Ombudsman
New South Wales

Review of administrative conduct and decisions in NSW since 1974 – an ad hoc and incremental approach to radical change

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This paper is in part a 'folk history' of the NSW Ombudsman and key changes in its operating environment since the *Ombudsman Act 1974* was passed by the NSW Parliament. The focus of the paper is the traditional administrative review role of the Ombudsman and changes in the administrative review environment in NSW.

The history of the development of the functions and powers of the Ombudsman mirrors the changes that occurred in the same period in the overall administrative review framework in NSW. These changes have been ad hoc and incremental, generally in response to: scandals; Royal Commissions or inquiries by Parliamentary Committees; amendments to legislation introduced by the Opposition, independents or minority party MPs holding the balance of power during Parliamentary debates on Bills; or initiatives that can be traced directly to the personal views, philosophies or enthusiasms of a Minister for Justice,[1] an Attorney General[2] and a Premier.[3] An alternative title for this part of the paper could be 'More By Good Luck Than Good Planning'.

The paper also considers changes in the public sector's attitude to issues such as oversight by the Ombudsman, customer service, complaints, whistleblowers and so on.

The final section of the paper looks to the future, considering whether it is time to recognise an integrity branch of government, whether it is time to review the jurisdictions, structures and approaches of administrative review type bodies, whether access to administrative review complaint mechanisms should be made more customer friendly, where the courts might take procedural fairness and how the Ombudsman's complaint handling approach could change to reflect changes in the capacity of agencies to deal with complaints.

The NSW Ombudsman

Creation of the Ombudsman

The present system of administrative law in NSW is largely a result of growing concern across Australia in the 1960s about the growth in bureaucratic discretionary decision making. In response, a number of reviews were conducted in the early 1970s which resulted in recommendations which constituted the basis for what became known as the *New Administrative Law*. In the Commonwealth sphere the most important of these reports was the *Kerr Report*, which recommended the establishment of a general administrative tribunal to review administrative decisions on the merits, codification and procedural reform of the system of judicial review, and the creation of an office of Ombudsman.

The establishment of the Ombudsman in NSW arose out of a 1973 report by the NSW Law Reform Commission (NSWLRC) entitled *Appeals and Administration.* In that report the NSWLRC recommended a three tier system for reviewing administrative decisions:

- tier 1 – an Ombudsman – to handle complaints about administrative conduct;
- tier 2 – a Public Administration Tribunal – to be an appeal body, but also to hold enquiries into official actions; and
- tier 3 – a Commissioner for Public Administration assisted by an Advisory Council – to examine powers exercised by public authorities and recommend changes.

In response to the NSWLRC's report, the then NSW government was initially only prepared to create an Ombudsman. It was lukewarm about even going that far and apparently the then Minister for Justice, The Hon John Maddison, who had been talking about an Ombudsman since 1964,[4] had to threaten to resign over the issue to get the government to agree to proceed. The *Ombudsman Act 1974* commenced on 12 May 1975.

While the creation of an Ombudsman in 1974 may have been an idea whose time had come, it was not an idea that originally had strong support across government. As one commentator noted: 'The Ombudsman has toiled long and hard in a hostile environment where it has been treated as an interloper by the courts, as an alien by agencies, has been unfamiliar to lawyers and has been largely abandoned by its natural protector and ally (Parliament)'.[5]

Interestingly, it took 22 years before anything equivalent to the proposed Public Administrative Tribunal was established in NSW, the Administrative Decisions Tribunal, in 1997. Today, 38 years later, there is still no Commissioner for Public Administration or an Advisory Council as recommended by the NSWLRC.

Another driver for the establishment of an Ombudsman in NSW was the fact that such a position had already been established in most other Australasian jurisdictions (New Zealand in 1962, Western Australia in 1971, South Australia in 1972, Victoria in 1973 and Queensland earlier in 1974).

Expanding jurisdiction of the Ombudsman

The other significant change over time has been the gradual expansion of the Ombudsman's jurisdiction. Starting with a jurisdiction that was solely public sector (but not all of the public sector), over the years the Ombudsman's jurisdiction has been expanded by successive governments, to include a large private sector component. As can be seen in the Annexure to this paper, over time the Ombudsman's role has been expanded by Parliament to cover:

- oversight of police investigation of complaints about police officers (a role that has changed significantly from a very hands-off external review to the ability to directly monitor and investigate);
- Freedom of Information complaints (a role transferred to the new Information Commissioner in 2009);
- auditing of records of bodies authorised to intercept telecommunications;
- complaints about the provision of community services (by both public and private organisations);
- coordinating the work of the Official Community Visitors,[6]
- oversight of the system that deals with allegations against people who work with children (in both public and private organisations) that they have behaved inappropriately;
- notification of employment related child protection allegations (by both public and private organisations);
- convening the NSW Child Death Review Team and providing support and assistance to that Team;
- reviewing the causes and patterns of the deaths of children in care, those who died as a result of abuse or neglect or in suspicious circumstances and those who died in detention, and reviewing the causes and patterns of the deaths of people with disabilities who died in care (the purpose of these reviews is to identify trends and make recommendations to prevent or reduce the risk of similar deaths in the future);
- reviewing the implementation of legislation giving greater powers to police[7] (since 1998 the Parliament has required the Ombudsman independently and impartially to analyse the exercise of new powers given to police in approximately 30 new laws);
- determination of Witness Protection appeals[8] (the Ombudsman's only determinative role);
- oversight of controlled operations;
- oversight of compliance by law enforcement agencies under the *Surveillance Devices Act 2007*;
- oversight of powers to conduct covert searches (under the *Law Enforcement (Powers and Responsibilities) Act 2008*); and

oversight of the implementation of whistleblowing legislation, including auditing, monitoring, investigating, training and guidelines.

The NSW Ombudsman's very broad jurisdiction covers what appears at first to be a range of disparate functions. However, there is a common thread running through the Ombudsman's functions – all involve an 'independent review' role given to the Ombudsman by the Parliament. This independent review role can be divided into four distinct categories of functions:

administrative reviews – including handling complaints about individual administrative conduct and decisions of public sector agencies and officials, and of equivalent bodies and persons, and witness protection appeals;

compliance reviews, these include:

reviewing compliance with the law and good practice (eg compliance with procedural fairness and good practice in investigations, use of police powers, controlled operations, auditing of telecommunication interception records);

reviewing compliance with the law and good practice in the handling of and response to allegations/complaints (eg about police, inappropriate conduct towards children, and community services); and

reviewing compliance with appropriate standards of service provision (eg provision of community services);

- death reviews – reviewing the courses and patterns of the deaths of certain children and people with disabilities; and
- legislative reviews – reviewing the implementation of certain legislation that expands the powers of police.

To ensure that each of the functions of the Ombudsman is given due attention and is performed efficiently and effectively, the office is currently structured around jurisdictions. The three operational branches of the office, each with its own budget and staff and headed by a Deputy Ombudsman,[9] are:

the Public Administration Branch – covering all aspects of the traditional role of the Ombudsman to deal with complaints about government;

the Police and Compliance Branch – covering the police, secure monitoring and legislative review roles; and

the Human Services Branch – covering community services, employment related child protection roles and death review roles.

There is also a Special Projects Division that focuses on major projects, particularly involving issues that cross the jurisdictional boundaries of one or more branches, and also a Corporate Branch.

Changing focus of the Ombudsman

The focus of the work of the Ombudsman has changed since 1975. In many jurisdictions, when an Ombudsman was established, it was said in support of the concept that the Ombudsman would be the 'citizen's defender'. Over time, the NSW Ombudsman has shifted from focussing solely on individual complaints to looking at systemic issues brought to light by complaints and an oversight of complaint handling systems. Although the Ombudsman can still be called the 'citizens' defender', the apostrophe has been moved!

Over time there has been a fundamental change to the work of the Ombudsman, from a reactive formal approach focussing on identifying problems, to a more pro-active informal approach where the focus is on adding value. Part of this change was described by Rick Snell, Senior Lecturer in Administrative Law, University of Tasmania, as a move away from a 'complaint-focused incident-based approach to problem solving' to a more 'institution-focused and performance-based approach'.[10]

The ways in which the Ombudsman has gone about implementing this change have included 'own motion' investigations focussing on systemic issues, audits of complaint handling systems, and offering training and guidance to agencies on complaint handling. A side effect of the change has been the Ombudsman moving from being perceived by agencies within its jurisdiction as a threat, opponent or nuisance to being seen in a more positive light.

There has also been a change in the subject matter of Ombudsman investigations and inquiries. Originally these focused solely on the substantive issues raised in complaints. Over time this focus broadened to include consideration of how these substantive issues were dealt with by the organisation concerned. This is particularly so in the areas of jurisdiction where the Ombudsman primarily oversights how agencies deal with complaints ie in the police and employment-related child protection jurisdictions. In these areas, where the Ombudsman conducts investigations, they are usually into how the agency investigated the substantive issue, not of the substantive issue itself.

Another significant change in the work and approach of the Ombudsman has been the development and publication of detailed guidance for agencies on expected standards of conduct and administrative practice. Starting in 1995 with the *Guidelines for Effective Complaint Management* that were published as part of the Ombudsman's Complaint Handling in the Public Sector (CHIPS) program and the *Good Conduct and Administrative Practice Guidelines for Public Authorities and Officials*, the Ombudsman has published (and often re-published) a large number of guidelines for the public sector.[11] The contents of these guidelines can be categorised as: guidance on good conduct and administrative practice; guidance on good complaint handling; and guidance on rights (for example in relation to local councils, covering rates and charges, and proposed developments).

The guidelines have been warmly received across the NSW public sector and many have been copied (with consent and acknowledgement) by numerous watchdog bodies and line agencies across a wide range of jurisdictions, in Australia, the UK and Canada.

Growing out of these guidelines and also as a result of new statutory training roles in the Ombudsman's community services and public interest disclosures jurisdictions, the Ombudsman has implemented a major move into the field of training and education. The Ombudsman now runs a significant training and education function providing workshops and other activities for public sector agencies, non-government organisations, and consumers of community services across NSW (and across Australia).[12]

Greater independence of the Ombudsman

Central to the effectiveness of an Ombudsman is the position's actual and perceived degree of independence from executive government.

The level of independence of the NSW Ombudsman was a significant issue for many years, and a regular topic discussed in most *Ombudsman Annual Reports* until the mid 1990s. As the then Ombudsman said in a special report to Parliament in 1990:

> The concept of the Ombudsman's independence from the executive is no mere issue of academic principle; rather, such independence is a practical necessity for an organisation whose task is to investigate citizens' complaints about maladministration by public authorities. Ministers are ultimately responsible for public authorities and governments have a tendency to view even constructive criticism of authorities under their control as criticism of their political administration.

For the first 10 – 15 years or so of its operation there were significant limitations on the Ombudsman's independence:

- for the first nine years the Ombudsman's staff were all employees of the Premier's Department – it was only in 1984 that the office of the Ombudsman became a separate 'administrative office' with the Ombudsman given departmental head status;

for the first 15 years the Ombudsman could only delegate the exercise of his functions to a 'special officer' of the Ombudsman, but needed the concurrence of the Premier to appoint an officer of the Ombudsman as a 'special officer'; and

for the first 16 years the appointment of a Deputy or Assistant Ombudsman could only be made by the Governor on the recommendation of the Premier – around 1990 the Act was amended to provide that the Ombudsman could make such appointments directly.

Other significant changes that increased the Ombudsman's independence were:

the establishment in 1990 of a Joint Parliamentary Committee to oversee the operations of the office; and

the amendment to the *Ombudsman Act 1974* in 1993 permitting the Ombudsman to present default,[13] special[14] and annual reports directly to the Presiding Officers of Parliament rather than through the relevant Minister.

Today the Ombudsman is generally seen by both the Executive and the Judiciary to be more an officer of the Parliament than of the Executive.[15] This reflects the fact that the Ombudsman can only be removed from office by the Governor upon the address of both Houses of Parliament, and the Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission has a veto power over the appointment of the Ombudsman.[16]

Changes in the mechanisms available for the external review of administrative decisions and/or administrative conduct and integrity

The *Ombudsman Act 1974* was originally the only legislation in NSW that established oversight bodies or other avenues of appeal or review of administrative decisions or conduct, laid down procedures and practices for the receipt, assessment, investigation or other handling of complaints, and set up oversight mechanisms in relation to integrity. Apart from a small number of ad hoc

tribunals with limited jurisdiction and the Auditor General (whose focus at the time was financial compliance), the NSW Ombudsman was the first body established in NSW with jurisdiction to review the administrative decisions, administrative conduct or general integrity of public sector bodies.

The Ombudsman Act 1974 was followed closely by the *Privacy Committee Act 1975* and four years later by the *Police Regulation (Allegations of Misconduct) Act 1979*. Apart from the *Judicial Officers Act 1986* that created the Judicial Commission, there was little further legislative action until the next change of government. This saw the passing of the *Independent Commission Against Corruption Act 1988* (ICAC) and the passing of the *Freedom of Information Act 1989* (FOI Act).

The establishment of the ICAC in 1989 filled a gap that none of the Australian Parliamentary Ombudsman were intended to address, that is, serious corrupt conduct which could only be discovered or investigated effectively through the use of covert powers of surveillance, such as listening devices and telecommunications interception. While the jurisdiction of the ICAC overlaps the jurisdiction of the Ombudsman in his administrative review role, the focus of the work of each body is different. The focus of the Ombudsman in this area is to ensure that public officials and agencies perform their public duties appropriately. The focus of the ICAC is on public officials who act in ways that are fundamentally opposed to their public duties, that is, corrupt conduct. It could be said that the nature of the role of corruption fighting bodies is in many respects more akin to law enforcement than to administrative review. Differences or distinctions between corruption fighting and complaint handling are listed in Annexure A.

In the 1990s, a number of bodies were established whose roles included reviewing aspects of administrative decisions or conduct and integrity in the NSW public sector, for example, the Community Services Commission and the Health Care Complaints Commission in 1993, the Police

Integrity Commission in 1996 (established in response to the recommendations of the NSW Police Royal Commission), the Administrative Decisions Tribunal in 1997 and the Privacy Commissioner in 1998 (both established under legislation championed by the then Attorney General, the Hon Jeff Shaw).

A timeline of the establishment of bodies with administrative review roles and the conferring of administrative review jurisdictions is set out in Annexure B.

In the 38 years since the passing of the *Ombudsman Act 1974* there has been a proliferation of legislation and organisations that provide for the external review of administrative decisions, administrative conduct and integrity.[17] Today, there are over 17 Acts of Parliament that provide for the handling of complaints about public sector decisions or actions.[18]

Bodies and their functions in the review of administrative decisions and conduct in NSW are the:

- NSW Ombudsman (often referred to as the State's 'general jurisdiction' watchdog body) – complaints about administrative decisions, administrative conduct and integrity; complaints about the provision of community services (public and private sectors); oversight of complaints about police'; and, oversight of complaints about child protection related reportable conduct in the context of employment (public and private sectors);
- Administrative Decisions Tribunal – reviews of certain administrative decisions;
- Information Commissioner – complaints about breaches of the *Government Information (Public Access) Act 2009*;
- Privacy Commissioner – complaints about breaches of the *Privacy and Personal Information Protection Act 1998;*
- ICAC – complaints about corrupt conduct;
- Police Integrity Commission (PIC)– complaints about serious misconduct by police officers;
- Judicial Commission – complaints about the conduct of judicial officers; and
- Audit Office – public interest disclosures about serious and substantial waste in the state government agencies.

Changes in public sector attitudes to oversight, customer service, transparency and complaints

Government attitude to the Ombudsman

When the Act was introduced, the jurisdiction of the Ombudsman in relation to the public sector was significantly limited – both local government organisations and police had successfully argued that they should not be within the jurisdiction of the Ombudsman. Jurisdiction was extended to local government councils in 1976 and to individual councillors and council staff in 1986. From 1979 the Ombudsman only had powers to review police investigations into complaints about police; this was expanded in 1984 to allow the Ombudsman personally to re-investigate complaints but the Ombudsman could only be assisted by seconded police officers.[19] The limitations on the jurisdiction of the Ombudsman to investigate complaints about the conduct of police were not fully addressed until 1993[20] in response to the recommendations made by the Parliamentary Committee on the Ombudsman following its inquiry into the handling of police complaints.

The initial negative reaction to the establishment of the Ombudsman persisted for many years, waxing and waning with both the electoral cycle and the length of time that a particular party was in government. The longer a government was in office, the more negative the attitude of that government to the Ombudsman was likely to be. The NSW experience reflects the experience of

many other Ombudsmen. The pattern was identified in the early 1980s by the then Saskatchewan Ombudsman, David Tickell, who made the following comments in his *1984/85 Annual Report*:

> To some extent, it may be inevitable that an Ombudsman who works up to his mandate will have something other than a smooth working relationship with the executive branch of government...Sooner or later there is a tendency to shoot the messenger when governments don't like the message...
>
> Having observed the approaches and experiences of a dozen or so provincial Ombudsmen, I can say with some certainty that every new Ombudsman enjoys a honeymoon period of variable duration with his or her government. From my own experience, I can also say with certainty that a change of government also brings with it a period of 'calm' and an exceptional opportunity to produce good results for his complainants...The honeymoon can last for months or even years, if the Ombudsman is adept, and the government is genuinely committed to working with a representative of the public.
>
> Issues rather than personalities usually end the honeymoon and this is perhaps as it should be.

The Saskatchewan Ombudsman went on to list a number of what he referred to as 'realities' about the relationship between the Ombudsman and the government of the day, including:

> Governments, for reasons that escape me, have a desire to appear infallible, or as nearly infallible as possible, and tend to view even constructive criticism as 'political' criticism.
>
> Governments dearly hope that the Ombudsman will keep his issues internal to government systems and not make them the subject of public discussion and debate.
>
> In Saskatchewan, governments will oppose structural moves to firm up the Ombudsman's accountability to the legislature and to reduce his dependence on the executive branch. This occurs, I assume, because the executive branch fears some loss of control over the Ombudsman's activities.
>
> Unless an Ombudsman operates on the premise that a satisfied government overrides his other responsibilities, his working relationship with government will never be entirely harmonious. Where a government is displeased, an Ombudsman can anticipate paying some kind of price for its displeasure...

The relationship between the NSW Ombudsman and governments of NSW closely followed this pattern over the first 20 years of its operation in particular. In those years the standard response was for Ministers to defend their agencies or officials and attack the credibility of the Ombudsman's report or decry the interference of the Ombudsman in the running of an agency or function.[21] As a former Ombudsman David Landa noted in a Special Report to Parliament in 1990 entitled: *Independence and Accountability of the Ombudsman*:

> Ministers are ultimately responsible for public authorities and governments have a tendency to view even constructive criticism of authorities under their control as criticism of their political administration...
>
> ...governments dislike and react against public discussion and debate of issues of public administration, such as often occurs where the Ombudsman decides to report to Parliament.

An indication of the waxing and waning, but largely negative, attitude of governments to the Ombudsman in the early years can be seen in the first edition of the NSW Public Sector Code of Conduct: Policy and Guidelines of June 1991. While the code referred to a range of integrity related legislation and organisations (for example the ICAC, *ICAC Act 1989*, FOI Act 1989, *Crimes Act 1914*, and the *Public Finance and Audit Act 1983*), it contained no mention of the *Ombudsman Act 1974* or the Ombudsman. Anecdotally, it was indicated to me by a highly credible source within the Premier's Department that this was intentional and reflected certain strongly held views of the then Premier about the then Ombudsman. The failure to acknowledge the existence of the Ombudsman was unchanged in November 1993 when the then government issued its *Code of Conduct for Special Purpose Bodies* and was only rectified in 1996 with the publication of the *Code of Conduct for NSW Public Agencies: Policy and Guidelines* and the *Code of Conduct and Ethics for Public Sector Executives*.

This anecdote highlights an important variable in the attitudes of governments to the Ombudsman, ie the personal relationship and interaction between each of the five NSW Ombudsman and the governments of the day. Although all were lawyers, each had a different background, personality, and approach to problems and priorities. Each faced a different attitude to the office, or personally,

on the part of the government of the day; in practice this was primarily reflected in the attitude of the Premier. Both the second and third Ombudsman had often problematic relationships with their Premiers and their interactions were on occasion quite robust. These interactions were primarily triggered by disputes over resourcing, limitations on the jurisdiction and protecting the independence of the office.

The relationship between the governments and the Ombudsman was also impacted by specific events, for example, particular reports of the office that became public and caused embarrassment. On one occasion in the mid 1980s, a newspaper headline which stated that the Ombudsman was seen as being the only opposition in the state had particularly disastrous consequences for the office for some years. This was because it led to a perception by the government that the Ombudsman was a political player and should be treated as such. It took many years for the government and the NSW public sector generally to realise that the Ombudsman was actually impartial and not a political player.

From my experience and from what I have seen of the role of the Ombudsman in other jurisdictions, a significant downside of a negative government perception of the Ombudsman is that there appears to be an almost direct correlation between the effectiveness of the office and the government's perception of the role being performed by the office. Effectiveness is at a minimum when an Ombudsman is viewed by the government of the day as the de facto opposition or a 'thorn in the side' of government. Effectiveness improves markedly when there is a realisation by government that the Ombudsman is actually there to help it do its job better by being a mechanism for alerting it to serious problems experienced by the public and suggesting sensible and practical ways to address those problems.

Thankfully, over the past 15 or so years fluctuations in the relationship appear to have become less severe. The turning point seems to have coincided with a marked change in the reaction of Ministers to Ombudsman reports that were critical of agencies or individuals within their portfolios.

This change occurred around 1995 when Ministers started routinely to embrace the Ombudsman's recommendations. At least initially, however, this did not necessarily extend to ensuring that the recommendations were actually implemented. In my opinion, this change was due to a realisation by Ministers that the previous approach, which often saw them rejecting the recommendations and attacking the Ombudsman, created controversy and bad press, while the new approach did not. Ministers may also have been sensitive to the likely reaction of the media and the public where they had to choose between believing an apolitical Ombudsman and a political Minister. The new approach may also have been influenced by an amendment to s 27 of the *Ombudsman Act 1974* in 1993, which provides that where the Ombudsman is not satisfied that sufficient steps have been taken in due time in consequence of a s 26 ('wrong conduct') report, the Ombudsman can make a report directly to the Parliament (not to the Minister as was previously the case). The responsible Minister is then obliged to make a statement to the relevant House within 12 sitting days after the report is made by the Ombudsman to the Presiding Officer of that House.[22] Because of the high rate of subsequent compliance with Ombudsman recommendations, this power has needed to be used on few occasions.

On the positive side, governments have also come to realise that successive Ombudsman have seen their role as trying to assist the public sector to do a better job, not just to criticise with the benefit of hindsight or to oppose government for the sake of it. The change in approach by Ministers can be seen as a sign of a maturing relationship between the Ombudsman and the executive government.

Public sector attitude to the Ombudsman

For a number of years after its establishment, the Ombudsman faced significant opposition from across the NSW public sector. This was particularly unfortunate given that, as the then Minister for Justice assured the Parliament in his second reading speech on the Ombudsman Bill in 1974,:

> ...the creation of this office is not to be seen as an attack on the integrity or efficiency of public officials. It recognises the complexity of administration and ... the varying qualities in decision-making as exist in all human beings.[23]

The attitude of the NSW public sector to the Ombudsman was a reflection of the wider public sector attitude to Ombudsmen across Australia. In an article entitled 'Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma', Rick Snell, then Senior Lecturer in Administrative Law, University of Tasmania,[24] referred to submissions made to a 1991 Senate Committee Review in the following terms:

> The tenor and tone of many of the agencies' submissions to the 1991 Senate Review highlighted that even after 15 years on the scene, the Ombudsman [in this case the Commonwealth Ombudsman], toothless or otherwise, was still regarded as an intruder.

An extreme manifestation of the negative attitude of some agencies to oversight by the Ombudsman was highlighted in the following article that appeared in The *Sun-Herald* of 13 February 1983:

> Police spying claims shock
>
> Allegations that NSW police have compiled dossiers on senior members of the State Ombudsman's Office have shocked political circles. According to the allegations, police put the Assistant Ombudsman, Miss Susan Armstrong, a prominent legal academic, under surveillance and compiled a list of meetings and activities she attended.
>
> The storm broke when Miss Armstrong was told by the Ombudsman, Mr George Masterman, QC, that Mr Rex Jackson, Corrective Services Minister, claimed to have a record of her activities compiled by police. Miss Armstrong was asked to provide Mr Masterman with a list of meetings and activities she had attended for the past year.
>
> Other members of the Ombudsman's staff have discovered that a senior policeman admitted to having investigated the private life of one of their colleagues.
>
> The allegations have been strongly denied by the Commissioner of Police, Mr Cec Abbott who said: 'Such a thing would be completely against our ethics. We have far more important things to do than following Miss Armstrong around'.

I can personally confirm the claim in the second last paragraph (which from my recollection occurred prior to the Ombudsman's reported conversation with Rex Jackson) as I was present when a senior officer of the then Police Internal Affairs Branch informed the Assistant Ombudsman that the police had both of us under surveillance.[25]

The context in which this conversation took place is illustrative of the earlier attitude of the NSW Police to oversight by the Ombudsman. In the first three to four years of the Ombudsman's police oversight role, all telephone contact with police in relation to that role was required to be with certain senior officers of the Police Internal Affairs Branch (PIAB), and all correspondence was directed to the Commissioner of Police. Prior to 1993, the staff of the Ombudsman responsible for oversighting the handling of police complaints had not even met those senior officers of the PIAB to whom they talked regularly over the phone. It was finally decided that this situation needed to change and a meeting occurred, which was followed by several more over the next 12 months. CHECK.[26]

In his *1988/89 Annual Report* the then NSW Ombudsman, George Masterman QC, noted that:

> Some public authorities seem to regard the Ombudsman's Office as aggressive and obstructive. It is understandable that the Ombudsman may come into conflict with some public administrators and their political masters, and that he will sometimes be regarded as a 'disturbing element' in the system.
>
> Traditionally, government departments have operated away from the public eye. To have their operations examined by outside investigators may, indeed, be disturbing to some officials and may even be perceived as an attack on the government of the day. Being questioned about administrative procedures and times and dates, and being exposed to close scrutiny, has at times caused disquiet within public authorities.[27]
>
> The fact that not all public authorities respond to this Office in a positive way stems partly from the past secretiveness of public administrators; officials have certainly not been accustomed to having their everyday files pored over by outside investigators. Some resent being asked to respond to

> enquiries by a fixed date and, in the few cases where it is necessary, to produce documents on demand. (This usually only happens when there has been no useful response to a series of requests.)[28]

The view in some quarters of the public sector that the Ombudsman was 'aggressive' may well have stemmed from the number of investigations undertaken by the then Ombudsman using his Royal Commission powers.[29] Another reason for the view may have been a number of 'raids' carried out in the 1980s. At that time there were occasions where an agency either failed or refused to provide documents required to be produced by formal notices issued by the Ombudsman. In those circumstances staff of the Ombudsman would attend the office of the CEO of the agency, without notice, and take immediate possession of the documents. Thankfully, the need for such unannounced visits is now very rare as it is now unheard of for an agency to refuse to comply with a formal notice issued by the office.

Another indicator of the negative attitude of the public sector to the Ombudsman in the early years was the inability of Ombudsman staff to gain employment in any other government agencies. For at least the first 10 to 15 years, employment in the Office of the Ombudsman had particularly negative consequences for public servant career prospects. This changed radically by the early 1990s to a situation where staff of the office are positively sought out by a number of agencies because of much improved perceptions about the quality of the work of the office and because the skills learned in this office are seen as being beneficial in other public sector contexts.

The changing attitude of the NSW public sector to the Ombudsman is also reflected in the legal actions instituted by public sector agencies or officials challenging the Ombudsman's jurisdiction. Such challenges started in the early 1980s and reached a peak in the first half of the 1990s, with only two Supreme Court challenges occurring in the last 16 years (one of which was discontinued).[30] A possible reason for the decline in legal challenges is that all challenges to the jurisdiction of the Ombudsman by public authorities and public officials have been unsuccessful. In fact, these cases generally resulted in strong statements by the courts in favour of a very broad interpretation of the role and powers of the Ombudsman. An example of this is the statement made by the then President of the NSW Court of Appeal, Kirby P, who said:

> Those powers, as the *Ombudsman Act 1974* reveals, are, as they ought to be, extremely wide. They are not powers which this Court should read down. They are beneficial provisions designed in the public interest for the important object of improving public administration and increasing its accountability, including to ordinary citizens...[31]

In another case, it was noted that the Ombudsman has '...a unique role to play in scrutinising the conduct of government agencies, reporting to Parliament on the results of investigations and proposing such remedial action as may be required'.[32]

By the mid 1990s there were other signs that a more positive attitude to the Ombudsman was developing in the NSW public sector. The results of a 1994 AGM McNair survey of NSW public authorities found that 90 per cent of respondents (most of whom were CEOs) saw the Ombudsman's office as a necessary part of public sector accountability.[33]

This more positive attitude is also reflected in a speech made in 1995 by the then Premier, the Hon RJ Carr, in which he stated that public officials should not fear scrutiny by the Ombudsman and pointed out the positive impacts that flow from such scrutiny. The speech, given at a function at Parliament House to mark the 20th anniversary of the creation of the Office of the Ombudsman in NSW, was reported in The *Sydney Morning Herald* in the following terms:

> The Premier, Bob Carr has called on his Ministers to ignore the self-interest of overly protective bureaucrats and open their departmental books to scrutiny by the NSW Ombudsman. In a major departure from the approach adopted by his predecessor, the new Premier said that Cabinet members had nothing to fear from the prying eyes of the State's watchdog organisation...

> 'Don't ever be drawn into antagonism towards the office by the defensiveness of public servants who have got worries about any outside supervisional monitoring.
>
> 'Those Ministers who have regarded the Ombudsman as an ally have always emerged better'.

The newspaper went on to note:

> Previous state leader John Fahey was in constant battle with Ms Moss's [the then Ombudsman] predecessor, David Landa – an animosity which manifested itself in the state budget last September when the office's funding was cut in real terms.

Since at least 1995, the role of the Ombudsman has enjoyed consistent public support from all Premiers.

Public sector attitude to customer service

Over the past 38 years there has been a fundamental change in the attitude of the public sector to customer service and the rights of the public.

In 1974, while good customer service may have been given 'lip service' the general attitude across the public sector was that the public should accept what they were given, that is, that they had no 'right' to good customer service. In 1974, the prevailing view across the public sector was that public servants were there to serve the government of the day (or council), not the public; good customer service was not seen as a priority or a 'right' which members of the public were entitled to expect. As Professor John Goldring[34] described it, the '...needs of the individual citizen received general lip service, and genuine attention in the hands of a proportion of officers' (by which I take him to have meant a 'small' proportion of officers!). Absent the humour, the portrait of the UK public service in '*Yes Minister*' was very close to the reality of the NSW public sector of the 1970s and early 1980s. This was confirmed by Gerry Gleeson, the Secretary of the NSW Premier's Department from 1977 to 1988, who in 2010 said: 'The "*Yes Minister*" television series was close to capturing the culture of the times'.[35]

March 1992 marked a turning point in the attitude of the public sector to customer service, when the government issued a 'Guarantee of Service' to the public in its statement, *NSW – Facing the World*. Soon after, the Premier issued a Memorandum to Ministers[36] asking them to communicate to their CEOs the importance the Premier attached to the government's customer service policy initiative, including the development and publication by service agencies of a guarantee or charter of service. This was followed by a further Premier's Memorandum[37] in 1993 which raised concerns about the failure of a number of direct service agencies to respond to the Premier's 1992 directive. The Premier specified that final drafts of 'Guarantees of Service' were to be forwarded to the Office of Public Management by May of that year. The Premier asked Ministers to ensure that the cultural change process in relation to customer service was being driven by a sufficiently senior person in their agencies to enable total organisational commitment.

In 1994, the Premier issued a further Memorandum[38] launching sector wide guarantees of service (GOS) and directing that new and refined GOS be prepared by agencies. This was in turn followed by another Memorandum[39] requiring departments and agencies to include in their GOS a commitment to process licence applications or grant approvals within stated maximum periods.

The next step in the government's program to improve customer service was a requirement that each agency undertake management strategies to bring about quality customer service. In this regard, the government published the *NSW Quality Customer Service Statement* to provide a framework to assist agencies to implement quality customer service.[40]

In 1995, the Premier issued a Memorandum on *Frontline Complaint Handling*[41] which acknowledged that complaint handling systems are an important element of quality customer service. Agencies were instructed to review their complaint handling systems to ensure that complaint handling and

resolution were given frontline emphasis. The Memorandum noted that the NSW Ombudsman and the Office on the Cost of Government were jointly publishing guidance developed by the Ombudsman on effective complaint management.[42] This was to be used by agencies as a resource to assist them in the review of their complaint handling systems. All agencies were required by the Premier to publish a revised *Guarantee of Service* which incorporated frontline complaint handling procedures.

In her first *Annual Report* in 1995, the then Ombudsman, Irene Moss, noted that over the past 20 years '...we have noticed a marked improvement in the way various public authorities respond to complaints'.[43] She also noted that 'public authorities are now generally implementing better internal complaint handling procedures to deal with citizen grievances'.[44]

The emphasis on customer service was again reinforced in regulations made in 2000 under the annual reporting legislation which obliged agencies to report on: 'If appropriate, the standard for providing services, together with comment on any variance from the standard or changes made to the standard'.

The growing support by consecutive NSW governments for improved customer service, guarantees of service and good complaint handling policies followed international public sector reform movements in the UK, USA and Canada. There was an element of reciprocity in that the Treasury Board of Canada went on to copy the *Guidelines for Effective Complaint Management* to support its own reforms in this area.

In his first *Annual Report* in 2001, the Ombudsman, Bruce Barbour, wrote:

> Over the last decade there have been several initiatives in the area of customer service. Each has been introduced or developed in isolation, with varying levels of government and public sector support. We have therefore suggested to the government that the elements of good customer service should be brought together into a comprehensive customer service framework. This would:
>
> demonstrate the government's commitment to good customer service,
>
> help the public sector to understand the various elements of good customer service and how they interrelate,
>
> encourage the public sector to provide a high standard of customer service,
>
> help members of the public to understand their rights and the standard of service to which they are entitled,
>
> assist the Ombudsman to promote good customer service throughout the public sector.
>
> We believe that the proposal would be best implemented by legislation, as this is the only way that full coverage of the public sector can be achieved.
>
> A 'Customer Service Act' could address a range of issues such as ethics, guarantees of service, internal complaint handling, reasons for certain decisions, internal review of decisions, information available to the public and protection from liability...

While no response was received from government to this proposal, the importance of good customer service is now recognised as vitally important by the executive and the public sector generally. A good example of the government's commitment to customer service is the establishment of a Customer Service Commissioner in NSW. The role of the Commissioner will be to work to ensure that government interactions with the citizens of NSW meet the needs of citizens. The Premier has stated that the purpose of this Commission will be, in part, to:

bring the interest of public service customers and the defence of public value and public interest right to the heart of decision-making

develop practical and sustainable ways to give Government's customers the value and results they deserve, and

ensure customer-centred services are a strategic priority for government, with Ministers to be the champions of the 'customer' within their portfolios.[45]

In a 2010 address, the current Premier '...identified five Customer Service Principles that provide a framework for implementing this new direction:

making customer focus a leadership issue

simplifying government

redesigning public service delivery to suit people, not bureaucracies

devolving authority to people, communities and frontline staff, and

measuring results and ensuring accountability.'[46]

In 2012, the NSW government intends to establish a new entity, *Service NSW*, as part of its *Simpler Government Service Plan*. The objective of this Plan is to simplify customer access to government services and to design services to meet customer needs.[47] It is planned that Service NSW will provide a single 24/7 government phone service, a customer friendly government web portal, one-stop-shops where multiple transactions are carried out for customers, and mobile applications that provide real-time information as customers need it.

Public sector attitude to openness and transparency

An example of the public sector's attitude to the public can be seen in the public sector's approach to openness and transparency, particularly in relation to access to government information. In my experience the idea that government held information 'in trust' for the people of NSW and that the public had a right to that information (other than where this would clearly not be in the public interest), was completely alien to the NSW public official of 1974. The prevailing view reflected the assertion in '*Yes Minister*'[48] that: 'You can be open – or you can have government.'

This appears to have been the universal view in public sectors across Australia. For example, the attitude to FOI in the Victorian context was recently described by former Victorian Premier, John Cain, in the following terms.[49]

> I always understood many people around government were, and remain, opposed to it. Many bureaucrats believe it is essential they keep control of public documents. In other words, they need to be able to manage the consultative mechanisms to ensure issues do not get out of hand, and that the overall direction of policymaking is maintained.
>
> So, many people inevitably see FOI as cutting across much of what is seen as holy writ. Senior bureaucrats regard all the information that government holds as being confidential. Knowledge is power, as they say. To them, FOI is capable of undermining the authority and integrity of the processes undertaken and ultimately the result they want to get.
>
> In the past, in the best Sir Humphrey tradition, many believed that government should be the custodian of all information that mattered, and should be miserly and obstructive in providing access to that information.

An explanation for the delay in the introduction of FOI into NSW, and a good indication as to the widespread attitude of the public sector to FOI at the time, can be found in a comment made by Gerry Gleeson, who was the then Secretary of the NSW Premier's Department from 1977-1988, in an interview in 2004:

> ...It was recommended in about 1977 that we have freedom of information laws in New South Wales and we did not introduce them until after I had left in 1988 so I've got to take some blame for that, in fact I do take responsibility for holding it back.[50]

He went on to say: 'Now that we have it, I think it is a good move and has helped public administration.'

In the 1970s and 1980s, when the view was put to public officials by Ombudsman staff that the public had a right to know (subject to certain essential limitations) and that government held information 'in trust' for the people of NSW, it was rejected out of hand. This widely-held view only started to change with the introduction of the *FOI Act* in 1989. However, change was slow as the new Act was met by an almost uniform approach by agencies and their legal advisors to read down its scope by the adoption of a very narrow and pedantic interpretation of its provisions.

The view that official information was held by government in trust for the people of NSW only achieved general acceptance across the NSW public sector (although still not universally) when it was effectively given statutory force in the *Government Information (Public Access) Act 2009*.[51] What assisted immeasurably in bringing about this change in attitude was a series of public statements made by the then Premier in support of greater openness. These statements were backed up by several Premier's Memoranda[52] and press releases, even before the new Act came into force. Staff in the Ombudsman's office noticed the change in approach almost immediately as FOI complaint numbers went down significantly, with the proportion of FOI complaints from third parties objecting to release increasing.

Public sector attitude to complaints and the people who make them

It is fair to say that in 1974 the public sector generally had a negative perception of complainants and their complaints. In the absence of strong evidence to the contrary in the complaint, the general starting position across the public sector (and particularly in the Police Force in relation to complaints about the conduct of police) was that the agency and its staff would have acted correctly and the complaint was without substance. In these circumstances it was not surprising that agencies made little or no information available to the public about how to make a complaint.

As part of a NSW Ombudsman project to foster better complaint handling, C*omplaint Handling In the Public Sector* (the CHIPS project), research undertaken by the NSW Ombudsman, in 1994 found that only 15 per cent of agencies had a complaint handling manual, only 20 per cent had a unit set up specifically for complaint handling and only 20 per cent had useful records or reporting systems.[53] Following the 1995 Premier's Memorandum on Frontline Complaint Handling, a similar survey conducted by the Ombudsman in 1999 found that approximately 50 per cent of agencies had a formal instruction manual for complaint procedures for their staff and approximately 90 per cent had specific complaint policies.[54]

It is of serious concern that when the survey was repeated in 2007, the Ombudsman found a notable reduction in the number of state government agencies with documented complaint handling systems. He also found a reduction in the number of state agencies that had clear and well understood procedures for handling complaints. For example, only approximately 80 per cent of state agency respondents said they had a documented complaint handling policy compared to approximately 90 per cent in 1999 and only 75 per cent said they had a clear and well understood procedure for people to make complaints compared to approximately 82 per cent in 1999. There was also a marked fall in the number of state agencies with customer service/guarantee of service policies (down from approximately 81 per cent in 1999 to 66 per cent). The reason for this decline is not immediately apparent.

In a report on the outcome of this survey the Ombudsman said:

> The decrease in the number of agencies with guarantees of service and documented complaint handling policies is concerning. However, the survey results also suggest there has been an increase in

> the sophistication of individual complaint handling systems. This is indicated in particular by the increase in the use of internal reviews and an increase in the level of information provided about external avenues of review, as well as the increased number of agencies which have performance standards for how they deal with complaints.[55]

Should the government proceed with its proposal to establish a Customer Service Commission, this is an issue that might best be addressed by the Ombudsman and that body as a joint project.

Improved resourcing and professionalism of agency complaint handling and investigations

In 1974 agencies that dealt with the public rarely had dedicated staff whose primary responsibility was complaint handling and there was no training available to learn how better to deal with complaints. Few agencies had access to suitably experienced investigators, and little or no attempt was made to ensure that people given complaint handling responsibilities had an appropriate mental attitude/personality/aptitude for the role. What this meant was that a low standard of complaint handling and investigative practice was the norm. This standard has been improving over time, assisted by detailed investigation guidelines published by the Ombudsman and the ICAC, improved practices and procedures brought about by the oversight of a number of agency investigations by one or other of those bodies, and a range of courses that have been introduced offering training for complaint handlers and investigators.

It is now common for agencies that deal with the public to have specific staff who are suitably trained and/or experienced in complaint handling and most agencies have reasonable access to suitably trained and/or experienced complaint handlers and investigators, either in-house or contractors.

Complaints are now more likely to be seen by the management of agencies as helpful in identifying problems in the management of the agency or customer service that need to be addressed.

Public sector attitude to whistleblowers

The public sector's attitude to whistleblowers in 1974 was very negative. They were universally seen either as disaffected trouble makers, 'rats under the house'[56] or people with mental health issues. Reprisal action against whistleblowers was the norm, including referring them to HealthQuest for an assessment of their mental health.

As an example, in 1971 Detective Sergeant Philip Arantz raised concerns that the NSW Police Force had been systematically under reporting crime statistics for many years. When those concerns were dismissed out of hand by his superiors, he gave the information to a journalist. He was almost immediately identified as the source of the leak and certified as mentally sick by the Police Medical Officer. Even though this diagnosis was found to be wrong when he was taken to a psychiatric hospital, and his version of the crime statistics was demonstrated to be correct, he was dismissed from the Police Force with no pension. It was not until 1985 that he received any compensation, and he was only finally cleared in 1989 by special legislation that allowed him notional reinstatement.

As recently as 1986 the then Ombudsman referred in his annual report to the harassment of police officers who made complaints about their colleagues because they were seen as 'betraying the Force'.[57] This negative attitude to whistleblowers is reflected in a reported statement made in the early 1990s by the former NSW Police Commissioner, Tony Lauer, that: 'Nobody in Australia much likes whistleblowers, particularly in an organisation with the police or the government.'[58]

In 1974 there were no policies and/or procedures in place in any NSW public sector agency for staff to make internal reports/disclosures. It was over 20 years before such policies/procedures became commonplace. The *Protected Disclosures Act 1994*, the first attempt at whistleblower legislation in NSW, was effectively forced on the government of the day as part of a deal (the *Charter of Reform*) in

return for the support of the three independent members of the NSW lower house who held the balance of power.

Unfortunately there were significant deficiencies in that Act that rendered it largely ineffective, for example' it imposed no obligations on agencies or management to facilitate the making of disclosures or to protect whistleblowers, and no official or agency was responsible to ensure the Act was implemented effectively. It was only in 2011, after a number of reviews of the Act by Parliamentary Committees, that significant amendments were made to what is now called the *Public Interest Disclosures Act 1974* to make it more effective.

Today, the vast majority of agencies have an internal reporting policy, which is now a statutory obligation.

Changes to policies, procedures and practice

Documentation of expected standards of conduct

In 1974 there were no documented (or for that matter even, agreed) standards of conduct for the public sector and it was virtually unheard of for an agency to have a code of conduct for its staff. The first well publicised attempt at establishing principles to guide standards of conduct in public life was the 1995 report of the *Nolan Committee* (the UK *Committee on Standards in Public Life*) that set out 'Seven Principles of Public Life', and called on all public bodies in the UK to draw up codes of conduct.

From 1982[59] the NSW Ombudsman advocated the adoption of a code of conduct for local councillors (drawing on the UK experience). Following discussion between the Ombudsman and the Local Government and Shires Associations,[60] a code was circulated to Councils by the Associations in 1984, and adopted by many.

To the best of my knowledge the first comprehensive code of conduct in NSW, comprising a set of principles and an associated guidance manual was the *NSW Local Government Code of Conduct and Manual*, published in 1990 by the Minister for Local Government. The development of this code and manual was a joint exercise of the Department of Local Government, the NSW Ombudsman and the ICAC, and the Code was endorsed by the Presidents of the Local Government and Shires Associations.

In 1991, the *NSW Public Sector Code of Conduct* (referred to earlier) was published; this was not in itself a code, but a guide for agencies on the drafting and implementation of their own codes.

The obligation on agencies to have a code of conduct was reinforced by regulations made under the annual reporting legislation passed in 2000. The regulations required departments and statutory bodies to include a copy of their code of conduct in their annual reports, and amendments to those codes were to be reported in subsequent years.[61] Today all agencies in NSW are obliged to have a code of conduct.

Over time, the Ombudsman and the ICAC have published comprehensive guidance on expected standards of conduct and ethics for public officials and public sector agencies.[62]

Apart from certain legislatively based codes of conduct for local government, the Senior Executive Service and MPs (each different to the others), there is currently also a 'model' code that provides guidance to agencies in the development of their own codes (again leading to the situation that many are different in key respects). There have been at least two unsuccessful attempts to develop a public sector wide code of conduct in NSW. The first attempt failed due to a lack of central agency commitment to the project. The second attempt also failed due to a dispute between the representatives of the three primary NSW integrity agencies (ie the Ombudsman, ICAC and Audit

Office) and the representatives of the Premier's Department as to: whether there should be a sector wide code or two separate (and different) codes – one for the SES and another for all other state public servants; and the relative importance of Parliament and whether the code should emphasise the central place of Parliament in our system of government. [63]

The passing of the *Public Sector Employment and Management Amendment (Ethics and Public Service Commission) Act 2011* established a Public Service Commission for NSW. The amendment Act also established a set of core values (integrity, trust, service and accountability) for the public sector and principles to guide their implementation. Hopefully these changes may lead to the development and promulgation of a single jurisdiction wide code of conduct in the near future, bringing NSW into line with other Australian jurisdictions.

Improved understanding and implementation of procedural fairness

While the nature and scope of the principles of procedural fairness were still being developed and clarified by the courts in the early 1970s, case studies in Ombudsman *Annual Reports* indicate that agencies regularly demonstrated little or no understanding of either the existence of, or the requirements for, what was then referred to as natural justice (now procedural fairness).[64]

While the courts have broadened the scope of the rules of procedural fairness over time, and their application has been interpreted quite flexibly, by the early 1980s the basic principles of procedural fairness had been clarified by the High Court.[65] These were further clarified by the Court in a series of decisions including: *South Australia v O'Shea* in 1987,[66] *Annetts v McCann* in 1990,[67] and *Ainsworth v Criminal Justice Commission* in 1991.[68]

Since 1995, the Ombudsman has been publishing guidelines that have provided detailed guidance for agencies on the requirements of procedural fairness,[69] and today there appears to be a widespread understanding and implementation of the relevant requirements across the public sector.

Greater willingness of public officials and agencies to apologise for mistakes

Worldwide there has been a growing recognition of the power of an appropriate apology to resolve complaints and disputes, fix damaged relationships, and restore trust.

Traditionally, the attitude of the NSW public sector, similar I suspect to public sectors everywhere, was a strong aversion to apologising. This was a reflection of the public sector's reluctance to accept responsibility for problems and mistakes. It was reinforced by the almost universal advice from lawyers advising public sector agencies and officials that any apology which included an admission of responsibility or fault would open the public official or public sector agency to legal liability.

It was recognised in the Ombudsman's office that a key impediment to agencies accepting responsibility and making a full apology was the involvement of lawyers, (who invariably gave advice from the perspective of protecting the agency and minimising risk). Consideration was therefore given as to how lawyers could be removed from that process.

In early 2001 the NSW Ombudsman suggested to the government that statutory protection be introduced for public officials making apologies to help resolve complaints. The government decided that not only was this a good idea, but that such protection should apply generally across the whole community.

A broad statutory protection for apologies was introduced through amendments to the *Civil Liability Act 2002* which came into operation in late 2002. NSW became the first jurisdiction in the common law world to legislate to give legal protection for a full apology (that is, an apology that includes an admission or acceptance of fault or responsibility) made by any member of the community.[70] Similar

protections have since been adopted in the Australian Capital Territory and Queensland in Australia and in eight Canadian provinces.[71]

As the NSW Ombudsman has written in his apology guidelines (*Apologies – a Practical Guide*):[72]

> An apology shows an agency taking moral, if not legal, responsibility for its actions and the research shows that many people will be satisfied with that. The introduction of the protections for apologies over time should therefore lead to a change in culture and have a very beneficial effect.

While the existence of the statutory protection for apologies is not widely known across the NSW community, key senior public officials are aware of it, and the perception of the office is that the propensity of public officials to give a full apology, in appropriate circumstances, has been improving since 2002.

Where to from here?

Is it time to recognise an 'Integrity Branch' of Government?[73]

Where are integrity bodies currently seen to sit in the structure of government?

The growth in the complexity of regulation, in the discretionary powers of public officials and in the size of Executive government, particularly in the 20th century, led to a growing realisation by the Executive and Legislative Branches that new structures and powers were needed to ensure the integrity of government.

The Executive Branch could no longer remain largely self regulating. In many Westminster systems a series of independent bodies has been established to join Auditors General in ensuring the integrity of government. This started with the appointment of Ombudsmen in most Westminster systems between 1975 and 2000. In various jurisdictions Ombudsmen were then joined by anti-corruption bodies, public sector standards or ethics commissioners, and information commissioners.

As various integrity type bodies were designed and intended to operate independently of Executive government, several did not think it appropriate that they be seen as part of the Executive Branch. In many Westminster systems Ombudsmen in particular have been seen as 'officers of the Parliament' – either explicitly through statute[74] or the *Constitution,*[75] or implicitly by the recognition of the close relationship between the Ombudsman and the Parliament.[76] This is seen as enhancing the ability of the Parliament to keep the executive accountable.

There has, however, been considerable confusion as to where integrity bodies fit within the structure of government – are they part of the Executive, the Legislature or the Judiciary? For example, are the Ombudsman, Auditor General and ICAC Commissioner and PIC Commissioner officers of the Executive or of the Legislature? Is the Judicial Commission part of the Executive or the Judiciary? Some bodies with integrity/watchdog roles are almost business units of government departments.

The 'officers of Parliament' approach might be difficult for integrity type bodies that have jurisdiction over the Parliament and/or MPs (eg in NSW the ICAC and Auditor General) and similarly if they have jurisdiction over the courts and/or judicial officers (for example, in NSW the ICAC, Auditor General and Judicial Commission).

This has led to concern about ways to ensure integrity bodies have sufficient guarantees of independence to ensure they are adequately able to perform their functions, which in turn has led to consideration of the place of integrity bodies in the structure of government.

Is the number of the 'branches' of government fixed and immutable?

In Westminster systems, the powers of government are commonly described as being separated into three branches: the Legislative branch (which makes laws); the Executive branch (which puts laws into operation); and the Judicial branch (which interprets the law).

When first established, most Ombudsmen were seen as part of the Executive Branch. This has changed over time in many jurisdictions, either explicitly or implicitly, to a perception that the Ombudsman is an Officer of the Parliament. In NSW this is now a generally accepted view held by both the Executive and the Legislature, particularly since the establishment of a Parliamentary Committee to oversight the work of the Ombudsman. Given that the Parliamentary Committee has a veto over the appointment of the Ombudsman, and that the Ombudsman can only be dismissed on the address of both houses of Parliament to the Governor, this reinforces the view that the Ombudsman is more an officer of the Legislature than of the Executive. In Victoria, this has been made explicit. The State's *Constitution* was amended to specify that the Ombudsman is an officer of the Parliament.

It has been argued by various commentators in recent years, for example Chief Justice Spigelman of the NSW Supreme Court,[77] the Commonwealth[78] and the Victorian[79] Ombudsman and others,[80] that consideration should be given to the concept that there is, or should be, another branch of government – the Integrity branch of government. Chief Justice Spigelman's idea is that an Integrity branch of government would incorporate the various agencies that have been established to ensure the integrity of government, possibly including such agencies as the Auditor General, Independent Director for the Public Prosecutions, Corruption Commissions, Ombudsmen, Statutory Integrity Commissioners and ad hoc commissions of inquiry. He went further to suggest that possibly such a branch of government could be seen as incorporating the integrity functions of the Judiciary.

What is meant by separation of powers?

What is being described by reference to various 'branches' of government is a way of thinking about the structure of government – referred to as the 'separation of powers'. This can also be described as a 'sharing of powers'. For example, law is made by each Branch; laws are interpreted by each Branch; rights are determined by each Branch; integrity issues are reviewed and/or enforced by each Branch.

Other overlap or sharing of powers are that: the funding of each branch is through the budget, which is prepared by the Executive and approved by the Parliament; the Executive appoints all judicial officers, who can only be dismissed on the address of both Houses of Parliament to the Governor/Governor-General; the Governor-General is the head of the Executive government and also is part of the Parliament (per ss 1 and 61 of the Commonwealth *Constitution*); in NSW the Chief Justice of the Supreme Court is the Lieutenant Governor and acts in that role when the Governor is absent; and Ministers of the Executive branch are all members of the Legislative Branch.

In practice, each Branch performs at least some functions of other Branches and is generally reliant on at least one other Branch to exercise its powers or to achieve its objectives or, conversely, has some form of veto over the actions of one or both of the other Branches. It could be argued that each branch performs a gatekeeper role in relation to one or both of the other Branches.

This does not mean that the idea of separation of powers is irrelevant. The purpose of the concept of separation of powers is the establishment of a system of checks and balances on the exercise of government power. The objective is to prevent the abuse or misuse of power by the Crown – in practice primarily by the Executive – with prevention of abuse or misuse of power by the Judiciary and the Legislature a secondary objective.

It is probably more accurate to describe the system as the sharing of powers (described by one commentator as 'separate institutions sharing powers').[81] However, within this system each branch of government has an overriding or paramount power in relation to its primary role: the Legislature is

the paramount body for the making law; the Judiciary is the paramount body in interpreting the law; and the Executive is the paramount body in the implementation of the law.

What are the central concepts of the separation of powers doctrine?

The central concepts of the separation of powers doctrine include, firstly, *independence*, which is ensured by such measures as: judges can only be dismissed on the address of the Parliament to the Governor (or equivalent); discussions in Parliament cannot be impugned or questioned in any other forum; what is said in court and in Parliament has absolute privilege in defamation; a member of Parliament cannot hold any office of profit under the Crown (other than Ministers); and during each term of Parliament (that is, between elections) members of Parliament may only be removed from office by the courts (or the Parliament), in circumstances prescribed by law (including the relevant Constitution).

The second central concept is *interdependence*, in the sense that each branch is reliant on at least one other branch to be able to exercise its powers or to achieve its objectives. Examples of this interdependence are that: the Executive can only exercise powers given to it by the Legislature (statutes) or the courts (common law); the Legislature can only achieve the objectives of its legislation through the Executive (and most Bills are introduced into the Parliament by the Executive); and the judgments of the Judiciary are enforced, in most cases, by the Executive.

In the Australian context, and in particular in NSW, we have separation of powers in the sense that the powers of each 'branch' are supposed to be implemented independently, not in the sense that each branch is completely separate from and independent of the others or that the core powers of each branch can only be exercised by that branch. The term 'separation of powers' refers to a doctrine or concept, not necessarily to any particular physical or legal structures.[82]

What should be the criteria for inclusion in an 'Integrity Branch' of government?

A number of integrity bodies or officers have been created in nearly all Westminster systems which meet the core requirements of each of the recognised branches of government, ie independence and interdependence. So, whether or not these officers or bodies are generally recognised as a fourth branch, they already meet the key criteria. Referring to them as an Integrity Branch of government would, therefore, merely be a recognition of this.

If an Integrity Branch of government were to be recognised, the criteria to determine which public bodies or offices form part of that Branch might include:

- a significant *integrity* related function, with a significant jurisdiction over at least one Branch of government;
- a need to be *independent* of Executive government, which could be demonstrated by measures such as:
  - the head of the body or the holder of the public office only being dismissible on the address of both Houses of Parliament to the Governor/Governor General;
  - a Parliamentary Committee having a veto over the appointment of the head of the body or the holder of the public office;
  - the body or public office not being subject to direction by a Minister or Executive government as to the exercise of its discretionary powers; and
  - the body or public office having a discretionary power to make a report to Parliament on any matter within its jurisdiction;
- a need to be *independent* of the Parliament and Judiciary if their role includes investigating MPs or judicial officers; and

interdependence with at least one other Branch (each Branch of government should be reliant on at least one other Branch of government in the achievement of its objectives), that is, the body or official does not have determinative or enforcement powers, and possibly not prosecutorial powers.

Other criteria that might be desirable could include, for example, a statutory Parliamentary Committee to oversight the body or public office.

What is required for the recognition of an 'Integrity Branch' of government?

In referring to an 'Integrity Branch' of government, this is not something that needs to be brought about by legislation or by the creation of some 'super' integrity body incorporating the integrity functions of existing bodies. After all, the other Branches of government were not 'established' as such by statute (although the Commonwealth and State Constitutions do embody, to one degree or another, the concept of separation of powers), and the Executive and Judicial Branches consist of numerous separate bodies.

A minimum requirement is a change in our perception of the structure of government, to recognise that there are several agencies that do not sit comfortably within one of the established Branches of government but have sufficient similarities in their role to be seen as a separate Branch in their own right.

The most significant impact of seeing the structure of government in terms of four branches would be to give some clarity to the requirements for a body to be considered part of the Integrity Branch.

Is it time to review the jurisdictions, structures and approaches of administrative review type bodies in NSW?

Review of existing bodies that have a role in the review of administrative conduct and decisions

The various bodies in NSW that have a role in the review of the administrative conduct and decisions of NSW public sector agencies and officials were established in a piecemeal fashion over the past 38 years. This has resulted in a numerous variations in their design, powers, responsibilities, approaches, and procedures.

From the perspective of the general public who might wish to complain about administrative conduct (including integrity issues) or apply for review of an administrative decision, the jurisdictions (which often overlap), roles and powers of these bodies must be bewildering.

The former Ombudsman, Irene Moss, drew attention to the issue of the proliferation of 'watchdogs' in 1996, in the following terms:

> I fully accept that certain problems are clearly best addressed by the establishment of separate specialised agencies, and I support the establishment of specific purpose watchdog/accountability bodies where this is clearly the best option.
>
> A major difficulty with the further proliferation of watchdog/accountability bodies arises out of the fact that jurisdictions are seldom clear cut and discreet. The overlap in jurisdiction that results can lead to problems of duplication, conflict, matters 'falling between the cracks', not to mention over complexity and confusion for the public.

Where the establishment of a new body is not essential for the effective implementation of the required watchdog/accountability role, the better approach would be to use existing bodies by, for example:

expanding jurisdiction (and funding) to cover the new role (for example, the proposed Privacy Commissioner); or

clarifying jurisdiction so as to redirect or better focus efforts (for example, the proposed Inspector General of the Department of Corrective Services); or

restructuring so that a body is better able to perform its intended role (for example, the new Department of Fair Trading).

Additional benefits of empowering, refocusing or restructuring existing bodies over the establishment of new bodies include:

reduced establishment costs due to the use of existing infrastructure; and

reduced operating costs due to economies of scale and maximising use of existing corporate service resources.[83]

Since 1996 few new bodies have been created in NSW, with most new oversight roles being given to existing bodies. The only new bodies created were the Privacy Commission in 1998, which was then combined with the new Information Commission in 2011, and the short lived Inspector General of Corrections.

Even though the rate of establishment of new bodies has diminished significantly, there is still a need for a comprehensive review of existing bodies to address the difficulties that arise in the current situation such as potential duplication, matters falling between the cracks, inconsistency in approaches to similar issues, and so on.

Review of legislation, structures and mechanisms that have a role in encouraging or enforcing ethical conduct

If there was to be a review of administrative review type bodies, it would make sense that it was undertaken in conjunction with a review of the overall adequacy of the legislation, structures and mechanisms in place in NSW for the encouragement and enforcement of integrity, good conduct and administrative practice.

To encourage and enforce good conduct and administrative practice, legislation, structures and mechanisms are required that are both proactive and reactive, and comprehensively address culture and behaviour, guidance and enforcement and process and outcome. The focus of any review should be to ensure that the following measures are adequately addressed:

standard setting – for example, offence provisions, legal obligations, legislated statements of values, jurisdiction wide codes of conduct, agency codes of conduct;

expectation setting – for example, establishing and maintaining an organisational culture that articulates the norms and values of the organisation and the standards of administrative practice and good conduct expected of staff;

prevention strategies – for example, removal of opportunities through fraud prevention measures, internal disclosure policies, disclosure of interests registers, gifts and benefits registers, merit based selection, records management legislation, internal and external audit, proper supervision, ethics training, etc;

enforcement mechanisms – for example offence provisions in law, whistleblowing legislation, internal disclosure policies, complaint policies, obligations to report corruption to the ICAC,

investigation capacity, FOI/GIPA, records management legislation and policies, merit reviews of administrative decisions; and

deterrence mechanisms – for example, watchdog bodies, internal and external audit, disciplinary action, prosecutions.[84]

Will access to administrative review complaint mechanisms be made more customer friendly?

Whether or not there is a review and rationalisation of administrative review type bodies, and particularly if this is not done, there is a clear need to improve accessibility to such review mechanisms for the general public.

The jurisdictions, roles, approaches and procedures of the various mechanisms available for the review of administrative conduct and decisions are overwhelmingly complex. It is unrealistic to expect members of the general public to know which agency they should approach for assistance. The fact that consistently around a fifth of people who approach the Ombudsman have come to the wrong place is testimony to this fact.

Although the Ombudsman gives those people advice about where they should take their concerns, it is to be expected that there will be a significant drop-out rate of people who decide it is all too difficult or too much work to keep going.

Apart from amalgamation of certain review bodies, the current complex situation could be simplified by, for example, the establishment of a single well publicised avenue for the making of complaints or raising of concerns. This would involve a single phone number, fax number, email address, website, mailbox, and, possibly, a single office where people could discuss their concerns in person. Behind this single portal would be a call centre to take inquiries and answer simpler questions immediately by phone, email or letter, and make arrangements to assess and triage all complaints and more complex requests for information to the appropriate agency, which would then respond to the complainant directly.[85]

In addition, there could be the co-location of administrative review bodies that have complaint handling functions (for example, in NSW the Ombudsman, Information Commissioner (including Privacy Commissioner), Anti Discrimination Board, and the Energy and Water Ombudsman NSW (EWON) – even though it is a non-government agency). Such bodies could share a switchboard, call centre, reception, interview rooms, etc[86] (such an arrangement is in place for administrative review bodies in Queensland).

As a minimum it is vital that the various bodies that have administrative review roles involving the handling of complaints have the legal authority to exchange information and directly refer complaints between themselves to ensure efficiency, consistency and minimise the number of matters that fall through the cracks. The bodies that should be authorised to share information and exchange complainants should include the: NSW Ombudsman, Information Commissioner/Privacy Commissioner, Audit Office, ICAC; PIC, Division of Local Government of the Department of Premier and Cabinet; Health Care Complaints Commissioner; Legal Services Commissioner, EWON and Anti-Discrimination Board (ADB).[87]

Consideration might also be given to the establishment of a committee of the heads of integrity agencies whose role would be to facilitate coordination of their activities in ways that do not impinge on the independence of each (this is an arrangement that has been in place for some time in Western Australia, it is called the Integrity Co-ordinating Group).

Where might the courts take procedural fairness?

There seems to be a move by the courts to expand the obligation on investigators to provide material to people who are the subject of investigation. No longer can it be said safely that (in the absence of a clear statutory authorisation) the hearing rule is satisfied if the person who is the subject of investigation is given the 'substance' of the grounds of proposed adverse comment.

While there are strong arguments in favour of an obligation to disclose '...adverse information that is credible, relevant and significant to the decision to be made',[88] there are also strong arguments against a broad interpretation of such an obligation.

In *Lohse v Arthur (No 3)* [2009] FCA 1118, the judge said that if '...adverse information that was credible, relevant and significant to the determination to be made by the decision-maker was placed before the decision-maker it would be unfair to deny a person ... an opportunity to deal with it where there was a real risk of prejudice, albeit subconscious, arising from the decision-maker's possession of the relevant information' (at 47) (emphasis added).

In my opinion, from a practical and operational perspective this is a problematic approach. Firstly, it appears to assume that the decision-maker is an outsider whose only knowledge of the circumstances or individuals involved is derived from information obtained as part of the investigation. In practice this is often not the case, for example, when investigations are undertaken by a line manager or other officer of the organisation who may have relevant experience or knowledge. Further, decisions made arising out of such investigations are generally made by line managers who would have some relevant knowledge, views or opinions. Should such an investigator or decision-maker be obliged to inform any person under investigation of all information in their possession, views, opinions, and prejudices, that may potentially have a bearing on the case?

Secondly, it appears to assume that there is little or no downside to the disclosure of information that was not explicitly taken into account by the decision-maker. Often information not explicitly taken into account might disclose sensitive personal information about third parties or the identity of confidential witnesses and/or whistleblowers, or information whose value as intelligence would be diminished if its existence became known. This disclosure will build an unnecessary delay into the process. Thirdly, it appears to assume that decision-makers are unable to assess rationally available facts and circumstances and give due weight to relevant considerations (and not vice versa). If this was the case, it casts doubt upon the competence and professionalism of investigators and administrative decision-makers generally.

In my view such an approach is in effect an attempt, possibly 'subconscious', to get around the accepted limitation on the appropriateness of a court scrutinising investigation reports for error or the weight given to particular matters. The approach advocated in *Lohse* does just that – it makes assumptions about the possibility of subconscious prejudice and in that way focuses on the weight given to particular matters.

In a recent case addressing the procedural fairness issue the NSW Supreme Court[89] referred to the need for the person who was the subject of an investigation '...to be given a fair account of the factual material uncovered in the investigation so that he could respond to the allegations' (at para 147). The court questioned the findings of the investigation on the basis that the investigator had '...failed to adequately inform [the subject of the investigation] of the substance of the adverse information he had obtained during the course of his enquiry...as the rules of procedural fairness required' (at para 174).

It appears to me that the court's main concern was grounded on the fact that the investigator's report did not disclose a serious failing in the conduct of the investigation and gave no reasons for the adverse findings he had made (paras 166, 173-174). From my reading of the judgment the issues appear to be, firstly, not about the content of the information in question but its credibility, and secondly about a failure to give reasons for adverse findings. It did not appear to me that the primary concern of the court was necessarily about whether all credible, relevant and significant

adverse information had been disclosed, but that the source of certain information, the weight given to it by the investigator and the explanations given for his findings, were questionable. These were issues going to the procedures used by and the approach of the investigator – to the investigator's competence and professionalism.

While the court noted that the investigator's '…report ought not to be over zealously scrutinised for error, or the weight [the investigator] gave particular matters which he considered…' (at para 160), this case illustrates that the courts are in fact prepared to consider the more serious examples of procedural incompetence or lack of professionalism by an investigator.

Far too often we see people the subject of investigation who have been denied fairness because of incompetence on the part of the investigator, for example failing to follow obvious lines of inquiry, (such as failing to interview clearly relevant parties, failing to obtain and consider obviously relevant documents), accepting one person's version of events over another's for no good reason, and failing to complete an investigation within a reasonable time frame (broadly interpreted).

Any expansion of the obligation to disclose information to the subject of an investigation as a way to address procedural competence and professionalism failings of an investigator is likely to create significant operational and practical problems for investigators and agencies. For example, it is not uncommon that certain information unearthed in an investigation is of important intelligence value provided it remains confidential, and may be relevant to any subsequent investigation into the conduct of a subject of the initial investigation, or a third party. It is also not uncommon that releasing all factual material uncovered in an investigation will result in breaches of the privacy of third parties, or the identity of confidential sources or whistleblowers.

Another relevant factor is that it appears to me that there has been a gradual but noticeable increase in the level of professionalism of investigators. The significant improvement that has occurred over time in the availability of training and guidance to assist people who conduct investigations, and in the expectations of public sector agencies as to the general quality of investigations undertaken by or for them, has not been reflected in changes to the principles of procedural fairness.

A procedural competence rule?

Instead of attempting to address investigator competence or professionalism issues in the context of one of the existing four rules of procedural fairness, maybe it is time for the courts to consider a possible fifth rule – a procedural 'competence' rule.

The implications of such a competence rule would be a need for investigators to be able to demonstrate that (within reason and subject to the particular circumstances of the individual case) they had made adequate inquiries to obtain relevant information and interview relevant witnesses and parties, and ensured that the information on which they based any report, findings or recommendations was factually correct.

Hopefully, investigators would also see the need to:

- specify in their draft and final reports the witnesses interviewed and the other sources of information that were explored (whether or not the information was relied upon in drawing conclusions); and
- establish that any applicable procedural preconditions had been met before finalising a report or making findings or recommendations.

Will the Ombudsman's complaint handling approach change to reflect changes in the capacity of agencies to deal with complaints?

The current position

Over the years the Ombudsman has moved from a focus on individual complaints to a role that includes the scrutiny and monitoring of agency complaint handling and investigation policies, procedures and practices.

The Ombudsman now has scrutiny and monitoring powers in relation to three of the Ombudsman's four primary areas of jurisdiction (the exception being the Ombudsman's general or 'traditional' administrative review role under the Ombudsman Act 1974).

It is now generally accepted across the public sector that agencies have primary responsibility for appropriately dealing with and responding to complaints about their policies, procedures or practices, or the conduct of their staff.

The new powers that would be required to facilitate this approach

To facilitate implementation of a scrutiny and monitoring approach in relation to the Ombudsman's administrative review role, the *Ombudsman Act 1974* could be amended to give the Ombudsman the power to:

- refer a matter back to the agency concerned requiring the matter to be dealt with appropriately (either through investigation, conciliation or other appropriate action), with the Ombudsman being able to either supervise or monitor the investigation, or scrutinise the adequacy and outcome of the agency investigation; and
- refer a matter to a third party with a supervisory/regulatory/complaint handling role in relation to the agency concerned, either for information or appropriate action, and report back as to the outcome.

To assist agencies and help ensure that they deal appropriately with complaints about administrative conduct, the *Ombudsman Act 1974* could be amended to authorise the Ombudsman to:

- audit/review/scrutinise the systems within an agency for dealing with/handling complaints from the public and disclosures by staff;
- inspect agency complaint handling records; and
- audit compliance with key legal obligations and requirements for good administrative practice.

Online interconnectedness

Over the past 15 years there has been a gradual move towards greater online connectedness between the Ombudsman's office and certain agencies. The process started with the NSW Police Service to facilitate the Ombudsman's oversight role in relation to complaints about police. This was followed by arrangements with certain agencies designed to facilitate the Ombudsman's complaint handling role, while minimising the impact of that role on the agencies concerned. There has also been a move to online reporting to the Ombudsman in relation to statutory reporting obligations in the areas of employment related child protection (by one agency so far) and public interest disclosures (by all agencies).

I see this trend continuing and expanding over time, particularly as more and more agencies go down the paperless office path and see the efficiency and information security benefits of electronic transfer of information to the Ombudsman.

Do the search powers of administrative review bodies need to be updated to address the changing circumstances of the electronic age?

To be an effective administrative review watchdog body, be it an integrity or regulatory agency, a prerequisite is effective powers to obtain information. An essential element of these powers is the ability to obtain entry to relevant premises, to conduct appropriate searches, to make copies of relevant information, and to be able to take possession of relevant materials.

An informal review of the search powers of state and federal administrative review bodies indicates that a number were designed with a paper-based environment in mind, and where attempts have been made to address issues that arise in the electronic age, these have been ad hoc and piecemeal.

Particularly where the powers of watchdog bodies were formulated 20 or more years ago, these search and seizure powers were not drafted to address such issues as electronic security systems, key card door accesses, log-on passwords, encryption, the 'paperless' office, and electronic recordkeeping and document management systems.

It is not enough that an Act might say that staff of a body within jurisdiction must assist people conducting a search. Would such a generalised provision be sufficient to convince them to breach their agency's policies about divulging passwords or allowing unauthorised access to the system. Would this be enough to convince a system administrator actively to assist an investigator to find information in the system that could be prejudicial to the person's employer or colleagues? Would this be enough to convince an agency's lawyers that the agency is obliged to comply?

What is needed are new search provisions designed for the electronic age: that provide the investigator with an effective 'key', 'roadmap' and 'guide' – a way in, a description of the system and its holdings, and assistance to find what the investigator is looking for.

Conclusions

The NSW Ombudsman, and the environment in which it operates, has changed radically since the *Ombudsman Act 1974* was passed by the NSW Parliament in 1974. The Ombudsman has gone from being a body:

- with jurisdiction limited to most (but certainly not all) of the public sector, to a body with jurisdiction across the whole public sector as well as several thousand private sector organisations.
- whose only role was complaint handling, to a body with a wide range of review functions including: administrative, compliance, legislative and death reviews;
- that was almost exclusively reactive and individual complaint driven, to a body that emphasises a pro-active approach with a focus on systemic issues; and
- that was in many respects effectively a business unit of the Premier's Department, to a separate administrative unit oversighted by a Parliamentary Committee.

The environment in which the Ombudsman operates has gone from having a single administrative review type body to a range of bodies, often with jurisdictions that overlap. The attitudes of the government of the day and the public sector to oversight in general and the Ombudsman in particular have improved immeasurably:

- the public sector now accepts that the public is entitled to expect high standards of customer services as a right, not a privilege;

complaints are now generally seen by the public sector to be an entirely valid source of feedback from the public, and a valuable management tool, which has also led to a much more positive attitude to complainants; and

the attitude of the NSW public officials to whistleblowers is also changing for the better, although there is still a long way to go.

The speed of change in the operating environment of the Ombudsman shows no sign of abating. I hope, however, that the very ad hoc and incremental changes that have characterised developments to date give way to some rationalisation and simplification. The starting point for this should be a comprehensive review of the existing environment. I also foresee a gradual recognition of an Integrity Branch of government and the resulting greater level of actual and perceived independence for 'integrity' bodies.

Finally, in the area of procedural fairness, I am hopeful that the courts will come to accept the need for a fifth rule – a procedural competence rule. I see this as a way that would avoid the need for further broadening of the obligations under the hearing rule which can have unintended detrimental consequences for the effectiveness of the complaint handling, corruption prevention and misconduct investigation activities of agencies.

Annexure A

Distinction between corruption fighting and complaint handling

There are good reasons for establishing corruption fighting bodies in each jurisdiction to complement the work of the Ombudsman. While adequate to deal with maladministration, the traditional powers and approaches of Ombudsman are not well suited to fighting serious systemic corruption.

In designing mechanisms to deal with issues relating to administrative conduct and decisions on the one hand and corrupt conduct on the other, it is important to recognise that there are a large number of significant differences between complaint handling and corruption fighting:

Complaint handling	Corruption fighting
Focus: • Public sector officials • Public sector agencies	• Public sector officials • Public sector agencies (particularly in relation to corruption prevention functions) • Private individuals
Subject matter: • Administrative conduct • Administrative decisions • Improving public administration • Dealing with complaints from the public • Customer service issues • Exposing misconduct	• Corrupt conduct • Exposing and dealing with corrupt conduct • Preventing corrupt conduct

Complaint handling	Corruption fighting
Relevance of intention: • Intention not required for unreasonable conduct or 'maladministration'	• Intention required for corrupt conduct (which would include actual or constructive knowledge that the conduct was wrong and conduct arising out of clear moral failings)
Sources of information: • Complaints (primarily)	• Intelligence from various sources (including complaints)
Accessibility to the public: • Regular communication with complainants, including details of final decisions/reports • Complainants have certain legal rights to be informed of action taken • Relative openness (ie communication with people the subject of investigation, the relevant agency and complainants, as and where appropriate) • Prior notification of persons or bodies the subject of investigation (ie procedural fairness)	• Any complaints received are primarily a source of information. Unlikely to be continuing contact with complainants • Any complainants, persons the subject of investigation and relevant agencies would have no automatic right to information (other than whistleblowers who have certain statutory rights to certain information) • Strict secrecy • No prior notification of persons or bodies the subject of investigation
Investigative approach: • Generally relatively open investigation techniques and informal procedures • Hearings in private using an inquisitorial approach	• Generally more covert investigation techniques and formal hearing procedures • Hearings in public using both adversarial and inquisitorial approaches
Volumes of work: • Large numbers of mainly small scale investigations	• Small numbers of large scale investigations
Procedural fairness: • Must inform the subjects of an investigation at the commencement of an investigation • Must inform people of proposed adverse comment and give them a chance to respond	• Need not inform the subjects of an investigation until the investigation is largely completed
Outcome where allegation sustained: • Rectification, management action, changes to policies or the law, or other resolution	• Prosecution, disciplinary action or dismissal. At times, organisational changes are recommended • Management action to address problems/improve systems
Resource implications: • Relatively inexpensive	• Resource intensive

The differences between complaint handling and corruption fighting are likely to give rise to conflict between the two roles if both were performed by the same agency or if either agency was subject to the control and direction of the other.

As a matter of principle, the avoidance of such conflict makes separation of the roles of fundamental importance. Additionally, as a practical matter, if the two roles were combined in one organisation it is likely that complaint handling (reactive, demand driven/complaint-driven and high volume) will be given priority in resource allocation primarily over corruption fighting (proactive, discretionary, intelligence-based and low volume).

Annexure B

Timeline for establishment of bodies with administrative review type roles, and conferring of jurisdictions

1975	Ombudsman Office
1976	Privacy Committee
	Ombudsman jurisdiction re local councils
Election _____	
1977	
1978	
1979	Ombudsman jurisdiction re police [a limited oversight role]
1980	
1981	
1982	
1983	
1984	Ombudsman jurisdiction to reinvestigate complaints about Police [using only seconded officers]
1985	
1986	Judicial Commission
	Ombudsman jurisdiction re elected members and staff of councils
1987	Ombudsman jurisdiction re inspection of records of authorities that intercept telecommunications
1988	
Election _____	
1989	ICAC
	Ombudsman & District Court jurisdictions re complaints under the *FOI Act*
1990	
1991	
1992	
1993	Community Services Commission [amalgamated into the Ombudsman in 2002]
	Ombudsman jurisdiction to directly investigate or monitor complaints against police
1994	Investigating authorities designated under the *Protected Disclosures Act 1994*

Election _____

1995	Ombudsman jurisdiction re witness protection appeals
1996	Police Integrity Commission [arising out of the Police Royal Commission]
1997	Administrative Decisions Tribunal
	Ombudsman jurisdiction re employment related child protection allegations [arising out of the Police Royal Commission]
	Ombudsman jurisdiction re controlled operations
1998	Privacy Commissioner [combined with the Information Commissioner in 2011]
1999	Inspector General of Corrections [position expired in 2003]
2000	
2001	
2002	Ombudsman jurisdiction re community services
	Ombudsman jurisdiction re reviewing the causes and patterns of deaths of certain children
	Ombudsman jurisdiction re reviewing the causes and patterns of deaths of disabled people in care
2003	
2004	
2005	
2006	
2007	
2008	Police Integrity Commission jurisdiction over NSW Crime Commission
2009	Information Commissioner [arising out of the Ombudsman's review of the FOI Act]
2010	

Election _____

2011	Public Service Commission
2012	

Endnotes

1 The Hon John Maddison – the Ombudsman.
2 The Hon Jeff Shaw – the ADT and Privacy Commissioner.
3 The Hon Nick Greiner – the ICAC.
4 Hansard, Legislative Assembly, 27 August 1974 (at p.667).
5 '*Towards an Understanding of a Constitutional Might: Four Snapshots of the Ombudsman Enigma*', by Rick Snell, in '*Sunrise or Sunset? Administrative Law in the New Millennium*', (Papers presented at the 2000 National Administrative Law Forum, edited by Chris Finn).
6 There are currently 31 Official Community Visitors (who are independent statutory appointees) and approximately 1550 visitable services across NSW.
7 Roles initially introduced into review legislation arising out of negotiations with the cross-benches.
8 A role incorporated into the Act through amendments introduced by the Opposition in the Legislative Council on 12 December 1995.
9 Deputy Ombudsman are appointed by the Ombudsman and may only be removed from office by the Ombudsman or by the Governor on the address of both Houses of Parliament – s.8(2) and s.6(5), *Ombudsman Act*.
10 See Endnote No. 5.
11 The guidelines include: *Ombudsman's Administrative Good Conduct*, and *Principles of Administrative Good Conduct*, January 1997; *The Complaint Handlers Toolkit* (2nd edition); *Public Sector Agencies Fact Sheets A – Z*; *Enforcement Guidelines for Councils*; *Practice Note No. 9 – Complaints Handling in Councils* (a joint publication with the Division of Local Government of the Department of Premier and Cabinet); *Better Service and Communication – Guidelines for Local Government*; *Apologies – a Practical Guide* (2nd edition); *Managing Unreasonable Complaint Conduct Practice Manual* (2nd edition); *Complaint Handling at Universities: Best Practice Guidelines*; *Protected Disclosure Guidelines* (now superseded); *Public Interest*

Disclosure Guidelines; *Options for Redress*; *Investigating Complaints – A Manual for Investigators*; *Guidelines for Dealing With Youth Complaints*.

12 Since 2011 the office has delivered close to 200 workshops to over 5,000 participants.

13 Under s.27, *Ombudsman Act 1974*.

14 Under s.31, *Ombudsman Act 1974*.

15 See for example the comment by Enderby J in *Ainsworth v The Ombudsman* (1988) 17 NSWLR 276: '*An Ombudsman is a creature of Parliament*', the comment by Whealy J in *K v NSW Ombudsman and Anor* [2000] NSWSC 771: '*The Ombudsman is an independent officer of the New South Wales Parliament...*' (at para 25), and the then-Premier's statement in the Legislative Assembly on 24 May 1990: '*It would be clearly undesirable if the Ombudsman were accountable to me as Premier or to the Executive Government*'.

16 Under s.6A, *Ombudsman Act 1974*.

17 A number of these mechanisms provide review options for complaints about both public and private sector individuals and organisations, eg the HCCC, LSC and the Ombudsman in his community services and employment related child protection jurisdictions.

18 *Ombudsman Act 1974*; *Ombudsman (Amendment) Act 1976* [brought local government within jurisdiction of Ombudsman]; *Judicial Officers Act 1986* [created the Judicial Commission]; ICAC Act 1989 [created the ICAC]; *Local Government Act 1990* [particularly Chapters 13 & 14 – replaced the Local Government Act 1919]; *Community Services (Complaints, Reviews and Monitoring) Act 1993* [created the Community Services Commission (CSC), which was amalgamated into the Ombudsman in 2002]; *Health Care Complaints Act 1993* [created the Health Care Complaints Commission (HCCC)]; *Public Interest Disclosures Act 1994* [originally titled the *Protected Disclosures Act 1994*]; *Police Integrity Commission Act 1996* [created the Police Integrity Commission]; *Administrative Decisions Tribunal Act 1997* [created the Administrative Decisions Tribunal (ADT)]; *Ombudsman Amendment (Child Protection and Community Services) Act 1998* [inserted Part 3A 'Child Protection' into the Ombudsman Act]; *Local Government Amendment (Ombudsman Recommendations) Act 1998*; *Police Service Amendment (Complaints and Management Reform) Act 1998* [inserted Part 8A, 'Complaints about the conduct of Police Officers', into the *Police Act 1990*]; *Privacy and Personal Information Protection Act 1998* [created the Privacy Commissioner and replaced the *Privacy Committee Act 1975*]; *Health Records and Information Privacy Act 2002*; *Community Services Legislation Amendment Act 2002* [amalgamated the CSD into the Ombudsman]; *Civil Liability Amendment (Personal Responsibility) Act 2002* [inserted Part 10 'Apologies', into the *Civil Liability Act 2002*]; *Government Information (Public Access) Act 2009 [replaced the FOI Act 1989]; Government Information (Information Commissioner) Act 2009* [created the Information Commissioner]; *Protected Disclosures Amendment (Public Interest Disclosures) Act 2010* [made major amendments to the *Protected Disclosures Act 1994*]; *Public Sector Employment and Management (Ethics and Public Service Commissioner) Act 2011* [created the Public Service Commissioner and set out the core values of the public sector].

19 In 1987 legislative amendments enabled the re-investigation of complaints by civilian investigators of the Ombudsman. In 1989 the Ombudsman Act and Police Regulation (Allegations of Misconduct) Act were amended to enable the Ombudsman to delegate his Royal Commission powers and reporting powers to Deputy and Assistant Ombudsman.

20 With the passing of the *Police Service (Complaints, Discipline & Appeals) Amendment Act 1993*.

21 See for example the 1985/86 Annual Report of the Ombudsman at pp.5-9 & 30-32.

22 Amendment – 1993 No. 37, Sch 1(5).

23 Second reading speech by Mr Maddison, Minister for Justice in the Legislative Assembly on 29 August 2974 (at p.774).

24 Published in: *Administrative Law for the New Millennium*, (Papers presented at the 2000 National Administrative Law Forum, AIAL).

25 At the time I was the Senior Investigations Officer (Police) of the Ombudsman.

26 This situation is very different today. Officers of the Ombudsman now have direct dealings with police at all levels of the Force in the performance of their oversight role.

27 Annual Report, 1988/89, pp 41-42.

28 Annual Report, 1988/89, pp 43-44.

29 Due to improved levels of cooperation by public officials, and the creation of the ICAC in 1989, there has been far less need to resort to the use of those powers, although they are still used several times each year.

30 See for example: *Boyd v The Ombudsman* [1981] 2 NSWLR 308; *Moroney v The Ombudsman* [1982] 2 NSWLR 591; *The Ombudsman v Moroney* [1983] 1 NSWLR 317; *Commissioner of Police v Deputy Ombudsman* (1990) unreported; *The Commissioner of Police v The Ombudsman* (1994) unreported, 30044/94; *Botany Council v The Ombudsman* (1995) unreported, 30071/94; *Botany Council v The Ombudsman* (1995) 37 NSWLR 357; *Kuring-gai Council v The Ombudsman* (1995) unreported, 30035/94; *K v NSW Ombudsman & Anor* [2000] NSWSC 771; *Ingleson v The Ombudsman* (discontinued March 2007).

31 Per Kirby P (with Sheller and Powell JJA agreeing) in *Botany Council v Ombudsman (1995)* 37 NSWLR 359.

32 Per Sackville AJ in *The Commissioner of Police v The Ombudsman (1994)*, unreported decision of the Supreme Court, 9 September 1994.

33 NSW Ombudsman, Annual Report 1994-95, pages 147-148.

34 Professor and Head of School of Law, Macquarie University, in an article entitled 'The Ombudsman and the New Administrative Law', *Canberra Bulletin of Public Administration*, Summer 1985, at p.288.
35 Gerry Gleeson, 'If I were Premier of NSW in 2011', The 2010 Spann Oration, *Public Administration Today*, January-March 2011.
36 M 1992-31 *Customer Service in the Public Sector*.
37 M 1993-11 *Customer Service in the Public Sector – Finalisation of Guarantees of Service*.
38 M 1994-03 *Development of Guarantee of Service by Agencies for 1994*.
39 M 1994-44 *Guarantee of Prompt Service*.
40 M 1994-45 *Quality Customer Service*'; & C 1995-25 '*Implementation of Total Quality*.
41 M 1995-29 *Frontline Complaint Handling*.
42 *Guidelines for Effective Complaint Management*, 1995, since revised and republished in 2000 as *Effective Complaint Handling*.
43 Annual Report, 1994/95, p.50.
44 Annual Report, 1994/95, p.3.
45 Address by the then Opposition Leader to CEDA in November 2010, entitled: 'Starting the Change – Transforming Customer Services in NSW'.
46 Source: Speech to ANZOG Conference on 28 July 2011 by Mr Chris Eccles, Director General, Department of Premier and Cabinet, entitled 'Restoring Trust in Government'.
47 The objectives of the *Simpler Government Service Plan* are set out within goals 30, 31 and 32 of the *State Plan NSW 2012*.
48 '*Yes Minister*', BBC Television series (program entitled '*Open Government*').
49 John Cain, 'Public's Right to Know Falls Victim to Political Infighting', *The Age*, 11 February 2012.
50 'In-Profile – Private Values in Public – Good Business Talks to Gerry Gleeson, Recently Retired Chief of the Sydney Foreshore Authority', Edmund Rice Business Ethics Initiative – *Good Business Newsletter* No. 10, 2004.
51 This Act implemented the majority of the recommendations made by the Ombudsman in his 2009 report to Parliament, *Opening up Government,* following his review of the *FOI Act*.
52 See: Memorandum No: 2009-18: *Agency Responsibility for FOI Determinations*; and Memorandum No. 2008-19: *Proactive Release of Information by Government Agencies*.
53 Annual Report 1991/92, at p.15.
54 Annual Report 1998/99, at p.58.
55 *Complaint Handling Systems Survey 2007, Report – Departments and Authorities*, NSW Ombudsman, Dec 2007.
56 Annual Report 1995/96, at p.142.
57 The then Ombudsman also noted that police complaining about police was a recent development that had only commenced the year before: Annual Report, 1985/86, p.178.
58 Interestingly the number of internal reports in the NSW Police Service (ie whistleblowers) went from less than 200 per year in the late 1980s to consistently over 1,000 per year since 2004-05 – the figure in 2010-11 being 1,208.
59 Annual Reports:1982-83, p.62-63; 1983-84, p.72-73; 1984-85, p.74; 1988-89, p.145, p.150; 1989-90, p.75-76.
60 Annual Report: 1982-83, p.62-63.
61 *Annual Reports (Departments) Regulation 2000*, cl.5 and *Annual Reports (Statutory Bodies) Regulation 2000*, cl.8. This obligation was not continued in the revised regulations made in 2010.
62 For example, the Ombudsman's *Good Conduct and Administrative Practice Guidelines* first published in 1995 and the ICAC's *A Practical Guide to Corruption Prevention* of June 1995, *Ethics: The Key to Good Management* of December 1998 and *Code of Conduct – The Next Stage* of March 2002.
63 Paper delivered by Deputy Ombudsman, Chris Wheeler, to the Ethical Excellence Conference in Canberra on 19 & 20 February 2009. Copy downloadable at: http://www.ombo.nsw.gov.au/publication/PDF/speeches/Ethics%20-%20Ethical%20Excellence%20Conference%20_19%20&%2020%20February%202009_.pdf
64 See for example *In re Pergamon Press Ltd* [1971] 1Ch 388 and *Stollery v The Greyhound Racing Control Board* [1972] HCA 53; (1972) 128 CLR 509.
65 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *Kioa v West* (1985) 195 CLR 550.
66 *South Australia v O'Shea* (1987) 163 CLR 378.
67 *Annetts v McCann* (1990) 170 CLR 596.
68 *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564.
69 For example: *Good Conduct and Administrative Practice: Guidelines for Public Authorities and Officials*, 1995; *Ombudsman's Administrative Good Conduct Guidelines*, 1997; *Investigation of Complaints – A Manual for Investigators*, 2000; Public Sector Fact Sheet No. 14, *Natural Justice/Procedural Fairness*, 2005; Information Sheet: *Reporting on Progress and Results of Investigations*, February 2012; PID Guideline C1: *People the Subject of a Report*; and PID Guideline C5: *Investigating Public Interest Disclosures*.
70 Four states in the USA had previously provided certain protections for apologies, but these were limited to mere expressions of sorrow (ie that did not include any acceptance or admission of fault or responsibility).

71 Including British Columbia, Manitoba, Saskatchewan, Alberta, Nova Scotia, Ontario, Newfoundland and Nunavut.
72 *Apologies – a Practical Guide,* first printed in 2007, with the second edition published in March 2009.
73 This section of the paper is based on a paper presented by me to the Ethical Leadership & Governance in the Public Sector Forum in Canberra on 20 June 2010.
74 Eg s.11(2), *Ombudsman Act 2001* (Queensland).
75 Eg s.94E, *Constitution Act 1974* (Victoria).
76 Eg the formal title of the WA Ombudsman is 'Parliamentary Commissioner for Administrative Investigations'.
77 *Judicial Review and the Integrity Branch of Government*, address by the Hon JJ Spigelman AC, Chief Justice of NSW to the World Jurist Association Congress, Shanghai, 8 September 2004; JJ Spigelman, 'The Integrity Branch of Government', *Quadrant*, July 2004, Vol. XLVIII Number 7-8.
78 Commonwealth Ombudsman Annual Report, 2006-07 (at Ch 8); John McMillan, *Future Directors – The Ombudsman*, Address to AIAL National Administrative Law Forum, Canberra, July 2005.
79 Victorian Ombudsman Annual Report, 2005 (at p 8); Transcript of Public Accounts and Estimates Committee Inquiry into a Legislative Framework for Victorian Statutory Officers of Parliament, 8 February 2006.
80 Eg Stuhmcke and Tran, 'The Commonwealth Ombudsman – An Integrity Branch of Government', *Alternative Law Journal*, Vol 32:4 December 2007 (at p.233).
81 Richard E Neustadt, *Presidential Power*, (Signet, New York, 1964) p.42.
82 Note, in contrast, the Commonwealth constitution rigidly applies the separation of powers concept, eg:
*'1 The **legislative power** of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives.'*
*'61 The **executive power** of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.'*
*'The **judicial power** of the Commonwealth shall be vested in … the High Court of Australia…'* (emphasis added)
83 Annual Report, 1995/96, p.9.
84 Discussed in more detail in *Ethics in the Public Sector – Clearly Important, but …*, a paper delivered by the author at the Ethical Excellence Conference in Sydney, 19-20 February 2009. The paper can be downloaded at: http://www.ombo.nsw.gov.au/publication/PDF/speeches/Ethics%20%20Ethical%20Excellence%20Conference%20_19%20&%2020%20February%202009.pdf.
85 This was attempted in NSW in the 1990s. Even though funding was approved by the government, agreement had been reached by all participating bodies, and an enabling Bill prepared for submission to Parliament, the project did not go forward because Treasury informed the Ombudsman that the capital funding that had been approved could not actually be spent as it was above the Ombudsman's capital spending limit!
86 This was attempted in NSW in the 1990s. Even though all relevant agencies had agreed to co-locate, and suitable premises had been found, the project did not go forward as the then Government Accommodation Management Committee refused to endorse it.
87 The current arrangements for the sharing of information between these organisations are inconsistent and ad hoc. Further, while Part 6 of the *Ombudsman Act* attempts to address this issue for a number of those agencies, it is subject to certain limitations that in practice do not appear to serve any good purpose (eg s.43(6) of the *Ombudsman Act*).
88 *Kioa v West* (1985) 159 CLR 550 at 629 per Brennan J. and *Lohse v Arthur (No. 3)* [2009] FCA 1118 (at p. 8) per Graham J.
89 Schmidt J in *Nichols v Singleton Council* [2011] NSWSC 1517.