 1994*, which creates the position of Queensland Integrity Commissioner (s 26) and defines 'integrity' as one of the five 'ethics principles … fundamental to good public administration' (s 4).

73 See J Uhr, 'Australia: Integrity Assessment' in M Camerer (ed), *Global Integrity Report* (2004), Centre for Public Integrity (www.publicintegrity.org).

74 *Chaos or Coherence: Strengths, Challenges and Opportunities for Australia's National Integrity Systems*, draft report (Nov 2004) (www.griffith.edu.au/centre/kceljag/nisa).

THE OMBUDSMAN AND THE RULE OF LAW

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Today I am keen to explore the role of Ombudsman in upholding the rule of law, and principles of fairness and ethics, in the context of some significant contemporary changes to and the evolving role of Ombudsman. These changes are happening across a number of jurisdictions in Australia – but I thought I would specifically draw on the evolution of the NSW Ombudsman over the last 30 years.

I do not believe these changes have so far been fully understood or appreciated – common notions of an Ombudsman today seem to still be largely entrenched in our foundational concepts. But an examination of the functions that Ombudsman are carrying out today must, I think, bring these concepts into question. I believe they also raise a number of challenges to our capacity to play an effective role in upholding the rule of law in the future and some interesting questions as to the future direction of Ombudsman.

Early perceptions and functions of Ombudsman in Australia

As most of you are probably aware - the history of Ombudsman in Australia go back to the 1970s and the rise at that time of the 'new administrative law'. They were born out of a social and political context - a time when public administration was growing and the powers of public authorities to affect private rights had increased. With this came a political will to make public officials more accountable, to make government more open and to provide accessible remedies for defective administration – which the courts had so far failed to effectively do. The public was demanding simple, cheap and quick procedures for those affected by official action.

Within this context, Australian jurisdictions propounded their own versions of the original Swedish concept of an Ombudsman. For example, in 1973 the Bland Committee, established by the Commonwealth Parliament to report on administrative discretion, reported its vision of an Ombudsman to be a body 'oriented towards the resolution of individual complaints and generally better at swatting flies than hunting lions'[1]. The Commonwealth Ombudsman was subsequently given powers to investigate and resolve individual grievances about public authorities and to make recommendations to departments and agencies.

In the same year as the Bland Committee's report - the NSW Law Reform Commission published a report on appeals in administration. The Commission had been requested to report on rights of appeal from administrative tribunals and officers and whether an Ombudsman should be appointed. It considered an Ombudsman to be a reference to 'an impartial person who deals with specific complaints about official actions of public authorities and investigates, assesses and reports upon, but does not reverse or modify those actions'[2].

* *New South Wales Ombudsman.*

The Commission recommended the appointment of an Ombudsman in NSW which would be more concerned with giving 'redress to a person whose rights have been unjustifiably encroached upon by an official action of a public authority'[3] and 'to intervene in disputes between government and citizen'[4].

The first NSW Ombudsman was subsequently appointed in 1975 to carry out functions that were largely in line with the concept put forward by the Law Reform Commission. In its early days the key functions of the office were narrowly focussed on resolving grievances about public authorities and administration:

- It was given the capacity to investigate administrative conduct of *public authorities*. Initially this jurisdiction was over *state* authorities only – the capacity to examine the conduct of local government employees was not obtained until 1986;

- Police officers acting as constables were also initially excluded from jurisdiction - only administrative conduct of police officers could be investigated;

- The capacity to undertake complaint and own motion investigations and to publicly report were the key means of carrying out this role.

At the end of the first year, the first Ombudsman, Mr Smithers, reported that he had 14 staff members. In the first year the office received under 2000 complaints.

In short, I think it would be fair to say that, while there have always been differences across jurisdictions in Australia, our early, foundational, ideas of the role of a public Ombudsman were primarily of keeping *public agencies accountable through the handling of individual complaints about administrative actions.*

Commentary on Ombudsman today

In the 30 year history of Ombudsman in Australia there has been much discussion about the contemporary issues facing Ombudsman and their future direction – both by Ombudsman themselves and legal scholars. These issues have ranged from concerns about threats to the capacity of Ombudsman due to under funding [5] through to the Ombudsman's role in systemic improvements through its complaint and own motion investigative functions.

In the last 10-15 years there has been discussion of the impact on Ombudsman of changes to the way in which government is providing its services and in particular the trend toward the privatisation and corporatisation of government. Some commentators have indicated a certain apprehension about the loss of jurisdiction as a result of government privatisation and the outsourcing of the delivery of services, resulting in calls for the Ombudsman to be given jurisdiction over core government services provided by third parties[6]. Others have seen this trend and a simultaneous rise in other, industry based, Ombudsman as a threat to our continued relevance and existence[7].

But underpinning these discussions is a continued concept that the role of public Ombudsman is primarily to keep *public authorities accountable by dealing with or investigating complaints about administrative action* – and at most to deal with complaints about third parties who provide core services of the government.

I find it surprising that, despite the significant changes in what public Ombudsman are doing today, common perceptions and thinking about them have not substantially shifted. We need to start challenging this and 'modernising' our concepts of public Ombudsman. To demonstrate why I would like to provide you with a snapshot of the work that my office – after 30 years of operation – is doing.

Evolution of NSW Ombudsman

Since we began in 1975 our role has been transformed in a number of ways.

One illustration of this, as with a number of other Ombudsman in Australia[8], is our expanded jurisdiction over police. As I mentioned earlier – our jurisdiction over police was initially limited to administrative conduct of police officers. Over several years our powers in relation to police have gradually increased. For example:

- In 1983 we were first given the power to investigate the conduct of police officers. It's hard to imagine now – but this allowed *seconded police officers* only to *reinvestigate* a complaint once it had already been investigated by police.

- In 1993 – we finally obtained full investigation powers which were not reliant on police investigating the complaint first. This was in addition to our role in reviewing investigations of complaints by police as well as a new power to monitor these investigations, for example, by observing interviews.

At this time, our expanding role in the policing area also resulted in an internal move toward specialisation. In 1993 the office created two teams – one to focus specifically on our police jurisdiction and the other to deal with our role in relation to public authorities generally.

Since 1993, our functions in relation to police have continued to evolve. Today our jurisdiction in this area involves a number of new and some unique functions. For example:

- We have functions in relation to reviewing legislation that gives police new and, usually controversial, police powers such as recent laws that allow police to use drug dogs in public places. These functions are carried out using a number of research strategies, for example, by observing police on the ground using the legislation and conducting surveys and focus groups about their effect.

- We have a specific function that requires us to 'keep under scrutiny' the systems established within police for dealing with complaints.

- We have a number of inspection and auditing functions, such as:

- to inspect the records of police to determine whether they are complying with requirements in relation to telephone intercepts;

- inspecting records relating to and monitoring 'controlled operations' in NSW. 'Controlled operations' are police operations to investigate crime that might otherwise involve police participating in unlawful activities, for example, purchasing drugs from suspected drug suppliers. Our functions include examining the substantive decisions that permit controlled operations.

- We have also initiated significant project work in the policing area to improve systems. For example, we have audited a number of commands with significant Aboriginal populations to see how well they are implementing the police Aboriginal Strategic Direction.

Aside from policing, we have had two other significant changes to our jurisdiction:

- The first of these was in 1998 when we were given jurisdiction in relation to allegations of conduct by employees of a range of government and non-government agencies that

could be abusive to children. This jurisdiction covers employees of, for example, schools, child care centres and residential care and juvenile justice centres. The relevant agencies are required to notify us of allegations of child abuse against their employees – including allegations of sexual offences and misconduct, assault, ill-treatment, neglect and psychological harm. We can either closely monitor the agencies' investigations or directly investigate the allegations. This role is a significant change in two respects - it involves overseeing government and *non-government* bodies and it is concerned with the handling of child abuse allegations - not strictly 'administrative conduct'.

- The second significant change in jurisdiction was in 2002. At this time my office obtained functions in relation to a range of community services – both government providers such as DoCS and DADHC as well as a range of non-government providers. Within this jurisdiction we carry out a range of functions including:

  - reviewing the deaths of certain children and people with disabilities;
  - reviewing the situation of certain people in care;
  - dealing with complaints about the provision of community services;
  - reviewing the complaint handling systems of service providers;
  - the oversight and coordination of official community visitors to accommodation services and residential centres; and
  - broad functions in relation to the monitoring and reviewing of the delivery of community services.

In addition to these new jurisdictions – the way we do business in our traditional jurisdiction of public administration has evolved. Rather than focusing solely on resolving and investigating complaints and individual grievances we have developed more sophisticated and proactive means of ensuring that public authorities administer services effectively and fairly. For example, we provide government agencies with training in investigations and complaint management and conduct 'mystery shopper' programs – where we conduct customer service audits of state and local government agencies by posing as members of the public.

Recently we have also sought amendments to our Ombudsman Act to specifically require us to keep under scrutiny the systems that public authorities have in place for dealing with complaints. This would bring the functions we have in relation to public authorities 'up to date' with the functions we have in our other jurisdictions.

In summary, our work has evolved and developed over the last 30 years in a number of ways:

- The nature of *what* we look at has changed – we've moved from a narrow examination of 'administrative' action to a range of conduct, including:

  - any action of police, whether on or off duty;
  - the handling of allegations of child abuse; and
  - the operation of particular legislation.

- *Who* we oversight has changed – we are no longer confined to 'public authorities', or even agencies that deliver services that were once provided by government. Our jurisdiction covers a range of government and non-government agencies as well as private individuals.

- *How* we do our work has also changed. We use a range of strategies to carry out our functions and no longer solely focus on the investigation of complaints. For example, we:

- audit systems and inspect records;
- review investigations by agencies;
- undertake research and project work;
- provide training; and
- prepare a range of publications and brochures.

In the mean time my office's staff has grown from 14, in its first year, to nearly 200 people. We now have 4 specialist teams for our police, community services, general and child protection jurisdictions. In the last financial year we received over 9000 formal complaints and notifications and over 26,000 informal complaints.

It is interesting to note that the changes that the NSW and some other Ombudsman in Australia have undergone are not necessarily occurring worldwide. For example, the Swedish Ombudsman's work is still quite narrowly focused on dealing with complaints about public officials – although for Sweden this has always included courts of law.

Changes in context

On one hand, the vastly different areas in which the NSW Ombudsman now operates may be considered to have taken us outside the bounds of what a public Ombudsman was initially established to do. On the other hand, I do not think these changes are at all surprising – perhaps they are even inevitable. As we gain experience and develop corporate skills and knowledge we are bound to rethink the way we do business.

While complaint handling will always be an important part of what we do – after 30 years we are aware if its limitations. It is essentially a reactive and to some degree ad hoc approach (given that it relies on people bringing grievances to our attention) to delivering outcomes for the public. We now know that in order to gain maximum benefits in the delivery of services we need to employ more proactive methods that achieve systems improvements, such as auditing and ensuring that agencies themselves implement effective complaint handling mechanisms. This is perhaps all the more important when many government welfare services, such as public housing, are now being provided to only the most needy in society – who are less likely to complain.

The sorts of changes experienced by the NSW Ombudsman are also to be expected because we are positioned within a social and political context where priorities are shifting and government policy and service delivery is continuously being remodelled. In this context – it is *critical* that we adapt our work if we are to remain relevant and effective. In turn, we should be informing and contributing to our social and political worlds with the results of our work. We would be critical of the agencies we oversight if they failed to be responsive to social changes going on around them.

I think the NSW experience provides a good example of how Ombudsman are capable of successfully rising to these challenges and maintaining our relevance and importance in society.

The increase in police powers is a good example of this. In recent years police in NSW have been provided with a range of new and more intrusive powers – for example, the ability to intercept telecommunications, to undertake otherwise criminal activities in 'controlled operations', to use dogs to search people publicly for drugs and to take DNA samples from suspects and some convicted offenders. We have played an important role in providing a counterbalance to these powers – by ensuring greater accountability, not just through complaints, but through a range of other mechanisms such as the legislative review functions and the inspection of relevant records I mentioned earlier.

Our role in oversighting certain allegations of child abuse also reflects a greater social consciousness in recent times about this issue. 10 - 15 years ago child abuse was not on the radar of public debate in the way that it is today. An increased awareness of the problem has led to a number of changes in public policy. In 1997, the NSW government held a Royal Commission into police corruption, which raised a number of concerns about police responses to child abuse allegations. This led to broader concerns and a further inquiry into how the government as a whole responds to prevent and handle cases of child abuse. As a result of this inquiry, the government implemented a range of strategies, including a requirement that certain public and non-government agencies report to the Ombudsman allegations against their employees of child abuse.

Our jurisdiction in this area and in relation to community services also reflects the dynamic nature of our evolution. The issue of government privatisation and its implications for Ombudsman have been on the agenda for some time. But the experience of NSW demonstrates our capacity, and I think our need, to respond more generally to issues of significant public interest that cut across a range of agencies – not just government (or agencies that now provide services that were once provided by government) but agencies that are licensed or funded by and in some way regulated by government.

The consistencies?

With all this change and the likelihood of more in the future, the question arises as to what, if anything, is the consistent theme in our work?

In 2001 I spoke at the Australian Institute of Administrative Law conference in Canberra about what the essential features of bodies that call themselves an Ombudsman are. At that time I suggested that a fundamental role of Ombudsman is to ensure that the powers of whatever agencies specified to be within jurisdiction are exercised in a way that produces responsible, fair and reasonable outcomes.

I also discussed some of the essential features of Ombudsman in carrying out this role. These include characteristics such as:

- independence
- impartiality
- fairness
- accessibility
- rationality

These are characteristics upon which the rule of law is premised.

While my office has been through a number of changes in our 30 years of operation, I can safely say that these principles have remained a constant. They continue to provide our guiding principles in carrying out our range of functions. It is these characteristics that the public has come to expect from us and, I think, have been the key to our success and continued relevance.

Changing Ombudsman and the rule of law

So far I have spoken about the changes to the NSW Ombudsman as though they have been a natural evolution without hiccups or difficulties.

While I am confident that we have thus far successfully managed these changes and have been able to effect improved outcomes for the community by examining the service delivery

and conduct of a broad range of agencies, there have been and will continue to be challenges. I think that these challenges raise a number of issues in relation to our continued capacity to effectively uphold the rule of law.

Non-government agencies and the rule of law

For one – our growing jurisdiction over non-government bodies raises a number of issues in relation to how we apply the principles of the rule of law.

Traditionally these principles have been applied to government agencies only. We are now in a position of holding a range of non-government bodies to these standards – for example private schools and private prisons. These non-government agencies are unfamiliar with the work we do, the principles we advocate and the standards we and the community expect of them. This brings with it a number of challenges in educating and developing working relationships with these bodies to successfully achieve outcomes.

Maintaining consistency

Another difficulty flowing from our expansion into new jurisdictions and a consequent growth in our physical size is maintaining coherence and consistency in our approach to our work.

As I mentioned earlier, my office's staff has increased from 14 in our first year of operation to nearly 200. Our success has largely been due to our capacity to consistently work within the essential characteristics of an Ombudsman – such as our independence, impartiality and accessibility. However, I think it is always more difficult to maintain consistency and quality in a large organisation and to some extent we run the risk of falling prey to our own success if we do not ensure that we manage our business effectively.

Practically speaking, I think there is an optimal size we can reach before we start running this risk. These practical considerations are going to mean that Ombudsman offices in different states and federal jurisdictions are going to develop differently. For example, in NSW we have an Energy and Water Ombudsman to deal independently with complaints about electricity, gas and water services. This office is separate from that of the public Ombudsman. In other states Ombudsman carry out dual roles in relation to industry and public administration. For example, in Tasmania the state Ombudsman holds the position of the Tasmanian Electricity Ombudsman. In Western Australia the state Ombudsman also holds the position of Gas Industry Ombudsman. I do not believe there is any inherent conflict with Ombudsman carrying out these dual functions. However, in NSW, given that EWON currently deals with over 6000 complaints a year, I doubt that it would be a workable option.

Aside from the practical issues of size – there are limits on the functions Ombudsman *should* have within jurisdiction. Ultimately, our responsibilities need to fit with the essential characteristics of Ombudsman I discussed earlier. I do not think that we should just uncritically accept government proposals to expand our jurisdiction. It is important that we challenge governments of the day if what they are proposing is not appropriate or they require us to carry out functions that do not fit with our philosophy. I believe there is a positive responsibility on incumbent Ombudsman to maintain the integrity of the office for its future occupants and the public interest they serve.

Greater accountability

Another by-product of our expansion into different areas is an increasing pressure for greater accountability of our offices and scrutiny of our work[9].

The accountability mechanisms in place for Ombudsman in Australia vary in different jurisdictions. For example, in NSW, my office is accountable to the Independent Commission Against Corruption and the Audit Office. A Joint Parliamentary Committee has a general responsibility to monitor and review the exercise of our functions and a right to veto a proposed appointment to the office. We also report publicly and in detail on our work each year in our annual reports. But we are immune from a number of the requirements that are placed on public agencies generally. For example, we are exempt from freedom of information requirements in respect of our complaint handling functions and significant limitations have been placed on the capacity to obtain judicial review of our decisions. We are not criminally or civilly liable unless bad faith can be proved and leave of the Supreme Court must be obtained before any proceedings can be commenced against us.

Other jurisdictions do not have the same level of parliamentary oversight as we do. NSW and Queensland are the only two jurisdictions to confer on a parliamentary committee mandatory functions of monitoring and reviewing the Ombudsman's exercise of functions. Most Ombudsman are immune from liability for their actions unless they are done in bad faith – a number of jurisdictions also have privative clauses that oust the jurisdiction of courts to review Ombudsman decisions. An exception to this is Queensland – which in 2001 enacted a new Ombudsman Act. This Act protects officers from liability for acts done 'honesty and without negligence' – leaving them open to criminal and civil proceedings, including judicial review for administrative error.

In principle, we should not be concerned about the prospect of being held more accountable. But greater accountability, for example by applying freedom of information requirements or exposing Ombudsman to judicial review, does run the risk of reducing our effectiveness in achieving outcomes for the public. From my experience, one of our strengths and our most effective strategies in achieving outcomes for the community is dealing with problems informally and creatively. For example, in my office, we deal with most complaints in the general area through informal 'preliminary' enquiries rather than using our formal, coercive powers of investigation. We also actively seek to resolve conflicts betweens members of the public and agencies or within agencies through alternative dispute mechanisms. It is also this informality that enables us to respond and achieve outcomes quickly and efficiently.

I think we therefore need to be careful about imposing greater accountability mechanisms on Ombudsman. While it is crucial that we demonstrate to the public our achievements and our worth, I do not think it would be in the public interest to create more formal and bureaucratic Ombudsman.

Concluding remarks

I started this discussion by reference to the Ombudsman's role in upholding the rule of law – both in a legal technical sense and more broadly in ensuring that public agencies provide services ethically and fairly.

What I have attempted to highlight today is that Ombudsman have and are undergoing a number of changes to the way in which they do business – the additional jurisdictions and functions that the NSW Ombudsman has gained over the last 30 years is just one example of this.

These changes are a reflection of, and a necessary part of, our success in ensuring our work remains relevant to the communities for whom we work. They also challenge our traditional notions of what a public Ombudsman is or does – we are no longer confined to the oversight of public administrative acts through complaint handling.

While I think we have to embrace these changes, they do raise a number of challenges to our continued capacity to effectively uphold the rule of law:

- our jurisdiction is no longer limited to government agencies – we are now required to keep to account non-government agencies who are unfamiliar with administrative law concepts.
- our expansion into new areas and our growth in size and staff brings with it greater difficulties in maintaining a consistent and cohesive approach to our work.

- we are and I think will continue to be under greater pressure to be subject to greater accountability mechanisms. This runs the risk of inhibiting one of our great strengths – to deal with problems informally and creatively.

These changes and challenges also raise interesting questions as to the direction in which Ombudsman in Australia are heading and what we will look like, say, in 10-15 years time.

As the NSW Ombudsman has expanded into new jurisdictions we have tended to move away from directly conducting investigations towards a greater emphasis on scrutinising the systems of agencies we oversight.

In the future - while we will continue to investigate matters of significant public interest or that raise systems issues – I think our role will continue to be more focussed on auditing and inspecting and ensuring that agencies have in place strong internal complaint handling systems. As this trend in the way we go about the business of accountability continues – so, I think, will the strength of Ombudsman and the important contribution we make to the community and the rule of law.

Endnotes

1 Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman* (AGPS, Canberra, December 1991) p14.
2 NSW Law Reform Commission, *Report of the Law Reform Commission on Appeals in Administration* (VCN Blight, CBE, Government Printer, NSW, 1973) pp 8 and 33.
3 NSW Law Reform Commission, n 2, p 72.
4 NSW Law Reform Commission, n 2, p 72.
5 For example – Anita Stuhmcke 'Privatisation and corporatisation: What now for the Commonwealth Ombudsman?' (2004) 11 *AJ Admin L* 101.
6 Philippa Smith – 'Red Tape and the Ombudsman' *Canberra Bulletin of Public Administration,* No. 88, May 1998, p19.
7 For example, comments by Sir John Robertson, the Chief Ombudsman of New Zealand in 1993 – cited in Anita Stuhmcke 'The Commonwealth Ombudsman: Twenty Five Years On and No Longer Alone' (2003) 36 *AIAL Forum* 54.
8 For example, the Commonwealth Ombudsman has also been provided with the task of monitoring and reviewing compliance with 'controlled operations' legislation.
9 For example, Katrine Del Villar 'Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsmen' (2003) 36 *AIAL Forum* 25.

DOES THE CHILD SUPPORT SACRED COW MILK PARENTS OF ADMINISTRATIVE JUSTICE?

Sandra Henderson-Kelly*

Ask any gathering of Australian adults about child support and you are almost certain to spark a lively and colourful debate about the hidden mass of greedy and unworthy parents in Australia and their protector, the Child Support Agency (CSA). Most Australians know someone affected by the child support scheme, which commenced operation in 1988, some sixteen years ago. The scheme has enormous reach, covering over 1.3 million parents and 1.1 million children.[1] It is highly controversial, but has proved enduring. Even a Minister responsible for child support, Larry Anthony, has described the scheme as a 'sacred cow'.[2]

This paper considers the efficiency and effectiveness of the legislative provisions which entitle parents to apply to vary child support payments that would otherwise be calculated according to a statutory formula. The main question canvassed is whether the existing decision-making framework delivers 'administrative justice'. This is measured by the extent to which the framework incorporates commonly accepted administrative law values of accountability, transparency, fairness, accessibility and effectiveness.[3]

Within government, there is a quest for administrative justice in decision-making models, particularly those characterised by administrative discretion. Discretion allows for tailoring of individual circumstances, but is also criticised for its potential for caprice.[4] To protect against abuse of discretion by officials, the Commonwealth administrative law system contains a network of appeal rights including merit tribunal review, judicial review, ombudsman oversight and freedom of information rights. The first two are restricted under the child support scheme.

The paper will review some of the difficulties that can arise from these restrictions, by looking at the standards of internal review, the opportunity for judicial review and the implications for particular client groups. In reviewing these, the paper examines data from the CSA, the Commonwealth Ombudsman, Commonwealth tribunals, the Family Court of Australia and the Federal Magistrates Court. In addition, it overviews data extracted from a relational database of reported child support decisions as at July 2003 that was created specifically for this project.

It would be neglectful to continue without discussing developments in the child support arena. The scheme was most recently reviewed by the House of Representatives Family and Community Affairs Committee which reported to the Australian Government in December 2003.[5] The report was finalised some nine years after the previous review undertaken by the Joint Select Committee on Certain Family Law Issues.[6] Both parliamentary committees recommended the introduction of merit tribunal review into the child support system. On each occasion, the Government of the day rejected the proposal. Apart from the reports by these committees, there has been little academic comment on the

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appropriateness of the decision-making framework within the scheme. Under the present government, the scheme has attracted much adverse public comment particularly through the newspaper media and mostly at the instance of the single fathers' movement. Much of the discussion is emotive and based on economic issues, not the legal merits of the decision-making framework.

While the child support scheme has developed an enclave of critics over the years, the Australian Government has assured its continuation through the promise of reform. The government's recent announcement of a new Taskforce with terms of reference to review the child support scheme has signalled significant change to the calculation of child support payments.[7] The structure of appeal rights will remain intact, however. Prime Minister Howard has implicitly rejected the establishment of a special Families Tribunal,[8] and the Taskforce's terms of reference do not trespass onto the administrative law framework that underpins the scheme.[9]

The political unpalatability of reform to some stakeholders may heighten the debate about the accessibility of appeal rights within the scheme, but this would be a distraction only. Regardless of whether the Federal Parliament alters the basis for calculating child support payments, appeal rights will have little bearing on the appropriateness of the amount of child support paid. From an administrative law viewpoint, the question remains: does the system meet accepted administrative law values?

It is disappointing that the Government has excluded government and administrative law aspects of the scheme from the purview of the Taskforce, as some anomalies persist. In particular, there is a lack of clarity about the operation of judicial review within the scheme, which could be of growing importance in the context of the Federal Magistrates Court being given both family and administrative law jurisdiction. Internal review practices are deficient in some respects. It also seems that there may be some inadequacies in the corporate governance arrangements that apply to the CSA. At the end of the day, however, the scheme is mostly well suited to its purpose. It requires only minor modification notwithstanding its limited reliance on administrative tribunals and judicial supervision.[10]

From humble beginnings: the child support scheme

The child support scheme has a fascinating history. The first child maintenance law was passed in 1840 by the New South Wales legislature, and was followed by similar laws in other Australian colonies.[11] Child maintenance was brought under Commonwealth regulation in the 1960s following difficulties experienced by sole parents in obtaining relief across state boundaries.[12] The *Matrimonial Causes Act 1959* (Cth), which commenced operation in 1961, provided relief with respect to children of divorced and deserted wives, while the maintenance of children born outside marriage continued to be subject to State and Territory laws. This reflected a lack of constitutional power at the Commonwealth level, which was mostly overcome in the 1980s when the states, apart from Western Australia, ceded power with regard to ex-nuptial children.[13]

The *Family Law Act 1975* (Cth), which repealed the Matrimonial Causes Act, is much celebrated for its profound effect on families undergoing breakdown, but is little recognised for its role in the development of the Australian child support scheme. In 1980, the Joint Select Committee on the Family Law Act, chaired by the now Attorney-General, the Hon Philip Ruddock MP, recommended the establishment of a national maintenance enforcement agency.[14] While this recommendation was not immediately embraced, a newly elected Labor government moved quickly in March 1983 to set up a national child maintenance inquiry,[15] and commenced Cabinet discussions about possible responses to the fiscal burden of the growing base of sole parents.[16] Eventually, the scheme formed one of the major planks of then Prime Minister Bob Hawke's 1987 election pledge to eliminate

child poverty by 1990.[17] Prior to the current system, only 30 per cent of non-custodial parents paid child maintenance, and court orders were generally regarded as low.[18]

The child support scheme began on 1 June 1988 with the commencement of what is now known as the *Child Support (Registration and Collection) Act 1988* (Cth). Called Stage 1, this part of the scheme allowed for the registration, collection and enforcement of child support orders made by the Family Court of Australia. Stage 2 began on 1 October 1989 with the commencement of the *Child Support (Assessment) Act 1989* (Cth) (the Act). Under this Stage, the vast majority of parents registered with the scheme have their child support payments assessed according to the statutory formula.

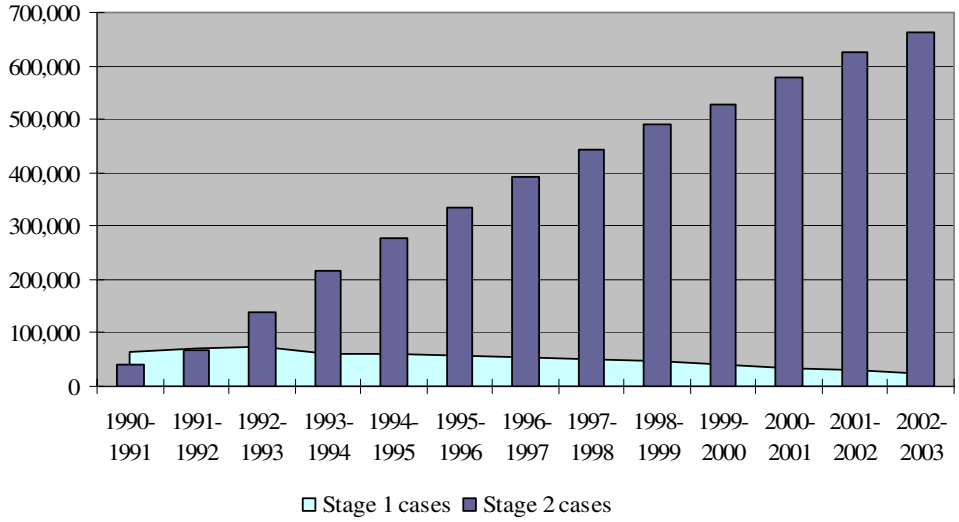
Supplementing these Commonwealth Acts are six sets of Regulations. Altogether, the laws amount to over 500 pages in the official Commonwealth legislation series. The legislation is noted for its complexity.[19] Wade observes that it is 'incomprehensible to all but an elite of child support officers and specialist family lawyers'.[20]

The legislative objects provide the best guidance as to the purpose of the scheme. The principal objects are to ensure that children receive a proper level of financial support from their parents[21] and that payments are made on a regular and timely basis.[22] Other objects are directed at ensuring that child support is determined in accordance with legislatively fixed standards, that parents be allowed to reach private agreements and that interferences with privacy be limited.[23]

From 30 June 1989, when the CSA processed only 22,610 cases,[24] the scheme now directly affects the financial position of over 2.4 million Australians. Stage 1 cases (that is, those determined in accordance with the Family Law Act) are not uncommon, but many have worked their way through the system, accounting for only 3.2 per cent of all registered child support cases by 30 June 2003 (Figure 1).

Child support liability is determined by the statutory formula in about 93 per cent of cases. Parents can depart from the formula by concluding an agreement registered with the CSA (accounting for 4.3 per cent of cases), applying to the CSA for a departure from the formula (2.4 per cent) or seeking a court order which departs from the CSA's departure decision and/or awards a lump sum payment (0.3 per cent).[25] The low proportion of non-formula cases invites a number of hypotheses about the success or otherwise of the existing formula and the arrangements that allow parents to depart from it. It may suggest that the framework has been successful in meeting its objectives of minimising the incidence of protracted and difficult legal proceedings and providing parents with certainty about their child support obligations. In turn, this may imply that there is no need to introduce a merit tribunal into the scheme, no matter how heavily criticised.

Figure 1: Active Child Support Cases, 1990-91 to 2002-03[26]



Change of assessment and court appeal framework

As noted above, the Act sets out a formula-based approach for the determination of child support which is applied in the normal run of cases. Factors that affect the rate of payment include payer and payee incomes, income amounts not assessed to enable parents to care for themselves, the number of children, the amount of care provided by each partner and the existence of other dependents. Contrary to popular myth, child support is largely determined according to the circumstances of the household. It is not, and was never intended to be, determined according to actual expenditure on the children.[27] Rather, the basis of the formula is to ensure that 'wherever possible children … enjoy the benefit of a similar proportion of parental income to that which they would have enjoyed if the parents had lived together'.[28] The Act also contains an opt-out provision by which parties may reach their own arrangements and register these with the Child Support Registrar under Part 6 of the Act.

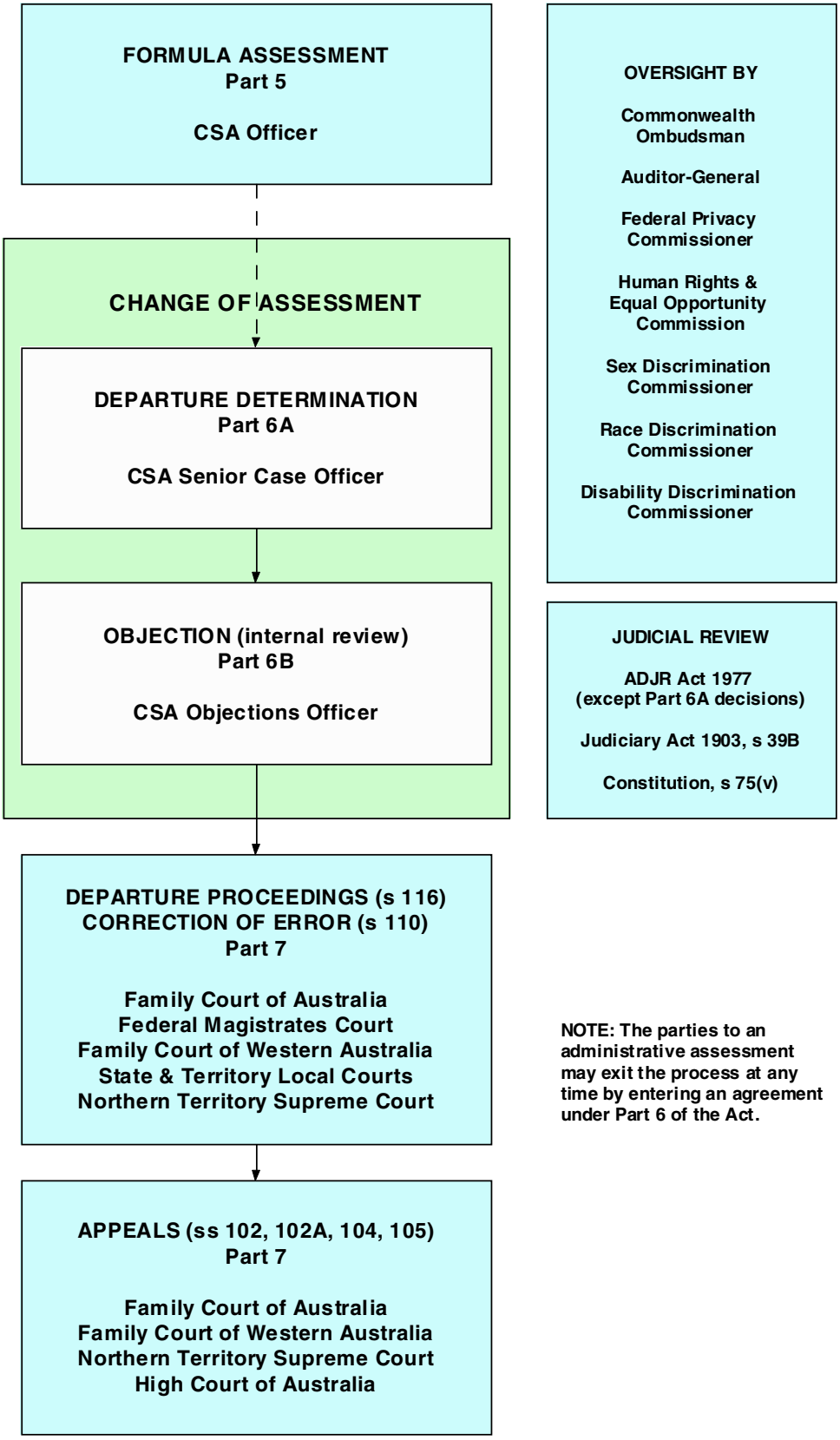
If the parties are dissatisfied with the formula and are unable to reach agreement as to what child support arrangements ought to apply, one or both may apply to the Child Support Registrar for a departure determination under Part 6A of the Act. In this process, the special circumstances of the case may be taken into account where a legislative reason exists. Once the Registrar or her delegate decides the application, an aggrieved parent may apply for internal review under Part 6B of the Act. This process is called an 'objection' and is mandatory before the parties can seek further review through the courts.

Combined, the agency level decisions under Parts 6A and 6B of the Act make up what is known as the Change of Assessment (COA) process. It is unsettling that the language of 'change of assessment', which finds expression in a range of public documents including those produced by the CSA, the Attorney-General, the Auditor-General and the Commonwealth Ombudsman, is not used in the child support legislation nor properly defined in any official publication; it is equally disquieting that a major parliamentary report recommending change to the scheme – the *Every Picture Tells a Story* report – defines the process as simply the original decision-making stage[29] and then incorrectly describes it as 'an internal review process'.[30]

Figure 2 sets out the framework of appeal rights within the scheme and, at a glance, demonstrates that the process is rational and streamlined. Some features of the scheme warrant brief comment.

In the large majority of cases, a Part 6A departure determination is triggered by a written application of one or either of the parents, and undertaken with the benefit of hearing both parties. Internal review, by way of a Part 6B objection, is only available upon written application by a child support parent. Objections are chiefly conducted 'on the papers' and are obligatory if one or both of the parties wish to progress to a court review. The COA process is accessible in that both levels of review are without charge and interpreter services are provided where required. Against this, the parties cannot be represented by another person before the Registrar.[31] The process is transparent in so far that original decision-makers must provide a written statement of reasons for their decisions[32] and objections officers may be required to provide written statements of reasons pursuant to s 28 of the *Administrative Appeals Tribunal Act 1975* (Cth).[33]

Figure 2: Decision-making and appeal framework for departures from the formula



The next level of review is undertaken by the courts under Part 7 of the Act. This may take the form of a review for correction of error under s 110 of the Act,[34] or a *de novo* review under s 116 of the Act.[35] *De novo* review means that 'the matter is heard afresh and a decision is given on the evidence presented at that hearing'.[36] Arguably, this can embrace consideration of the legality of the original and objection decision.[37] Appeals lie to higher courts, while an appeal to the High Court can only take place by special leave or on a certificate from the Full Family Court that an important question of law or public interest is involved.[38] Scheme accessibility may be at risk of being undermined by the high cost and degree of formality involved in court proceedings.

Judicial review is largely an incident to the scheme but is technically available. Part 6A departure determinations are excluded from review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act), but the Part 6B internal reconsiderations are not. By all accounts, courts are reluctant to exercise jurisdiction under the ADJR Act or the *Judiciary Act 1903* (Cth), on the basis that ss 110 and 116 appeals are intended to supply the core court-based review mechanisms. This approach is implicit in the explanatory memorandum to the Child Support Legislation Amendment Bill (No 2) 1992 which introduced Part 6A into the Act, and reflects the Federal Court's statutory discretion to not act where suitable alternative review processes are available.[39] This means that patent errors of law by agency decision-makers are not easily rectified given that the parent may have to undergo full *de novo* review. This has not escaped the notice of some Family Court judges. In *Abela & Abela*, Nicholson CJ said that he had 'some concerns … that a Review officer can make an assessment which widely differs from that provided under the Act itself and anyone who seeks to challenge the assessment is forced to do so within the confines of the somewhat restrictive provisions in section 117 of the Act'.[40]

Scheme performance

This section discusses the available data concerning the extent to which customers engage in COA and appeal processes so as to gauge the effectiveness of the decision-making framework. Some caution is warranted when interpreting the data. Low application rates at the various levels may indicate any one of a number of things – satisfaction with the underlying policy rationale of the scheme; good decision-making; that the decision-making criteria are constrained; or that the system of appeal rights is flawed. On the other hand, high application rates may indicate dissatisfaction with the policy rationale; poor decision-making; loosely defined decision-making criteria; or that the system of appeal rights is flawed. In either case, the possibility of inadequate information about appeal rights must also be borne in mind.

Departure determinations

In 2002-03, the CSA finalised 32,976 'applications' for 'change of assessment' (presumably departure determinations and associated objections), including 229 Registrar-initiated cases.[41] This equates to around 5 per cent of the Stage 2 caseload. The CSA accepted 80 per cent of these applications and departed from the formula in around 69 per cent of these.[42] Table 1 provides a summary of these outcomes for 2002-03. The data show that payers were more likely to seek departure from the formula than payees; however, variations initiated by payees were granted in greater numbers and proportions than those initiated by payers.

Table 1: Change of assessment outcomes – Stage 2, 2002-03[43]

	Payer Initiated	Payee Initiated	Registrar Initiated	Total
Applications Accepted				
Variation	8,216	9,641	207	18,064
No Variation	3,998	2,321	12	6,331
No Decision	1,571	303	0	1,874
Client Agreement	23	25	3	51
TOTAL	16,861	12,290	222	26,320
Applications Not Accepted				
Withdrawn	1,133	882	1	2,016
Incomplete	2,471	1,355	4	3,830
Ineligible	493	315	2	810
TOTAL	4,097	2,552	7	6,656
FINALISED	**17,905**	**14,842**	**229**	**32,976**

Objections

The CSA publishes limited information on the outcomes of objections, which are conducted in respect of a range of CSA decisions, not just departure determinations. In 2002-03, the CSA received a total of 14,630 objections.[44] Some 14,057 applications were finalised, of which 56.7 per cent were disallowed, 15 per cent were upheld or partially upheld, and 28.3 per cent were withdrawn or invalid.[45] In 2001-2002, only 11.1 per cent of objections were upheld or partially upheld.[46]

The CSA's objection overturn rates are suspiciously low. Other schemes report much higher overturn rates. In social security, for example, Centrelink, reports that in 2002-03 around 28.7 per cent of challenged decisions were overturned at internal review, another 33.2 per cent of decisions that went on to the Social Security Appeals Tribunal (SSAT) were overturned, and another 24.7 per cent of customer appeals to the Administrative Appeals Tribunal (AAT) succeeded.[47]

In 2002, the Auditor-General reported a COA objection uphold rate of six per cent in 2000-01 or 'around one per cent of [Senior Case Officer] decisions being changed by the objections process'.[48] The CSA claimed this was due to 'the high quality of original decisions',[49] which is incongruous with its own quality audit team's findings that decision-makers departed from policy and legislation in about 45 per cent of audited cases.[50]

Section 116 appeals

In terms of child support applications, in 2002-03 the Family Court received 372 *Form 63* applications for review of departures from the COA assessment, lump sum payments and discharge from, or variation to, child support agreements.[51] Between 1 July 2003 and 14 October 2003, 49 *Form 63* applications were filed.[52] These numbers are higher than expected in the light of the *Case Management Direction* that gives the Federal Magistrates Court a primary role in child support. It may be that the Family Court is hearing child support applications with property distribution proceedings. Presumably, too, a number of these matters were remitted to the Federal Magistrates Court.

In 2002-03, the Federal Magistrates Court reported a 26.5 per cent increase in its child support caseload.[53] Table 2 shows that 1,758 *Form 63* applications were filed with the court between 1 July 2000 and 10 October 2003. A breakdown between payers and payees was not available, but the table shows that women (mostly payees) filed more child support applications than men (mostly payers).

The Child Support Decisions Database (CSDD), a database of child support judgments created for this project, provides some useful information. Over the nearly 15 years to 1 July 2003, there were only 70 reported departure decisions, 37 of which were decided by the Family Court and 33 by the Federal Magistrates Court. In 2002-03, the Federal Magistrates Court stated that it reported just over half of its family law and child support judgments.[54] Around 27 per cent of child support litigants were unrepresented in that court that year.[55] Since 1 January 2000, the Family Court has reported only one departure judgment.

Table 2: Form 63 Applications received and finalised by the Federal Magistrates Court, by year and gender, 1 July 2000 to 10 October 2003[56]

	Female Applications		***Male Applications***		
Year	**Number**	**%**	**Number**	**%**	***Total***
Application Received					
2000	44	47	50	53	94
2001	195	64	112	36	307
2002	434	56	345	44	779
2003	291	50	287	50	578
TOTAL	**964**	**55**	**794**	**45**	**1,758**
Applications Finalised					
2000	43	46	50	54	93
2001	194	64	107	36	301
2002	383	57	285	43	668
2003	118	49	124	51	242
TOTAL	**738**	**57**	**566**	**43**	**1,304**

Appeals to higher courts

In 2001-02, the Federal Magistrates Court reported 18 child support appeals from local courts (compared to seven in the previous year).[57] There are no recent published data on child support appeals to the Family Court. The CSDD shows that since the commencement of the scheme to the end of July 2003 there were 23 reported appeal judgments by the Family Court.

Judicial review applications

Judicial review proceedings in the child support area have for the most part been spectacularly unsuccessful. This seems to be due to the Federal Court's reluctance to hear ADJR matters given that there are more suitable alternative appeal rights, as well as confusion among aggrieved parents about the source of rights for judicial review. In the few reported cases, judicial review applications concerning child support matters have been dismissed.[58] The Federal Court case of *Garnaut v Child Support Registrar*[59] demonstrates that judicial review has not been completely exiled from the child support scheme. The judgment recounts that Mrs Garnaut had earlier succeeded in obtaining relief with regard to an incorrect standard of review applied by the objections officer. On that occasion, Mrs Garnaut's case was remitted to the CSA.

Which model best suits the purpose?

When designing or reviewing a framework of appeal rights, three factors invariably arise for consideration: the characteristics of the people who might seek review; the type of decision to be reviewed; and the issues at stake. The Administrative Review Council (ARC), the Australian Government's administrative law think tank, suggests that these matters should guide the degree of formality adopted in tribunal proceedings.[60] However, they are also

useful in designing decision-making structures, including whether appeal mechanisms are best placed in an administrative or judicial context.

Customer profile

The CSA customer base is dominated by parents with one or two children eligible for child support (56.9 and 31.1 per cent of cases respectively).[61] Sole care arrangements are the norm. Ninety-three per cent of children spend 256 nights or more per year with one parent, mostly their mother.[62]

Generally speaking, CSA customers are low-income earners. With median taxable incomes of $31,688 in 2002-03, payers earned around 59 per cent more than payees, who had median incomes of $19,885.[63] This difference is a telltale sign of the long-term impact that separation has on women's financial and labour market position. For the purpose of the paper, the more important point is that both amounts equate to less than average weekly earnings.[64] The scheme also assists well-paid customers. In 2002-03, the highest recorded payer taxable income was around $8.3 million, and the highest payee taxable income was just under $2.1 million.[65]

The most common source of income for CSA payers is salary and wages (almost 87 per cent of all payers), while around 18 per cent of payers received some or all of their income from government benefits and allowances.[66] However, payers also received income from business allowances or director's fees (24.6 per cent of cases), partnerships and trusts (6.5 per cent) and business profits or loss (9.7 per cent).

The CSA does not report levels of educational achievement among its customers, but Doyle notes that when the COA process was first introduced in 1992, decision-makers were advised that the average reading age of customers was around 13 years.[67] There is no published information on the language skills or cultural heritage of customers.

The above data suggests that the child support scheme is largely comprised of low-income, poorly educated parents. Women tend to assume the role of sole carer while men, for a range of reasons, are predominantly absent fathers. The customer profile points glaringly to a need for a low-cost and informal mechanism for review. Nonetheless, segments of the child support community do not fit the mould. They are high-income earners with diverse and complex financial arrangements and whose circumstances are not always appropriately assessed on basic taxation data. The appeal framework needed for one category of cases will not necessarily be suitable for a different category. On this consideration alone, merit review by an administrative tribunal able to adjust its approach or formality according to the nature of the case before it would be an attractive option. The nature of the proceedings could be modified according to the socioeconomic features of the core customer base and the gravity of the issues to be explored.

Type of decision

COA decisions are highly discretionary and fall easily within the ARC's criteria as being suitable for merit review. These are principally that the decisions are made by administrative process and will or are likely to affect the interests of a person.[68] Moreover, the decisions in question are not legislation-like decisions of broad application, and nor do they automatically flow from the happening of a set of circumstances.[69]

A COA decision can only be granted where each of the three legislative criteria contained in s 117 of the Act are made out.[70] That is, where:

- the special circumstances of the case warrant a departure from the formula in that they fall within one or more of legislatively specified reasons (Step 1); and

- it would be 'just and equitable as regards the child, the liable parent, and the carer entitled to support' to grant a departure (Step 2); and

- the departure would be 'otherwise proper' (Step 3).

The establishment of a reason for departure (at Step 1) should be a relatively straightforward process provided the decision-making criteria are suitably cast. The CSA has decoded the legislation as providing ten reasons for a departure. Briefly, these include the income, earning capacity, property and financial resources of the parties or the children; requirements for self-support or support of other legal dependents; the high cost of contact with the children; the special needs of the children; and additional income earned for the benefit of resident children. An application for a departure determination might rely on a number of these reasons.

Similarly, in the ordinary run of cases, it should be a relatively undemanding procedure to establish the approximate effect of a COA decision on consolidated revenue (Step 3).

There is, however, a substantial degree of discretionary judgment in determining whether it is 'just and equitable' to grant a departure and the quantum that satisfies this indeterminate standard. At Step 2 parents are most exposed to human error in the decision-making process. This vulnerability may well be exacerbated by the CSA's decision to employ large numbers of contracted lawyers, most of whom are outside its normal employment, training and corporate governance arrangements, to make original decisions on the Registrar's behalf. Theoretically, any difficulties with this arrangement should, for the most part, be redressed in internal review. The CSA has acted to minimise the scope for error through the development of a policy manual called *The Guide*. The purpose of the manual is to assist parents and decision-makers on the legislation and Family Court decisions. Somewhat remarkably, the manual has not so far incorporated any of the decisions of the Federal Magistrates Court which now deals with the majority of child support departure cases.

The issues at stake

Child support is a highly emotive issue, and from time-to-time the scheme has been pilloried by the media as being a trigger for familial violence and suicide. It is inappropriate to lay blame on the scheme in this way, but few would doubt that a desirable feature of the scheme is to limit conflict and bring disputes to a speedy resolution particularly when small amounts of money are involved. The layers and accessibility of appeal rights necessarily have a substantial impact on the duration of a dispute. Arguably, family and child support law are exceptional areas where less may be more.

The determination of the appropriate amount of child support is a highly sensitive area of decision-making. It traverses difficult emotional and financial issues particularly as they affect the parents, children and subsequent family members. The legislation acknowledges this difficulty by importing the objective that the level of financial support provided by parents is to be determined according to 'capacity', and that parents with like capacity should provide like support (s 4(2)(a)).

In the context of evaluating the appropriateness of particular appeal rights, questions of quantum have significant consequence. In 2002-03, child support liabilities amounted to $260 or less per annum in almost 40 per cent of cases.[71] Parents in this child support bracket might be unwise to pursue court review given the high financial and emotional costs associated with legal action. Administrative review might also prove impractical where an

application fee is imposed, such as the AAT where there is an application fee of around $600,[72] and representation may be necessary. In 2000, the Australian Law Reform Commission stated that the median legal costs in the Family Court were $2,209 for applicants and $2,090 for respondents, while the equivalent figures for the AAT were $2,585 and $4,006 respectively.[73] These data suggest that both varieties of external review entail substantial costs.

Excluding the low-liability cases above, the median child support liability in 2002-03 was around $5,081.[74] Child support payments exceeding $10,000 per annum were paid in about seven per cent of cases.[75] While these cases involve substantial amounts of money, it is not clear that the amounts disputed in the departure process are anywhere near these levels. Again, in the normal run of cases, court review is likely to be cautiously pursued.

There are, on the other hand, some cases that can be resolved more suitably by a court process. The Commonwealth Ombudsman reports that the most common reason for a change of assessment is that the income, earning capacity, property or financial resources of one or both of the parents is not properly reflected in the formula assessment.[76] The CSDD confirms that this reason is a persistent area of dispute. Around 45 per cent of reported court cases relate to difficulties in ascertaining the financial resources of the parent in circumstances involving self-employment, partnerships, companies and/or trusts. This is a complex area of the law with regard to which the Parliament has given inadequate guidance to child support decision-makers. Given the intricacy of the legal devices involved, many of these cases may be better suited to court review rather than administrative review, particularly in the light of the courts' expertise and powers of discovery.

Other issues

From a government perspective, fiscal considerations dominate given that the CSA's role is to arbitrate what is essentially a dispute between parents. There are substantial budgetary costs associated with administrative tribunals, with the SSAT running on an annual budget of around $13m[77] and the AAT $28m.[78] The SSAT has an average cost per finalised application of around $1,300 while the AAT has an average cost of $7,100 per application completed with a hearing. With 40 per cent of child support cases involving amounts of $260 or less per annum, and another 46 per cent of cases assessed at amounts of less than the average cost of an AAT hearing, there must be a real question as to whether it is appropriate for government to commit resources to initiatives that may only serve to encourage and prolong disputes of this kind.

At this point, it is useful to address briefly the proposal that the child support scheme adopt the SSAT for the purposes of reviewing COA decisions. This approach could be seen to avoid tribunal set-up costs, provide economies of scale and capitalise on the SSAT's developing body of expertise with regard to social security and associated areas of law. These are worthy considerations, but contextual matters tilt the value of this proposal the other way. In this regard, it is significant that social security customers are entitled to appeal SSAT decisions to the AAT for further merit review. If child support cases were limited to the SSAT layer of appeal only, this would be likely to evoke a degree of confusion and anger among child support customers. Similarly, it is possible that faced with workload and time pressures, SSAT members may accord similar timeframes to decisions under both systems (child support and social security), when the former class of decisions might sometimes require greater resources given the absence of further appeal rights. In addition, the SSAT framework was created on the basis that the government is always a party to the dispute, and that some grievances may be readily resolved by giving the legislation a beneficial construction. Child support disputes are a very different beast, and it is not immediately apparent that the SSAT could easily switch its focus in this respect.

A countervailing consideration is that the absence of an independent administrative tribunal can potentially involve a degree of rough justice for child support parents. Officials are empowered to make decisions about matters that have no bearing on the Budget and in respect of which there is a shortage of low-cost appeal rights that citizens have come to expect in government schemes. Against this can be said that the system of administratively determining child support is infinitely preferable to only court action (or no practical redress) as was the case prior to the scheme. Furthermore, there are mechanisms to alleviate the cost of court action for those inclined to bring worthy claims to court. First, there are no application fees for matters commenced under Part 7 of the Act. Secondly, low-income parents may apply for Legal Aid or seek the assistance of a community legal centre where available. Table 3 shows the extent of this assistance under the scheme generally. Finally, parties to court proceedings are entitled to apply for a costs certificate pursuant to the *Federal Proceedings (Costs) Act 1981*, under which the court may order the Attorney-General to pay costs on a party and party basis. Decisions in the CSDD suggest that aggrieved child support parents have so far not sought this relief in the Federal Magistrates Court even though it is available.[79]

Table 3: Legal Aid and Community Legal Centre (CLC) assistance, 1996-97 to 2001-02[80]

Year	Legal Aid			*CLC Assistance*	
	CSA Client Applications	Legal Aid Granted	Legal Aid Refused	Advice	Cases Opened
1996-1997	2,288	2,217	38	3,590	1,505
1997-1998	3,423	3,418	40	3,662	1,446
1998-1999	3,281	3,265	94	4,609	1,268
1999-2000*	3,086	3,040	41	4,432	1,325
2000-2001*	3,276	3,247	33	3,759	1,221
2001-2002	2,697	2,574	114	3,639	967

*Legal Aid data exclude NSW.

Possible improvements to the scheme

The foregoing analysis shows that the child support scheme is characterised by competing considerations. The discussion points to a need for external review of child support decisions, but in a form that takes account of the diverse customer base. Given the prevalence of low-income earners within the scheme and the educational disadvantage of some CSA customers, an administrative tribunal seems instinctively preferable to a court process. Factors that incline instead towards a judicial process are the desirability of finality with regard to family disputes; the cost-effectiveness of the present appeal process; the characteristics of the segments of the diverse customer group which suggest that only a limited number of people will be likely to engage the appeal process; and the nature of the issues likely to be subject to challenge in a dispute between two private parties. It also disregards other safeguards within the existing system that are designed to minimise the cost of appeal, yet also minimise recourse to the appeal process.

Primary decision-making and internal review could certainly be improved, but there are less costly ways of achieving this, including through improved quality assurance procedures. The cost of court action can be alleviated by legal aid, community legal services and the availability of cost certificates under which the Attorney-General may pay a substantial amount of the appeal costs. The potential for adverse cost awards acts as a filter against the pursuit of unworthy cases. One further benefit of the existing system is that aggrieved parents who have private collection arrangements in place can obtain enforcement of child support arrears through the courts concurrently with a review of their COA outcomes.[81]

Administrative tribunals, by contrast, cannot enforce their own determinations as this would involve an exercise of judicial power.[82]

Under the scheme as it now exists, the absence of an administrative tribunal is softened by the involvement of the Office of the Commonwealth Ombudsman which has taken an active role in child support administration. This is borne out by the continuing large number of complaints to the Ombudsman which has exceeded 2000 per annum over the eleven years to 30 June 2003.[83] Moreover, this oversight role extends beyond the individual complaint level to agency-wide practices that can be reviewed under the Ombudsman's own motion powers.[84] The Ombudsman has issued two own-motion reports concerning aspects of the scheme in recent years.[85] However, just as it is important to assume that internal decision-making is not indefensible, it is equally important to anticipate that the Ombudsman is not placed to sleuth out all substandard administration. For that reason, it is important to look at some other changes to the child support scheme – of both a legislative and an administrative kind – that provide a better framework for administrative justice in the child support scheme.

Decision-making criteria

The current parliamentary processes have failed to address an emergent but rudimentary aspect of the scheme, notably the determination of the income, earning capacity and property and financial resources of the parties. The impact of changes in the labour market and corporate law and taxation systems on child support payments demand closer scrutiny. The fact that the Ombudsman specifically targeted this aspect of the scheme is indicative that developments in these areas have outstripped the existing legislative provisions. These developments include the incidence of commission payments and salary sacrificing, the use of partnerships and company structures to retain profits or split income between a parent and a new spouse or other family members, the divesting of assets and the use of trusts to avoid child support obligations.

The scheme also invites the need for greater administrative and judicial activity in the area of determining the 'earning capacity' of parents and their children. These aspects of the legislation demand meaningful guidance at more than a politically perfunctory level. They are beyond the Ombudsman's legal authority to review, and are infinitely more suitable for targeted consideration, perhaps by the new Taskforce.

Standard of review

On another front, there are indications that the CSA may have misdirected itself in the approach that should be adopted in the internal reconsideration process instituted in 1998. There are some public statements about the objection process which suggest that the CSA may have applied a flawed standard of review for some time.[86] As recently as 2003, the Federal Court found that the CSA misapplied the Part 6B provisions.[87] Even now, there are indications that that the internal review process is still affected by agency misperceptions as to its proper role.[88] The upshot is that the scheme is not delivering adequate feedback to its decision-makers. This may be partly due to a failure by the Federal Magistrates Court to forward child support decisions to the CSA as a matter of course. However, the CSA must also take responsibility for failing to monitor the evolution of the law and not incorporating decisions into the policy manual and decision-making processes. Strengthening the CSA's governance arrangements – such as improved cooperative processes between the CSA and courts – could readily cure some of these weaknesses.

Structure of review

From an administrative justice perspective, it is important that departure matters not be delayed by dogged adherence to process. This is evidenced by the Registrar's power to refuse to make Part 6A determinations because the issues are too complex.[89] In such cases, the applicant may sidestep a Part 6B internal review and proceed to court for a determination order under Part 7 of the Act.

A similarly reasoned and worthwhile change flagged in the last Parliament and reintroduced in the current Parliament in December 2004 is the proposal in the Child Support Legislation Amendment Bill 2004 'to make optional the requirement for an objection to have been lodged before a person has access to the court'.[90] If enacted, the change will allow a parent to seek court review of an original decision where, for example, he or she considers that the court process would be more effective even though an appeal stage would be foregone. Under this arrangement, one parent could conceivably lodge an objection while the other may seek court review. The Bill provided that, in such cases, the court will decide whether the Registrar should consider the objection or whether it should proceed to hear the primary application. This reform will enhance scheme effectiveness as it will enable parties to limit delay and short-circuit administrative processes that may be of limited value in difficult or novel cases.

Corporate governance and reporting arrangements

In the area of corporate governance, a noticeable failing is the absence of a separate annual report to Parliament some 16 years after the commencement of the scheme. Currently, the CSA provides a confined range of data in the Annual Report of the Commonwealth Department of Family and Community Services. This arrangement is unsatisfactory given that the CSA is responsible for the transfer of child support liabilities of around $2.2 billion per annum.[91] Child support is no small endeavour. The CSA's limited reporting practices make it difficult for observers to make reliable assessments about the success or otherwise of the scheme's decision-making processes. Improvements in this area can only contribute to the level of informed public debate and overall agency performance. The reach of the scheme heightens the need for enhanced public accountability measures, and the Act already has a mechanism for separate reporting.[92]

A recent report by the Commonwealth Ombudsman underscores the greater emphasis governance arrangements ought to be accorded by the CSA. Earlier this year, the Ombudsman found that there were substantial regional differences in the nature and style of COA processes within the agency, including in the overall standard of decision-making, the level of investigation undertaken by the decision-maker, and the reasoning underlying the decisions.[93] Nearly one quarter of COA decisions were rated as being not reasonably open to the decision-maker, not the best possible decision or not possible to categorise.[94] The CSA has agreed to implement appropriate training arrangements to correct these problems,[95] but it is likely that they are deeply embedded in the decision-making culture and will take sustained effort and time to overcome.

Conclusion

To return to the question first asked in this paper – does the child support sacred cow milk parents of administrative justice? – the answer is addressed in two ways. First, the paper has analysed the customer base and context for decision-making; and secondly it has examined the appeal framework, including criteria applied in the review of decisions. The conclusion reached is that the government has adopted the correct legal structure, but that some fine-tuning is required. The other standout point is that child support is a field of law and administration that is loaded with emotion and disputation. As a result, it is inevitable

that some parents will feel they have been deprived of administrative justice. Individual grievances are real and provide pertinent material upon which to consider and propose change. Ongoing discussions in other quarters are similarly constructive. If the scheme is to remain largely in its present form, it should be regularly reviewed to take account of public discussion and private complaint. The issues raised in this paper demonstrate that child support law has been a neglected area of study and analysis for too long.

Endnotes

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75 Ibid, p 24.
76 Commonwealth Ombudsman, *Child Support Agency change of assessment decisions - Administration of change of assessment decisions made on the basis of parents' income, earning capacity, property and financial resources*, Report No 1/2004, p 4.
77 Social Security Appeals Tribunal, *Annual Report 2002-2003*, p 42.
78 Administrative Appeals Tribunal, *Annual Report 2002-2003*, p 16.
79 Subparagraph 3(ga)(ii) of the Federal Proceedings (Costs) Act provides that an appeal that is heard and determined, or to be heard and determined, in the Federal Magistrates Court is a 'federal appeal' for the purposes of that Act.

80 Child Support Agency & Attorney-General's Department*, Child Support: Facts and Figures*, various.
81 Child Support (Assessment) Act, s 79; *Luton v Lessels* (2002) 210 CLR 333 at 340 per Gleeson CJ, McHugh J concurring; at 351 per Gaudron and Hayne JJ, Kirby J concurring; at 380 per Callinan J.
82 *Brandy v Human Rights and Equal Opportunity* Commission (1995) 183 CLR 245; *Luton v Lessels* (2002) 210 CLR 333.
83 Commonwealth Ombudsman, *Annual Report*, various.
84 *Ombudsman Act 1976*, s 5(1)(b).
85 Commonwealth Ombudsman, above n 74, and *Review of the Child Support Agency's Complaint Services*, July 2001.
86 Commonwealth Department of Community Services, 'Child Support: New elements in the "Change of Assessment" process' (1999) 13(4) *Australian Family Lawyer* 12 at 13; L Young, 'Child Support: A practical approach to the change of assessment process' (2002) 8 *Current Family Law* 45 at 62; ANAO, above n 18, p 82, paragraph 7.37.
87 See discussion in *Garnaut v Child Support Registrar* [2004] FCA 1100.
88 For example, the explanatory memorandum to the Child Support Legislation Amendment Bill 2004 and the CSA's policy manual, *The Guide,* at Chapter 4.1, contain some inaccurate statements about the nature and content of internal review.
89 Child Support (Assessment Act), s 98R.
90 Explanatory Memorandum to the Child Support Legislation Amendment Bill 2004, p 19.
91 Anthony, above n 1.
92 Child Support (Assessment) Act, s 148.
93 Commonwealth Ombudsman, above n 74, p 1.
94 Ibid.
95 Ibid, pp 59-61.

IS LEGAL PROFESSIONAL PRIVILEGE AN ENDANGERED SPECIES?

Stephen Argument*

This paper was originally prepared as a CLE presentation.

Introduction

This paper considers the effect of some recent cases on the scope and application of legal professional privilege (also referred to as 'client legal privilege'[1]). Some recent cases have arguably operated to limit both the scope and the application of the privilege. The potential effect of the limitations may be of particular interest to in-house lawyers in government agencies.

What is legal professional privilege and why does it exist?

This question was recently answered by the High Court, in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*:

> …. legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.[2]

In short, the privilege exists to ensure that there can be a full and frank exchange of confidence between a solicitor and his or her client, so that the client receives the necessary legal advice.

Waiver of privilege

Legal professional privilege can be waived, by the client, either expressly or by implication. In *Mann v Carnell*, the High Court stated:

> Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. …. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.[3]

This concept of 'inconsistency' is referred to in more detail in the following discussion of the relevant cases.

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Lovegrove

In *Lovegrove Turf Services and Another v Minister for Education*,[4] a decision of the Western Australian Supreme Court, the issue was whether, in using legal advice in the course of making an administrative decision, the decision-maker impliedly waived the privilege that would otherwise attach to the advice.

The plaintiff, Lovegrove Turf Services, was contracted by the defendant, the WA Department of Education, to provide lawn-mowing services at schools. The Department decided to put the lawn-mowing services out to tender. The tender process was split into two rounds. The plaintiff was advised that it had been awarded a Round 1 contract. After the Round 2 tenders closed, a recommendation was given that the plaintiff be awarded the contract. Although that decision was endorsed by a State committee, an independent consultant was brought in to review a complaint concerning the tender evaluation process, as a result of which the tenders were recalled.

The plaintiff commenced legal proceedings against the Department, effectively seeking judicial review of the decision to recall the tender. In its defence, the Department pleaded that, in making the decision to terminate the tender process, the Department took into account, among other things, legal advice. The Department also pleaded that, in referring to the legal advice in the defence, it did not waive privilege in relation to the advice, either expressly or by implication.

There was no assertion by the plaintiff that the waiver arose because of the reference to the legal advice in the defence. The judge noted that the High Court's decision in *Mann v Carnell* established the principle that the inconsistency resulting in implied waiver must arise from the conduct of the party that enjoys the privilege. In this application, the plaintiff relied solely on the events that occurred when the decision was made. The plaintiff asserted that the Department, in taking the legal advice into account in making the relevant decision, had acted inconsistently with maintaining its privilege over that advice.

Justice Johnson considered the authorities on legal professional privilege and acknowledged that there was a large and developing body of case law on waiver of legal professional privilege. However, as her Honour could find no case directly on point, she proceeded to draw analogies from authorities on waiver of privilege in the case of expert witness reports. The essence of those authorities is that if an expert, in preparing a report that is to be used in legal proceedings, relies on what would otherwise be privileged material, then the confidentiality of that material (upon which the privilege relies) is destroyed. The basis of this proposition is that access to the privileged material is required in order for a court to understand the influence of the privileged material on the expert's opinion.

Applying this analogy to the case at hand, the judge agreed with the plaintiff's submission that, by taking into account legal advice in making the decision to recall the tender, the Department had acted inconsistently with maintaining the privilege over the advice. As a result, there was an implied waiver of the privilege. Further, the judge agreed that to find otherwise would be to deprive a person seeking judicial review of such a decision of the right to exercise such review, because precise knowledge of the material on which a decision was based is fundamental to any challenge to the decision. Her Honour stated that, in the context of the judicial review of a decision, there was an inconsistency in taking legal advice into account in making a decision but then declining to identify the content of that advice.

In the concluding paragraph of the judgment, Her Honour stated that, while legal professional privilege was a 'fundamental common law right' that should not lightly be interfered with, she was persuaded that 'incorporating legal advice into an administrative

decision is inconsistent with maintaining the confidentiality of that advice'. Her Honour concluded by stating:

> In my view, in the context of a judicial review of an administrative decision, maintaining the privilege creates a level of unfairness which serves to highlight the inconsistency which is the cornerstone of the relevant test of waiver. The result is an unintentional and implied waiver of legal professional privilege over the legal advice referred to in .... the amended defence.

The potential ramifications of *Lovegrove*

On its face, *Lovegrove* presents significant problems for decision-makers who rely on legal advice in making decisions since, by relying on the advice, it is arguable that they impliedly waive any privilege in the advice, should someone affected by the decision seek judicial review. Some comfort might be drawn, however, from the reference (late in the judgment) that the legal advice must be 'incorporated' into the decision for the privilege to be waived. This might be interpreted as requiring something more than that the decision-maker, at some stage, considered the advice. It might, for example, be interpreted as requiring that legal advice was provided to the effect that the decision-maker should do (or not do) 'x' and that the decision-maker, in fact, did 'x'. On its face, however, the analogy drawn from the expert opinion authorities applies equally to *any* advice given in the lead-up to an administrative decision, whether it was acted upon or not. On the analogy, it would apply equally to advice that the decision-maker did not act on, including advice that the decision-maker chose to ignore.

Adelaide Brighton Cement Limited v Victorian Rail Track

Lovegrove was recently considered by the Victorian Civil and Administrative Tribunal ('VCAT'), in *Adelaide Brighton Cement Limited v Victorian Rail Track*.[5] In that case, Adelaide Brighton Cement Limited ('ABC') sought access under the *Freedom of Information Act 1982* (Vic) to certain documents relating to a commercial dispute about a railway line between North Geelong and Fyansford. Victorian Rail Track denied access to some of the documents, on the basis that they were exempt under section 32 of that Act, which relates to legal professional privilege. Counsel for ABC relied on *Lovegrove*, arguing that any privilege in the documents had been waived, by virtue of their being integral to the making of, and reasons for, a review of an administrative decision.

Justice Bowman rejected ABC's arguments. His Honour began by noting that the High Court had stressed that legal professional privilege was 'an important common law immunity', which was not to be lightly swept aside. His Honour then distinguished *Lovegrove*, partly on the basis that he considered the respective fact situations were 'considerably removed' from each other and partly because he considered that acceptance of the interpretation advanced on behalf of ABC would render the protection afforded by section 32 of the Act 'useless'.[6]

Bennett

The inconsistency argument in relation to waiver of privilege was given more detailed consideration in the recent decision of the Full Federal Court in *Bennett v Chief Executive Officer of the Australian Customs Service*.[7] That case involved a dispute between the Australian Customs Service ('ACS') and Peter Bennett, in his capacity as President of the Customs Officers Association ('COA'). The particular issue was whether subregulation 7(13) of the (then operative) *Public Service Regulations 1935* operated to limit what Mr Bennett could say in public.

In the course of the dispute, the Australian Government Solicitor ('AGS'), on behalf of ACS, wrote to Mr Bennett's solicitors, stating (among other things):

> AGS has now advised Customs that Public Service Regulation 7(13) does not prohibit all public comment by an officer on matters of public administration.
>
> ……..
>
> AGS has advised Customs that your client is not correct in asserting that he is not subject to the [Public Service] Act and Regulations if he makes public statements about Customs-related matters in his capacity as President of the COA.

Mr Bennett sought access under the *Freedom of Information Act 1982* (FOI Act') to the legal advice on which these statements were based. Access was denied, on the basis of section 42 of the FOI Act, which provides an exemption in relation to documents protected by legal professional privilege. Mr Bennett argued that any privilege in the documents had been waived as a result to the references in the AGS letter to his solicitors.

The Full Federal Court (Gyles and Tamberlin JJ, Emmett J dissenting) agreed. Justice Tamberlin referred to the following passage from *Mann v Carnell*:

> Disclosure by a client of a confidential legal advice received by the client, which may be for the purpose of explaining or justifying the client's actions … will waive the privilege if such disclosure is inconsistent with the confidentiality which the privilege serves to protect …[8]

His Honour also referred to the following passage from Deane J's judgement in the High Court decision in *Attorney-General for the Northern Territory v Maurice*:

> … ordinary notions of fairness require that an assertion of the effect of privileged material or disclosure of part of its contents in the course of proceedings before a court or quasi-judicial tribunal be treated as a waiver of any right to resists scrutiny of the proprietary of the use he has made of the material by reliance upon legal professional privilege. ... If, in such a document, a party sets forth part of the contents of a particular identified document or communication or asserts the effect of or his reliance upon a particular identified document or communication, it may be that consideration of fairness might require that he be treated as having waived any legal professional privilege in relation to the whole document or communication. ... [9]

In *Maurice*, Deane J went on to say:

> Where, however, he does no more than make use of privileged material (e.g. legal advice, expert opinion or statements of potential witnesses) for the purpose of formulating the statement in such a document of the details of the case which he proposes to make, it would be an affront to ordinary notions of fairness to hold that the effect of his compliance with that procedural requirement was that he has waived his legal professional privilege ...'[10]

In *Bennett*, Tamberlin J went on to note that mere reference to the existence of legal advice does not waive the privilege in such advice, citing the High Court decision in *Ampolex Ltd v Perpetual Trustee Company (Canberra) Ltd*.[11] However, his Honour further noted that the 'substance' of legal advice may be disclosed if the 'ultimate conclusion' is disclosed, without the supporting reasoning, citing the NSW Supreme Court's decision in *Ampolex.*

Justice Tamberlin gave the example of a situation where it was disclosed that interpretation 'A' was preferred to interpretation 'B' of a legislative provision. In this situation, his Honour concluded, the reasoning and content of the advice leading to those conclusions may also be waived.[12]

His Honour also went on to say that the disclosure of one conclusion does not necessarily waive privilege in relation to any undisclosed conclusions. He also said, however, that if the conclusions and reasoning set out in an advice are so interconnected that they cannot be isolated then waiver may be implied in relation to the whole of the advice.[13]

Implications of *Bennett*

I have little or no difficulty with the Full Federal Court's reasoning in *Bennett*, as it seems to be a relatively unavoidable conclusion that, in the paragraphs of the AGS letter referred to, AGS had disclosed to Mr Bennett's solicitors the substance of the advice to ACS. The privilege in that advice had, as a result, been waived.

The role of practising certificates and independence

The second issue to be discussed in this paper is the role of practising certificates and independence in relation to legal professional privilege, with particular reference to the recent decision of Crispin J of the ACT Supreme Court in *Russell Vance v Air Marshall Erroll John McCormack in his capacity as Chief of Air Force and the Commonwealth*.[14] In *Vance*, Crispin J considered an application by the plaintiff (Mr Vance) for an order requiring the defendants to provide a large number of documents for inspection and/or copying by the plaintiff. The application was opposed by the defendants, on the ground that all the documents in question were the subject of a claim for legal professional privilege.

The proceedings involved a claim for damages in relation to the alleged unlawful termination of the plaintiff's employment as a Squadron Leader in the Royal Australian Air Force. Three categories of documents were in dispute. The first involved a document that contained advice from a legal officer employed by the Australian Defence Force who occupied a position referred to as a 'Departmental Legal Officer' ('DLO'). The second group of documents consisted mainly of communications between DLOs and counsel, relating to advice given by them regarding the termination of the plaintiff's employment. The third group of documents consisted of communications with DLOs in connection with requests for, or the provision of, legal advice.

There was a further categorisation of the documents, however, in the sense that some of the DLOs were civilian lawyers, some of the DLOs were military lawyers and some of the DLOs were Reserve lawyers.

Justice Crispin saw 2 issues in relation to the lawyers concerned:

- were they 'practising' lawyers?
- were they sufficiently independent of their employer for there to be a solicitor/client relationship?

'Practising' lawyers

In his judgment, Crispin J referred to the High Court's decision in *Waterford v The Commonwealth*.[15] In *Waterford*, the High Court upheld a claim for privilege in respect of Commonwealth documents that had been brought into existence for the sole purpose of seeking legal advice from salaried government lawyers or for the provision of such advice.

There was, however, an important distinction between *Waterford* and the situation before Crispin J, because in *Waterford*, the persons in question were not only lawyers but held practising certificates. Mr Vance argued that *Waterford* could be distinguished because, in this case, the DLOs did not.

In response, Defence argued that, in *Waterford*, the High Court had not said that a lawyer must have a practising certificate for his or her advice to be protected by privilege. Crispin J acknowledged this but noted that, in *Waterford*, Dawson J said that, for the privilege to apply,

> …the legal advisor must be qualified to practice law and, it seems, subject to the duty to observe professional standards and the liability to professional discipline.[16]

Justice Crispin said that it was difficult to see how Dawson J's conditions could be satisfied by lawyers who did not hold practising certificates or, perhaps, worked under the supervision of a lawyer with a practising certificate.

What, then, are the perceived advantages of a lawyer having a practising certificate? According to Crispin J, holding a current practising certificate indicates 'continued good standing in a profession that takes active steps to ensure the maintenance of appropriate ethical and professional standards'.[17] His Honour stated that the legal profession does this by:

- fostering awareness of its traditions of integrity and service;
- the influence of peers;
- the need for practitioners to demonstrate continuing compliance with ethical standards; and
- (in most jurisdictions) participation in continuing legal education in order to maintain practising certificates.[18]

It is significant to note that a Defence witness conceded that DLOs were not required to keep abreast of changes in rules of practice or legal ethics.[19]

Justice Crispin went on to say that practising certificate requirements were not 'mere formalities' but an important part of the legislative scheme for the regulation of the profession.[20] His Honour made particular reference to the role of the Professional Conduct Board of the Law Society of the ACT and the liability to professional discipline that this involved.[21]

His Honour concluded that lawyers need to hold a practising certificate or enjoy a statutory right to practise if communications with them for the purpose of obtaining legal advice are to enjoy the protection of legal professional privilege.[22]

A further requirement - Independence

Justice Crispin did not stop there. Again picking up from *Waterford*, Crispin J said that the 'broader issue' was whether the DLOs employment with Defence involved a professional relationship which allowed the advice to have 'an independent character notwithstanding the employment'.[23]

In the *Vance* situation, Crispin J noted that the military DLOs held commissions as full-time officers and were subject to an 'authoritarian' structure in which obedience could be enforced by penal sanctions.[24] His Honour rejected the argument that this was qualified by the proposition that only lawful commands were applicable.[25] Justice Cripsin further noted that:

- commanding officers could give orders to DLOs that conflicted with professional conduct rules;[26]
- many DLOs were under the command of superior officers who were not legally qualified;[27]
- there was no requirement for DLOs to be members of Law Societies;[28] and
- there was evidence of an 'ADF culture' within which DLOs clearly lacked the requisite independence.[29]

Having reached these conclusions along the way, Crispin J decided that legal professional privilege:

- did not apply to military DLOs, due to a combination of factors[30];
- did not apply to civilian DLOs, due to the lack of practising certificates;[31] but
- did apply to the reserve DLOs, partly because they had a right to practise and partly because they were only involved in the Defence culture on 'a part-time basis'.[32]

Ramifications of *Vance*

Not surprisingly, the *Vance* decision has caused a flurry of activity in the ACT. The ACT Law Society has written to government agencies, urging them to arrange for their lawyers to have practising certificates. The potential impact to agencies is no doubt lessened by the fact that the Law Society is currently offering such certificates at discounted rates.

A further issue, of course, is the limitation on government lawyers holding unrestricted practising certificates. Again, however, the Law Society has advised that, pending possible amendment of the *Legal Practitioners Act 1970* (ACT), it is prepared to allow government lawyers to have unrestricted certificates if they, in return, undertake not to perform work of a legal nature other than for their employer.

The Secretary of the Attorney-General's Department has also written to agencies, seeking their views on the implications of *Vance* for their agencies. It is evident that some agencies have already taken steps in relation to practising certificates.[33]

But what about the independence issue? My own view is that the independence requirement is the more problematic issue arising out of *Vance*. Is it the case that lawyers in government agencies are immune from the 'chain of command' type arguments accepted by Crispin J in *Vance*? If not, how might agencies be re-structured in order to give them the necessary independence?

These issues may be addressed, in part, by arguing that it is possible to limit *Vance* to its facts, that is, to limit its application to situations where there is the sort of formal command structure that is involved in Defence. This is, however, presumably an argument that is yet to be won or lost.

ADDENDUM

The *Vance* decision has been considered by the Administrative Appeals Tribunal ('AAT') in *Re McKinnon and Secretary, Department of Foreign Affairs and Trade*,[34] in the context of the application of legal professional privilege as a ground of exemption under the (Commonwealth) FOI Act. In that decision, the President of the AAT, Justice Downes, stated:

> 50. The authorities establish that legal professional privilege is attracted by legal advice otherwise qualifying even though the advice is given by an employed lawyer to his employer, including a Government department or agency, provided that the employee is acting independently in giving the advice (see *Australian Hospital Care Pty Ltd v Duggan (No 2)* [1999] VSC 131; *Waterford v The Commonwealth* (1987) 163 CLR 54).
>
> 51. In *Australian Hospital Care v Duggan*, Gillard J concluded that provided the advice given was independent advice, it did not matter that the lawyer did not have a practising certificate for a claim of legal professional privilege to arise (at [111]). In *Vance v McCormack and The Commonwealth* [2004] ACTSC 78, Crispin J in the Supreme Court of the Australian Capital Territory concluded that a practising certificate was necessary (at [48]). **I prefer the conclusion and reasoning of Gillard J. The real test is whether the advice had the necessary quality of being independent advice. Whether or not legal professional privilege is attracted should be determined by the substance not the form.** The rise of requirements for practising certificates is relatively recent and is associated primarily with regulatory considerations and matters associated with lawyers holding themselves out to the public as qualified. Many of these considerations are irrelevant to the role of the employed lawyer. [emphasis added]

This might be seen as alleviating the need for in-house lawyers to rush out and obtain practising certificates, with Justice Downes being more concerned by the substance of a lawyer's independence than whether or not he or she holds the relevant 'ticket' to practise. It does not address the independence issue, however, meaning that in-house lawyers still need to consider whether they can meet the requirement that their advice have 'an independent character notwithstanding the employment'.[35]

Endnotes

1 See Part 3.10 of the *Evidence Act 1995* (Cth).
2 (2002) 192 ALR 561, per Gleeson CJ, Gaudron, Gummow, Hayne JJ, at para 9.
3 (1999) 210 CLR 1, at para 29 (per Gleeson CJ, Gaudron, Gummow and Hayne JJ).
4 [2003] WASC 213, 5 November 2003, per Johnson J.
5 [2004] VCAT 930 (20 May 2004).
6 See para 40.
7 (2004) 210 ALR 220.
8 At para 3 (the *Mann v Carnell* passage being from para 34 of that judgment).
9 (1986) 161 CLR 475, at 493.
10 Ibid.
11 (1996) 137 ALR 28 (see Kirby J at 34).
12 *Bennett*, above n 7 at para 13.
13 Ibid, para 14.
14 [2004] ACTSC 78 (2 September 2004).
15 (1987) 135 CLR 674.
16 Ibid, at 96 (and at para 35 of Crispin J's judgment).
17 [2004] ACTSC 78, at para 42.
18 Ibid.
19 Ibid, at para 43.
20 Ibid, at para 45.
21 Ibid.
22 Ibid, at para 47.
23 Ibid, at para 49.

24 Ibid, at para 57.
25 Ibid, at para 60.
26 Ibid.
27 Ibid, at para 61.
28 Ibid, at para 62.
29 Ibid, at para 64.
30 Ibid, at para 88.
31 Ibid, at para 89.
32 Ibid, at para 93.
33 In an advertisement in *The Canberra Times* on 23 October 2004, for example, the Department of Education, Science and Training indicated that practising certificates would be a condition of employment for Government Lawyers in that Department.
34 [2004] AATA 1365 (21 December 2004).
35 In this context, we note that the Attorney-General's Department has issued a "Guidance Note" to Commonwealth agencies, recommending that certain steps be taken to demonstrate the necessary independence of legal areas.

NOTE TO 'EXTERNAL REVIEW OF CHILD SUPPORT AGENCY DECISIONS: THE CASE FOR A TRIBUNAL' BY TAMMY WOLFFS IN AIAL FORUM NO. 43

Les Blacklow*

I read with considerable interest the article 'External Review Of Child Support Agency Decisions: The Case For A Tribunal' by Tammy Wolffs in *AIAL Forum* No. 43 at pages 55–72.

I noted, however, that in the context of arguing that the Social Security Appeals Tribunal ('the SSAT') would be the most logical of the existing merit review tribunals to undertake review of CSA decisions, Ms Wolffs stated at page 69 that '[t]his would require developing new procedures for the SSAT, which currently does not allow parties, other than the appellant, to appear before it.'

This statement is incorrect. Sections 156 and 160 of the *Social Security (Administration) Act 1999* (Cth) provide for other persons to be made parties to an SSAT review. There are equivalent provisions in the A New Tax System (Family Assistance) (Administration) Act 1999, sections118 and 122.

In essence, s.156 provides that any person, other than the applicant, 'whose interests are affected by the decision', may apply in writing to be made a party to the review. Section 160 essentially provides that if the Executive Director is satisfied that the interests of any non-party are affected, reasonable steps must be taken to notify that person in writing of his/her s.156 rights to enable him/her to apply to be added as a party to the review.

The SSAT has well settled procedures in this regard. For example, the SSAT often adds another party in so-called 'member of a couple' cases, where the question is whether a man and a woman are a member of a couple for the purposes of determining the correct rate of social security payments payable.

More to the point perhaps in the current context, is the fact that the SSAT also very often 'adds' the other parent as a party when the amount of child care provided by the applicant is in question for the purposes of determining the rate of Family Tax Benefit ('FTB'). In those cases, a finding of a change to the percentage of care for one partner will invariably have an impact on the percentage of care, and hence the rate of FTB payable, in respect to the other.

The potential impact on the other person is of course the very reason such other persons can, and do, participate in SSAT reviews.

* *Executive Director, Social Security Appeals Tribunal.*

RESPONSE TO LES BLACKLOW'S NOTE TO MY ARTICLE

Tammy Wolffs*

I welcome Les Blacklow's comments on my article. I acknowledge that reference could have been made in my article to sections 156 and 160 of the *Social Security (Administration) Act 1999* (Cth) and equivalent provisions in the *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) and, in particular, to the addition of the other parent in cases before the Social Security Appeals Tribunal (SSAT) that deal with the apportionment of care for determining the rate of Family Tax Benefit.

While the experience of the SSAT in respect of these cases strengthens my argument that the SSAT is best placed to consider appeals of Child Support Agency (CSA) decisions, I believe the implications for the SSAT, as set out in my article, remain. That is, the formulation of procedures for ensuring that the other parent in any child support cases is heard and his or her views considered appropriately would helpful. This is because of the significant increase in the volume of cases where another person is added. Further, this increase in volume, combined with the complexities of child support law and the conflicts that can often occur between parents, is a further consideration that supports the development of tailored procedures.

Finally, I am encouraged by Les Blacklow's consideration of my arguments and heartened that he has not identified any obstacles to the inclusion of CSA decisions in the jurisdiction of the SSAT.

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