

'EACH FOR THEMSELVES' OR 'ONE FOR ALL'? THE CHANGING EMPHASIS OF THE COMMONWEALTH OMBUDSMAN

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INTRODUCTION

In the Australian liberal democratic tradition, the expectation that government be accountable to the people is a product of the electorate's grant of power to government. As government becomes more complex due to the expansion of human activity it regulates there is increased reliance upon official means of facilitating democratic accountability. Indicative of this development is the 20th century supplementation of traditional Westminster¹ mechanisms of accountability with administrative law institutions such as the Commonwealth Ombudsman. These supplementary review processes and institutions of 'new administrative law' aim to render the application of discretionary decision-making by government administrators transparent and fair to the individual citizen. This was the primary vision of the Kerr and Bland Committees which framed the need for administrative review agencies against the background of the protection and promotion of individual citizen rights.²

Three decades later and administrative law agencies such as the Commonwealth Ombudsman continue to encourage good administration and therefore to act for, and

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1 It has been suggested that the Westminster system is now without 'clarity or credence': Elizabeth Harman, 'The Impact of Public Sector Reforms on Australian Government' in Patrick Weller, John Forster and Glyn Davis (eds), *Reforming the Public Service* (1993) 16, 33. Indeed as Mason J states, 'the doctrine of ministerial responsibility is not in itself an adequate safeguard for the citizen whose rights are affected. This is now generally accepted and its acceptance underlies the comprehensive system of judicial review of administrative action which now prevails in Australia': *The Queen v Toohey; Ex parte Northern Land Council* (1980-81) 151 CLR 170, 222.

2 Commonwealth, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971); Commonwealth, *Interim Report of the Committee on Administrative Discretions*, Parl Paper No 53 (1973); Commonwealth, *Final Report of the Committee on Administrative Discretions*, Parl Paper No 316 (1973) (see for specific examples the *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971) [11], [354], [363]).

on behalf of, the public.³ While this objective of improving public administration has remained constant since the Office commenced operations in 1977, a close examination of the history of the Commonwealth Ombudsman reveals operational changes. One such critical change is that the individual complaint-handling operation of the Commonwealth Ombudsman has dramatically altered. While current *Annual Reports* of the Commonwealth Ombudsman confirm that the 'primary function of the Ombudsman's office is to handle complaints and enquiries from members of the public about government administrative action',⁴ the data used in this article shows that the Commonwealth Ombudsman has increased its use of discretion to now refer large numbers of individual complainants away from its own complaint-handling services. At first blush, such usage of discretion suggest that when evaluated against its original objectives of protecting the individual's rights of review of discretionary decision-making, the Commonwealth Ombudsman is failing the persons for which it was established.

This article argues that administrative review agencies should not remain static while the system of government and administration changes. Today the Commonwealth Ombudsman has three clear functions – individual complaint-handling, systemic investigation and audit – reflecting a change in emphasis towards what may be broadly termed the quality control of government administration.⁵ An increase in the use of own motion and audit powers to improve the quality and efficiency of administrative decision-making need not conflict with the objective of the Commonwealth Ombudsman to provide an individual citizen with rights to review. Administrative law which regulates the relationship between the governors and the governed does not just take place in courts, Parliament, Cabinet, tribunals and in ombudsmen offices – discretionary decisions applying to individual citizens are made primarily by administrators. Indeed, the history of the 'new administrative law' includes an acknowledgement that administrative review need not be only reactive and critical of processes and discretionary decision-making, but that it can, and should, be proactive and constructive, and act to improve decision-making by individual government administrators.

More difficult to evaluate is the impact which promoting improvements to overall administrative decision-making and increasing audit functions will have upon the role the Ombudsman plays in protecting individual review rights and therefore upon notions of democratic accountability. Is it optimal to achieve accountability through

³ See *Hot Holdings v Creasy* (2002) 210 CLR 438, 467 (Kirby J), citing Paul Finn's three forms of accountability as follows:

One form is accountability to official superiors and peers. This is the preferred, but most diluted, method of accountability favoured in Westminster systems. Another is accountability to agencies such as the Auditor-General, the Ombudsman and to Parliament. These agencies act, or should act, for and on behalf of the public. The final form of accountability is to members of the public directly, either as individuals (as through administrative law mechanisms) or as a community (as through elections).

⁴ Commonwealth Ombudsman, *Annual Report* (2008–09) 2.

⁵ This general movement has been noted by peak bodies such as the Administrative Review Council. See Administrative Review Council, Commonwealth Parliament, *Better Decisions: Review of Commonwealth Merits Review Tribunals Report No 39* (1995).

correcting defective decisions which concern the individual citizen?⁶ Or is it best to increase administrative efficiency and justice through improving the system of overall decision-making and thus assuring the public that the rule of law is safeguarded?⁷ The wider issue for the system of administrative review is whether such questions expose inherent tension in the aim of promoting good government administration for the benefit of the public. While the original 1970s architects of the 'new administrative law' were cognizant of such issues⁸ the question as to whether improvements would flow on to the wider system of administrative review, and the related ramifications for efficiency of the administrative process, were viewed as peripheral to the objective of safeguarding the individual.

In conclusion, this article recommends ongoing reflection and evaluation of the changing emphasis of the Commonwealth Ombudsman. The future challenge is the practical difficulty of how an accountability institution such as the Commonwealth Ombudsman may preserve equilibrium between the goals of protecting individual rights and improving the overall quality of the administrative system.⁹ It is suggested that it is critical that the Office retain its current primary focus upon the individual complainant. To travel too far down the path of quality improvement may mean that the Office will fail, or be perceived to fail, to protect the individual complainant and thus remove an important avenue for individual citizens to hold government democratically accountable.

THE COMMONWEALTH OMBUDSMAN AND THE INDIVIDUAL CITIZEN

The architects of the 'new administrative law' focused upon providing redress to the individual citizen. The mould for the approach of the committees was the common law conception of administrative review, with discussion confined largely to the institutions which should supplement courts in their role of reviewing administrative decisions affecting individuals. Three committees considered the introduction of the 'new administrative law': The Commonwealth Administrative Review Committee ('the Kerr Committee') which in October 1971 recommended a new system of administrative law;¹⁰ the second committee, the Committee on Administrative Discretions ('the Bland Committee') issued two separate reports in January 1973 and in October 1973;¹¹ and the final report of the 1973 Committee of Review of Prerogative Writ Procedure ('the

⁶ Evidentiary proof that any such improvement occurs is rare: See Australian Law Reform Commission, *Managing Justice: A Review of the Federal Justice System*, Report No 89 (1999) [1.43].

⁷ Commonwealth, *Commonwealth Administrative Review Committee Report*, above n 2, [354], [364].

⁸ Stating that the reinforcement of avenues for individual review rights would minimise administrative error and 'stimulate administrative efficiency', see Commonwealth, *Commonwealth Administrative Review Committee Report*, above n 2, [12], [364].

⁹ For further discussion see Gabriel Fleming, 'Administrative Review and the "Normative" Goal – Is Anybody Out There?' (2000) 28 *Federal Law Review* 61.

¹⁰ Commonwealth, *Commonwealth Administrative Review Committee Report*, above n 2.

¹¹ Commonwealth, *Interim Report of the Committee on Administrative Discretions*, above n 2; Commonwealth, *Final Report of the Committee on Administrative Discretions*, above n 2 (Bland Committee Final Report).

Ellicott Committee').¹² The result of the deliberations of the Committees was the *Ombudsman Act 1976* (Cth) together with the *Administrative Appeals Tribunal Act 1975* (Cth), and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act') which set up the framework for the federal system of administrative law. On introducing the Bill for the ADJR Act, the Attorney-General, Mr Ellicott QC stated:

It will thus be seen that the 3 avenues of review, appeal on the merits to the Administrative Appeals Tribunal ["the AAT"], investigation by the Commonwealth Ombudsman, and judicial review by the Federal Court of Australia, provide different approaches to the remedying of grievances about Commonwealth administrative action. Each has its own place in a comprehensive scheme for the redress of grievances.¹³

The central focus of the institutions created through the reform was to address the individual grievances of citizens. This is not surprising given that the terms of reference¹⁴ of each of the Committees focused upon the redress of individual grievances. Any impact that such redress of individual grievances may have upon improving the overall system of administrative review was seen as incidental to the process of reform.¹⁵

Of course, today, exclusive focus upon the correction of poor government decision-making in individual cases is no longer the sole objective associated with the administrative review system. By the mid 1990s the Administrative Review Council observed four objectives of the merits review system: improving the quality and consistency of agency decision-making, providing the correct and preferable decision in individual cases, providing an accessible mechanism for merits review, and enhancing the openness and accountability of government.¹⁶ The current view is that the correction of individual wrongs is not the only path for administrative review to achieve balance between administrative efficiency and individual justice.

EACH FOR THEMSELVES: THE TRADITIONAL CORE ROLE OF THE COMMONWEALTH OMBUDSMAN

The establishment of the Commonwealth Ombudsman thereby occurs within a legal framework where democratic accountability equates to individual rights. This individual rights approach fits ideologically with the 1970s and 1980s, decades where the individual held centre stage.¹⁷

¹² Commonwealth, *Report of the Committee of Review of Prerogative Writ Procedure*, Parl Paper No 56 (1973) (Ellicott Committee Report).

¹³ Cited in *Shergold v Tanner* (2002) 209 CLR 26, 130 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

¹⁴ Although there was some comment that acknowledged that it may have broader application, see for example the terms of reference of the Commonwealth, *Commonwealth Administrative Review Committee Report*, above n 2, [1].

¹⁵ Indeed commentary on the improvement of the system was confined to the need to balance 'the desirability of achieving justice to the individual and the preservation of the efficiency of the administrative process': *ibid* [12].

¹⁶ Administrative Review Council, above n 5.

¹⁷ See, eg, Charles Sampford, 'Law, Institutions and the Public/Private Divide' (1991) 20 *Federal Law Review* 185, 185; referring to the 1980s. This may be broadened into a discussion of classical versus new liberalism: see Martin Loughlin, 'The Functionalist Style in Public Law' (2005) 55 *University of Toronto Law Journal* 361.

The first federal parliamentary records, which commence in 1963, evidence the overwhelming focus upon the role of the Commonwealth Ombudsman in providing redress for individual grievances.¹⁸ In an internal Treasury report provided to the Secretary of the Prime Minister's Department in 1967¹⁹ it was claimed that political leaders at a federal level were 'lukewarm or opposed to Ombudsmen' as Parliament provides a sufficient access for individual grievances and administrative problems.²⁰

This focus upon the individual complainant is reflected in the model chosen for the Office. The rejected model as proposed by the Kerr Committee was a 'General Counsel for Grievances'. The Committee favoured locating the 'grievance man within the system of administrative review rather than in the parliament-executive context'.²¹ This approach would accommodate a larger role for the Office than that of a traditional Ombudsman,²² as apart from the investigation of complaints relating to administration by the public service, additional functions envisaged for the office included the Ombudsman advising complainants of their rights of review before courts or tribunals and extended to proceeding on their behalf in some cases.²³ This suggestion was subsequently revised by the Bland Committee, which 'saw a less extensive role for the Ombudsman than the Kerr Committee'.²⁴ 'The Bland proposals were for an Ombudsman located outside the legal system of administrative review, oriented towards resolution of individual complaints and generally better at swatting flies than hunting lions.'²⁵ This was the model adopted. The Ombudsman model introduced aimed to provide independent investigation and resolution of individual grievances with the power to make recommendations to departments and agencies rather than a role such as that performed by the Administrative Review Council which monitors the whole system of administrative review or suggests systematic reforms to public administration.

¹⁸ Archival parliamentary material records confidential files on the concept of the Ombudsman from 1961: See Archive file: ECOSOC – Proposal for an "Ombudsman" in Australia File No 929/1/4. See also Archive files: No 68/3880; No 929/1/4; see also Commonwealth, *Parliamentary Debates*, House of Representatives, 16 April 1970, 1 314; 15 March 1967, 724; 26 April 1966 1 195; 27 April 1965, 921; 13 October 1964 1875; 10 September 1963 807.

¹⁹ A Harris, First Assistant Secretary, Ref No BA 66/36 Commonwealth Treasury Canberra ACT to The Secretary Prime Ministers Department contained in National Archives.

²⁰ Ibid. The other reasons being that the population is too large in relation to Commonwealth functions with the special difficulty of vast geographical spread; and difficulties associated with the federal system.

²¹ Commonwealth, *Commonwealth Administrative Review Committee Report*, above n 2, [313].

²² For example, the Office was envisaged as an advocate with an incidental system fixing role which 'would act mainly on complaint being made to him': Ibid [313]. Even so, Chapter 15 of the report discussing the proposed Ombudsman makes no mention of improvement to the system of administrative review.

²³ Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Review of the Office of the Commonwealth Ombudsman* (1991) 8.

²⁴ Commonwealth Ombudsman, *Annual Report* (1977-78) 2.

²⁵ Senate Standing Committee on Finance and Public Administration, above n 23, 14.

The Parliamentary Debates of the Ombudsman Bill 1976 also emphasize the redress of individual grievances.²⁶ Statements made during the passage of the Bill include: 'The Ombudsman Bill is virtually to establish a judicial office to guarantee that complaints are investigated';²⁷ that the Office would be 'empowered to investigate grievances by members of the public about administrative actions of officials and staff of Commonwealth departments, statutory authorities and other government agencies',²⁸ and

to investigate allegations that are made by individuals against administrative discretion and the way in which it has been exercised, to ascertain whether an injustice has been done to the individual citizen and, if there is an injustice, to initiate steps that will result in rectifying it.²⁹

The Explanatory Memorandum to the *Ombudsman Act 1976* describes the essential features of the Ombudsman as being 'to investigate complaints made to him about administrative functions of officials'.³⁰ While the legislation contained powers to allow the Ombudsman to investigate matters of his or her own motion and to make recommendations for systemic change (not limited to the individual case in question) this role was not prioritised by the policy-makers of the day.

Today, the Commonwealth Ombudsman maintains an ongoing self-proclaimed focus upon individual complaints, stating that its 'essential business... is to handle complaints and enquiries from members of the public about government administrative action'.³¹ This traditional individual complainant focus is evidenced in a myriad of ways:

- each *Annual Report* of the Office contains a detailed statistical report of individual complaints;
- since the early 1990s the Office has instigated the long-term collection and recording of data through consultants carrying out client satisfaction surveys for individual complainants;³² and
- nearly 500 000 grievances handled with over a 25 year period by the Office – a large number when compared to the number of Federal Court applications for administrative law matters being less than 10 000 (in the same period) and the combined administrative review caseload of the

²⁶ The role of the Office was described in parliamentary debate as one 'of investigating, conciliating and cajoling' see Commonwealth, *Parliamentary Debates*, House of Representatives, 4 June 1975, 3366 (John Howard).

²⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 August 1976, 474 (Lionel Bowen).

²⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 4 June 1976, 3068 (Robert Ellicott, Attorney-General).

²⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 August 1976, 476 (Neil Brown).

³⁰ Commonwealth Ombudsman, *Annual Report (1977–78)* 3. See also Commonwealth, above n 28.

³¹ Commonwealth Ombudsman, *Annual Report (2007–08)* 2.

³² See, eg, Roy Morgan Research Centre, *Public Awareness Survey* (June 1992); AGB McNair, *Complainant Satisfaction Survey* (May 1994).

major Commonwealth tribunals since they were established being over 400 000 decisions.³³

Individual complaint-handling statistics (1977–2005)³⁴

It is this continual and ongoing focus by the Office upon individual complaint-handling which renders analysis of its track record a viable and effective option to both map historical trends and predict future outcomes for its operations. For this purpose the individual complaint-handling data in each *Annual Report* of the Office from 1977–2005 is aggregated in Tables 1 and 2. The data is annually allocated to each of the seven individuals who have held the position of Ombudsman between 1977 to the present day:

- Professor Jack Richardson (JR) 1977–85;
- Geoffery Kolts (GK) 1986–87;
- Professor Dennis Pearce (DP) 1988–91;
- Alan Cameron (AC) 1991–92;
- Philippa Smith (PS) 1993–98;
- Ron McLeod (RM) 1998–2003;
- Professor John McMillan AO (JM) 2003– present.

To facilitate data analysis the statistics have been divided into two time periods which correlate with individual Ombudsman. The first period of 16 years, from 1977–93, is contained in Table 1. The second period of 12 years, from 1994–2005, is contained in Table 2 (discretion rates are noted separately below for 2006, 2007 and 2008 due to changes in the work practices of complaint recording by the Office).

At the outset it should be noted that there are two main categories of complainants who find themselves in the 'wrong place' and are thus referred away from the Ombudsman:

- 1 'Out of jurisdiction'/request for information complainants; and
- 2 complainants who are 'referred back' to the agency.

While the data in this article focuses upon those complainants classified as being 'within jurisdiction' it is worth briefly noting the significant number of 'out of jurisdiction' or request for information complainants that the Office also receives. For example, in 2008–09 of the 45 719 total approaches and complaints received by the Office 26 307 (58 per cent) were found to be outside jurisdiction.³⁵ While these levels of

³³ Robin Creyke, 'The Performance of Administrative Law in Protecting Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights* (2006) 101, 120.

³⁴ The detailed data finishes at 2005. On 29 November 2005 the Commonwealth Ombudsman issued a 'Public Statement: Changes to Ombudsman's Work Practices', which notes that 'upcoming work practice and systems changes will affect our statistical recording...it may mean that our complaint statistics for 2005–06 are not representative or comparable with those for previous years.' Commonwealth Ombudsman, 'Public Statement: Changes to Ombudsman's Work Practices' (Press Release, 29 November 2005) <www.ombudsman.gov.au/commonwealth/publish.nsf/Content/mediarelease_20> at 2 March 2009.

³⁵ Commonwealth Ombudsman, *Annual Report* (2008–09) 13, 17.

out of jurisdiction complaints have not been subject to comprehensive empirical investigation³⁶ it is suggested that the need for such work is increasingly critical given an emerging trend across Australian ombudsmen as to a growing number of 'out of jurisdiction' complaints straining already limited budgets.³⁷ In the 2008–09 *Annual Report* of the Commonwealth Ombudsman it was observed that there was a 30 per cent increase over the previous year in out of jurisdiction complaints and requests for information.³⁸

It is the second category of complainant, those that are turned away while being within jurisdiction, which are the focus of this article. In Table 1 and 2 the total number of finalised complaints includes the number of complaints within jurisdiction where discretion was used by the Office *not* to investigate that complaint. This is necessary as the legislation administered by the Office provides the discretion not to investigate a complaint in particular circumstances.³⁹ This use of discretion by the Ombudsman does not leave a complainant without further avenues to pursue. For example, apart from using discretion to refer an individual complainant back to the agency they are complaining about, the Office may also use the discretion to transfer complaints to other bodies⁴⁰ and also transfer complaints to another Commonwealth or state or territory authority.⁴¹

³⁶ In one of the only recent studies, the Northern Territory Ombudsman provided data to track out of jurisdiction complaints. In 2008–09 it was determined that within the Northern Territory 53 per cent or 818 complaints were out of jurisdiction, the Annual Report notes that '[s]tatistics were kept for the first time regarding the inquiries that were out of jurisdiction. The results show that 24% were about employment issues and 14% related to consumer affairs issues.' Northern Territory Ombudsman, *Annual Report* (2008–09) 21.

³⁷ For example in the 2008–09 *Annual Report* of the Queensland Ombudsman it was noted that '[r]eferrals have increased 136% since 2005–2006' and that '[w]ith the increasing number of complaint resolution bodies being established, both in government and in the private sector, people are becoming confused about the correct agency to contact for assistance.' Queensland Ombudsman, *Annual Report* (2008–09) 16.

³⁸ Commonwealth Ombudsman, *Annual Report* (2008–09) 13.

³⁹ The grounds upon which the Ombudsman can exercise this discretion are contained in s 6 of the *Ombudsman Act 1976* (Cth), eg, the Ombudsman can decline to investigate if a matter is more than 12 months old; if the complainant does not have a sufficient interest in the subject matter of the complaint; if a complainant has not first raised the complaint with the agency; or if there is a more appropriate alternative avenue of review available to the complainant. Practically, the most important of these powers is the discretion not to investigate until the complainant has raised the complaint at first instance with the agency concerned: Commonwealth Ombudsman, *Annual Report* (2003–04) 14–25..

⁴⁰ Such as the Privacy Commissioner; the Public Service Commissioner; an industry ombudsman; the Australian Broadcasting Authority; the Australian Communications authority and the Employment Services Regulatory Authority: *Ombudsman Act 1976* (Cth) s 6.

⁴¹ *Ombudsman Act 1976* (Cth) s 6A.

Table 1:
Individual complaints finalised under the Ombudsman Act 1976 (Cth) from 1977-1993

Year	Ombudsman	Total finalised (Ombudsman complaints)	Discretion not to investigate	Percentage
1992-1993	AC	14 362	4 506	31%
1991-1992	AC	15 237	4 590	30%
1990-1991	DP	12 721	3 968	31%
1989-1990	DP	9 646	2 304	24%
1988-1989	DP	10 779	2 536	24%
1987-1988	GK	11 180	2 631	24%
1986-1987	GK	10 279	2 571	25%
1985-1986	JR	11 563	2 222	19%
1984-1985	JR	12 864	2 011	16%
1983-1984	JR	10 130	1 306	13%
1982-1983	JR	7 148	1 468	21%
1981-1982	JR	6 483	1 285	20%
1980-1981	JR	6 845	1 327	19%
1979-1980	JR	5 493	1 036	19%
1978-1979	JR	2 146	343	16%
1977-1978	JR	1 030	199	19%
	Totals	147 906	34 303	23%

It follows that the actual number of complaints dealt with may be determined through subtracting those where the Office used its discretion to refer individuals away from the total number of complainants who contacted the office. So, for example in Table 1 the number of total finalised complaints is 147 906. When the number of complaints where discretion not to investigate was exercised is removed (34 303) we are left with a total of 113 603 complaints being investigated from 1977 through to 1993. This figure is then converted to a percentage in the final column meaning that the rate of discretion was 16 per cent in 1978-79 (ie: 16 per cent of complainants were turned away in the year the Office began operations) rising to 31 per cent in 1992-93.

A longitudinal comparison⁴² of the data in Tables 1 and 2 reveals a startling change in Office practice. Over history there is a dramatic increase in the use of the

⁴² This article uses standardised statistics and itemises them into portfolio, year and individual Ombudsman to allow meaningful analysis and comparisons of the longitudinal operation of the Office. For an overview as to the methodology use to create this data: See

discretionary powers to decline to deal with a 'within jurisdiction' complainant. To take for example Table 2, which identifies the period of 1993–2005 during which Philippa Smith, Ron McLeod and the current Ombudsman, Professor John McMillan, hold office. Table 2 provides the numbers of finalised complaints dealt with in each year under the *Ombudsman Act 1976* by the relevant Ombudsman and the numbers of those complaints where the Ombudsman used discretion not to investigate – meaning that in the year 2004–05 Professor John McMillan used discretion to not investigate 73 per cent of approaches to the Office. Table 2 shows the discretion percentage not to investigate has increased from 46 per cent in 1993–94 to 73 per cent in 2004–05. This rate has remained steady. In 2005–06 the discretion rate was 66 per cent⁴³, in 2006–07 it was 76 per cent⁴⁴ and in 2007–08 it was 75 per cent⁴⁵ and in 2008–09 it was 73 per cent.⁴⁶ When compared with Table 1, this trend is clearly different from that of the first four Ombudsmen who held Office between 1977–93. During this sixteen year period a total of 23 per cent or 34 303 complainants were subject to the use of discretion.

The data therefore identifies a tripling in the use of discretion by the Office since inception.⁴⁷ In Table 1 the 16 year period from 1977–93 has an overall percentage of 23 per cent of complainants or 34 303 people being 'referred away' (this phrase includes complaints redirected back to an agency or referred to other complaint bodies) from the Office, while in Table 2 the 12 year period between 1993–2005 reveals an overall percentage of 65 per cent or 144 685 individuals making a complaint to the Office being subject to the exercise of discretion. The result being that this increasing use of discretion to turn away complaints results in a declining number of actual complaints being investigated.

Anita Stuhmcke, 'Changing Relations between Government and Citizen: Administrative Law and the Work of the Australian Commonwealth Ombudsman' (2008) 67(3) *The Australian Journal of Public Administration* 321–39.

⁴³ Commonwealth Ombudsman, *Annual Report* (2005–06) 23.

⁴⁴ Commonwealth Ombudsman, *Annual Report* (2006–07) 2.

⁴⁵ Commonwealth Ombudsman, *Annual Report* (2007–08) 19. As noted above the data for the years from 2006 onwards is not included in tabular form due to changes in Office work practices.

⁴⁶ Commonwealth Ombudsman, *Annual Report* (2008–09) 15.

⁴⁷ Removal or aggregation of the data to take into account the four year difference between the time periods being compared does not significantly impact upon this finding.

Table 2:
Individual complaints finalised under the Ombudsman Act 1976 (Cth)
from 1993–2005

Year	Ombudsman	Total finalised (Ombudsman complaints)	Discretion not to investigate	Percentage
2004–2005	JM	16 192	11 755	73%
2003–2004	JM	16 297	11 881	73%
2002–2003	RM	18 814	13 170	70%
2001–2002	RM	18 036	14 242	79%
2000–2001	RM	20 967	16 657	79%
1999–2000	RM	19 156	15 224	79%
1998–1999	RM	23 306	15 558	67%
1997–1998	PS	20 341	12 750	63%
1996–1997	PS	21 283	11 720	55%
1995–1996	PS	18 451	8 409	46%
1994–1995	PS	14 281	6 651	47%
1993–1994	PS	14 340	6 668	46%
	Totals	221 464	144 685	65%

Despite this large increase in the percentage of complainants who are referred away from the Office there is little statistical breakdown available in the *Annual Reports* providing reasons why cases within jurisdiction are not pursued. When statistics are included even the more detailed explanations, such as in the 2000–01 *Annual Report* retain a high level of generality, stating for example that in '68% of instances, the complainant was advised to pursue the matter with the agency concerned in the first instance. There was clearly no defective administration by the agency and investigation was not warranted in another 19% of cases.⁴⁸ In each *Annual Report* since 2000–01 where statistics are offered to explain why complainants within jurisdiction are referred away anywhere between 40–70 per cent⁴⁹ of the total within jurisdiction

⁴⁸ Commonwealth Ombudsman, *Annual Report* (2000–01) 12. Any additional reasons stated in Annual Reports are both general and rare for example, 'A smaller number of complaints are not investigated due to insufficient information, or where the client requests that their complaint be withdrawn.' Commonwealth Ombudsman, *Annual Report* (1997–98) 41.

⁴⁹ See, eg, Commonwealth Ombudsman, *Annual Report* (2000–01) 12 – 68 per cent; Commonwealth Ombudsman, *Annual Report* (2001–02) 16 – 67 per cent; Commonwealth Ombudsman, *Annual Report* (2002–03) 13 – 69 per cent; Commonwealth Ombudsman, *Annual Report* (2003–04) 23 – 43 per cent; Commonwealth Ombudsman, *Annual Report*

complainants are referred back to agencies to raise their complaint at first instance. It may therefore be suggested that failure to complain to an agency at first instance is the major reason for referring complainants away from the jurisdiction of the Office. This assertion is also supported by statements by Ombudsman such as in the 2008–09 *Annual Report* observing that the 'common reason for not investigating a complaint is that the person has not raised the complaint with the agency involved'.⁵⁰ Indeed the policy of the Office is that it is a complaint agency of 'last resort'⁵¹ meaning that complainants should raise their issue of complaint with the agency they are complaining about before contacting the Office.

Is the Commonwealth Ombudsman failing the persons for whom it was established?

The data raises the issue as to whether this escalation in the use of the discretion rate contradicts the traditional and ongoing self-proclaimed focus of the Commonwealth Ombudsman upon the individual complainant. Indeed, concern over this large cohort of complainants being referred away by the Office has resulted in the Commonwealth Ombudsman implementing measures to improve complaint-handling at the departmental level.⁵² Importantly, quality in agency complaint-handling skills will decrease, the Office workload. The logic being that as agencies improve their complaint-handling, complaints about those agencies to the Office should both decrease and a complainant should be able to be referred back to that agency at first instance to have their matter reviewed. The aim is therefore twofold: reduce overall individual complaints through improving agency complaint-handling skills *and* thereby raise the profile of the Office as an agency of last resort.

In this respect two identifiable steps have been implemented by the Office to improve agency complaint-handling. The first is that from 1994 the Office has positioned itself as the standard setter for good complaint-handling and thus entrenched the notion of good complaint-handling within government agencies. To entrench normative change the Office shifts from a single agency approach to looking at how it could improve complaint-handling across the entire government sector. This was initially done through the provision of presentations and publishing reports and guidelines such as: *Oral Advice – Some Questions and Issues* (1995–96); *Issues Relating to Oral Advice: Clients Beware* (1997); *A Good Practice Guide for Effective Complaint Handling* (1999); *Balancing the Risks* (1999); and *To Compensate or not to Compensate* (1999).⁵³ The

(2004–05) 20 – 40 per cent; Commonwealth Ombudsman, *Annual Report* (2008–09) 17 – 58 per cent.

⁵⁰ Commonwealth Ombudsman, *Annual Report* (2008–09) 17.

⁵¹ Indeed, the reference to the Office as an agent of last resort – pushing complaints back to agencies – is used for the first time in the *Annual Report* (1996–97): Commonwealth Ombudsman, *Annual Report* (1996–97) 3.

⁵² Commonwealth Ombudsman, *Annual Report* (2002–03) 14.

⁵³ Commonwealth Ombudsman, *Oral Advice: Some Questions and Issues* (1996); Commonwealth Ombudsman, *Issue Relating to Oral Advice Clients Beware: Report Under Section 35A the Ombudsman Act 1976* (1997); Commonwealth Ombudsman *A Good Practice Guide for Effective Complaint Handling* (1999), Commonwealth Ombudsman, *Balancing the Risks Own Motion Investigation Into the Role of Agencies in Providing Adequate Information to Customers in a Complex Income Support System : Report Under Section 35A of the Ombudsman Act 1976* (1999) and *To Compensate or not to Compensate Own Motion Investigation of*

second step is to address the lack of effective government agency internal complaint mechanisms with the Office stimulating the creation within agencies of internal complaint-handling units. Such units are set up to ensure transparency, responsiveness and objectivity within the agency when dealing with complainants. The Office supports these steps by being perceived to be, and performing, wider functions across the system of administrative review such as becoming a member of the Australian Federal Police Commissioner's Education Advisory Council to help develop a culture of best practice. External observers validate this process, for example, in 1997 the then Prime Minister, John Howard, stated that '[s]ince its inception the Office has assisted the public sector to improve the way it operates.'⁵⁴

More recently the need to ensure the Office is not failing complainants it refers away has been recognized by the current Ombudsman, Professor John McMillan (from 2003–08). Professor McMillan has introduced two internal operational developments: firstly, standing arrangements with agencies for referrals and secondly, introducing a Public Contact Team ('PCT').⁵⁵ In relation to standing arrangements with agencies the Office has created a referral system whereby complaints are referred directly by the Office to the agency internal complaint-handling unit thereby eliminating the need for the complainant to have to contact and repeat the details of their issue to the agency. This arrangement has been employed with some of the larger individual complaint generating agencies such as the Australian Taxation Office ('ATO') and Centrelink. The supplementary development of the PCT is an attempt to control the guidance and advice of Office staff with respect to the complainants referred back to an agency. The aim of the PCT Office staff is to make referrals appropriately and to attempt to limit review fatigue or 'complaint fatigue'.⁵⁶ The complainant is given the contact details for an agency's complaint area and advised to contact the Office again if they are not satisfied with an agency's response.⁵⁷

Commonwealth Arrangements for Providing Financial Redress for Maladministration: Report Under Section 35A of the Ombudsman Act 1976 (1999). See also: Commonwealth Ombudsman, *Better Practice Guides* <<http://www.ombudsman.gov.au/pages/publications-and-media/better-practice-guides/>> at 14 April 2010 and Professor John McMillan, 'Future Directions for Australian Administrative Law - The Ombudsman' (Speech delivered at the *Australian Institute of Administrative Law*, National Administrative Law Forum, Canberra 3-4 July 2003, <<http://www.ombudsman.gov.au/docs/speeches/futuredirections-AIAL-4july03.pdf>> at 14 April 2010).

⁵⁴ John Howard, 'Message; 20th Anniversary of the Office of the Commonwealth Ombudsman July 1997', *Twenty years of the Commonwealth Ombudsman 1977-1997* (1997) cited in Administrative Review Council, *The Contracting Out of Government Services*, Report No 42 (1998) [4.71].

⁵⁵ For further commentary on the standing arrangements with agencies see the Commonwealth Ombudsman, *Annual Report* (2004–05) 67–73; as to the introduction of the Public Contact Team see the Commonwealth Ombudsman, *Annual Report* (2005–06) 40–45. In Professor John McMillan's second term (2008–current) an internal working party has recommended further changes to the way that complaints are managed see the Commonwealth Ombudsman, *Annual Report* (2007–08) 42.

⁵⁶ This term has been used by Australian ombudsmen to refer to complainants who 'give up' on the pursuit of their complaint. See Commonwealth Ombudsman, *Annual Report* (2005–06) 40–45.

⁵⁷ Commonwealth Ombudsman, *Annual Report* (2005–06) 43.

Whether the Office is failing the persons for whom it was established is however neither proved nor disproved by either the data which shows high discretion rates or by identifying such operational changes within the Office. To know whether the Office is failing such persons we must know what happens to them when they are referred back to agencies to have their complaint dealt with. Some attempt has been made to ascertain this by the Commonwealth Ombudsman. The 2003–04 *Annual Report* mentions a Client Satisfaction Survey conducted in May 2004 which shows that the large majority (87 per cent) of complainants advised to take their complaint directly with the agency followed the advice of the Office.⁵⁸ The 2008–09 *Annual Report* of the Commonwealth Ombudsman also notes a further client survey on this matter, finding that where the Office advised a person to take up their matter with the agency first, 88% of all complainants did so. The main reasons complainants (12 per cent or 1288 people) did not take up their complaint was that they did not have the confidence that the agency would be helpful, they resolved their problem another way or it was too difficult.⁵⁹ Such monitoring is therefore important as respondents who give up before having their complaint resolved are generally attributed to have done so due to suffering from 'complaint fatigue'.⁶⁰

These surveys demonstrate concern by the Commonwealth Ombudsman that complainants not be disadvantaged through being referred back to agencies. It remains difficult however to thereby conclude that the outcome of such surveys is that complainants are not disadvantaged by the use of discretion. This is because the surveys focus upon whether the complainant followed up the referral rather than on whether the outcome of the referral was ultimately effective from the perspective of the complainant. This gap requires further exploration, especially in light of evidence that respondents who were referred back to agencies by a state ombudsman had not received a decision they considered to be fair and reasonable.⁶¹

With reference to this gap as to whether complainants receive satisfactory outcomes through being referred back, the Office has used its powers of systemic investigation to monitor whether this use of discretion or 'referral back' to agencies works in practice for the individual complainant. For example, in the Executive Summary of the systemic investigation titled 'Review of the Child Support Agency's ('CSA') Complaint Service' Ron McLeod, the then Ombudsman, states:

My office has adopted a policy of 'decline and refer' for agencies that have a viable internal complaints service, on the basis that it is desirable for agencies to deal with complaints about their actions and service, in the first instance.⁶²

Ron McLeod concluded in the same report that:

⁵⁸ Commonwealth Ombudsman, *Annual Report* (2003–04) 23.

⁵⁹ Commonwealth Ombudsman, *Annual Report* (2008–09) 17.

⁶⁰ Similar research carried out by the Queensland Ombudsman in 2004 notes a failure of 33.4 per cent of complainants to pursue their complaint: Queensland Ombudsman, *Annual Report* (2004–05) 14. One of the principal findings was that '46.8% of complainants did not follow our advice to contact the agency' see David Bevan, 'Survey of complainants referred to agencies' (Presentation to 22nd APOR Conference, Wellington, New Zealand, 2004).

⁶¹ David Bevan, 'Survey of complainants referred to agencies' (Presentation to 22nd APOR Conference, Wellington, New Zealand, 2004) 2.

⁶² Ron McLeod, Commonwealth Ombudsman, *Review of the Child Support Agency's Complaint Service* (2001) 1.

In a clear majority of cases, the Complaints Service effectively and efficiently resolved the complaints originally brought to my office. It is therefore reasonable for my office (in the absence of any special factors) to continue to decline to investigate complaints where the complainant has not been to the Complaints Service and to refer them there instead, with an invitation to return to my office if the Complaints Service is unable to resolve the problem.⁶³

Despite such review there remains ongoing need for systematic empirical mapping of the outcome for individuals who are referred away. This is due to the fact that each method adopted by the Office – Client Surveys or monitoring through systemic investigation – has limitations. For example the above systemic investigation of the CSA Complaint Service fails to assess what proportion of complainants who are referred back to the Complaints Service follow that advice. In short, further empirical work must be undertaken to determine whether complainants referred away from the Office do follow that advice and whether they then gain a satisfactory outcome.

Given the dramatic increase in referrals away from the Office of complainants who are in jurisdiction since the mid 1990s the need for such analysis is critical. This call is reinforced through a background of underwhelming history of independent empirical review undertaken with respect to the operation of the Office. The only comprehensive empirical study by external investigators to determine whether the Office is efficient and effective in terms of its role and function took place in 1991, following the first 15 years of operation of the Office, and was conducted by the Senate Standing Committee on Finance and Public Administration ('Review'). The Review was conducted from a public administration rather than a legal standpoint, reviewing the 'Ombudsman's jurisdiction, performance, resources and legislation primarily as they affect the overall system of public administration not the legal system'.⁶⁴ Indeed, most Australian commentary takes the approach of balancing positive observations against negative comments to arrive at conclusions as to the success of the Office. A prominent example is the 1970s reports responsible for the inception of the Commonwealth Ombudsman where, in endorsing the recommendation for the creation of a Commonwealth Ombudsman, the Bland Committee noted that there is a 'price for having an Ombudsman' and nonetheless concluded that the benefits outweighed the disadvantages.⁶⁵ The Committee made a number of intuitive evaluations, citing the benefits as the correction of error and the 'improvement that occurs in administrative procedure and the care with which officials handle their relations with the public'.⁶⁶ The negatives were the fact that not all grievances could be solved by the Ombudsman; that decision-making might be delayed or too much time taken to avoid error if a government authority knew it would later be reviewed by the Ombudsman; the fact that there might be a need for more staff; and further rigidity in the exercise of

⁶³ Ibid 2. On a side note, the issue as to whether the outcomes and impact of own motion investigations are evaluated sufficiently by the Office also requires empirical attention.

⁶⁴ Senate Standing Committee on Finance and Public Administration, above n 23, 64. Apart from this review, the jurisdiction of the Ombudsman was the subject of a working party report which was implemented in part by the *Ombudsman Amendment Act 1983* (Cth): Administrative Review Council, *Jurisdiction of Ombudsman: Working Party Report to Council* (1980).

⁶⁵ Commonwealth, *Interim Report of the Committee on Administrative Discretions*, above n 2, [65].

⁶⁶ Ibid [64].

discretion. All of these effects might occur without at the same time lessening the load of Members of Parliament in dealing with grievances.

The Commonwealth Ombudsman is in good company, indeed international commentary on the government or classical ombudsmen overwhelmingly supports the success of the institution.⁶⁷ Yet a central feature of this analysis is the absence of an accepted or universal methodology used to support such a conclusion.⁶⁸ The absence of accepted empirical measures opens the debate to the use of statistical data to evaluate whether the Office has failed the individual citizen. Of course such evaluation is open to criticism, as the Office itself observes:

Statistics, of course, tell only part of a story. It is the way they are interpreted that conveys the real message... While it is difficult to be definitive, the discussion of these possibilities will be better informed if there is contextual data available on how people perceive the office.⁶⁹

Despite the lack of a universally accepted evaluative approach, empirical investigation must be taken up by academics and other independent external investigators.⁷⁰ Without such independent analysis the Office, in using such high rates of discretion, remains open to the allegation that it is failing the individual citizens for

⁶⁷ See, eg, commentators on the United Kingdom Ombudsman, see Mary Seneviratne, *Ombudsmen: Public Services and Administrative Justice* (2002); North American and Canadian Ombudsman, see Office of the Ombudsman Province of New Brunswick, *Annual Report* (2003-04); See also Larry Hill, 'The Ombudsman Revisited: Thirty Years of Hawaiian Experience' (2002) 62(1) *Public Administration Review* 24, 41; Latin American Ombudsman, see Fredrick Uggla, 'The Ombudsman in Latin America' (2004) 36(3) *Journal of Latin American Studies* 423, 441; European Ombudsmen, including specialist ombudsmen, see Gary Melton, 'Lessons from Norway: The Children's Ombudsman as a Voice for Children' (1991) 23(2) *Case Western Reserve Journal of International Law* 197; African Ombudsman, see Charles Fombad, 'The Enhancement of Good Governance in Botswana: a Critical Assessment of the Ombudsman Act, 1995' (2001) 27(1) *Journal of Southern African Studies* 57; Eastern European Ombudsmen, see Milan Ambroz, 'The Mediating Role of the Ombudsman in the Protection of Human Rights' (2005) 14(2) *International Journal of Social Welfare* 145; Asian Ombudsmen, see Carlos Lo and Robert Wickins, 'Towards an Accountable and Quality Public Administration in Hong Kong: Redressing Administrative Grievances Through the Ombudsman' (2002) 25(6) *International Journal of Public Administration* 737.

⁶⁸ Evaluations range from 'the most informal intuitive sense of goodness or badness to more formalised scientific analysis': Steven Aufrecht and Marc Hertogh, 'Evaluating Ombudsman Systems' in Roy Gregory and Philip Giddings (eds), *Righting Wrongs: The Ombudsman in Six Continents* (2000) 389, 393.

⁶⁹ Commonwealth Ombudsman, *Annual Report* (2003-04) 102.

⁷⁰ Such independent investigation has largely been non-existent, see comments by Rick Snell, 'Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma' in Chris Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (2000) 188, 188 who uses the phrase the 'ombudsman enigma' in arguing that the 'office for too long has been neglected by Parliament, academics, lawyers and others'; Dennis Pearce, 'The Jurisdiction of Australian Government Ombudsmen' in Matthew Groves (ed), *Law and Government in Australia* (2005) 110, 111 'the office of the ombudsman has attracted limited academic attention.'; Hugh Selby, 'Ombudsman Inc: A Bullish Stock with a Bare Performance' (1989) 58 *Canberra Bulletin of Public Administration* 174, who notes that most commentary is supplied by ombudsman or ex-ombudsman staff, calling for independent critical examination of its operation.

whom it was established to assist, as even the perception that the Ombudsman is turning away a high number of complainants may undermine the authenticity of claims made as to contributions made to democratic accountability.

Why is there an increasing rate in the use of discretion?

While not evidenced by the data, the suggestion made in this article is that the changing discretion rate is the result of a decade long conscious strategy of the Commonwealth Ombudsman. There are at least two interrelated reasons for this strategy: firstly, limited resources and external pressures being brought to bear upon the Office; and secondly, the internal strategic choice of the most recent three Ombudsmen to pursue a more proactive role in improving the quality of public administration more generally.

With respect to the first reason, external resource allocation by government will have a critical impact upon the operations of the Office. At the 25th anniversary of the Administrative Review Council in 2001 it was noted:

In recent years government has not encouraged continued expansion of the concept of review of government decisions. Financial and other limits have been placed upon review bodies with the result that the effectiveness of the system to provide adequate means for review of government decisions has been markedly diminished. By way of diverse examples, the Ombudsman now exercises the discretion not to undertake investigations in relation to 70% of the complaints received by the Office. In 1995-96 that figure was 45%. In 1991-92 it was 33%.⁷¹

Just four years earlier, in 1997, the Office reported that

the funding of the office had been reduced by 20% over 2 years which linked to the closing of the office in Tasmania and its replacement by a toll free number to Melbourne, the loss of two community liaison officers, one for indigenous people and one for non-English speaking people and an increase in the use of the Ombudsman's discretion ie: complaints that are received but declined any investigation. The discretion rate had gone up over the last year from 40% to 50%, or 4000 cases not being dealt with.⁷²

Implicit in the above quotes is the notion that the Office is a 'one stop shop'. This means that if the resource allocation to the Office is reduced the internal allocation and decision making must find budget cuts from somewhere and realistically this will be done by the Office 'managing' its reactive complaint-driven role. Of course the Ombudsman is not unique in this respect. The Australian Law Reform Commission has noted the necessity for managing reactive complaint-handling as 'triage' across the entirety of the federal system, involving the initial and prompt separation of cases according to the degree of urgency and specialist attention required.⁷³

External pressure may also play a role in the increasing rate of discretion. In the early 1990s, coinciding with the rise in the use of discretion, several external events impacted upon the Office. Firstly, an Administrative Review Council report of its

⁷¹ Dennis Pearce, 'The Anniversary Lecture', (Speech delivered at the 25th Anniversary Proceedings Administrative Review Council, Canberra, 6 December 2001), 13 <www.ag.gov.au> at 12 April 2007.

⁷² Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *The Human Rights and Equal Opportunity Commissioner and the Commonwealth Ombudsman report on Public Seminars 20 and 25 September 1996* (1997) 9.

⁷³ Australian Law Reform Commission, above n 6, [1.90].

Multicultural Australia Project recommended 'the Ombudsman ... take a leading and coordinating role in the promotion of administrative review'⁷⁴ and secondly, the 1991 Review by the Senate Standing Committee on Finance and Public Administration which investigated the effectiveness of the operation of the Commonwealth Ombudsman stated that while the 'principal role of the Office should remain the investigation and resolution of complaints by individuals', the Office should improve administration by providing feedback to departments on complaints trends, by reviewing its complaint systems and by establishing a specialist investigation unit within the Office to investigate major complaints.⁷⁵

These external factors either drive and/or complement internal strategy. The second reason for the high rates of discretion may be linked to the choice of the Office to increase emphasis upon the development of the roles of systemic improvement and audit. The complaint-handling role of the Office is reactive. Amongst ombudsmen the practice of controlling numbers of individual complaints handled through discretion is neither new nor surprising. The Office is not alone in making such choices. For example, '[w]hen reviewing the history of the Danish Ombudsman institution, one finds deliberate and consistent efforts to control the number of incoming cases and at the same time make it possible to work at the general level.'⁷⁶ As the Office is a one stop shop an increasing discretion rate allows internal redistribution of resources and the development of differing emphasis in relation to its operations.

This assertion is supported – though not proven – through analysis of the individual Ombudsman who utilise increased discretion rates. For example, Table 1 shows Philippa Smith, the Ombudsman between 1993 and 1998, applying discretion rates of 46–63 per cent. The period where she is the incumbent Ombudsman marks the start of the trend to escalate the use of discretion. From the beginning of her term she prioritised non-complaint-handling roles – in particular the system-fixing role. Philippa Smith argued that it was this capacity to review practices, legislative provisions, and procedures which was unique in the administrative review arena and therefore set the Ombudsman apart from other institutions of administrative review. She observed that a 'priority is the identification and correction of the underlying causes of complaints'⁷⁷ and that 'this preventive role is a key part of the modern Ombudsman's role'.⁷⁸

As Table 3 shows this continued use of discretion remains high under her successors. Between the years of 1999 to 2005, the discretion rate is at 70 per cent and above. It confirms that the average discretion rate for these six years is 76 per cent meaning that of the 109 462 complainants that came to the Office only 26 533 had their complaint investigated. The remaining 82 929 were subject to the use of discretion.

⁷⁴ Administrative Review Council, *Access to Administrative Review by Members of Australia's Ethnic Communities Report No 34* (1991), 5 see also 67.

⁷⁵ Senate Standing Committee on Finance and Public Administration, above n 23, 66, 69.

⁷⁶ Jens Olsen, Soren Knudson, Ermir Dobjani and Christian Moller, *Some Experiences in the Field of Assistance and Cooperation between Ombudsman*, Parliamentary Commissioner for Civil and Military Administration in Denmark <<http://www.ombudsmen.dk/publikationer/cooperation/>> 23 March 2010, 9.

⁷⁷ Commonwealth Ombudsman, *Annual Report* (1992–93) xi. This point is reiterated in the next Commonwealth Ombudsman, *Annual Report* (1993–94) 1–2.

⁷⁸ Commonwealth Ombudsman, *Annual Report* (1994–95) 7.

Table 3:
Individual complaints finalised *Ombudsman Act 1976* (Cth) from 1999–2005

Year	Ombudsman	Total finalised (Ombudsman complaints)	Discretion not to investigate	Percentage
2004–2005	JM	16 192	11 755	73%
2003–2004	JM	16 297	11 881	73%
2002–2003	RM	18 814	13 170	70%
2001–2002	RM	18 036	14 242	79%
2000–2001	RM	20 967	16 657	79%
1999–2000	RM	19 156	15 224	79%
	Totals	109 462	82 929	76%

If this assertion is true – that increased discretion to turn away individual complainants matches an increased focus upon the quality of public administration – then the use of discretion at the rates identified in Table 3 will continue. This is the case as the strategy of the Office remains one of invigorating attention into the alternate non-individual complaint-handling own motion and audit roles. In the 2007–08 *Annual Report* Professor McMillan, the current Ombudsman, confirmed that:

The office plans to intensify its own motion and auditing role in the coming years. Individual complaint-handling will always remain the core business of the office, but needs to be supplemented by other techniques for identifying problems and improving government. This is a necessary response to the growing size and complexity of government and the frequent contact that people have with government across all aspects of their lives.⁷⁹

Indeed the Office now states in its *Annual Reports* that it has three roles: individual complaint-handling (its core focus); own motion; and audit.

ONE FOR ALL: INDIVIDUAL COMPLAINT-HANDLER AND QUALITY-CONTROLLER

While the Commonwealth Ombudsman was primarily introduced to provide a free and quick mechanism to the individual citizen to ensure that administration by government is transparent, efficient and in accordance with law, there is nothing inherently untoward about the evolving systemic and audit roles. Indeed, when reviewing the development of the Commonwealth Ombudsman there is recurring

⁷⁹ Commonwealth Ombudsman, *Annual Report* (2007–08) viii.

recognition of the dual roles⁸⁰ of individual complaint handler and system improver with the systemic improvement role being consistently acknowledged as a secondary function of the institution.

Thus, there is no impediment to the Commonwealth Ombudsman diversifying its roles. Indeed, apart from its operational legislation,⁸¹ the word 'Ombudsman' itself,⁸² while being a powerful brand or trade name, contains no prescription as to usage. This is most simply captured by the plethora of descriptors of what an Ombudsman does: combining 'the judicial functions of judge or magistrate and the administrative functions of an inquisitor';⁸³ a 'watchdog' or 'protector';⁸⁴ 'a person who redresses the power imbalance';⁸⁵ and a 'man or woman who combines the functions of a mediator, reformer, and fighter'.⁸⁶ The movement by the Commonwealth Ombudsman towards increasing its focus upon systemic improvement and enhancing its audit role reflects the movement of other ombudsmen across Australia where many of the public law ombudsmen offices have diversified in terms of their roles and functions.⁸⁷

Clearly, while the ability of an individual to make a complaint against government and to be heard and have a decision reviewed, remains one of the major purposes of the institution of the Commonwealth Ombudsman, it is only one purpose. There was acknowledgment in the interim report of the Bland Committee that not every discretionary power affects the citizen nor the relationships between the government and the governed and that

⁸⁰ The dual role of Ombudsmen is found in originating legislation and echoed in judicial dicta: see *Re Alberta Ombudsman Act* (1970) 10 DLR (3d) 47, 61 (Milvain CJTD) and *Botany Council v The Ombudsman* (1995) 37 NSWLR 357, 363 (Kirby P).

⁸¹ Only in South Australia and in New Zealand are there legislative guidelines on the use of the title Ombudsman. In South Australia the internal use of the title by a government agency is prohibited: *Ombudsman Act* 1972 (SA) s 32; *Ombudsman Act* 1975 (NZ) s 28A(1). Since 1991 in New Zealand it has been necessary to have a statutory appointment or permission of the Chief Ombudsman before the title is used; this has been given to two industry Ombudsmen in New Zealand: *Ombudsmen Act* 1975 (NZ) s 28A, the two other Ombudsmen are the New Zealand Insurance and Savings Ombudsman and the Office of the Banking Ombudsman.

⁸² The word 'ombuds' is a Swedish word meaning representative or agent of the people or a group of people, it has been asserted that the word itself derives from Germanic tribes 'where the term was applied to a third party whose task was to collect fines from remorseful culprit families and give them to aggrieved families of victims': H H Kirchheiner, 'The Ideological Foundation of the Ombudsman Institution' in Gerald E Caiden (ed), *International Handbook of the Ombudsman: Evolution and Present Function* (1983) 23.

⁸³ Commonwealth Ombudsman, *Annual Report* (1977-78) 7.

⁸⁴ Arthur Maloney, 'The Ombudsman Idea' (1979) 13 *University of British Columbia Law Review* 380.

⁸⁵ Commonwealth Ombudsman, *Annual Report* (1977-78) 214 citing 'The Concept of Ombudsman' in *The Ombudsman through the Looking Glass*, Proceedings of a Seminar at the Law School The Australia National University (1985).

⁸⁶ Arthur Maloney, 'The Ombudsman as Mediator, Reformer, and Fighter?' in Gerald E Caiden (ed), *International Handbook of the Ombudsman: Evolution and Present Function* (1983) 71.

⁸⁷ For a good overview of developments see K Del Villar, 'Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsman' (2003) 36 *Australian Institute of Administrative Law Forum* 25.

many of the powers have no significance in the sense that they can personally affect the citizen. Those that do personally effect the citizen do not all have the same significance... Yet that is not to say that there should be no review at all in any of these cases.⁸⁸

The other purpose of the Office therefore exists apart from the individual complainant. Ombudsmen are now expected to not only provide individual redress, but also to produce some form of 'policy impact': administrative policy changes which have consequences into the future and beyond the particular decision complained against. Own motion investigations are a tool used by ombudsmen to promote quality control which aims 'to inculcate standards of lawfulness, fairness, rationality and accountability across public administration for the betterment of all those who deal with government'.⁸⁹ It is therefore appropriate that the Commonwealth Ombudsman promote an aim of administrative law which is to improve the overall quality of public administration – to provide good managerial normative guidance and thus ensure managerial accountability of the bureaucracy and government agencies to the public. In this sense the Commonwealth Ombudsman should rectify administrative defects as a managerial quality improvement tool.

Despite the legitimacy of this objective, Professor Dennis Pearce warns that '[t]here is a danger in Australia that the original purpose for the establishment of the office is being lost'.⁹⁰ The danger Professor Pearce alludes to may include resources increasingly being diverted from the core functions of ombudsman. The issue raised is not one of whether the movement to embrace auditing or systemic improvement should or may occur. Rather, the danger lies in the degree to which such a shift or an ever expanding jurisdiction will involve the Commonwealth Ombudsman in moving away from its core function of individual complaint handling.

While it is not suggested that the Commonwealth Ombudsman be forever shackled to its historical aims and origins, it is argued that the individual complaint-handling function of ombudsmen not be subverted or lost as the founders' intentions as to the 'new administrative law' do have continuing relevance.⁹¹ Ombudsmen were created to deal with the 'persistent bureaucratic maladies'⁹² of insensitivity, poor service, arrogance, inflexibility, haste and rudeness by a government department. The normative origins of the ombudsman institution is perhaps best captured in the leading Canadian case on parliamentary ombudsmen, *British Development Corporation v*

⁸⁸ Commonwealth, *Interim Report of the Committee on Administrative Discretions*, above n 2, [22]-[23].

⁸⁹ Robin Creyke, above n 33; see also Robin Creyke, 'Administrative Justice: Beyond the Courtroom Door (2006) *Acta Juridica* 257.

⁹⁰ Dennis Pearce, 'The Jurisdiction of Australian Government Ombudsmen' in Matthew Groves (ed), *Law and Government in Australia* (2005) 110, 138.

⁹¹ See, eg, in *Allan v Transurban City Link Ltd* (2001) 208 CLR 167,188-9 (Kirby J) referring to the Kerr Committee report to justify the 'general trend of Australian federal legislation in recent years to enlarge the scope of rights to initiate administrative review. This was certainly the intention of those who planned the creation of the AAT.' See also *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, 673 (Wilson J): 'Furthermore, some significance must attach to the time when these statutes were enacted, coming at the end of a decade of extraordinary executive and legislative activity in Australia directed to the improvement of efficiency and procedural fairness in public administration: see, e.g., the 1971 Report of the Commonwealth Administrative Review Committee (the Kerr Committee).'

⁹² Roger Cramton, 'A Federal Ombudsman' (1972) 1 *Duke Law Journal* 1, 2.

Friedman [1984] 14 DLR 129. In this decision the Court approved of the following statement of H R Wade in *Administrative Law*, 5th ed, who, in explaining the special role the Ombudsmen have come to fill, wrote:

But there is a large residue of grievances which fit into none of the regular legal moulds but are none the less real. A humane system of government must provide some way of assuaging them, both for the sake of justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country... What every form of government needs is some regular and smooth-running mechanism for feeding back the reactions of its disgruntled customers, after impartial assessment, and for correcting whatever may have gone wrong.⁹³

The Commonwealth Ombudsman must not travel so far on its current trajectory of improving the quality of public administration that it is in danger of losing this original purpose.

Resolution of this issue is fundamental to the effective operation of the Ombudsman and therefore to ensuring democratic accountability. The Kerr Committee, in considering the introduction of the 'new administrative law' package in the 1970s commented upon the tension between administrative review and administrative efficiency: 'although administrative efficiency is a dominant objective of the administrative process, nevertheless the achievement of that objective should be consistent with the attainment of justice to the individual.'⁹⁴ The implicit warning of the Kerr Committee is to move too far towards administrative efficiency may be at the expense of the individual meaning that 'the chief beneficiary of this Office [will be] the Executive branch of Government ...'.⁹⁵

The danger need not be one where the Office actually loses, or has lost sight of its commitment to the individual citizen. Indeed such a conclusion would ignore the current rhetoric of the Office which is to reinforce the importance of the individual complaint-handling role. As noted by Professor John McMillan '[t]he core activity of the office remains the handling of complaints and enquiries from members of the public about government administrative action.'⁹⁶ Instead the danger may be one of shifts in perception – indeed the perception that the individual citizen holds of justice and accessibility is just as critical as the actuality of the delivery of services. The broader issue, then, is whether the Office will, through an increased use of discretion, lose the confidence of the public and the government. To put it bluntly, as Laking states:

Inevitably the pressures on any Ombudsman towards conformity and absorption in the governmental machinery are heavy and continuous. To resist them without at the same time forfeiting the confidence of either the public or the administration calls not only for a certain agility of approach but also an awareness of the changing nature of society and the changing base of government within society.⁹⁷

⁹³ See *British Development Corporation v Friedman* [1984] 14 DLR 129, 139 (Dickson J).

⁹⁴ Commonwealth, *Commonwealth Administrative Review Committee Report*, above n 2, [12].

⁹⁵ Senate Standing Committee on Finance and Public Administration, above n 23, 386–7.

⁹⁶ Commonwealth Ombudsman, *Annual Report* (2006–07) 2.

⁹⁷ George Laking, 'Address at the Official Opening' (Speech delivered at the Sixth Conference of Australasian and Pacific Ombudsman 1982) in Commonwealth Ombudsman, *Annual Report* (1982–83) 145 (Appendix C).

The obvious danger of increasing rates of discretion is the perception that government and the public service, rather than the individual citizen, are the greatest beneficiaries of the Office's investigations. The contest for the Office may no longer be one of how to react to demanded rights of the individual citizen against agencies but rather one of ensuring that it maintains the perception of its neutrality and therefore public confidence as the Office increasingly takes up the more interesting pursuit of issues of quality control in government policy. The battle for the Office may therefore be how to best manage an increasingly close relationship with government.

The implication is, from the perspective of the citizen, that while there is the benefit of an improved normative culture of administrative decision-making that an increased quality focus will bring, the drawback is the reduction in the numbers of individual complaints dealt with by the Ombudsman (assuming a continued limit on provision of external resources). In this sense the largest hurdle for the Office will be maintaining positive public perception of its relationship to government. While the historical focus of the Office is upon individual complaints it is also clear that the role of system-fixer is accepted as a justified and increasingly important one. The Office must, however, convince the wider public that it will change the system and that it will do so for the improvement of public administration generally rather than just being a public relations exercise for the benefit of government.

There are also practical considerations behind this suggestion. The first is that, in terms of acting effectively as a quality control agent, it is important that the Office maintain a duality of roles or a mixed approach. That is, administrative deficiencies should be identified by both a top-down or managerial approach and a bottom-up or individual complainant approach. This is to avoid the selection of quality control issues becoming completely either agency driven or managerial. The second is that, in the wider administrative law system, it is critical that the role of the Office as an alternative mechanism for the resolution of grievances be preserved where other avenues of review are not available or inappropriate.

CONCLUSION

The 1970s administrative law reforms manifested a political desire to make public officials accountable for their actions and to provide individuals with effective and accessible remedies for correcting defective public administration. The traditional kernel of Australian administrative law is this centralisation of an individual rights based approach to review with the aim of rendering government decision-makers accountable to the public. In this context 'individual rights' and 'accountability' are broadly understood as being both instruments to enhance the effectiveness and efficiency of public governance and as being goals in themselves – indeed both concepts have remained largely unquestioned as holy grails of administrative law.⁹⁸

Three decades on and the current approach of the Commonwealth Ombudsman, to increasingly control the numbers and types of individual complaints the office investigates, highlights the necessity for review of the current application of these iconic concepts. Such revision was envisaged as early as 1977 when, in the foreword to

⁹⁸ Mark Bovens, 'Analysing and Assessing Public Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447, 454.

the Administrative Review Council's *First Annual Report*, the then Brennan J observed in relation to the 'new administrative law' that

the structures of administrative review will inevitably produce changes in the citizen's relationship with government and in the workings of the machinery of government. Changes of these kinds will not be effected without the development of tensions, but the tensions should produce constructive and critical examination of the new system.⁹⁹

In line with Brennan J's prediction, the operational structures of administrative review have changed the citizen's relationship with the machinery of government. There is now an expectation that individual complainants about government administration will be met by good normative complaint handling systems across the whole of government. Once agencies are handling complaints effectively the importance or value of an individual complaint to the Commonwealth Ombudsman is now more often assessed by its capacity to expose systemic deficiencies and thus result in quality improvement.

Such fundamental change necessitates questioning the ongoing role and value of the Commonwealth Ombudsman in ensuring accountability. The explicit trigger for such review is the high discretion rate applied by the Office to turn away individual complainants. An ever present danger for ombudsmen is to be used as a public relations tool of government, a place created by government where citizens may go with their complaints but when they arrive they find themselves being sent away. As the Office pursues the conscious objective of increasing emphasis upon its systemic improvement and audit roles the issue becomes one as to whether the Office has, or will, move too far along the path of improving the bureaucracy at large and in turn minimise the perceived or actual accountability mechanisms which it offers the individual citizen.

The assumption behind this suggestion is that there is a point at which the ombudsman institution is transformed so that it departs from its original role and function and thus implicitly loses credibility with respect to the protection of the interests and rights of an individual citizen. Importantly this is an assumption. The claim is not made that the Commonwealth Ombudsman has reached that point. To date the Commonwealth Ombudsman has increased its use of discretion to decline to deal with an increasing number of individual complainants without fracturing the institution. Indeed the institution has grown in relevance and stature over the last 30 years.¹⁰⁰ July 2007 marked the 30th anniversary of the establishment of the Office of the Commonwealth Ombudsman which was widely hailed as three decades of success as evidenced by its:

- longevity;¹⁰¹
- the high numbers of citizen complaints about government administration which the Office has dealt with;¹⁰²

⁹⁹ Administrative Review Council, *First Annual Report* (1977) Foreword.

¹⁰⁰ Commonwealth Ombudsman, *Annual Report* (2006-07) at 2.

¹⁰¹ Dennis Pearce, above n 90, 138 stating '[T]he ombudsman is now a well established part of the Australian government scene...no government would now act to abolish the office.'

¹⁰² Professor John McMillan in the Annual Report celebrating three decades of operation observes that over its thirty years of operation the Office 'has dealt with more than 600 000 complaints' see Commonwealth Ombudsman, *Annual Report* (2006-07) 6.

- the Senate Standing Committee finding that the Office has made a 'positive contribution to Australian public administration';¹⁰³
- positive commentary by external observers and ombudsmen;¹⁰⁴ and
- the ongoing expansion of jurisdiction of the Office supported by successive federal governments.¹⁰⁵

Any evaluation of the Commonwealth Ombudsman must be cognizant that both the institution of the Ombudsman and administrative law are 'in perpetual motion'.¹⁰⁶ Perhaps the broader lesson which may then be drawn by observers of Ombudsman, administrative law and policy-makers is that the ombudsman institution may evolve and diversify its functions without compromising its principles or aims. The central import of this article is to highlight the fluidity of the Ombudsman institution in developing new and old functions. This enhanced understanding leads to increased knowledge and improved outcomes in terms of what ombudsmen may offer society. More broadly it reinforces the changing nature of administrative law and highlights the need for careful and timely review of its evolution to ensure it continues to achieve its purpose of enhancing the individual citizen's democratic right to call the government to account.

¹⁰³ Senate Standing Committee on Finance and Public Administration, above n 23, 111.

¹⁰⁴ Sir Anthony Mason, 'The 30th Anniversary: A judicial Perspective' (2007) 58 *Admin Review: Thirtieth Anniversary Issue* 13, 15, stating that:

Of the major reforms, the Ombudsman has been perhaps the most successful; indeed more successful than I expected Ombudsmen have succeeded in dealing expeditiously and effectively with a very large number of complaints at very low cost.

¹⁰⁵ The Commonwealth Ombudsman now has seven roles: Commonwealth Ombudsman, ACT Ombudsman, Defence Force Ombudsman, Taxation Ombudsman, Immigration Ombudsman, Postal Industry Ombudsman, and Law Enforcement Ombudsman: Commonwealth Ombudsman, *Annual Report* (2005–06) 1.

¹⁰⁶ Sian Elias, 'Administrative Law For "Living People"' (2009) 68(1) *Cambridge Law Journal* 47, 47.

