OMBUDSMEN'S JURISDICTION IN PRISONS

MATTHEW GROVES*

This article examines the operation of Ombudsmen, using examples drawn from their work within prisons. The article commences with an explanation of the principle of administrative justice, which encompasses the goals that the various elements of administrative law such as the Ombudsman seek to foster. It then explains the jurisdiction, powers and procedures of Ombudsmen. The article argues that, while Ombudsmen are not granted determinative powers, they use informal and flexible procedures to work effectively with administrative officials to review and reconsider decisions. The article also considers whether Ombudsmen foster or 'deliver' administrative justice. The article concludes that the informal procedures and negotiation used by Ombudsmen are effective to deal with the individual complaints of citizens, while also providing a useful mechanism to improve administrative practices on a wider scale. It is also argued that Ombudsmen should not be granted determinative powers because such powers might impede their neutrality and, therefore, their ability to influence the administrative officials they must work with.

I INTRODUCTION

In the Commonwealth, and all States and Territories, there are several means by which citizens may complain about an administrative decision that they believe is unlawful, unjust or wrong. They may seek further detail about an administrative decision by use of freedom of information legislation or a statutory right to obtain reasons for decisions.[1] It may be possible to commence an application for judicial review if the decision is contrary to law. It may also be possible to seek merits review of an administrative decision, by an application for review to either a specialist appeals tribunal or a tribunal with a more general appellate jurisdiction in respect of administrative decisions.[2]

* Lecturer, Faculty of Law, Monash University. I am grateful to Emeritus Professor Enid Campbell for her comments and assistance in relation to the writing of my doctoral thesis from which parts of this article are drawn.

1 Every jurisdiction in Australia has enacted freedom of information legislation. The Northern Territory recently enacted similar legislation though a slightly different title: *Information Act* 2002 (NT). That act will commence operation no later than 1 July 2003: s2(2)

2 Tribunals with general jurisdiction to hear and determine appeals against certain administrative decisions are established in the Commonwealth, New South Wales and Victoria respectively by the *Administrative Appeals Tribunal Act* 1975 (Cth), the *Administrative Decisions Tribunal Act* 1997 (NSW) and the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic). Like all administrative tribunals these tribunals possess no inherent jurisdiction. They are granted jurisdiction to review administrative decisions made under a wide range of Acts. In these and all other jurisdictions, merits review is also available to specialist tribunals.

In the Commonwealth and all States and Territories it is also possible to seek assistance from an Ombudsman.[3] Ombudsmen provide an unusual form of redress. They have general jurisdiction to receive complaints from members of the public about administrative action. Ombudsmen do not possess determinative powers and do not, therefore, constitute an avenue of review or appeal in the strict sense, but they exert considerable influence over administrative officials and may often persuade an administrative official to revoke or vary a decision.

The office of the Ombudsman has a high public profile. The Ombudsmen of Australia receive over a hundred thousand inquiries and complaints each year.[4] The annual reports and the special investigations conducted by Ombudsmen also attract considerable public attention. Despite the importance and profile of the work of the Ombudsman, the office receives considerably less attention than other parts of the administrative law system.[5] This article examines the jurisdiction and work of Ombudsmen, and the role that Ombudsmen occupy within the wider system of administrative law governing the review of administrative decisions. The examples considered in this article are drawn from the work of Ombudsmen in reviewing the actions of administrators of prisons. The isolated nature of prison and the vulnerable position of prisoners provide a useful area to determine the ability of Ombudsmen to review administrative action and provide administrative justice.[6]

3 The following jurisdictions have enacted an *Ombudsman Act*: South Australia in 1972; Victoria in 1973; New South Wales in 1974; the Commonwealth in 1976; Tasmania in 1978; the Northern Territory in 1980, the ACT in 1989 and Queensland in 2001 (replacing a 1974 Act). Western Australia has enacted a *Parliamentary Commissioner Act* 1971 (WA). Terminology aside, this Act creates an Ombudsman's office that is no different to that in other jurisdictions. For convenience, references to the various Ombudsman and Parliamentary Commissioner legislation refers only to the jurisdiction, year and relevant section of each statute. It should be noted that federal prisoners are held in State prisons. Federal prisoners are subject to the same regime of treatment as State prisoners. Accordingly, most complaints from federal prisoners are considered by State Ombudsmen. The Commonwealth Ombudsman retains the right to investigate complaints from federal prisoners. This right is normally exercised in cases involving federal administration, e.g. an administrative decision concerning a prisoner's entitlement to remission according to federal sentencing law.

4 This figure is taken from the total numbers of inquiries and complaints listed in the Annual Reports of all Australian Ombudsmen for 2000-01.

5 A point made by some of the few academic commentators who have written on Ombudsmen: Dennis Pearce, 'Commonwealth Ombudsman: Right Office in the Wrong Place' in R Creyke & J McMillan (eds), *The Kerr Vision of Australian Administrative Law at the Twenty Five Year Mark* (1998) 72; R Snell, 'Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma' in C Finn (ed), *Administrative Law for the New Millennium* (2000) 188-9.

6 It should be noted that prisoners may also complain to official visitors. Visitors are appointed to visit prisons, to speak with prisoners about their complaints and concerns, provide advice and, where necessary, pursue issues with prison administrators. They provide an 'in house' form of grievance handling, whereby prisoners, and sometimes staff, can air complaints to a person who has some knowledge of prison administration and, therefore, may be able to provide a relatively fast solution. In most jurisdictions visitors are appointed by, and answerable to, correctional officials or Ministers. Accordingly, they do not hold the same level of independence of Ombudsmen. On the operation of visitors, see S McCulloch & P McFarlane, 'The Official Visitor Program in the Queensland Correctional System' (1994) 94 *Prison Service Journal* 47. This survey highlights the general paucity of information about the effectiveness of the role of visitors. For example, there is no detailed information as to why prisoners choose, or decline, to approach official visitors. The various Ombudsmen do not keep detailed statistics on the number of complaints that have been unsuccessfully aired with visitors before they are passed to Ombudsmen.

The first part of this article explains the concept of administrative justice. This concept has assumed increasing importance in attempts to develop a coherent rationale for the elements of administrative law that enable citizens to complain about, or to seek review or appeal of administrative decisions. The next parts examine the jurisdiction, powers and procedures of Ombudsmen. The final section considers the implications of the work of Ombudsmen and the extent to which they can deliver administrative justice.

II ADMINISTRATIVE JUSTICE AND ACCOUNTABILITY

The central values of administrative law reflect the desire to ensure the proper exercise of public power. These values are often collectively referred to as administrative justice.[7] The precise content of administrative justice may be difficult to define, but there is general agreement that the concept of administrative justice draws from a number of widely accepted principles such as transparency (in the sense that the processes of government are open to external scrutiny), accountability, consistency, rationality, impartiality, participation, procedural fairness and reasonable access to judicial and non-judicial grievance mechanisms.[8] Galligan suggests that the 'main concern' of administrative justice is:

> To treat each person fairly by upholding the standards of fair treatment expressed in the statutory scheme, together with standards derived from other sources ... and proper application of authoritative standards ... [with] emphasis ... on accuracy and propriety in each case, not just in the aggregate.[9]

Some commentators have suggested that a right of administrative justice may be developing into a new and distinct human right.[10] Bradley, for example, has suggested that this new right may be composed of a number of elements of administrative law, particularly the right of an individual to seek review of an administrative decision before an independent forum. Bradley suggests that other aspects of this right include the existence of some form of appeal from a decision of first instance (to a tribunal or a judicial body), and the availability of some form of judicial scrutiny of the merits and legality of particularly important decisions.[11]

7 Wade has described the various areas of administrative law as the 'machinery of administrative justice' which 'drives' the quest for good administration: Sir William Wade and Christopher F Forsyth, *Administrative Law* (7th ed,1994) 7. Interestingly, that passage is not included in the subsequent edition.

8 Much of this list is drawn from Mark Aronson and Bruce Dyer, *Judicial Review* (2nd ed, 2000) 1. Similar values are advocated by C Harlow and R Rawlings in *Law and Administration* (2nd ed, 1998).

9 D Galligan, *Due Process and Fair Procedures* (1996) 237.

10 This should be distinguished from the frequent suggestions that courts should integrate fundamental human rights into the common law, in the form of presumptions applied by courts in judicial review.

11 A W Bradley, 'Administrative Justice: A Developing Human Right?' (1995) 1 *European Public Law* 347. See also M Janis, R Kay and A W Bradley, *European Human Rights Law* (1995). Bradley places the greatest emphasis on the importance of the first of the factors mentioned in the text. For an analysis of Bradley's views in the context of Australian administrative law, see J McMillan and N Williams, 'Administrative Law and Human Rights' in D Kinley (ed), *Human Rights in Australian Law* (1998) 63, 64-9.

The jurisdiction of Ombudsmen does not fit neatly into this model. While Ombudsmen remain clearly independent of the executive, and the departments and agencies whose decisions they investigate, they lack the power to quash or remake decisions.[12] Ombudsmen are, however, an independent forum in which citizens may call a decision maker to account. One Ombudsman has suggested that the lack of determinative powers does not impede Ombudsmen because they are not intended to review and recast decisions, but rather to provide a bridge between legal and moral notions of justice. He explained:

> The ombudsman idea comes close to proposing control over some of the content of political morality underlying the legal order. It has, in short, much to do with what have been described as 'those attitudes about what justice and fairness require in relations between government and governed.'[13]

The work of Ombudsmen serves to establish some lever of control over governmental administration by providing a means of accountability that is independent from the executive.[14] Accountability may conveniently be described as a requirement that a decision maker explain and justify his or her use of power.[15] In the context of administrative action, accountability fosters the values of administrative justice by ensuring that public officials are answerable to those who are affected by administrative decisions. Effective mechanisms of accountability also provide an important source of moral and political legitimacy to administrative officials, by ensuring that they may be seen to act according to the values and standards that are generally accepted as applying to the exercise of public powers. The Administrative Review Council has explained the relationship between the accountability of public officials and the public acceptance of administrative action in the following terms:

> Accountability is fundamental to good governance in modern open societies. It is necessary to ensure that public moneys are expended for the purposes which they are appropriated and that government administration is transparent, efficient and in accordance with law. Public acceptance of Government and the

[12] Ombudsmen remain subject to the supervisory jurisdiction of the courts. An Ombudsmen who attempts to investigate a matter that is beyond his or her jurisdiction, such as a complaint that does not raise a 'matter of administration', is liable to the normal remedies that preclude a public official from exceeding his or her jurisdiction. See, eg, *Owen v Ombudsmen* (1999) 131 NTR 15 (NT SC) where a newspaper complained about various aspects of a police investigation. Martin CJ held that the newspaper had no greater interest in the police conduct than any other member of the public and, therefore, was not 'a person aggrieved' for the purposes of lodging a complaint to the Ombudsmen. Martin CJ granted a declaration that the Ombudsman had no jurisdiction to investigate the matter.

[13] Eugene Biganosvky, 'The Australian Ombudsman - Another Guardian of the Public Interest' in M Harris and V Waye (eds) *Australian Studies in Law: Administrative Law* (1991) 148.

[14] The independence of Ombudsmen is secured by several means. Ombudsmen are normally granted secure tenure, and may only be removed by a vote of Parliament. They are also granted immunity from civil liability for acts and conduct made in good faith in the discharge of their duties. Importantly, Ombudsmen are not subject to any form of ministerial direction. On the relationship between Ombudsmen and parliaments see, D Pearce, 'The Commonwealth: Present and Future Developments' in Commonwealth, *Unchaining the Watchdogs*, Papers on Parliament No 7 (1990), 48-52; R Snell, 'Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma' in C Finn (ed), *Administrative Law the New Millennium* (2000) 188, 193-8.

[15] This description is drawn from D Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 *Oxford Journal of Legal Studies* 257, 271. See also Chief Justice John Doyle, 'Accountability: Parliament, the Executive and the Judiciary' in Susan Kneebone (ed,) *Administrative Law and the Rule of Law* (1999) 18, 19.

> roles of officials depends upon trust and confidence founded upon the administration being held accountable for its actions.[16]

Those forms of accountability that involve the political arm of government normally operate in a general manner because they direct attention to the operation of institutions as a whole, rather than to individual decisions. Examples of accountability of this nature include annual reporting requirements, ministerial responsibility, and the appointment of royal commissions and administrative inquiries. There is increasing acceptance that the doctrine of ministerial responsibility does not provide an effective means by which Ministers may be held accountable for the behaviour of senior public officials who may answer directly to the Minister, or for the behaviour of junior public servants who answer to more senior officials.

Many commentators have suggested that the size and character of modern bureaucratic structures have significantly weakened ministerial and parliamentary control over administrative action. Sir Anthony Mason, for example, has stated extra-judicially that 'the blunt fact is that the scale and complexity of administrative decision-making is such that Parliament simply cannot maintain a comprehensive overview of particular administrative decisions.'[17] A former senior federal public servant has suggested that it is not possible for a Minister to be held responsible for every decision taken within a department that he or she administers in view of the increasing complexity of government activities. Ministerial responsibility may, instead, attach only to activities or decisions in which a Minister was directly involved, or should have acted.[18]

In view of the limitations on the effectiveness of ministerial responsibility and other forms of political accountability, the various administrative law mechanisms by which decisions makers may be held accountable have assumed great importance to persons who are aggrieved by individual decisions.[19] Chief Justice Spigelman of the Supreme Court of New South Wales has suggested, extra-judicially, that particular aspects of administrative law, such as freedom of information legislation and the availability of judicial and merits review over a wide range of administrative decisions have, in combination, introduced a new and direct form of accountability over administrative officials. Chief Justice Spigelman explained:

16 Administrative Review Council, *Contracting Out of Government Services*, Report No 42 (1998) 5, quoting Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, Report No 48 (1996) 4-5.

17 Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122, 129.

18 M Keating, 'The Public Service: Independence, Responsibility and Responsiveness' (1999) 58(1) *Australian Journal of Public Administration* 39, 40.

19 This may have been an intended consequence of the new Commonwealth administrative law package. The report which led to the introduction of the Commonwealth administrative law reforms was strongly influenced by the view that Ministerial accountability was not an adequate means of redress for administrative injustices: Commonwealth Administrative Review Committee, *Report* ['the Kerr Report'], Parl Paper No 144 (1971).

> The cumulative impact of this entire body of reform ... has been to introduce a new and distinctive character to our mechanisms of governance. What we now have, operating in parallel to the system of ministerial responsibility- both individual and collective- is a system that is appropriately characterised as 'administrative responsibility' ... a system by which public servants have a direct responsibility for their conduct, not merely a derivative responsibility, through their minister and parliament.[20]

Administrative responsibility implies that a level of equality exists in the relationship between a decision maker and an individual who is the subject of a decision. In my view, it is not controversial to suggest that some form of relationship arises in administrative decision making because a grant of power that enables one person to make a decision that affects another person necessarily creates some form of connection between the two parties.

III THE JURISDICTION OF OMBUDSMEN

A *General Jurisdiction Over Administrative Action*

The jurisdiction of Ombudsmen extends to complaints concerning 'matters of administration.'[21] In some instances the jurisdiction of Ombudsmen may be wider than the supervisory jurisdiction of the courts. For example, courts are extremely reluctant to examine the administrative decisions made by prison officials during an emergency, even though such decisions often cause great hardship to prisoners.[22] In other areas where courts have accepted that supervisory review extends to the decisions of prison officials, they have demonstrated such deference to prison officials that it may be suggested that judicial review does not provide an effective remedy for prisoners.[23] The jurisdiction of Ombudsmen is not subject to such restraints.

The criteria by which Ombudsmen may examine decisions also differs to the grounds available in an application for judicial review. Ombudsmen are empowered to determine whether administrative action involves 'injustice', 'oppression', 'improper discrimination' or is 'unreasonable'.[24] These criteria

20 Chief Justice J Spigelman, 'Foundations of Administrative Law: Toward General Principles of Institutional Law' (1999) 58(1) *Australian Journal of Public Administration* 3, 7. A similar point was made soon after the introduction of the first reforms upon which this notion of administrative responsibility is based: John Goldring, 'Public Law and Accountability of Government' (1985/86) 15 *Federal Law Review* 1, 22.

21 WA s 14(1); SA ss 3, 13(1); Vic ss 2, 13(1); Cth, s 5(1); Tas s 12; NT ss 3, 14(1); ACT s 5(1)(a), Qld ss 7, 12. The precise terminology used varies slightly, but the essence of the jurisdiction of each Ombudsman is to review administrative action. For example, in NSW, the Ombudsman is empowered to investigate the 'conduct of a public authority,' but this is defined to include 'any action or inaction relating to a matter of administration': NSW s13(1).

22 See, eg, *McEvoy v Lobban* [1990] 2 Qd R 235 at 241 (CA) where the court held that the managerial decisions of prison officials should only be reviewed on the grounds of bad faith.

23 See Matthew Groves, 'Administrative Segregation of Prisoners: Powers, Principles of Review and Remedies' (1996) 20 *Monash University Law Review* 629 where it is concluded that prisoners sent to or detained in segregation have almost no prospect of gaining relief by way of judicial review except if prison officials blatantly fail to follow the procedures governing segregation.

24 WA s 25(1); SA s 25(1); Vic s 23(1); Cth, s 15(1); Tas s 28(1); NT s 26; ACT s 18(1); Qld s 49(2).

introduce substantive principles of fairness, logic and correctness which are ultimately concerned with the quality of the decision itself. Thynne and Goldring suggest that these criteria grant Ombudsmen a 'wide charter' to:

> Examine the whole of the decision making process and to measure it against standards, which although imprecise ... give to the Ombudsman a sufficiently wide brief to look at every aspect of both the procedure and the substance of the decision.[25]

The principles applied by courts in applications for judicial review are, in theory, not concerned with the merits of the decision but the more limited goals of determining whether the decision is consistent with the statute under which it was made and the process under which the decision was made.[26]

The early decision of *Booth v Dillon [No 1]*[27] suggests that the jurisdiction to investigate 'matters of administration' will not be interpreted narrowly. In that case the Ombudsman had commenced an investigation into a complaint received from a prisoner, alleging that he had been assaulted by an officer while several senior prison officials looked on. The head of the department responsible for the administration of prisons sought to prevent the Ombudsman from investigating the complaint on the ground that it did not concern a 'matter of administration'.[28] Lush J declined to consider in detail the scope of that phrase, but was satisfied that the complaint in issue fell within the jurisdiction of the Ombudsman because it contained far more than an allegation of common assault. Lush J reasoned:

> This was not a complaint merely of assault but of facts concerning the enforcement of discipline governing both prisoners and staff and the proper hearing of complaints in the prison. It was not an incident between angry men. It was an incident in which the authority of office was asserted and exercised with some formality and in the course of that assertion and exercise irregularities occurred which were closely bound up with it.[29]

It also suggests that a single allegation by a prisoner that he or she was assaulted would not normally constitute a matter of 'administration', but a complaint suggesting the existence of a wider regime of assaults that were officially sanctioned or systematically suppressed could do so.[30]

It is often said that Ombudsmen may investigate administrative acts or practices

25 I Thynne and J Goldring, *Accountability and Control* (1987) 150.

26 The limited focus of the principles of judicial review are explicable partly by the distinction between review and appeal. An appeal involves a rehearing/redetermination of a decision. Accordingly, the review body may decide the decision anew by reference to the evidence at hand. Review essentially involves a narrower and more formalistic assessment of the process by which the decision was made. On the distinction between review and appeal see M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) 134-41.

27 [1976] VR 291 (SC).

28 The matter proceeded as a case stated, by consent, pursuant to s 27 of the *Ombudsman Act* 1973 (Vic).

29 [1977] VR 291, 296 (SC).

30 A similar conclusion was reached in *Re Ombudsman & Minister for Social Services* (1980) 103 DLR (3d) 695 (Sask QB), where it was held that an allegation by a prisoner that she was sexually assaulted by a guard did not raise a matter of administration.

which are unfair, unjust or oppressive, but not the efficacy of government policies. In one sense this distinction is illusory because the investigation of even one complaint has the potential to raise broader questions concerning the policy upon which the relevant administrative action is based. In *Booth v Dillon (No 2)*[31] the Supreme Court of Victoria acknowledged that there was no clear line of demarcation between matters of administration and issues of policy.[32] In that case the Department of Social Welfare had received a report from a commission of inquiry regarding various aspects of management of Pentridge Prison. The report included findings about the prevalence of sexual attacks in dormitory accommodation in the prison. The Ombudsman commenced an investigation of what, if any, steps had been taken by the Department to modify the dormitory quarters in Pentridge, and whether adequate funds had been sought or allocated for such changes. Dunn J held that the provision of funds to a department, and the manner in which any funds allocated would be spent, were matters of policy rather than administration and, therefore, could not be investigated by Ombudsman. But his Honour accepted that 'no clear line of demarcation exists between what is involved in policy and what is involved in administration.'[33]

The Supreme Court of Canada has adopted a more expansive approach to an equivalent provision in Canadian legislation. The Court reasoned:

> There is nothing in the words "administration" or "administrative" which excludes the proprietary or business decisions of governmental organisations. On the contrary, the words are fully broad enough to encompass all conduct engaged in by governmental authority in furtherance of governmental policy - the business or otherwise ... The touchstone of administrative action ... is the government's adoption, formulation or application of general policy in particular situations ... the phrase "a matter of administration" encompasses everything done by governmental authorities in the implementation of government policy.[34]

The artificial nature of the distinction between matters of policy and administration is frequently highlighted in the work of Ombudsmen. The investigation of individual complaints by Ombudsmen will often reveal administrative practices or policies that are unreasonable, unjust, or discriminatory.[35] In the course of investigations, an Ombudsman will normally invite the responsible department or agency to explain the relevant administrative action and, where necessary, the broader rationale for the action. Even if the

31 [1976] VR 434 (SC).

32 A similar point was made by the Royal Commission on Australian Government, which was conducted in the immediately before the Commonwealth Ombudsman was established: Commonwealth, Royal Commission on Australian Government, *Report* (1976) 66-7. The Commission acknowledged that it was not possible to draw an easy and clear distinction between policy and administration.

33 [1976] VR 434, 439. This approach was adopted in *Salisbury City Council v Biganovsky* (1990) 54 SASR 117, 121 (SC).

34 *Re British Columbia Development Corporation and Friedmann* (1985) 14 DLR (4th) 129, 147-9 (SCC).

35 All relevant statutes empower the Ombudsman to make an adverse reports upon administrative action of this kind: WA s 25(1)(b); SA s 25(1)(b); Vic s 23(1)(b); NSW s 26(1)(b); Tas s 28(1)(b); NT s 26(1)(b); ACT s 18(1)(a); Qld s 51(3), (4).

wider purpose of a particular action or practice is not directly questioned in the course of such investigations, an agency or department may undertake such a review if a report of the Ombudsman highlights flaws or inconsistencies in administrative action.

The recent annual reports of the Ombudsman of Western Australia provide many illustrations of administrative practices that have been introduced or modified as a result of investigations conducted by the Ombudsman. The Corrective Services Division of Western Australia has revised the system for handling prisoners' property, while prisoners are transferred from prison or court, to minimise the possibility of loss or damage to property. The simplified system required a prisoner to seal his or her property when leaving one prison, and open the seal, in the presence of a prison officer when arriving at another prison. This procedure was intended to ensure that property was stored and transported in a manner that could be verified by both prisoners and staff, thereby reducing the possibility of the frequent complaints from prisoners about the damage or loss of their personal property during transfers.[36]

Allegations about the treatment of pregnant inmates raised far more serious issues. The Western Australian Ombudsman received complaints from two female inmates, alleging that they had suffered miscarriages because they were required to perform unsuitable work and received inadequate medical attention. The Ombudsman commenced an investigation on his own initiative, which examined not only the matters raised in the two complaints but also broader issues concerning the health and welfare of prisoners, such as the level of access of prisoners to proper medical care.[37] The report of the Ombudsman made no finding of negligence on the part of nursing staff or prison officers, but did identify several specific concerns about the standard of medical services provided to prisoners. The report found that information provided to pregnant prisoners was unclear; the level of medical services available was significantly below that outside prison; and the policies governing pregnant prisoners did not provide adequate procedures to monitor prisoners. The report also found widespread deficiencies in the level of information provided by medical staff to prison officers, which could prevent officers from properly discharging their duty of care towards prisoners. It is worth noting that the Ombudsman received a submission from the prison officers' union, which expressed similar concerns.

In response to the Ombudsman's report the Department increased the level of medical staff at the relevant prison, revised procedures to allocate and monitor the work of pregnant prisoners, commenced an ante natal care program, and

[36] Western Australia, Parliamentary Commissioner for Administrative Investigations, *Report No 23* (1994) 76-7. The Ombudsman has since investigated complaints from many prisoners who lost property while absent from prison. As a result one superintendent introduced new procedures for the storage of property while prisoners were absent, to help prevent such loss: Parliamentary Commissioner for Administrative Investigations, Parliament of Western Australia, *Report No 26* (1997) 52-3.

[37] The investigation was commenced pursuant to *Parliamentary Commissioner Act* 1971 (WA) s 15. All other Ombudsmen possess similar powers: SA s 13(2); Vic s 14(1); NSW s 13(1); Cth s 5(1)(b); Tas s 13; NT s 16(1); ACT s 5(1)(b); Qld s 18(1)(b).

introduced procedures whereby prisoners could provide consent for relevant medical information to be forwarded to prison officers. The Department also commenced a trial program to provide 24 hour nursing care to female prisoners. The Ombudsman declared that, despite these significant improvements, the provision of medical services to prisoners remained 'a matter of some importance and one which I intend to pursue.'[38]

B *'Own Motion' Investigations*

While most of the work of Ombudsmen is directed to the investigation and resolution of complaints received from individuals, Ombudsmen are empowered to commence investigations of their own motion.[39] An own motion investigation is normally reserved for an issue of considerable gravity that cannot be resolved by the conduct of one or more investigations into individual complaints about administrative activity. While investigations of this nature may be intended to prevent large numbers of complaints about a single issue, any investigation of such problems on a larger scale enables Ombudsmen to examine issues far more systematically than is possible during the investigation of individual complaints. The scope and purpose of such investigations will almost inevitably draw Ombudsmen into investigations of policy. But investigations are not without risk to Ombudsmen. The use of own motion investigations have the potential to affect Ombudsmen just as much as the department or agency under investigation. A former legal adviser to one Ombudsman explained:

> The single factor which distinguishes such investigations from the vast majority of ombudsman inquiries and investigations is the amount of work required to complete the task and the potential impact of the office's investigation on the administrative and political system which is the subject of scrutiny, and on the credibility of the office itself.[40]

Two recent 'own motion' investigations conducted by different Ombudsmen illustrate how such investigations may draw Ombudsmen into an examination of matters of policy. The first was an inquiry by the Ombudsman of Western Australia into deaths in the State's prisons over the previous ten years.[41] The inquiry considered the circumstances surrounding each death, each coroner's report into the death of a prisoner and any action taken by the Ministry of Justice to implement recommendations made by coroners. The inquiry examined many

38 Western Australia, Parliamentary Commissioner for Administrative Investigations, *Report No 23* (1994) 121. This issue was pursued tenaciously. The Ombudsman accepted that, while the Department had increased the level of medical staff to meet increases in prison populations, prisoners with complex medical problems continued to arrive in prisons. Accordingly, he should continue to monitor the provision of medical services to prisoners: [WA] Parliamentary Commissioner for Administrative Investigations, Annual Report *No 26* (1997) 54-5.

39 See WA s 25(1)(b); SA s 25(1)(b); Vic s 23(1)(b); NSW s 26(1)(b); Tas s 28(1)(b); NT s 26(1)(b); ACT s 18(1)(a); Qld s 51(3), (4).

40 Charles Ferris, 'Special Ombudsman Investigations' in Linda Reif (ed), *The International Ombudsman Anthology* (1999) 595. Pearce explains candidly that 'while the Ombudsman will attract the headlines if he sweeps the Augean stable clean, no one will pull him out if he begins to get in more deeply than he can manage': Dennis Pearce, 'The Ombudsman: Review and Preview. The Importance of Being Different' in Reif 73, 95.

41 Western Australia, Parliamentary Commissioner, *Report of the Inquiry into Deaths in Prisons* (2000). The report examined 74 deaths that had occurred from 1 January 1990 to 30 June 2000.

relatively routine administrative issues such as the effectiveness of record keeping within prisons, and whether different bodies within the prison system were able effectively to coordinate their activities. It also examined issues of a more general nature, such as the extent to which the treatment of prisoners complied with relevant national standard and international instruments,[42] and recommendations made by the Royal Commission into Aboriginal Deaths in Custody.[43] The report of the Ombudsman found that many problems concerning prisoners' deaths were due to uncoordinated or inadequate administrative practices, and made a large number of recommendations to correct such problems. The Ombudsman and the Ministry of Justice commenced discussions about recommendations concerning inadequate administrative practices before the report had been completed. Many of these recommendations were implemented soon after the report was tabled.[44]

The Ombudsman also recommended that substantial extra funding should be provided in order to improve several parts of the prison system, most of which concerned health care.[45] The Ministry was much less receptive to these recommendations. Several months after the report was tabled, the Ombudsman conceded frankly that additional funding to implement these recommendations was unlikely to be provided.[46]

In the second investigation, the Victorian Ombudsman commenced an inquiry into conditions under which prisoners detained in police cells were held. The Ombudsman had received continued complaints on this issue from prisoners who had been held in police cells for extended periods.[47] The Ombudsman had previously investigated many individual complaints, only to discover that prisoners were held in police cells for extended periods because virtually all prisons within the State were full, or overcrowded, and could not receive more prisoners. He decided to conduct an own motion inquiry into the conditions in which prisoners were held in police cells and the reasons why prisoners were persistently held in police cells for long periods.

The report made several recommendations designed to resolve or improve problems that had been the source of specific complaints made to the Ombudsman, such as unhygienic toilet and showering conditions, poor lighting, the lack of visiting facilities and inadequate food.[48] Ombudsmen commonly

42 On national standards and international instruments governing prisons and prisoners, see Matthew Groves, 'International Law and Australian Prisoners' (2001) 24 *University of New South Wales Law Journal* 17.

43 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Final Report* (1991). The history and influence of the Royal Commission are explained in Richard Harding, Roderick Broadhurst, Anna Ferrante and Nini Loh, *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody* (1995).

44 A summary of these steps is provided in Western Australia, Parliamentary Commissioner, *Annual Report* (2001) 34-5.

45 For example, that funding should be increased for general health services, specialist care for 'at risk' prisoners, prison pharmacy services and the Parole Board.

46 Western Australia, Parliamentary Commissioner, *Annual Report* (2001) 35-6.

47 Police cells are normally designed to hold prisoners for short periods and, therefore, lack facilities for proper showers, cooking, sleeping and receiving visitors, etc.

48 Victoria, Ombudsman, *Report on Conditions in Overcrowding in Police Cells* (2002) 14-6.

make recommendations of this nature in response to individual complaints. This part of the investigation appears consistent with the traditional role of the Ombudsman and, apparently, provided an effective remedy for prisoners. The report attracted considerable publicity and a prompt response from prison officials. In some instances prisoners were transferred from overcrowded police cells just hours after the report was delivered.[49]

The report also examined the broader problem of whether the State had sufficient prison accommodation. This problem raised a novel issue for the Ombudsman. Overcrowding in prisons and police cells was due to the reluctance of previous State governments to commit the substantial amounts required to build one of more new prisons. The government in office at the time of the Ombudsman's inquiry had announced plans to construct several new prisons that, when completed, would remove the source of the problem. It is difficult to see how the Ombudsman could observe the restriction that prevented him from considering issues of policy, such as decisions on the allocation of funds to improve prisons,[50] while reviewing problems that clearly arose from decisions concerning the allocation of funds for prisons. The report of the Ombudsman made no reference to these jurisdictional limits, but the method of inquiry provided a pragmatic means of removing potential jurisdictional objections. The Ombudsman consulted the agencies affected by his investigation, and provided an opportunity for them to comment upon draft recommendations.[51]

The report recommended that construction of a proposed new prison to hold remand prisoners should be expedited, and that consideration be given to establishing further remand centres at country prisons. It also recommended that several antiquated police cells be upgraded, and that prisoners should not be held in these cells until improvements had been completed. The police and prison officials responded to recommendations to build new prisons or upgrade existing facilities by asserting that such recommendations required significant funds that simply were not available. The police rejected the suggestion that prisoners should not be held in some police cells as impractical. The Ombudsman rejected this response, stating:

> It is not a satisfactory response to just say that the recommendation is impractical. It is imperative that the authorities recognise the realities of the situation and undertake urgent measures to alleviate the problems and provide long term solutions.[52]

49 'A Mother's Courage, and Gentle Victory', *The Sunday Age* (Melbourne) 19 May 2002, 10.

50 See above for the discussion of *Booth v Dillon* [No 2] [1976] VR 434.

51 In previously mentioned cases in which the jurisdiction of the Ombudsman was subject to challenge, such as *Booth v Dillon* [No 2], the Ombudsman had conducted an investigation despite strident objections of the agency under investigation. The agency commenced legal proceedings to query the jurisdiction of the Ombudsman. Subsequent changes in the law of procedural fairness suggest that the Ombudsman was obliged to provide the Police and the Correctional Services Commissioner with an opportunity to comment on any potential adverse findings before publishing his report: *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

52 Victoria, Ombudsman, Report on Conditions and Overcrowding in Police Cells (2002) 17.

It is worth noting that no agency affected by the Ombudsman's inquiry, or any member of the government, publicly queried the Ombudsman's decision to conduct the inquiry, or the proprietary of the blunt criticisms that he made of the police in several instances.

C *Services Provided by Private Corporations*

In most Australian jurisdictions, correctional authorities use private corporations to manage one or more prisons. For the purpose of an analysis of a mechanism of public sector accountability such as the Ombudsman it is important to note that the correctional legislation that enables prison officials to enter contracts with private corporations also preserves many aspects of public responsibility and power. For example, correctional legislation normally provides that any agreement for the use of private providers is subject to any applicable correctional legislation, that the most senior public correctional officer retains the formal legal custody of prisoners held in privately managed prisons, and that private service providers are accountable to various public officials.[53] In all jurisdictions, where correctional legislation enables prison officials to enter agreements for the use of private prison managers, any agreement must include provision for the Ombudsman to receive complaints from prisoners held in privately managed prisons.[54]

In the short period that such provisions have been in operation they have met with mixed success. The Victorian Ombudsman, for example, was directly involved in developing procedures to ensure that the staff of private prisons understand the role of the Ombudsman, and that complaints are forwarded to his office promptly and unhindered. Not long after these procedures were finalised, the Ombudsman concluded that prisoners held in privately managed prisons are able to gain access to his office without any significant difficulty.

IV THE POWERS AND PROCEDURES OF OMBUDSMEN

A *Powers*

Ombudsmen do not possess determinative powers. Accordingly, an Ombudsman has no power to quash or otherwise nullify a decision, or force the relevant decision maker to take corrective action, even if investigation has shown the decision to be based in whole, or in part, on an error of fact or law. The absence of any power to remake a decision means that the Ombudsman does not, and cannot, constitute an avenue of appeal in the strict sense. Ombudsmen may,

[53] See, eg, *Prisons Act* 1981 (WA) s 15C(a) [any contract for private prison management must provide for contractor to comply with correctional legislation and any other law], s 15D [privately managed prisons are subject to minimum standards determined by CEO of prisons. Standards must be tabled in parliament], s 15G [CEO of prisons must prepare an annual report on the performance of privately managed prisons, for tabling in parliament], s 15W-Y [granting CEO of prisons wide powers to intervene to supervise behaviour of private prison managers].

[54] See, eg, *Prisons Act* 1981 (WA) s 15C(l); *Corrections Act* 1986 (Vic) ss 8C(1)(g), 9(2)(i)(j); *Crimes (Administration of Sentences) Act* 1999 (NSW) s 246; *Corrective Services Act* 2000 (Qld) s 197(4).

however, recommend that the relevant agency undertake one or more remedial actions which are not available in other forms of review. Remedies of this nature include providing an apology, reconsideration of the relevant action or decision, or an ex gratia payment to compensate the complainant for any loss or damage suffered.[55]

An Ombudsman may provide an adverse report to the relevant agency if the matter is not resolved. Where the Ombudsman does not receive a satisfactory response to such a report, a further report may be tendered to Parliament.[56] This sanction is regarded as the Ombudsman's weapon of last resort and is used only rarely. This power is not unlike the remedy that has traditionally been provided by members of Parliament. Until relatively recently it was not uncommon for citizens with a grievance about an administrative decision to write to their local member of Parliament, with a view to having the matter raised by the member in the form of a question in Parliament. While citizens still seek the assistance of members of Parliament to resolve a great range of complaints about unfair and unlawful administrative action, such matters are now rarely raised during parliamentary proceedings.

Sir William Wade has suggested that the absence of determinative powers does not significantly hamper Ombudsmen because the office derives its true power from the ability to focus public and parliamentary attention upon the grievances of members of the public. Wade states that 'publicity based on impartial inquiry is a powerful lever ... For the department knows that a public report will be made and that it will be unable to conceal the facts from Parliament and the press.'[57] In most cases, however, Ombudsmen need not invite public scrutiny of administrative behaviour.

The inability of Ombudsmen to quash defective administrative decisions also deprives them of the power to grant relief in respect of a complaint that arises from the operation of an apparently unlawful rule or regulation. The consequences of these potential limitations on the Ombudsman's powers were explained in *Maybury v Osborne*.[58] In that case a prisoner applied for a declaration that a rule, upon which an adverse disciplinary determination had been made, was invalid. When it became clear that the court accepted that the rule was invalid, counsel for the prison governor invited the court to exercise its discretion to refuse to grant the declaration on the ground that the prisoner had not exercised his right to complain to the Ombudsman. Lee J pointed out that:

> The Ombudsman can only investigate the matter and make a report - he has no power to declare a prison rule invalid as this Court can. Resort to the

55 Most governments have a general policy governing ex gratia payments that is devised by agencies other than Ombudsmen. The federal scheme is described in D Pearce & M Allars, *Australian Administrative Law Service*, para 553A and Australia, Ombudsman, *Annual Report* (1996-97) 42-51. The federal scheme provides that an ex gratia payment may be made if a person has suffered because of defective administration or has been treated unfairly.

56 WA s 25(6); SA s 25(6); NSW s 31; Vic s 23(6); Cth s 17; Tas s 28(6); NT s 26(6); ACT s 20; Qld s 51(3), (4).

57 Sir William Wade and Chirstopher F Forsyth, *Administrative Law* (8th, 2000) 88.

58 [1984] 1 NSWLR 579, 588-9.

> Ombudsman does not [therefore] constitute such an adequate alternative remedy as should incline the court against granting relief.[59]

This point should not, however, be taken to suggest that an investigation by an Ombudsman cannot lead to changes in rules, regulations, or even statutory provisions concerning disciplinary proceedings. During the investigation of one complaint, or a handful of isolated complaints, an Ombudsman will often uncover defective rules, regulations or administrative procedures. The annual reports of the various Ombudsmen are replete with examples where the investigation of one or more such complaints has stimulated changes in disciplinary procedures. In Victoria, for example, the Ombudsman received several complaints from prisoners which revealed that when prisoners lodged complaints to his office about alleged defects in the conduct of disciplinary proceedings, prison officials did not defer impending hearings or punishments until the Ombudsman had concluded his investigations. Accordingly, the effectiveness of review by the Ombudsman was generally stymied. After extensive negotiations, prison officials agreed to adopt a general policy to defer any disciplinary proceedings that were subject to investigation by the Ombudsman, pending completion of the investigation.[60]

B *Procedures*

Complaints to the Ombudsman may be lodged either orally or in writing.[61] The ability for citizens to make oral inquiries or complaints, particularly by simply making a telephone call, removes an important potential impediment upon the ability of people to complain about administrative action. Oral complaints avoid the technical problems that lay people may encounter in completing and lodging documents with other grievance avenues such as courts and tribunals. The annual reports of Ombudsmen indicate that most inquiries and complaints to Ombudsmen are made orally.[62]

Prisoners have an unfettered right to correspond with the office of the Ombudsman in all Australian jurisdictions except Tasmania.[63] In most

[59] Ibid 588-9. The invalidity of the rule in issue was due to a complicated issue of statutory interpretation, the relevance of which has been removed by subsequent legislative amendments.

[60] Victoria, Ombudsman, *Twenty Second Report of the Ombudsman* (1994/5) 69. See also New South Wales, Ombudsman, 20th *Annual Report* (1994/5) 88 [a prisoner complained that he was not allowed to call witnesses in disciplinary hearing, despite statutory provision conferring such a right. The Governor of the prison upheld the action of the presiding officer. After an exchange of correspondence with Ombudsman, the Governor accepted a need to adhere to both letter and spirit of disciplinary provisions, and agreed to cease such practices].

[61] The WA Ombudsman is not empowered to receive oral complaints, but has stated that her office receives 'many thousands of telephone enquiries each year': Western Australia, Parliamentary Commissioner for Investigations, *Annual Report* (1999) 3.

[62] In Victoria for example, the Ombudsman received 16,100 telephone inquiries and commenced 2,130 complaint files in the year 2000/1. The previous year the Ombudsman received 16,000 telephone inquiries and commenced 2,035 complaint files: Victoria, Ombudsman, 28th *Annual Report* (2000/1) 6.

[63] *Prisons (Correctional Services Act* NT (1980) s 48(1); *Prisons Act* 1981 (WA) s 67(1); *Correctional Services Act* 1982 (SA) s 33(7); *Corrections Act* 1986 (Vic) s 47(1)(m); *Crimes (Administration of Sentences) Regulations* 2001 (NSW) r 110; *Corrective Services Regulations* 2001 (Qld) r 7. In the ACT prisoners have a general right to send and receive mail: *Remand Centres Act* 1976 (ACT) s 20.

jurisdictions, Ombudsmen staff are also granted a right to visit prisoners.[64] Ombudsmen staff also regularly visit prisons, in order to promote awareness of the role of the Ombudsman, to receive and investigate complaints, and to maintain contact with prison administrators. The relative ease with which Ombudsmen may be contacted has proved particularly attractive to prisoners. A perusal of the annual reports of Ombudsmen demonstrates that prisoners are well informed of their right to communicate with the Ombudsman, and also that they encounter little if any problem in doing so.[65] The various Ombudsmen of the States and Territories normally receive several thousand complaints each year from prisoners.[66]

Ombudsmen have been granted considerable discretion in determining the manner in which investigations should proceed. Investigations are normally conducted by way of simple queries, discussions and informal negotiations with administrative officials and complainants. The Ombudsman of the Northern Territory explained that procedures of this nature enable Ombudsmen to make 'informal inquiries of the agency complained against for the purpose of resolving complaints expeditiously. Most complaints are resolved by means of such inquiries'.[67] Such non-adversarial tactics often enable Ombudsmen to suggest or negotiate solutions in a manner that obviates the need for determinative powers. The discretion granted to Ombudsmen is intended to enable them to take account of the unusual problems that Ombudsmen often face. The Supreme Court of Canada has explained that 'the powers granted to the Ombudsman allow him to address administrative problems that the court, the legislature and the executive cannot effectively resolve.'[68] The only clear requirement, to which all Ombudsmen are subject, is that investigations be conducted in private.[69]

Upon receipt of a complaint, Ombudsmen normally request the responsible agency to explain the decision or action in question and, in some cases, the process by which it was made. Ombudsmen may then seek the views of the complainant before deciding whether the decision is fair and reasonable. During this process of consultation with the complainant and the responsible agency, Ombudsmen often explain to the agency any apparent defects in the decision and

64 *Prisons (Correctional Services) Act* 1980 (NT) s 39(d) [visits by staff of Ombudsman] s 48(1) [letters to and from Ombudsmen]; *Prisons Act* 1981 (WA) s 61(c) [visits], s 67(1)(c), (d) [letters]; *Correctional Services Act* 1982 (SA) s 33(7)(8) [letters]; *Corrections Act* 1986 (Vic) s 47(1)(j) [complaints to Ombudsman generally], *Corrections Regulations* 1998 (Vic) r 17(1) [letters to and from Ombudsman exempted from general power of governor to open, read, etc]; *Corrections Act* 1997 (Tas) s11(1)(b) [visits], s 29(1)(l) [letters]; *Corrective Services Act* 2000 (Qld) s 35(1) [enabling the searching all mail except privileged mail], *Corrective Services Regulations* 2001 (Qld) r 7(1)(d), (e) [deeming letters to Ombudsmen to be privileged]; *Crimes (Administration of Sentences) Regulation* 2001 (NSW) r 110 [letters].

65 In Western Australia, for example, the recent annual reports of the Ombudsman reveal the following number of complaints concerning correctional services: 1996/7 (210); 1997/8 (303); 1998/9 (510); 1999/2000 (541); 2000/1 (696): Western Australia, Parliamentary Commissioner for Investigations, *Annual Report* (2001) 30.

66 Complaints are also received from the friends and relatives of prisoners, most commonly arising from the behaviour of prison officials in the course of a visit by the complainant.

67 Northern Territory, Ombudsman, *Annual Report* (1997/8) 42.

68 *Re British Columbia Development Corporation and Friedmann* (1985) 14 DLR (4th) 129, 140.

69 WA s 19(2); SA s 18(2); Vic s 17(3); NSW s 17; Cth s 8(2); Tas s 23(3); NT s 19(2); ACT s 9(3); Qld s 25(2)(a).

the process or policy under which it was made. An informal discussion about the merits of a decision provides an opportunity for Ombudsmen to negotiate with and persuade administrative officials to reconsider a particular decision, and perhaps also the procedure or policy upon which it was based. It is worth noting that, where a decision appears fair and reasonable, the informal conduct of Ombudsmen provides ample opportunities to explain this to the complainant. The informal nature of such discussions also provides an appropriate opportunity for Ombudsmen to suggest and negotiate an apology by a decision maker. The use of apologies as a form of redress is a little known aspect of the work of Ombudsmen. Apologies provide a form of vindication that is not available in adversarial proceedings.[70]

In recent years Ombudsmen have placed greater emphasis on the use of negotiation and conciliation to resolve complaints about administrative action. In some jurisdictions Ombudsmen legislation has been amended to grant clear power for Ombudsmen to seek conciliation.[71] In other jurisdictions Ombudsmen attempt to use conciliation to reach a consensual resolution of complaints. It could be suggested that the use of conciliation can detract from the investigative role of Ombudsmen. The Ombudsman of South Australia has suggested that conciliation can supplement the investigative role of Ombudsman because it is not normally used in complaints that expose a serious departure of proper standards of administrative conduct, or those that do not warrant investigation because they are trivial or vexatious. Conciliation is well suited to matters where there is no real disagreement that a defect in administration has occurred, but there is a clear difference of opinion on the appropriate remedy. He explained that, in such cases, conciliation 'may encourage parties to find a common ground ... restoring communication between the parties and trust in administration and also showing real commitment to any remedial action.'[72]

A recent annual report of the South Australian Ombudsman provides an illuminating example of the use of conciliation. The Ombudsman received a complaint from a prisoner about her treatment. The prisoner has suffered significant sexual abuse prior to her imprisonment, and sought counselling for psychological problems the abuse had caused. She complained to the Ombudsman, alleging that prison officials had failed to provide her with appropriate treatment. She also complained that prison officials had not allowed her partner, who was also imprisoned, to visit her. The Ombudsman commenced an investigation. Prison officials conceded that the prisoner's treatment raised a range of complex issues, but argued that most of the prisoner's difficulties were due to her own behaviour. They also suggested that her history of drug offences made her unsuitable to receive either medical treatment from a practitioner

70 A settlement in favour of a plaintiff is normally made without any admission of liability. A favourable judgment is provided by the court. Each remedy neither requires nor normally involves any form of admission of fault.

71 For example, the *Ombudsman Act* 1972 (SA) was amended in 1996 to empower the Ombudsman to delegate some functions to investigative staff to conduct conciliation: s 17A.

72 South Australia, Ombudsman, *Annual Report* (1999/2000) 53.

located outside prison, or visits from her partner.[73] Despite the great difference of opinion between the prisoner and prison managers, a delegate of the Ombudsman conducted a conciliation conference. The prisoner and the general manager of the prison met and discussed the issue, with the assistance of the Ombudsman's delegate. The parties resolved several parts of the initial complaint and agreed on a procedure to attempt to resolve future complaints between themselves. The Ombudsman contacted both parties several months later, and found that the prisoner was able to raise and resolve her concerns with prison staff without the need for assistance from the Ombudsman.[74]

Negotiation and conciliation may be a very effective means of resolving grievances by providing a 'face saving' means of correcting a decision that, upon investigation, appears illogical, unfair or unlawful.[75] Decision makers are not, however, always willing to revoke or vary such decisions.[76] In such cases, the absence of determinative powers can stymie the effectiveness of the Ombudsman. An example may be drawn from the annual reports of the Victorian Ombudsman.[77] The Ombudsman received a complaint from a prisoner who was dissatisfied about the conduct of a disciplinary hearing. The prisoner alleged that he was removed from a dining hall, during his meal, and placed before the Governor to face a disciplinary charge. The charge was heard and resolved on the spot, and the prisoner sentenced to a loss of 28 days remission. The abrupt conduct of the hearing clearly contravened a statutory direction that prisoners receive at least 72 hours notice of the time and place of a proposed disciplinary hearing.[78] The prisoner subsequently complained to the Ombudsman, alleging that the hearing was conducted in an oppressive and unfair manner. An investigation upheld the complaint. The Governor accepted the Ombudsman's report, but directed that the prisoner should serve the punishment. The Ombudsman took no further action.[79]

[73] Prison officials regard visits between prisoners as a particularly sensitive aspect of prison administration.

[74] South Australian, Ombudsman, Annual Report (1999\2000) 60-1.

[75] On the use of ADR by Ombudsmen see J Taylor, 'The Role of Mediation in Complaints Handling: The Experience of the Office of the Commonwealth Ombudsman' in Finn, above n 5, 178. Taylor concludes that mediation can be especially effective for the resolution of complex disputes that come to Ombudsmen.

[76] On the law concerning this issue see Enid Campbell, 'Revocation and Variation of Administrative Decisions' (1996) 22 *Monash Law Review* 30.

[77] Victoria, Ombudsman, *Annual Report* (1990/1) 114-7.

[78] Under the *Corrections Act* 1986 (Vic) s50(3), the prisoner was entitled to waive the notice period, though the governor conceded that waiver clearly had not occurred.

[79] The notation of this incident in the Ombudsman's report does not explain why the Ombudsman did not raise the action of the prison Governor with the responsible Minister. It is worth noting that, in subsequent report, the Ombudsman of Victoria has emphasised that his main concern with disciplinary penalties is whether the penalty could have been made on the evidence presented, and little more: Victoria, Ombudsman, *Annual Report* (1997/8) 49.

V ANALYSIS

A *Do Ombudsmen Interfere With Administration?*

When Ombudsmen legislation was proposed there was some concern that an office that was granted jurisdiction to examine administrative jurisdiction might undermine the doctrine of ministerial responsibility.[80] These concerns may, however, have been directed to the introduction of a further form of review rather than the creation of Ombudsmen. Government departments and agencies rarely welcome external review of any form. It is worth noting that the proposed Commonwealth General Counsel would have provided a far more intrusive mechanism of review than Ombudsmen, particularly if the power to commence and intervene in court and tribunal proceedings involving administrative action before any court of tribunal on behalf of citizens had been exercised boldly. The refusal to grant such powers to Ombudsmen, and the absence of determinative powers, may have been intended to ensure that the Ombudsman could deal only with minor matters and, therefore, might not intrude to any great degree into the administrative activities of agencies. But the procedures adopted by Ombudsmen have enabled them to establish and maintain a considerable amount of influence over administrative agencies. Much of this influence is derived from the constant contact that Ombudsmen have with agencies during the investigations of complaints about relatively minor administrative matters.

One former Commonwealth Ombudsman explained that the close contact between Ombudsmen and agencies has not proven an irritant to agencies because 'familiarity, rather than breeding contempt, has bred co-operation. The value of the office in providing a second look at decisions has been recognised as worthwhile.'[81]

There is widespread acceptance that the broader supervisory work of Ombudsmen provides considerable benefit to both the public and the agencies over which Ombudsmen have jurisdiction. A Senate Committee that reviewed the operation of the Commonwealth Ombudsman received evidence from a large number of Commonwealth departments and agencies on this issue. The Committee concluded that 'without exception, the agencies subject to the largest numbers of complaints to the Ombudsman ... found the Ombudsman's reviews to be constructive and an aid to good management.'[82] It may be that Ombudsmen

[80] By contrast a former Ombudsman of New Zealand expressed surprise that the office was accepted without significant controversy, particularly in view of the apparent constitutional change caused by establishment of an independent office whose incumbent was granted power to scrutinise administrative decisions: Sir George Laking, 'The Ombudsman in Transition' (1987) 17 *Victoria University Wellington Law Review* 304, 308.

[81] Dennis Pearce, 'The Ombudsman: Neglected Aid to Better Management' (1989) 48 *Australian Journal of Public Administration* 359, 360.

[82] Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Review of the Office of the Commonwealth Ombudsman* (1991) [2.56]. A review of the Queensland Ombudsman concluded that the office 'has not tarnished the reputation of Queensland's public servants, nor resulted in any campaign against the public service, as was flagged by many': K Wiltshire, *Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations)* (1998) 18.

are an 'auditor, inspector or management consultant' of administrative standards and practices.[83] The key to the acceptance of this 'auditing' function of Ombudsmen is the consensual manner in which many recommendations are developed. In a recent annual report the Ombudsman of Western Australia explained that his work concerning complaints about that State's Corrective Services Division was intended to:

> Assist in improving the quality of the Division's management and administration by recommending changes to practices and procedures where it is evident from ... investigations that this is necessary ... and indeed, in the course of investigations, the Division often recognises that improvements are needed and, in consultation with my office, moves to implement the necessary changes.[84]

This approach, while eminently sensible, veers close to an open acknowledgement of the inexorable pressure upon Ombudsmen to review policy. It is appropriate and desirable that Ombudsmen review and comment upon inadequate or unsatisfactory managerial practices, particularly if the relevant department then develops and implements revised practices that meet its own needs and the concerns of the Ombudsman. Such investigations constitute an important form of accountability, and provide a means by which new or better administrative practices may be developed. But when do they constitute a review of policy? In my view, an investigation that may improve 'management and administration by recommending changes to practices and procedures' is an investigation into policy in an administrative rather than political sense. Whether a distinction between the various forms of policy is helpful to an analysis of the work of Ombudsmen is another matter.

These issues are highlighted in the use of 'own motion' inquiries. The broad scope of such inquiries, and the systemic problems that normally provoke an own motion inquiry, almost invariably raise issues of policy in a wider sense. The own motion inquiries examined above suggest that such inquiries consider many apparently forbidden areas such as decisions related to the funding of the area of administration under investigation, whether particular recommendations made by the Ombudsmen are practicable and the adequacy of previous government attempts to correct or reform the area under review. It is worth noting that, despite the sensitive issues examined by each inquiry, the agencies under investigation did not dispute the ability or wisdom of the Ombudsman's decision to conduct an own motion inquiry.

It is possible that the wide acceptance of the work of Ombudsmen in providing advice and assistance in the development and review of administrative practices has removed much of the apparent resistance that agencies exhibited to own motion inquiries when Ombudsmen were first established. Whether such

[83] A W Bradley, 'The Role of the Ombudsman in Relation to the Protection of Citizens' Rights' (1980) 39 *Cambridge Law Journal* 304, 307.

[84] Western Australia, Parliamentary Commissioner for Administrative Investigations, *Report No 25* (1996) 57.

inquiries touch upon matters of so-called policy may no longer be relevant because the work of Ombudsmen has become sufficiently integrated into the operation of government that it is no longer adjudged by the 'policy/administrative' distinction. Support for this proposition was provided in a recent review of the work of the Queensland Ombudsman. The review recommended that the Ombudsman make increased use of own motion investigations because the Ombudsman should be 'less reactive and less oriented to individual complaints, and become more proactive, systematic and preventative.' The review considered that a change of this nature would enable the Ombudsman to become 'more of a consultant to government agencies and working with them to identify and eliminate basic causes of maladministration.'[85]

B *Should Ombudsmen be Granted Determinative Powers?*

The lack of determinative powers is regarded by some as the single most important limitation on the work of Ombudsmen, though some have questioned whether it is a limitation. Pearce suggests that it is mainly lawyers who believe Ombudsmen would be more effective if granted determinative powers, because it would transform the Ombudsman into a traditional form of review. He argues that the adversarial custom of resolving disputes by way of determination in open proceedings cultivates a scepticism in lawyers towards any form of review that relies on persuasion and, in the normal course, only the possibility of publicity.[86] The reservations that many lawyers have towards Ombudsmen may illustrate that the culture of the adversary system is not receptive to other forms of dispute resolution.[87]

Ombudsmen would clearly be more able to provide administrative justice in individual cases if they could correct individual decisions when necessary, but this power would carry other consequences. Craig suggests that Ombudsmen could begin to function as quasi-small claims courts if granted determinative power.[88] In one sense, any such change might simply formalise the current practices of Ombudsmen. Ombudsmen frequently recommend that agencies make compensatory payments to parties that have suffered loss or damage as a result of maladministration. This solution has proven an effective remedy for many complaints received by Ombudsmen from prisoners concerning the loss or damage of important items of personal property.[89] Ombudsmen make recommendations of this nature in almost every area of their jurisdiction. On rare

85 Wiltshire, above n 82, 8.

86 D Pearce, 'Commonwealth Ombudsman: Right Office in the Wrong Place' in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law at the Twenty Five Year Mark* (1998) 65.

87 On the limitations of the adversary system, see Sir Richard Eggleston, 'What is Wrong With the Adversary System' (1975) 49 *Australian Law Journal* 428; Joan Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures' (1991) 20 *Federal Law Review* 252.

88 P P Craig, *Administrative Law* (4th ed, 1999) 240-1.

89 This problem is a constant source of complaints to Ombudsman from all jurisdictions. See, eg, the comments in Western Australia, Parliamentary Commissioner for Administrative Investigations, *Report No 23* (1994) 47; *Report No 26* (1997) 52-3; Victoria, Ombudsman, *Annual Report* (2000/1) 58-9.

occasions they may recommend a substantial payment of compensation.[90] It is worth noting that there is strong doubt whether the Commonwealth Ombudsmen could be granted power to make binding determinations on such matters.[91]

At present, the influence of Ombudsmen is derived from their stature, experience and ability to work closely with administrative officials in the review of administrative practices. The grant of determinative powers to Ombudsmen might undermine their ability to influence administrative practices. If Ombudsmen possessed determinative powers they would inevitably become tempted to avoid lengthy or detailed investigations by exercising determinative powers, particularly over minor complaints. It would be easier and more convenient simply to vary or remake the relevant decision. While this form of investigation would be convenient, Ombudsmen might also be less likely to uncover the source of any problem. It is possible that Ombudsmen's knowledge of, and influence over, administrative behaviour would decline correspondingly with the lesser extent to which they sought to change administrative decisions by persuading administrative officials to do so.

The grant of determinative powers might also encourage parties to adopt an adversarial approach. Once parties appear before an adjudicator who is empowered to reconsider and remake a decision, the pressure to adopt competing positions and the associated trappings of adversarial justice begins to rise. The informal procedures currently used by Ombudsmen would not sit easily with adversarial decision making. Departments and agencies would be far less amenable to adopt the procedures that are required to settle disputes by negotiation, such as discussing the circumstances of a decision in an open manner and disclosing relevant information, if Ombudsmen could ultimately impose a solution upon parties.

It is also possible that administrative officials might perceive any new decision that was imposed by way of determination in an entirely different light to one reached by consensus. An administrative official is, like any other person, more likely to resent and resist a decision that is imposed by an outside authority than one that is varied or revoked voluntarily. This resistance might not be limited to individual decisions. Administrative officials could also be less likely to consider

90 This occurred in England after the so-called Barlow Clowes affair. Many investors suffered great financial loss after the Barlow Clowes investment house collapsed. They blamed the Department of Trade and Industry for their loss because it failed to revoke the licence of the investment house after receiving notice of a dealing that provided a strong reason to do so. The Ombudsman upheld complaints of maladministration against the Department and recommended that investors be paid millions of pounds in compensation. The government rejected the finding of maladministration, but made most of the payments recommended by the Ombudsman: Roy Gregory and Gavin Drewry, 'Barlow Clowes and the Ombudsman - Part I' [1991] *Public Law* 192; 'Barlow Clowes and the Ombudsman - Part II' [1991] *Public Law* 408.

91 Such powers might involve the exercise of judicial power and, therefore, contravene Chapter III of the Constitution. See *Brandy v Human Rights and Equal Opportunity Comission* (1995) 183 CLR 245. It could be suggested that the grant of determinative powers to the Commonwealth Ombudsman would create a jurisdiction that is not unlike that of the Commonwealth AAT. The AAT is granted jurisdiction to review decisions taken under an enactment on a statute by statute basis. By contrast, the Ombudsmen is granted general jurisdiction to review administrative decisions. It could be suggested that, if the Ombudsmen's general jurisdiction was expanded to include determinative power, it would be closer to that granted to a court rather than the AAT.

and adopt advice provided by Ombudsmen on improving administrative practices.

If Ombudsmen were able to review and remake decisions, their status as disinterested observers could be undermined. There are many adjudicators, such as courts and tribunals, where a similar criticism is regarded as irrelevant to the exercise of their determinative functions. But courts and tribunals are not required to maintain close and continued contact with one party in the same manner that Ombudsmen must with an agency whose activities generate regular complaints from the public.

C *Do Ombudsmen Deliver Administrative Justice?*

Prior to the enactment of Ombudsmen legislation there were very few means by which ordinary citizens could query the correctness or fairness of an administrative decision. The means that did exist were either complex or expensive, or both.[92] These procedural and financial difficulties clearly influenced the recommendation of the Kerr Committee, that an office of General Counsel for the Commonwealth be established and that the General Counsel be invested with power to proceed on behalf of complainants in courts and tribunals or intervene in proceedings concerning administrative action. The Committee believed that ordinary citizens were placed at such a disadvantage when dealing with administrative officials and government departments that an office with far more powers than are possessed by Ombudsmen should be established.[93] This recommendation was ultimately rejected for the reason that an office granted general jurisdiction to receive complaints about administrative action should operate as informally as possible, and should not be distracted by potential involvement in legal proceedings.[94]

It is not clear whether the separation of Ombudsmen from the legal process has actually served as a catalyst for the development of the informal procedures adopted by Ombudsmen. The procedures used by Ombudsmen clearly remove the procedural and financial problems associated with other forms of review. The ability to lodge complaints either orally or in writing, free of charge, provides a simple and convenient avenue of redress. Importantly, the use of informality extends beyond the reception of inquiries and complaints to the use of negotiation and persuasion to resolve complaints. The relative ease with which Ombudsmen can be accessed, and the simplicity of their procedures, provides a considerable benefit to all citizens, particularly disadvantaged groups such as prisoners. It

92 Administrative action can be queried by way of judicial review, but legislation for statutory judicial review was not enacted in most jurisdictions until roughly the same time as Ombudsman legislation. Before the Ombudsman existed judicial review was far more expensive and technically complex than it is today.

93 'The Kerr Report', above n 20, Chapter 15. This recommendation drew from an influential article by Professor Whitmore (a member of the Kerr Committee). He suggested that the disparity in expertise and resources between citizens and administrative officials was so great it would be unfair if the citizen was not provided with assistance and representation. H Whitmore, 'The Role of the Lawyer in Administrative Justice' (1970) 33 *Modern Law Review* 481. This aspect of the Kerr Report is discussed in Pearce, above n 6, 54-9.

94 Commonwealth Attorney-General's Department, *Interim Report of the Committee on Administrative Discretions* ['the Bland Report'], Parl Paper No 53 (1971) [29].

should be noted that the ability to use a right of redress is an important aspect of administrative justice, and one that Ombudsmen facilitate extremely well.

The informal procedures adopted by Ombudsmen reinforce other goals of administrative justice, such as transparency and participation, because they enable citizens to understand and, if they wish, participate in an inquiry conducted by Ombudsmen. These benefits also extend to administrative officials.

The work of Ombudsmen in the scrutiny and formation of administrative practices introduces rationality into administration in several ways. First, the investigation of individual decisions ensures that they will be examined to determine whether they have been made according to law, by reference to guidelines that are fair, lawful and applied in a reasonable manner. Secondly, the role of Ombudsmen in identifying systemic flaws in administrative practices and policies or, in some cases, the problems that are caused by the absence of an appropriate policy, increases the likelihood that the sources of unfair and arbitrary decisions will be detected and corrected. Thirdly, Ombudsmen are often directly involved in the formation or revision of administrative practices, to ensure that agencies adopt fair and lawful procedures. It should also be noted that the informal negotiations used by Ombudsmen often convince administrative officials to acknowledge and correct errors. A mechanism that enables administrative officials to detect and voluntarily correct errors is a useful supplementary means of ensuring rationality in decision making.

The procedures adopted by Ombudsmen also foster the direct accountability of administrative officials to citizens envisaged by the principle of administrative responsibility. Obvious examples are negotiation and mediation, during which an administrative official may be required to explain and justify a decision directly to the complainant. The work of Ombudsmen in prisons indicates that they are able to establish a dialogue between prisoners and prison officials. It is difficult to imagine an area of administration where the position and interests of administrative officials and those who are affected by administrative decisions is more different than prisons. The relationship between prison officials and prisoners is marked by a clear inequality in the legal and social power held by each. If Ombudsmen can conduct effective negotiation and mediation between parties with such disparate interests, they clearly possess the ability to establish and maintain some form of relationship between the governors and the governed in the sense suggested by administrative responsibility.

Conciliation and apologies raise different issues because each procedure is more concerned with the behaviour of an administrative official rather than the decision in issue. Procedures of this nature impose a more subtle, though perhaps more direct, form of responsibility upon administrative officials.

VI CONCLUSIONS

Ombudsmen provide a useful and independent forum for the investigation of complaints from people who are dissatisfied with administrative decisions and practices of public officials and agencies. The examples discussed in this article demonstrate that Ombudsmen are an effective agency to receive and resolve grievances from prisoners concerning a wide range of administrative decisions taken by prison officials. The informal and non-adversarial procedures used by Ombudsmen are an important element of their apparent success. In my view, Ombudsmen should not be granted determinative powers. Any benefit that Ombudsmen might provide by remaking individual decisions could be outweighed by the danger that this new function could present to their ability to influence wider administrative processes.

While the work of Ombudsmen in the investigation of individual complaints clearly has a normative influence on the administrative officials directly involved in the decision, the investigation of individual complaints by Ombudsmen often leads them to examine wider practices and policies. I have argued that this aspect of Ombudsmen's work does not constitute an interference with administration because it provides an effective means of auditing and improving administrative behaviour. Administrative officials appear to have accepted that this aspect of work of Ombudsmen is appropriate, perhaps even desirable.

The doctrine of administrative justice and the notion of administrative responsibility both raise holistic questions about administration that cannot be fully answered by reference to a single area of administration or a single avenue of redress. The analysis in this article of the work of Ombudsmen within prisons does, however, illustrate how each may operate. The work of Ombudsmen in prisons suggests that informal and non-adversarial procedures are an important element in the delivery of administrative justice.