

# THE LEGALITY OF WALKING AWAY FROM PUBLIC SERVICE OMBUDSMAN REPORTS: THE UNITED KINGDOM'S EXPERIENCE

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*Public sector integrity bodies, such as ombudsmen, have progressively become a core element of Australian administrative law. Despite carrying out inquisitorial functions to identify the root causes of defective public administration, there have been debates on whether the government is, or should be, legally bound by ombudsmen's findings and recommendations. In the Bradley litigation, for example, the United Kingdom's Court of Appeal held that relevant investigated agencies cannot reject an Ombudsman's findings without cogent reasons. Subsequent decisions in the United Kingdom have largely echoed the principle laid down by Bradley. Due to limited judicial guidance in Australia, this article analyses Bradley and relevant precedents from the United Kingdom, including recent developments, and then discusses legal implications for Australia. This article also revisits the parameters of ombudsmen's functions and makes recommendations for potential reform to the Commonwealth Ombudsman legislation to provide greater clarity on how government departments and public authorities should respond to, and collaborate with, Ombudsman investigatory processes. It is suggested here that the Ombudsman procedure assumes a joint public responsibility to ensure access to the administration of justice: the executive arm of government, with decision-making responsibility, verifies the Ombudsman's findings, which with its investigatory powers diagnoses the cause of alleged maladministration.*

## I INTRODUCTION

Upon appointing Professor Jack Richardson as the inaugural Commonwealth Ombudsman in 1977,<sup>1</sup> Australian Prime Minister Malcolm Fraser announced that the establishment of the Ombudsman's Office was to ensure that government

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1 The first Australian Ombudsman was established in 1971 in Western Australia, followed by South Australia in 1972 and Victoria in 1973: see Jack Richardson, 'The Australian Commonwealth Ombudsman: State of the Institution' (Speech delivered at the International Ombudsman Institute, Canberra, June 1984) <[http://www.ombudsman.gov.au/\\_\\_data/assets/pdf\\_file/0024/30669/speeches\\_institution\\_as\\_it\\_exists\\_in\\_australia.pdf](http://www.ombudsman.gov.au/__data/assets/pdf_file/0024/30669/speeches_institution_as_it_exists_in_australia.pdf)>. For the Ombudsman's appointment procedure at the Commonwealth level, see *Ombudsman Act 1976* (Cth) s 21.

departments and public authorities are 'responsible, adaptive, and sensitive to the needs of citizens'.<sup>2</sup> These terms collectively suggest that public service ombudsmen exist to scrutinise the procedural aspects of government activities in order to correct and mitigate potential 'defective administration' or 'maladministration', which would otherwise have an adverse effect on the public. Ombudsmen, therefore, theoretically generate a protective arm of government for society, practically in addition to the existing three branches, to uphold the objectives of public administration and allow access to the administration of justice. Due to these overarching objectives, a growing number of independent agencies — not just ombudsmen — now operate at the Commonwealth and state and territory levels in Australia.<sup>3</sup> Such bodies are now often referred to as 'integrity agencies', or a part of the emerging 'integrity branch of government' because there exist several institutions, of which ombudsmen are one example, seeking to ensure accountability in the public sector.<sup>4</sup>

Despite exercising oversight roles in public administration, many scholars are continuing to debate whether public sector ombudsmen are capable of providing individuals with appropriate remedies sought.<sup>5</sup> This could be partially due to the non-binding legal nature of Ombudsman reports, generally consisting of findings and recommendations. Ombudsmen have sometimes been criticised as a 'toothless tiger' or a 'watchdog in chains',<sup>6</sup> since, while retaining the power to make or remake decisions and reach opinions, their determinations are not enforceable. Whether ombudsmen help serve the process of 'good administration',<sup>7</sup> legality or individuals' right to justice is generally dictated by the control functions governing the relevant Ombudsman, including statutory mechanisms. This means that the structure, purpose and advisory options available to particular institutions within the remit of an Ombudsman depend on the legislator, as does the normative concept of 'Ombudsman'.<sup>8</sup>

2 Commonwealth Ombudsman, *History of the Commonwealth Ombudsman* <<http://www.ombudsman.gov.au/about/our-history>>.

3 Apart from the Ombudsman, other integrity bodies at the Commonwealth level include the Australian National Audit Office and the Australian Public Service Commission. The principal legislation for public sector ombudsmen at the state and territory levels are: *Ombudsman Act 1989* (ACT); *Ombudsman Act 1974* (NSW); *Ombudsman Act 2009* (NT); *Ombudsman Act 2001* (Qld); *Ombudsman Act 1972* (SA); *Ombudsman Act 1978* (Tas); *Ombudsman Act 1973* (Vic); *Parliamentary Commissioner Act 1971* (WA).

4 Robin Creyke, 'An "Integrity" Branch' (2012) 70 *Australian Institute of Administrative Law Forum* 33, 36–9; Anita Stuhmcke and Anne Tran, 'The Commonwealth Ombudsman: An Integrity Branch of Government' (2007) 32 *Alternative Law Journal* 233, 233. Further details are provided in Part II Section C of this article.

5 Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) 248–51. Notable challenges also include efforts to increase the public awareness of the right to complain through ombudsmen.

6 For example, see William B Gwyn, 'The British PCA: "Ombudsman or Ombudsmouse?"' (1973) 35 *Journal of Politics* 45, 46–7, quoted in Philip Giddings and Helen Irwin, 'Objects and Questions' in Philip Giddings (ed), *The Future of Parliament: Issues for a New Century* (Palgrave Macmillan, 2005) 67, 69.

7 Milan Remac, 'Standards of Ombudsman Assessment: A New Normative Concept?' (2013) 9(3) *Utrecht Law Review* 62, 66–7.

8 *Ibid* 66–8.

Noting the above, what are the legal ramifications of failing to endorse, or completely rejecting, Ombudsman findings and recommendations? Similarly, are there any measures to limit the government from cherry-picking specific recommendations favourable to its interests? If the government has unfettered discretion to disregard the outcome of Ombudsman investigations without due process, wouldn't it undermine the very nature, practical purpose and operation of ombudsmen? In demystifying these questions, this article will first examine the legal regime that governs ombudsmen to understand the breadth of their objectives and functions. It will then explore key precedents, as well as recent policy developments, examining the government's ability to 'walk away' from Ombudsman reports. As there is currently limited judicial guidance in Australia on this specific topic, it is useful to analyse the approaches of other jurisdictions, namely the United Kingdom ('UK'), where courts have now affirmed that an investigated authority cannot simply reject Ombudsman findings without valid reasons.<sup>9</sup> Provided that the government is held to be bound by the findings, it is also important to explore whether any legal avenue is available to challenge the validity of those conclusions. Finally, this article will consider whether any reform is required to strengthen the legal significance of Ombudsman reports.<sup>10</sup> While this article refers to a broad range of ombudsmen across various jurisdictions, the primary focus will be on the Commonwealth Ombudsman, and the general implications for public service ombudsmen, rather than those exercising sectorial functions.

## II WHY DO PUBLIC SERVICE OMBUDSMEN EXIST?

To analyse the scope of ombudsmen's powers, both the underlying rationale for establishing an Ombudsman and the current legislative scheme in Australia must first be discussed. While the structure and emphasis may continue to shift over time,<sup>11</sup> the skeleton of an Ombudsman's role remains substantially

9 For example, Sir John Chadwick in *R (Bradley) v Secretary of State for Work and Pensions* [2009] 1 QB 114, 176–7 [72] ('Bradley') noted that the Secretary of State for Work and Pensions could have rejected the Parliamentary Ombudsman's findings with rational and cogent reasons. The legal principles of *Bradley* and relevant subsequent court decisions will be discussed in Part III of this article.

10 It has been suggested that reforms to Australian ombudsmen have been 'incremental, *ad hoc*, reactive to government change' (ie top-down legislative reform), rather than 'a bottom-up evaluation based on stakeholder need'. This article therefore aims to provide holistic consideration of future reforms to Ombudsman legislation: see Anita Stuhmcke, 'Australian Ombudsmen: Drafting a Blueprint for Reform' (2017) 24 *Australian Journal of Administrative Law* 43, 43.

11 See Chris Gill, 'The Evolving Role of the Ombudsman: A Conceptual and Constitutional Analysis of the "Scottish Solution" to Administrative Justice' [2014] *Public Law* 662, 667–9. In this instance, the Scottish Public Service Ombudsman's function in developing standards for complaint-handling, and monitoring performance, represent a shift 'towards a system-fixing and quasi-regulatory approach': at 663. For an empirical study of the Commonwealth Ombudsman's function, see Anita Stuhmcke, 'Changing Relations between Government and Citizen: Administrative Law and the Work of the Australian Commonwealth Ombudsman' (2008) 67 *Australian Journal of Public Administration* 321. Stuhmcke suggests that the Ombudsman acts as a 'structural link between [government agencies] and [individuals]': at 335.

unchanged.<sup>12</sup> This part focuses on whether and how: (1) ombudsmen demonstrate the core values of administrative law; and (2) their functions overlap with the other branches of government by examining the separation of powers doctrine.

## **A The Founder's Intent**

### **1 Key Motivational Factors**

Swedish in origin, the word *ombuds* means 'representative' or 'agent of the people'.<sup>13</sup> Stuhmcke identifies that '[t]he modern ombudsman institution is universally accepted as originating from the creation of the Swedish Parliamentary Ombudsman ... in 1809'.<sup>14</sup> Its original responsibility was, and partially still is, to ensure compliance with the law by all state officials and judges. Arguably, this pinpoints the historical necessity of providing an additional avenue for individuals to have access to the administration of justice, via an impartial and apolitical authority as their representative. For example, the UK's Parliamentary Commissioner for Administration ('UK Parliamentary Ombudsman') was intended to: (i) 'augment [parliamentary members'] capacity ... to chase constituents' grievances' (ie individually); and (ii) 'hold the executive branch to account in the event of administrative failure' (ie collectively).<sup>15</sup>

As in the UK, the move to introduce ombudsmen in Australia was suggested to be political and legal.<sup>16</sup> The opposition political parties had a strong desire to establish an Ombudsman, while the parties in power were unenthusiastic about the proposal.<sup>17</sup> Regardless of its political motivation, the Australian Ombudsman model is also based upon, and serves, the traditional objectives and functions. For instance, the key role of the Commonwealth Ombudsman is to hold the executive accountable by providing a complaint-resolution option for those aggrieved by

12 Nick O'Brien, 'What Future for the Ombudsman?' (2015) 86 *Political Quarterly* 72, 72-4. O'Brien identifies that even public service ombudsmen, with a particular focus on the UK regime, gradually seek to investigate the quality and level of services provided.

13 Anne Peters, 'The European Ombudsman and the European Constitution' (2005) 42 *Common Market Law Review* 697, 697-8; Mary Seneviratne, *Ombudsmen: Public Services and Administrative Justice* (Butterworths, 2002) 1.

14 Anita Stuhmcke, 'The Ombudsman' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 326, 329.

15 Mark Elliott, 'The Government Versus the Ombudsman: What Role for Judicial Review?' (2010) 69 *Cambridge Law Journal* 1, 1. See also UK Parliamentary and Health Service Ombudsman, *The Parliamentary Ombudsman: Withstanding the Test of Time* (2007) 4-6. Currently, unlike Australia, the UK Parliamentary Ombudsman can only consider a complaint referred by members of Parliament: see *Parliamentary Commissioner Act 1967* (UK) c 13, s 5(1). The Draft Public Service Ombudsman Bill 2016 (UK) seeks to abolish this requirement. Further details will be provided in Part III of this article.

16 Stuhmcke, 'The Ombudsman', above n 14, 330. The political rationale behind the appointment of the Commonwealth Ombudsman, including Cabinet's considerations, is explained in David J Turton, 'Delivering a "New Administrative Law": Commonwealth-Queensland Ombudsman Cooperation, 1976-1981' (2015) 39 *Journal of Australian Studies* 216, 222-3.

17 Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Review of the Office of the Commonwealth Ombudsman* (1991) 7. This historical background is more generally discussed in Stuhmcke, 'The Ombudsman', above n 14, 329-31.

government decision-making.<sup>18</sup> In addition to these primary complaint-handling tasks, the auditing role of the Ombudsman is now expanding.<sup>19</sup> These functional developments suggest that the conventional dispute resolution role of ombudsmen now more broadly covers the management of government activity.<sup>20</sup> Therefore, whilst retaining explicitly wide legal duties and investigatory powers, the Ombudsman must adhere to the Australian Public Service values,<sup>21</sup> and thereby should remain apolitical and accountable to the public. By providing a forum for citizens to dispute government activity, the Ombudsman process also promotes participation, accessibility and fairness: the fundamental values of administrative law.<sup>22</sup> Further details on the Commonwealth Ombudsman's investigative powers conferred by legislation will be discussed below.

## 2 Detection of Maladministration

There is no universal concept of maladministration. In the mid-1960s, Richard Crossman, a UK Cabinet Minister, attempted to define it as 'bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on'.<sup>23</sup> In response to this open-ended description, Lord Denning MR held that 'Parliament ... deliberately left [the definition of maladministration] to the [O]mbudsman himself to interpret the word as best he could: and to do it by building up a body of case law on the subject'.<sup>24</sup> Henry LJ subsequently

18 *Ombudsman Act 1976* (Cth) ss 3, 3A, 5. See also Anita Stuhmcke, "'Each for Themselves" or "One for All"? The Changing Emphasis of the Commonwealth Ombudsman' (2010) 38 *Federal Law Review* 143, 145–6.

19 John McMillan and Ian Carnell, 'Administrative Law Evolution: Independent Complaint and Review Agencies' (2010) 59 *Administrative Review* 30, 35. Furthermore, the Ombudsman's jurisdiction 'extends to private businesses that provide government services under contract to the public': at 33.

20 Anita Stuhmcke, 'Australian Ombudsmen: A Call to Take Care' (2016) 44 *Federal Law Review* 531, 540–6. Ombudsmen arguably seek to 'serve the citizen through better government ... [by transforming] management functions into outcomes which include recommendation and improvement to the system of administrative justice': at 542–3, citing John McMillan, 'How Ombudsmen Review and Influence Public Administration' (Paper presented at the International Intelligence Review Agencies Conference, Sydney, March 2010) 4 <[http://www.ombudsman.gov.au/\\_\\_data/assets/pdf\\_file/0016/31642/10-March-2010-How-Ombudsmen-review-and-influence-public-administration.pdf](http://www.ombudsman.gov.au/__data/assets/pdf_file/0016/31642/10-March-2010-How-Ombudsmen-review-and-influence-public-administration.pdf)>. Such roles have built upon the original intent of establishing an Ombudsman.

21 *Ombudsman Act 1976* (Cth) s 31; *Public Service Act 1999* (Cth) s 10.

22 '[A]dministrative justice is best understood as the sum total of the values or goals of administrative law ... [including] accountability, consistency, rationality, impartiality, participation, procedural fairness and reasonable access to judicial and non-judicial grievance mechanisms': see Matthew Groves and HP Lee, 'Australian Administrative Law: The Constitutional and Legal Matrix' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 1, 2, citing Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 3<sup>rd</sup> ed, 2004) 1.

23 United Kingdom, *Parliamentary Debates*, House of Commons, 18 October 1966, vol 734, col 51 (Richard Crossman), quoted in Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3<sup>rd</sup> ed, 2009) 534. Crossman's definition was referred to in *R v Local Commissioner for Administration for the North and East Area of England, Ex parte Bradford Metropolitan City Council* [1979] 1 QB 287, 311 (Lord Denning MR).

24 *R v Local Commissioner for Administration for the North and East Area of England; Ex parte Bradford Metropolitan City Council* [1979] 1 QB 287, 311 (Lord Denning MR). In *R (Doy) v Commissioner for Local Administration* [2001] EWHC Admin 361 (27 April 2001), Morrison J held that 'the Ombudsman and not the court is the arbiter of what constitutes maladministration': at [16].

elaborated that '[m]aladministration comes in many guises, and while there is a substantial element of overlap between maladministration and unlawful conduct ... they are not synonymous'.<sup>25</sup> Nevertheless, even without a common definition, maladministration is clearly beyond mere illegal or unlawful behaviour.

Similarly in Australia, although the Commonwealth Ombudsman must report evidence of maladministration,<sup>26</sup> the *Ombudsman Act 1976* (Cth) itself is silent about what constitutes maladministration, including the parameters and magnitude required.<sup>27</sup> Using Crossman's definition, maladministration is likely government behaviour that is more than mere corruption or intentional misconduct, but also includes less intentional acts that occur without a specific positive act or decision. It is necessary, therefore, for ombudsmen to identify the root causes of so-called 'bad administration' and analyse options for remediating these defects.

In practice, it would be very difficult to precisely calculate the degree, or even existence, of maladministration.<sup>28</sup> This is particularly so without holistically understanding all the relevant procedures, policy directions, social and financial impacts, and rationale adopted by the government during its decision-making process. The principles of good administration would normally require: (i) 'accurate, comprehensive and accessible records'; (ii) 'active management of unresolved and difficult cases'; and (iii) 'awareness of the need to guard against erroneous assumptions'.<sup>29</sup> Accordingly, ombudsmen utilise thorough investigative and audit methods, including document reviews and in-depth interviews, to ascertain the qualitative aspects of public administration.<sup>30</sup> These unique inquisitorial features enable ombudsmen to reach their opinions in an open and flexible manner, which is not readily available in the judicial review context. The Australian conception of judicial review does not permit the examination of matters of official decision-making by reference to substantive standards as

25 *R v Local Commissioner for Local Government for North and North East England; Ex parte Liverpool City Council* [2001] 1 All ER 462, 470 [17] (Henry LJ).

26 Explanatory Memorandum, *Ombudsman Bill 1976* (Cth) 28–33.

27 Ombudsman legislation in Australian jurisdictions outline administrative actions that warrant an Ombudsman making a report into the action of a person or body within their jurisdiction: *Ombudsman Act 1976* (Cth) s 15; *Ombudsman Act 1989* (ACT) s 18; *Ombudsman Act 1974* (NSW) s 26; *Ombudsman Act 2009* (NT) s 59; *Ombudsman Act 2001* (Qld) ss 49, 50; *Ombudsman Act 1972* (SA) s 25; *Ombudsman Act 1978* (Tas) s 28; *Ombudsman Act 1973* (Vic) s 23; *Parliamentary Commissioner Act 1971* (WA) s 25. Such types of action also broadly reflect the grounds for judicial review, arguably confirming the non-exhaustive nature of maladministration. The meanings given to these terms are listed, for example, in NSW Ombudsman, *Investigating Complaints: A Manual for Investigators* (2004) 94–7.

28 Glen O'Hara, 'Parties, People and Parliament: Britain's "Ombudsman" and the Politics of the 1960s' (2011) 50 *Journal of British Studies* 690, 709. O'Hara argues that 'the opaque approach has provided the office [of Ombudsman] with a wide freedom of maneuver, rather than limiting its power': at 709.

29 Robin Creyke, 'Integrity in Tribunals' (2013) 32 *University of Queensland Law Journal* 45, 48.

30 Many files held by public authorities, however, would normally not be disclosed in judicial review settings. For further analysis, see John Halford, 'It's Public Law, But Not as We Know It: Understanding and Making Effective Use of Ombudsman Schemes' (2009) 14 *Judicial Review* 81, 83–4.

to whether the decision was fair or correct.<sup>31</sup> The powers of ombudsmen assume greater potential value in light of these doctrinal limitations on judicial review.

## **B Legislative Framework for the Commonwealth Ombudsman**

### **1 Investigatory Scope and Powers of the Ombudsman**

The International Bar Association described an Ombudsman as:

An office provided for by the constitution or by action of the legislature ... and headed by an independent high-level public official who is responsible to the legislature ... who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and *who has the power to investigate, recommend corrective action and issue reports.*<sup>32</sup>

This definition is still widely used by scholars, governments and ombudsmen.<sup>33</sup> As such, the investigatory and reporting mechanisms embedded in the *Ombudsman Act 1976* (Cth) substantially mirror public service Ombudsman legislation in other jurisdictions, including the *Parliamentary Commissioner Act 1967* (UK) c 13. Therefore, the limits of the Commonwealth Ombudsman's investigatory powers and the procedures it needs to adopt should be understood.

The Commonwealth Ombudsman has an obligation to investigate complaints from the public, as well as the ability to undertake own-motion investigations.<sup>34</sup> To exercise this function, the Ombudsman is given power to question relevant parties and to inspect documents and premises.<sup>35</sup> Anyone can lodge a complaint 'regardless of their citizenship status' and 'irrespective of whether they have personally been affected by the administrative action'.<sup>36</sup> In considering the complaints received, the Ombudsman can exercise its discretion not to pursue a complaint.<sup>37</sup> This flexibility re-emphasises that the Ombudsman, while an independent decision-maker, should not be considered a legal mechanism for control of government as Ombudsman reports are non-enforceable.

31 However, a clear distinction between review of 'legality' and review of the 'merits' of administrative decisions is an ongoing challenge for the courts: see Matthew Groves and Greg Weeks, 'Substantive (Procedural) Review in Australia' in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015) 133, 137–9.

32 Bernard Frank, 'Open Meeting of the International Bar Association Ombudsman Committee' (1974) 5(2) *International Bar Journal* 136, 137 (emphasis added); Sabine Carl, 'Toward a Definition and Taxonomy of Public Sector Ombudsmen' (2012) 55 *Canadian Public Administration* 203, 205.

33 Carl acknowledges that while the International Bar Association's definition was not intended to be 'scientific', it serves as a 'recommendation for international politics': Carl, above n 32, 210.

34 *Ombudsman Act 1976* (Cth) s 5(1). Many commentators have also analysed the Commonwealth Ombudsman's powers. For example, see John McMillan, 'The Ombudsman and the Rule of Law' (2005) 44 *Australian Institute of Administrative Law Forum* 1, 5–10.

35 *Ombudsman Act 1976* (Cth) ss 8, 13, 14.

36 Brogan Elliot, 'The Hidden Influences That Limit Governmental Independence: Controlling the Ombudsman's Apparent Independence' (2013) 21 *Australian Journal of Administrative Law* 27, 30 (citations omitted).

37 *Ombudsman Act 1976* (Cth) s 6.

While the Ombudsman can investigate administrative actions of departments, agencies and contractors that provide services to the public, as a general rule it cannot investigate actions of Ministers or judicial officers, or proceedings in Parliament.<sup>38</sup> An important exception arose in recent Victorian litigation,<sup>39</sup> in which the Legislative Council of Victoria made a reference to the Victorian Ombudsman, requesting that she investigate claims of misconduct by government members during the 2014 Victorian State election. The reference was made under a power allowing either House of the Victorian Parliament to refer ‘any matter, other than a matter concerning a judicial proceeding’ to the Ombudsman.<sup>40</sup> The Supreme Court of Victoria and the Court of Appeal each declined to dictate the precise scope or limits of ‘any matter’, however, each accepted the phrase was not unlimited but did clearly allow either House of Parliament to refer conduct involving its own members to the Ombudsman.<sup>41</sup> This case arguably sheds no light on the position of other jurisdictions because the Victorian Courts placed great weight on the particular wording of the *Ombudsman Act 1973* (Vic) and distinguished it from other comparable jurisdictions which had amended Ombudsman legislation to expressly exclude referrals or investigations involving members of Parliament.<sup>42</sup>

## **2 The Legality of the Ombudsman’s Findings and Recommendations: Current Position**

Following an investigation, the Ombudsman will make findings and, usually, recommendations for remedial action.<sup>43</sup> These recommendations can extend to systemic changes, which may require major change within government administration, or law reform. While Ombudsman recommendations are non-enforceable, lacking the hard-edged powers of a court, the rate of acceptance of their recommendations has been historically high. In the Commonwealth Ombudsman’s Annual Report of 2010–11, for example, the Ombudsman made 80 recommendations in published reports on its own-motion and major investigations in the 2010–11 financial year, of which 99 per cent were accepted in full or part.<sup>44</sup> This highlights the importance of the Ombudsman providing clear, sufficient and legitimate reasons to the investigated authority regarding their conclusion and continuously working with relevant parties to redress maladministration.

38 Ibid s 5(2).

39 *Glass v President of the Legislative Council* [2016] VSC 507 (26 August 2016) (‘*Glass*’); *A-G (Vic) v Glass* [2016] VSCA 306 (9 December 2016). A special leave application to the High Court was rejected: [2017] HCA 82 (5 April 2017).

40 *Ombudsman Act 1973* (Vic) s 16(1).

41 *Glass* [2016] VSC 507 (26 August 2016) [205]–[258]; *A-G (Vic) v Glass* [2016] VSCA 306 (9 December 2016) [44]–[65].

42 *Glass* [2016] VSC 507 (26 August 2016) [224]–[225]; *A-G (Vic) v Glass* [2016] VSCA 306 (9 December 2016) [63].

43 *Ombudsman Act 1976* (Cth) ss 12(5), 15(2)–(3).

44 Commonwealth Ombudsman, *Annual Report 2010–11* (2011) 3. This rate was much higher than in previous financial years. Since 2010–11, the Office appears to have ceased publishing the percentage of acceptance rates of recommendations.



It also illustrates how highly regarded the Ombudsman is in the Australian administrative system as a check-and-balance on the exercise of executive power.

If recommendations are not accepted, or other appropriate remedial action not taken within a reasonable time, the Commonwealth Ombudsman can inform the Prime Minister and make a special report to Parliament.<sup>45</sup> That is the ultimate legislative sanction possessed by the Ombudsman, and has rarely been utilised.<sup>46</sup> Despite this, the Ombudsman is suited to addressing the problem of administrative decision-makers who fail to adhere to their own soft law instruments. Such legislative arrangements plausibly suggest that relevant Ministers are to be answerable to Parliament, not the courts, for their responses to the Ombudsman's functions, findings and recommendations. Moreover, the Ombudsman has a duty to present annual reports, including information regarding its performance, to Parliament,<sup>47</sup> once again confirming that it is answerable to Parliament, and the very decision-makers the Ombudsman may investigate.

Interestingly, as in the UK, the executive's 'decision to accept or reject the [Ombudsman's] findings [and recommendations] is not expressly constrained by statute'.<sup>48</sup> Having regard to the scheme and policy of the *Ombudsman Act 1976* (Cth), it assumes that 'the government is intended to have much freedom, within legal boundaries, to formulate a response and that Parliament did not intend that response to be subject to searching judicial scrutiny'.<sup>49</sup> In 1995, the Federal Court of Australia confirmed that the Commonwealth Ombudsman does not have the power to 'compel any action on the part of the relevant individual, department or authority'.<sup>50</sup> However, the Court held that the Ombudsman has discretion to disclose information regarding the investigation if it is in the public interest.<sup>51</sup> This reasoning suggests the courts' general reluctance to directly interfere with both the relationship between the Ombudsman and public sector agencies, and the outcomes of investigations. Nevertheless, the Ombudsman's final reports can sometimes be politically sensitive or damaging, especially when the contents of investigations become publicly available.

45 *Ombudsman Act 1976* (Cth) ss 16–17.

46 While no easily accessible statistics are available regarding the use of this power, a cursory view of the websites of Australian ombudsmen reveals very few such reports are made in any given year. A similar approach is also taken in the UK. See also *Parliamentary Commissioner Act 1967* (UK) c 13, s 10(3), which permits the Parliamentary Ombudsman to lay a special report before Parliament, if 'it appears ... that injustice has been caused to the person aggrieved in consequence of maladministration'. This provision has substantially been replicated in Draft Public Service Ombudsman Bill 2016 (UK) cl 15.

47 *Ombudsman Act 1976* (Cth) s 19(1); *Public Governance, Performance and Accountability Act 2013* (Cth) s 46.

48 Jason N E Varuhas, 'Governmental Rejections of Ombudsman Findings: What Role for the Courts?' (2009) 72 *Modern Law Review* 102, 111.

49 Any challenge to the substance of a Ministerial response would be more appropriately made through political routes: see also *ibid* 111. While Varuhas refers to the UK Parliamentary Ombudsman scheme, the principles discussed are equally relevant to Australian ombudsmen.

50 *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163, 168, 174.

51 *Ibid* 168, quoting *Ombudsman Act 1976* (Cth) s 35A.

Ombudsman reports and assessment standards may appear to be merely persuasive. This is possibly because the tone of the reports is likely based on the nature of particular ombudsmen in each legal system.<sup>52</sup> As statutory provisions do not support ombudsmen having mandatory influence, it is at the relevant department's discretion as to whether it has the readiness to endorse ombudsmen's recommendations. Accordingly, ombudsmen strive to provide the moral norms and guidance for the administration of government that society seeks, and requires, to avoid maladministration.<sup>53</sup> This is a function, which cannot be, and is not, provided by the judiciary.

## **C Are Ombudsmen Different to Courts and Tribunals?**

### **1 Perceiving Ombudsmen as a 'Fourth' Arm of Government**

This concept 'builds on the analogy of the separation of powers' structure of Australian governments.<sup>54</sup> The arms of government are the legislature, executive, judiciary and, potentially, the emerging 'integrity' branch, comprising independent statutory agencies including ombudsmen.<sup>55</sup> Whilst these oversight agencies do not formulate policies, provide services or regulate society, they investigate and hold to account the departments and authorities that discharge those executive functions.<sup>56</sup> Integrity bodies act in support of good public administration, however, whether they can or should be regarded as a separate, fourth arm of government is another matter.<sup>57</sup>

Whether ombudsmen are carrying out similar functions to the judiciary can be unpacked through the separation of powers principle. In Australia, the *Boilermakers* approach<sup>58</sup> confirms that judicial power cannot be conferred on a non-judicial body. The Court of Conciliation and Arbitration, which had been given a mixture of judicial and arbitral functions, could not exercise the determinative power of imposing a fine on a union that was in breach of a Court

52 Remac, above n 7, 75.

53 Magdalena Elisabeth de Leeuw, 'The European Ombudsman's Role as a Developer of Norms of Good Administration' (2011) 17 *European Public Law* 349, 358–60.

54 John McMillan, 'Re-Thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423, 440.

55 Ibid.

56 Cady Simpson, 'Effective Ombudsman Own-Initiative Investigations: Ideas from Ombudsman Own-Initiative Investigations, Auditor-General Performance Audits and Law Reform Commission Projects' (2014) 21 *Australian Journal of Administrative Law* 156, 157–60; cf Gill, above n 11, 676. Gill argues that an [O]mbudsman with integrity mechanisms involves the dissociation of the [O]mbudsman institution from its traditional basis as both an adjunct of Parliament and as an institution aligned to the justice system'.

57 As 'institutional integrity goes beyond matters of legality', an integrity arm of government may scrutinise integrity functions that the three recognised branches of government perform: see J J Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724, 725–6. An alternative to this view is that there is a lack of clarity regarding the relationship between the integrity body and the traditional Westminster system of government: see Wayne Martin, 'Forewarned and Four-Armed: Administrative Law Values and the Fourth Arm of Government' (2014) 88 *Australian Law Journal* 106, 113–16.

58 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*').

order.<sup>59</sup> Similarly in *Lane v Morrison*,<sup>60</sup> the High Court held that the establishment of the Australian Military Court was an impermissible attempt to create a legislative court outside ch III of the *Commonwealth Constitution*.<sup>61</sup> Even if the judicial branch is crucial to public integrity, it was not established solely for that purpose.<sup>62</sup> Such a strict approach in Australia also suggests that an Ombudsman's findings and recommendations are not constitutionally intended to confer strict legal enforceability as a judicial power.

Nevertheless, considering the growing demands and roles placed on ombudsmen, it is important to ensure their offices are protected. Due to an 'absence of constitutional protection or sanction' for ombudsmen's function, it ultimately 'falls to courts and tribunals to review [O]mbudsman jurisdiction',<sup>63</sup> thereby requiring a more careful examination in doing so. Furthermore, the Ombudsman brand name should be protected to preserve the spirit of public power exercised by ombudsmen.<sup>64</sup> The need to protect the Ombudsman institution is relevant to any decision not to follow Ombudsman recommendations, although it presumably requires a higher level of consideration that courts could not take into account.

## 2 *Should Inquisitorial Powers be Legally Enforceable?*

Unlike courts, which make orders and provide binding remedies in the resolution of disputes, the outcome of Ombudsman investigations is neither legally enforceable nor binding.<sup>65</sup> Granting an Ombudsman determinative powers would be problematic because it would change its nature to that of a lower court or tribunal,<sup>66</sup> potentially blurring the separation of powers. Thus, it is promising to ask why, and to what extent, ombudsmen have become central to the landscape of Australian public law. The form of review undertaken by ombudsmen may

59 Ibid 266, 298–9. The reasoning by the joint majority (4–3) led by Dixon CJ derived from the principle that non-judicial power cannot be vested in a ch III court: at 271–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

60 (2009) 239 CLR 230.

61 Ibid 237–8 [11] (French CJ and Gummow J). Their Honours specifically found that it was inappropriate to 'borrow for the [Australian Military Court] the reputation of the judicial branch of government for impartiality and non-partisanship'.

62 A J Brown, 'The Integrity Branch: A "System", an "Industry", or a Sensible Emerging Fourth Arm of Government?' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 301, 317–18.

63 Stuhmcke, 'Australian Ombudsmen: A Call to Take Care', above n 20, 537 (citations omitted). Stuhmcke notes: 'Such review is limited. Australian courts have had rare opportunities to scrutinise the validity of legislative grants of jurisdiction to ombudsmen'.

64 Ibid 553–4. Stuhmcke argues that while '[a]dministrative law has historically been predicated upon a public and a private modality of governance', such a principle is now less convincing.

65 For example, the Explanatory Memorandum of the Ombudsman Bill 1976 (Cth) clearly provided that the Ombudsman 'cannot compel the Department or other agency to put his recommendations into effect' nor does it have power to 'overrule a decision and substitute his own view of what ought to have been done': at 1–2 [4].

66 Matthew Groves, 'Ombudsmen's Jurisdiction in Prisons' (2002) 28 *Monash University Law Review* 181, 203.

largely overlap with judicial review or merits review proceedings,<sup>67</sup> as they examine whether a decision is lawful and correct. However, ombudsmen assess the correctness of the decision by applying broader principles of fairness and reasonableness.<sup>68</sup> These standards are both derived from, and aiming to serve and improve, the broader system of public administration,<sup>69</sup> rather than only being applied to promote the interests of either the citizen or the government. Such Ombudsman features not only reiterate the purpose of maintaining neutrality in government, but also ensure fair and equitable steps are undertaken in every decision-making process. In this respect, ombudsmen fulfil a hybrid function; despite lacking enforceability, the inquisitorial nature of the proceedings stands opposed to the traditional adversarial court system. This saves both time and resources and more efficiently detects the problem in government, rather than a strict application of legal principles.<sup>70</sup>

As such, the Ombudsman model is more flexible and less adversarial than the courts. Ombudsmen adopt informal procedures, which do not necessarily allow for a formal hearing or cross-examination on either side.<sup>71</sup> Despite having the scope to investigate the issues, the Ombudsman's conclusion may not necessarily appease both parties. Ombudsmen may also make human errors by incorrectly reporting the facts or issues. Due to these reasons, it is difficult to impose legal responsibilities on the government to act as dictated by an independent public official. Should Ombudsman reports become legally enforceable, it may potentially open the floodgate of independent grievances and inquiries, increasing the investigatory burden of the office. This would then undesirably substitute, or interfere with, the judiciary's functions in government.

67 See, eg, D G Gardiner, 'Policy Review Reviewed: The Pubescent State of the "New" Administrative Law' (1988) 4 *Queensland University of Technology Law Journal* 123, 133–4.

68 Simon Cohen, 'Fair and Reasonable — An Industry Ombudsman's Guiding Principle' (2010) 63 *Australian Institute of Administrative Law Forum* 20, 24. While Cohen focuses on industry ombudsmen, the same principles could effectively apply to public sector ombudsmen. See generally Naomi Creutzfeldt, 'What Do We Expect from an Ombudsman? Narratives of Everyday Engagement with the Informal Justice System in Germany and the UK' (2016) 12 *International Journal of Law in Context* 437, 438.

69 Anita Stuhmcke, 'The Evolution of the Classical Ombudsman: A View from the Antipodes' (2012) 2 *International Journal of Public Law and Policy* 83, 84, cited by Gill, above n 11, 667–9. While the Ombudsman institution was traditionally described as 'fire-fighting' (ie reactive to redress individual grievances), it now widely conducts 'fire-watching' or 'fire-prevention' functions (ie proactively investigate and help improve public administration).

70 It should be noted that the relationship between legality and good administration is different: see de Leeuw, above n 53, 361–3.

71 Richard Kirkham, Brian Thompson and Trevor Buck, 'When Putting Things Right Goes Wrong: Enforcing the Recommendations of the Ombudsman' [2008] *Public Law* 510, 523. Creutzfeldt states that ombudsmen reach their decisions on a 'fair and reasonable' basis, which is 'over and above strictly legal questions': Creutzfeldt, above n 68, 438.

### III UK CASE STUDIES: LEGAL EFFECTS OF PUBLIC SERVICE OMBUDSMAN REPORTS

Ombudsman legislation across Australia, and Australian courts, have been silent on the expected quality of an agency's response to Ombudsman reports. This creates a legal question as to whether public officials can decide to simply nullify — or 'walk away' from — the outcome of Ombudsman investigations. Regarding this uncertainty, several UK decisions that explored the government's rejection of Ombudsman findings and recommendations will now be analysed.

#### A *Bradley: Failure to Provide Workers Compensation*

##### 1 *Background*

The *Bradley* litigation<sup>72</sup> considered the legality of a ministerial decision to reject the UK Parliamentary Ombudsman's *Occupational Pensions Special Report*, which had been laid before Parliament.<sup>73</sup> This report related to the treatment of workers who had, following Government encouragement, invested in occupational pension schemes in the early 2000s. The Ombudsman found that the Government had been guilty of maladministration in publishing inaccurate and misleading information about the level of financial security conferred by such pension schemes.<sup>74</sup> In particular, the report noted that due to the administrative errors by the Department for Work and Pensions, the complainants had suffered injustice and experienced distress and uncertainty.<sup>75</sup> The Ombudsman recommended the Government consider ways to remedy the losses suffered by the relevant workers, such as via payments from public funds.<sup>76</sup> In response, the Permanent Secretary for the Department for Work and Pensions rejected the Ombudsman's findings regarding alleged maladministration, and any causal link between the Government's actions and the financial losses suffered by individuals.<sup>77</sup> The Secretary also declined to adopt most of the recommendations. Thus, the Government rejected the first four of the Ombudsman's recommendations, but accepted the fifth. A group of the affected parties sought judicial review challenging the Government's rejection of the report.<sup>78</sup> The key legal challenge was assessing what the Government was required to have done, or discharged, before freely rejecting the Ombudsman's findings.

72 *Bradley* [2009] 1 QB 114. This reported decision covers both the High Court (Bean J) and Court of Appeal (Sir John Chadwick, Blackburne J and Wall LJ) judgments.

73 The special report was produced under *Parliamentary Commissioner Act 1967* (UK) c 13, s 10(3). For the specific contents, findings and recommendations of the report, see UK Parliamentary and Health Service Ombudsman, *Trusting in the Pensions Promise: Government Bodies and the Security of Final Salary Occupational Pensions* (2006) ('*Occupational Pensions Special Report*').

74 *Occupational Pensions Special Report*, above n 73, 154–5. See *Parliamentary Commissioner Act 1967* (UK) c 13, s 5(1), which empowers the Parliamentary Ombudsman to investigate any 'action taken in the exercise of administrative functions' by government departments or public authorities.

75 *Occupational Pensions Special Report*, above n 73, 164–5.

76 *Ibid* 76.

77 *Ibid* 180–2, 235–9.

78 *Bradley* [2009] 1 QB 114, 118.

## 2 Legal Principles

Kirkham, Thompson and Buck note that '[u]ntil *Bradley*, it was largely understood [in the UK] that respect for Ombudsman reports operated [only] as a matter of convention'.<sup>79</sup> The trial judge, Bean J, applied the principle that a local authority is bound to 'loyally accept' findings of the Local Government Ombudsman ('LGO').<sup>80</sup> Such a proposition implies that the LGO scheme imposes on local councils a general obligation to implement the LGO's reports. His Honour also found a parallel between the effects of decisions of the Ombudsman compared to those of other quasi-judicial bodies in the public sector.<sup>81</sup> Bean J's approach seemed to heavily focus on the logic and correctness of the Ombudsman's findings, while attempting to draw a connection between the findings and injustice.<sup>82</sup> As such, his Honour reached diverging positions on each of the findings of maladministration in dispute.<sup>83</sup> Such a conclusion largely stemmed from a general principle that although recommendations of the Ombudsman are not legally authoritative on the agency, findings of fact are binding unless legally flawed or unreasonable per *Wednesbury*.<sup>84</sup> His Honour's ruling would, had it been upheld by superior courts, effectively force affected authorities to accept all findings. This could undesirably result in the investigated agencies pursuing every possible option for judicial review, in order to challenge the validity of the Ombudsman report.

Both the Secretary and the claimants appealed the trial judge's decision.<sup>85</sup> While reaching substantially the same conclusion,<sup>86</sup> the Court of Appeal held that Bean J erred in applying the principle relevant to the LGO to the Parliamentary Ombudsman because of the legislative differences. When construing the *Parliamentary Commissioner Act 1967* (UK) c 13, in particular, it is implicit

79 Kirkham, Thompson and Buck, above n 71, 518.

80 *Bradley* [2009] 1 QB 114, 134 [50]–[51] (High Court, Bean J). In doing so, his Honour applied Lord Donaldson MR's judgment in *R v Local Commissioner for Administration for the South, the West Midlands, Leicestershire, Lincolnshire and Cambridgeshire; Ex parte Eastleigh Borough Council* [1988] 1 QB 855.

81 *Bradley* [2009] 1 QB 114, 135–6 [56]–[58] (High Court, Bean J). His Honour referred to Judge LJ's reasoning in *R v Secretary of State for the Home Department; Ex parte Danaei* [1998] INLR 124, 134–5, that '[t]he desirable objective of an independent scrutiny of decisions ... would be negated if the Secretary ... were entitled to act merely on his own assertions and reassertions about relevant facts contrary to express findings made by [the Ombudsman]'.

82 *Bradley* [2009] 1 QB 114, 139–40 [67]–[70] (High Court, Bean J).

83 *Ibid* 138–9 [66], 141 [79] (High Court, Bean J). The first and third findings of maladministration, as well as the finding regarding causation of injustice, were contested. Bean J concluded that while the first finding of maladministration was logical, the third finding did not meet such standards. Thus, his Honour quashed the Secretary's decision to reject only in relation to the first finding: see also Varuhas, 'Governmental Rejections of Ombudsman Findings: What Role for the Courts?', above n 48, 106–7.

84 *Bradley* [2009] 1 QB 114, 134–5 [53], 144–5 [92] (High Court, Bean J). For the basis of 'unreasonableness' as a ground for judicial review, see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (Lord Greene MR) ('*Wednesbury*').

85 *Bradley* [2009] 1 QB 114, 145. The Secretary challenged the High Court's decision to quash its rejection of the first finding of maladministration, while the claimants appealed on the basis that Bean J erred in declining to quash the Secretary's decision to reject the third finding of maladministration and the finding as to causation of injustice.

86 *Bradley* [2009] 1 QB 114, 200 [131] (Court of Appeal, Sir John Chadwick). Wall LJ and Blackburne J agreed with Sir John Chadwick: at 201 [132]–[133]. With respect to the issue of causation of injustice, the Court of Appeal held that the High Court had erred in treating the Ombudsman's finding of injustice as only relating to the creation of financial losses: at 191 [108].

that Ministers be answerable to Parliament, not the judiciary, for their responses to the Ombudsman's findings.<sup>87</sup> The Court of Appeal rejected the position that the findings were binding on the Secretary,<sup>88</sup> which would, therefore, preclude a response from the government justifying their decision in accordance with their policy and political direction.

However, the Court of Appeal prescribed a condition that the Secretary's rejection of findings must have been rational.<sup>89</sup> The scope of this rationality requirement was not the relatively narrow prevailing test that deems a decision or action to be irrational when it defies logic or widely accepted standards. The Court instead imposed a fairly demanding requirement of explanation by the Government. When assessing whether the Government has responded rationally to the Ombudsman's report, the question is not whether the defendant himself considers that there was maladministration, but whether in the circumstances his rejection of the findings to this effect is based on 'cogent reasons'.<sup>90</sup> With respect to the Secretary's rejection of the first finding of maladministration, which related to an official leaflet found to be misleading, the Secretary contended that the publication was made to provide brief and non-technical guidance, which does not constitute authoritativeness.<sup>91</sup> With the Court acknowledging the logic behind this argument, the Secretary was also required to have provided good reasons for rejecting the Ombudsman's views. This naturally influences the court adjudicating as to whether those reasons are evidence-based and convincing, as opposed to legally irrational per the *Wednesbury* standard. Furthermore, the decision affirmed that the Secretary was not entitled 'to reject the [O]mbudsman's finding merely because he preferred another view which could not be characterised as irrational'.<sup>92</sup> In other words, a relevant Minister cannot put forward his view as a justified representation of the government without clear and logical reasons. The uncertainty lies with why courts should intervene with ministerial decisions simply because they disagree with such decisions.<sup>93</sup> It also appears that the Court of Appeal forestalled any risk of the Government misusing its executive power to quash any Ombudsman's findings that may jeopardise its political objectives and standing. Based on *Bradley*, the same logic would also likely apply to reports issued by other public service ombudsmen, including the UK's LGO.

87 Ibid 152 [13] (Court of Appeal, Sir John Chadwick); 202–3 [142] (Court of Appeal, Wall LJ). This is based on the allocation of constitutional responsibilities: see Jason N E Varuhas, 'Judicial Capture of Political Accountability' (Judicial Power Project Report, Policy Exchange, 2016) 15.

88 *Bradley* [2009] 1 QB 114, 163 [40]–[41], 164–5 [44] (Court of Appeal, Sir John Chadwick); 201 [135] (Court of Appeal, Wall LJ).

89 Ibid 166 [51], 176 [71]–[72] (Court of Appeal, Sir John Chadwick).

90 Ibid 176–7 [72], 186 [97] (Court of Appeal, Sir John Chadwick). The Court endorsed an unusual definition of unreasonableness, equating it with an absence of 'cogent reasons'.

91 Ibid 160–1 [34], 177 [73]–[74] (Court of Appeal, Sir John Chadwick).

92 Ibid 184 [91] (Court of Appeal, Sir John Chadwick).

93 Varuhas, 'Judicial Capture of Political Accountability', above n 87, 16.

## **B Equitable Life: Rejecting the Establishment of a Compensation Scheme**

### **1 Background**

In 2009, *Equitable Life*<sup>94</sup> was the first opportunity to review and apply the *Bradley* judgment. Specialising in pension provision, particularly ‘with profits’ pensions, the Equitable Life Assurance Society became financially incapable of honouring guarantees concerning the worth of policyholders’ pensions in the late-1990s.<sup>95</sup> This resulted in the near-collapse of the Society and unexpected reductions in the value of members’ investment.<sup>96</sup> Upon conclusion of a lengthy investigation, the Ombudsman issued a report<sup>97</sup> finding that regulators were guilty of complacency and serial failure.<sup>98</sup> It also recommended that the Government establish a compensation scheme to restore investors’ financial positions, but for the alleged maladministration.<sup>99</sup> The Treasury, however, rejected some of the Ombudsman’s findings and agreed only to compensate a narrower category of policyholders.<sup>100</sup> The Equitable Members Action Group, which represented over 20 000 existing and former policyholders, sought judicial review of the Treasury’s response, contending that it had acted unlawfully in the course of rejecting the Ombudsman’s findings and refusing to fully implement the recommendations regarding compensation.<sup>101</sup> The crux of this litigation was: (i) whether the rationale for dismissal was reasonable and equitable; and (ii) which standard was to be adopted in assessing reasonableness.

### **2 Legal Principles**

The Administrative Court reaffirmed *Bradley* in respect of the actual findings of the Ombudsman, noting the Ombudsman had to be viewed in the context of its relationship with Parliament.<sup>102</sup> Thus, the Court held that the primary place for the enforcement of an Ombudsman’s findings was Parliament.<sup>103</sup> As such, the applicants were partly successful in challenging the Treasury’s decisions regarding the findings, which were held to be of substantive unlawfulness. Although not bound by the findings, the Court held that the Treasury could reject them only on

94 *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin) (15 October 2009) (*‘Equitable Life’*).

95 *Ibid* [11]–[19].

96 *Ibid*.

97 For specific findings and recommendations, see UK Parliamentary and Health Service Ombudsman, *Equitable Life: A Decade of Regulatory Failure* (2006). The report made ten findings of maladministration, and found that six of these instances of maladministration led to injustice: at 315–32, 344–55.

98 *Equitable Life* [2009] EWHC 2495 (Admin) (15 October 2009) [40]–[42].

99 *Ibid* [48].

100 *Ibid* [49].

101 *Ibid* [1]–[2], [7].

102 *Equitable Life* [2009] EWHC 2495 (Admin) (15 October 2009) [26]–[27], [50] (Carnwath LJ and Gross J).

103 *Ibid* [50], [52] (Carnwath LJ and Gross J).



a cogent basis. The Court acknowledged that there is no precise test in assessing cogency and did not wish to attempt to further define the test or ‘to suppose that there is some exhaustive list of such reasons’.<sup>104</sup> Individual cases must turn on careful examination of their facts, ‘with the focus resting upon the decision to reject the [Ombudsman’s findings], rather than [its] findings themselves’.<sup>105</sup> From a government perspective, it may be easier to justify rejection of the findings if it successfully demonstrates the Ombudsman is wrong in fact or in law, or provides further analysis not undertaken by the Ombudsman.<sup>106</sup>

In relation to the recommendations, however, the Court found that the Treasury’s decision to implement a less generous compensation scheme than that recommended by the Ombudsman was not unreasonable. Carnwarth LJ and Gross J noted that ‘whether to establish a compensation scheme in any particular context, and the limits of such a scheme, is a matter for the Government, reporting to Parliament, and not reviewable in the courts save on conventional irrationality grounds’.<sup>107</sup> The Court signalled that ministerial rejection of the Ombudsman’s recommendations, as distinct from findings, would attract review only on conventional irrationality grounds.<sup>108</sup> This potentially implies that establishing unreasonableness would be more complex. The judgment, once again, emphasised the Court’s hesitance in interfering with government policy-making.

*Equitable Life* also confirms the theory that ombudsmen are responsible for maintaining factual accuracy, rather than driving policy directions of government through their recommendations. Webley and Samuels note that the judgment ‘[does] not mean that [an Ombudsman’s] findings are legally binding, but that if they are rejected, the government ... must give rational and intelligible reasons for the decision to reject them’.<sup>109</sup> The impact of *Equitable Life*, when read with *Bradley*, suggests that UK courts may have influence on issues which in Australia are regarded as being matters of government policy, rather than law. Although the two dimensions are interrelated, the courts’ responsibility should be limited to measuring and ensuring that legal requirements are met, as opposed to obstructing the powers Ministers are entitled to exercise. However, at least in the UK, the principles that established the ‘cogent reasons’ test in *Bradley* were therefore upheld.

104 Ibid [66]–[67] (Carnwarth LJ and Gross J). The Ombudsman also noted that ‘[t]he lawfulness of the Government’s response is of course a matter for the courts’: UK Parliamentary and Health Service Ombudsman, *Injustice Unremedied: The Government’s Response on Equitable Life* (2009) 5 [26], quoted in Varuhas, ‘Judicial Capture of Political Accountability’, above n 87, 35.

105 *Equitable Life* [2009] EWHC 2495 (Admin) (15 October 2009) [66].

106 Ibid [67]. For example, the government may separately undertake an actuarial analysis of the findings to validate the findings and recommendations: at [88], [92].

107 Ibid [132] (Carnwarth LJ and Gross J).

108 Ibid; See also Elliott, above n 15, 3. Elliott argues that strict review of dismissals of the Ombudsman’s findings ‘strengthens the proper role of the Ombudsman — it stops ministers from evading political responsibility’.

109 Lisa Webley and Harriet Samuels, *Complete Public Law: Text, Cases and Materials* (Oxford University Press, 3<sup>rd</sup> ed, 2015) 411.

## C Gallagher: LGO's Investigation

### 1 Background

The Administrative Court's decision in *Gallagher*<sup>110</sup> illustrates how the nature of LGO investigations is different to that of the Parliamentary Ombudsman, and provides a clearer distinction between 'findings' and 'recommendations' by ombudsmen. The claimants were travellers living on an unauthorised site.<sup>111</sup> As part of a planning process for this site, they provided the local council with medical and other personal information about their children.<sup>112</sup> Subsequently, the information was published as part of a committee meeting, which had later been publicly distributed.<sup>113</sup> The claimants lodged a complaint to the LGO about the council's decision to publish their personal information, seeking an apology and financial compensation.<sup>114</sup> The LGO concluded the publication of the private information amounted to an administrative failing and recommended that the council apologise and pay the claimants £300 each.<sup>115</sup> While the council agreed to apologise, it refused to pay compensation.<sup>116</sup> The key issue was whether the council was entitled to reject the recommendation for monetary compensation.

### 2 Legal Principles

In line with the Parliamentary Ombudsman's role, the LGO has the power to investigate a complaint of alleged maladministration in connection with a local authority's administrative functions.<sup>117</sup> Where the authority fails to comply with the recommendations, the LGO can require the authority to publish a statement in local publications, setting out its recommendations and any other material it requires.<sup>118</sup> When the LGO issues a report, those findings are *prima facie* binding on the authority unless successfully challenged by way of judicial review. However, similar to the Parliamentary Ombudsman, the authority's decision about how to respond should be governed by the usual general public law requirements of good faith, rationality and fairness.<sup>119</sup>

Furthermore, the Court affirmed these legislative reporting procedures and held that a local authority may lawfully reject the LGO's recommendations,

110 *R (Gallagher and McCarthy) v Basildon District Council* [2010] EWHC 2824 (Admin) (9 November 2010) ('*Gallagher*').

111 *Ibid* [3].

112 *Ibid*.

113 *Ibid*.

114 *Ibid* [4].

115 *Ibid* [4]–[5].

116 *Ibid* [5].

117 *Local Government Act 1974* (UK) c 7, ss 24A, 26.

118 *Ibid* ss 31(2D)–(2F). See also *Gallagher* [2010] EWHC 2824 (Admin) (9 November 2010) [14].

119 Nothing in the judgments of the UK Supreme Court in *JR55* (see Part III Section D of this article) or the Court of Appeal in *Bradley* suggests that the reasoning in those cases is limited to the Parliamentary Ombudsman. Thus, the statement made here, drawn from those cases, equally applies to the LGO.

unless the rejection can be impugned on public law grounds, such as *Wednesbury* unreasonableness.<sup>120</sup> More importantly, the Court emphasised that recommendations must be distinguished from findings of fact.<sup>121</sup> The Court held that the LGO is in a good position to make factual findings ‘by reason of his expertise, accumulated experience of local administration’,<sup>122</sup> while recommendations are not hard-edged. This case reinforces the necessity of understanding the legal impact of rejecting findings and recommendations. The only express sanction for failure to follow Ombudsman recommendations was ‘local publicity, leaving the electors to determine whether the local authority had behaved acceptably in rejecting any recommendation designed to remedy an injustice to a local citizen’.<sup>123</sup>

## D JR55: A Doctor’s Refusal to Compensate

### 1 Background

The *JR55* litigation<sup>124</sup> involved the Northern Ireland Commissioner for Complaints’ (‘NICC’) investigation into a complaint against a general medical practitioner. The complainant was the widow of one of the respondent’s patients, who died due to a myocardial infarction in early 2009.<sup>125</sup> The care that he had received prior to his death, such as the respondent’s delays in passing on relevant information regarding his ongoing treatment, was the subject of various complaints to the NICC.<sup>126</sup> The Commissioner concluded that the respondent had failed to provide a reasonable level of care and treatment and was guilty of maladministration.<sup>127</sup> The NICC also recommended that the respondent pay a £10 000 consolatory payment to the complainant.<sup>128</sup> In response, the respondent apologised to the complainant and adopted changes to his practice’s procedures designed to avoid a recurrence of the administrative failings.<sup>129</sup> However, the respondent declined to pay the compensation recommended, contending that he was not legally bound to do so.<sup>130</sup>

120 *Gallagher* [2010] EWHC 2824 (Admin) (9 November 2010) [26]–[28], [31]–[33]. This would potentially encourage judicial review proceedings to test the validity of LGO recommendations.

121 *Ibid* [18], [27].

122 *Ibid* [27].

123 *Ibid* [26]. This position was echoed in *R (Nestwood Homes Developments Limited) v South Holland District Council* [2014] EWHC 863 (Admin) (25 March 2014) [58] (‘*Nestwood*’).

124 *JR55 v Northern Ireland Commissioner for Complaints* [2015] NI 97 (‘*JR55 CA*’); *Re JR55’s Application for Judicial Review* [2016] NI 289 (‘*JR55 SC*’).

125 *Ibid* 294 [7].

126 *Ibid* 294–5 [9].

127 *Ibid*.

128 *Ibid* 295 [9].

129 *Ibid* 295 [10].

130 *Ibid*.

## 2 Legal Principles

Unlike the cases above, *JR55* involved an investigation against a person who was not a public authority. The litigation focused on the extent of the NICC's power to recommend a private individual rectify his medical practice. It was also questionable as to whether the NICC has the ability to issue a report drawing the attention of Parliament to such a person's failure to comply with its recommendation.

The Court of Appeal in Northern Ireland ('NICA') ruled that the NICC did not have the power to recommend financial compensation.<sup>131</sup> In doing so, the Court pursued a strict interpretation of the laws around Ombudsman schemes, noting that '[s]uch a power would have to be found in express wording or by necessary implication from the relevant legislation'.<sup>132</sup> Without a clear reference to the power to recommend financial compensation within the primary legislation, the NICC decision was held unlawful.

The UK Supreme Court unanimously upheld the NICA's decision. The Court specifically interpreted the relevant Order that allows the NICC to investigate complaints against individuals, such as the respondent, providing professional services under contracts or other consensual arrangements with a public body.<sup>133</sup> However, the Order provides that the NICC may not carry out any investigations in respect of which the complainant has a remedy by way of proceedings in a court, unless it is not reasonable to expect the complainant to resort to law.<sup>134</sup> In holding that the NICC had no power to recommend a monetary payment against an individual, the Court made a distinction between complaints against: (i) public authorities; and (ii) private individuals performing public services in contract with a public body. The Court enunciated:

[the NICC] is not a court ... [it] is an official, albeit an independent one, performing an investigatory and advisory function under statute ... At best, [the NICC's recommendations] are legally enforceable only by virtue of the public law duty of a public body not irrationally to reject them. But that duty is irrelevant to a person in the position of the respondent, who has no relevant public law duties.<sup>135</sup>

Lord Sumption also noted that a monetary recommendation must be rational and capable of explanation, preferably with a coherent calculation.<sup>136</sup> It can be deduced that failing to do so would be held to be irrational. With respect to the NICC's power to table a report in Parliament on private individuals, the Court reiterated that the legislative framework governing the Parliamentary Ombudsman provides that a special report can be issued to Parliament if it finds injustice caused by

131 *JR55 CA* [2015] NI 97, 111 [33].

132 *Ibid* 110 [31] (Girvan LJ).

133 *JR55 SC* [2016] NI 289, 295–8 [11]–[17] (Lord Sumption); see also *Commissioner for Complaints (Northern Ireland) Order 1996* (NI) SR 1996/1297, art 8.

134 *Commissioner for Complaints (Northern Ireland) Order 1996* (NI) SR 1996/1297, arts 9(3)–(4). See also Richard Kirkham and Alexander Allt, 'Making Sense of the Case Law on Ombudsman Schemes' (2016) 38 *Journal of Social Welfare and Family Law* 211, 217–18.

135 *JR55 SC* [2016] NI 289, 299 [20] (Lord Sumption).

136 *Ibid* 303 [30] (Lord Sumption).

maladministration and that the injustice will not be remedied.<sup>137</sup> The relevant Order in *JR55* does not provide the NICC with such powers. Thus, private individuals without a public law duty are not subject to oversight by the legislature.

Overall, the reasoning of *JR55* indicates that Ombudsman reports are even less enforceable against those without public law duties, such as private individuals or businesses, or those in contracting arrangements. It is therefore important to construe the legislation regulating the industry or individuals in question and consider whether they are part of, or regulated by, the public sector.<sup>138</sup>

## **E Legislative Reforms Underway in the UK**

The UK Government, through a draft Bill released in December 2016, expressed an intention to create a single Public Service Ombudsman.<sup>139</sup> This is designed to modernise the functions of the existing Parliamentary and Health Service Ombudsman and the LGO. The aim of simplifying the system is to improve access to Ombudsman services.<sup>140</sup> The key criticisms of this Bill, however, lie at establishing the legality and enforceability of findings and recommendations. With respect to recommendations, the Bill seeks to codify parts of the *Bradley* principle, particularly in requiring that a designated authority consider the Ombudsman's recommendations, but not obliging implementation.<sup>141</sup> What steps the authority needs to take to demonstrate due consideration, and the legal consequences for failure to do so, remains unclear.

The Bill is silent on the binding nature of the new Ombudsman's findings. This has been labelled as a 'regressive move', potentially undermining the Ombudsman's ability to deliver justice.<sup>142</sup> Considering the new Ombudsman's remit, the diverging positions of *Bradley* (relating to the Parliamentary Ombudsman) and *Gallagher* (relating to the LGO), regarding whether findings are binding, should

137 Ibid 301–2 [26] (Lord Sumption).

138 Alternative views to the literal interpretative approach, including purposive interpretation, were discussed in Richard Kirkham, 'JR55, Judicial Strategy and the Limits of Textual Reasoning' [2017] *Public Law* 46.

139 Draft Public Service Ombudsman Bill 2016 (UK) cl 1. The idea of such a 'one-stop' approach, using the Scottish example, was also broadly discussed in Gill, above n 11, 663–7.

140 Draft Public Service Ombudsman Bill 2016 (UK) cl 5. For example, the draft Bill seeks to enable the public to complain directly to the new Ombudsman, instead of notifying a Member of Parliament who filters any complaints that do not fall within the Parliamentary Ombudsman's remit. Currently, the 'filter' requirement only applies to the Parliamentary and Health Service Ombudsman when acting as the Parliamentary Ombudsman.

141 Ibid cl 14(8). It is unclear whether there will be a requirement for 'cogent reasons' as there is with rejecting findings. See also letter from Mick King (Local Government and Social Care Ombudsman) and Rob Behrens (Parliamentary and Health Service Ombudsman) to Chris Skidmore (Minister for the Constitution), 17 July 2017 <[https://www.ombudsman.org.uk/sites/default/files/Joint\\_reponse\\_on\\_the\\_Draft\\_Public\\_Service\\_Ombudsman\\_Bill.pdf](https://www.ombudsman.org.uk/sites/default/files/Joint_reponse_on_the_Draft_Public_Service_Ombudsman_Bill.pdf)>. The Ombudsman, in its response to the Draft Bill, considered that cl 14(8) could be strengthened even further to enable it to 'seek a response from the highest level of decision-making within the authority'.

142 Gavin McBurnie, 'The Draft Public Service Ombudsman Bill: What Recommendations are Being Taken Forward?' on UK Administrative Justice Institute, *UKAJI Blog* (12 January 2017) <<https://ukaji.org/2017/01/12/the-draft-public-service-ombudsman-bill-what-recommendations-are-being-taken-forward/>>.

be reconciled to provide legislative certainty and consistency. Moreover, the Bill does not specify the types of remedies available to the new Ombudsman for recommendation. Noting the *JR55* judgment, which was based partly on the textual interpretation of the relevant legislation not permitting recommendations of financial compensation as a means of remedy, it is debatable whether the Bill should 'clarify in advance the nature of permissible remedies'.<sup>143</sup> Since recommendations are made upon the completion of an open and inquisitorial process, ombudsmen should be free to propose suggested remedial actions as appropriate. While a list of remedies in legislation may provide guidance to the new Ombudsman, and complainants, regarding possible recommendations, misleading or false expectations as to the enforceability of recommended remedies may arise if such recommendations are not binding.<sup>144</sup> Were a situation like *JR55* to arise in future, it would be more appropriate that damages be privately granted by way of litigation, rather than through an Ombudsman process. The Ombudsman's systemic function is to help understand and rectify the causes of maladministration upon receiving complaints from the public, as opposed to assessing the quantum of compensation entitlement. It is important that this distinction is upheld.

## **F Implications for Australia**

The UK precedents have been analysed as generally being regarded as 'successful in ensuring a heightened degree of accountability'.<sup>145</sup> Commentators such as Kirkham, Thompson and Buck considered that courts would likely follow *Bradley* for other types of public service ombudsmen, due to the Parliamentary relationship.<sup>146</sup> In contrast, Varuhas contends that courts should only be utilised, using an orthodox *Wednesbury* standard, when assessing the government's response to reports, and not in determining the threshold of rejection.<sup>147</sup> While the principles of the above UK judgments, and the legislative proposal, cannot be generalised easily, several salient principles could be inferred for Australian ombudsmen as follows:

1. the legal framework should be carefully construed when determining the scope of Ombudsman investigatory reporting mechanisms;
2. findings of Ombudsman investigations would be prima facie valid (cf legally binding), unless they are flawed or made erroneously;

143 See Richard Kirkham and Brian Thompson, 'An Initial Commentary on the Draft Public Services Ombuds Bill' on UK Administrative Justice Institute, *UKAJI Blog* (20 December 2016) <<https://ukaji.org/2016/12/20/an-initial-commentary-on-the-draft-public-services-ombuds-bill/>>.

144 A study found that citizens expect ombudsmen to act as their interpreter, advocate, ally and instrument: see Creutzfeldt, above n 68, 442–7.

145 Gordon Anthony, 'Administrative Justice in the United Kingdom' (2015) 7 *Italian Journal of Public Law* 9, 22.

146 See Kirkham, Thompson and Buck, above n 71, 529.

147 Varuhas, 'Governmental Rejections of Ombudsman Findings: What Role for the Courts?', above n 48, 110–11.

3. an additional burden could arguably be placed on public authorities to provide cogent reasons when rejecting findings of ombudsmen;
4. recommendations by ombudsmen are confirmed not to be legally binding, particularly where such recommendations require substantial monetary compensation and/or law reform; and
5. Ombudsman reports appear to be even less legally enforceable against private individuals, whether or not a relationship with the public sector exists.

The facts of, and subsequent decisions in, the UK cases raise the interesting question of whether ombudsmen should be able to grant remedies, including forcing government authorities to provide the remedy.<sup>148</sup> Benefits would include increased authority of, and improved public confidence in, ombudsmen. Individuals would understand that if there were a finding of maladministration, they would receive a remedy of some kind. Conversely, the disadvantages include the informality of proceedings that are inquisitorial in nature, which do not necessarily give sufficient opportunity for the government authority to respond at every stage.<sup>149</sup> In particular, the *Bradley* judgment signals the significance of construing the reporting procedures of Ombudsman reports and assessing the nature of the content of the report. This also implies the importance of actively communicating with the Ombudsman while finalising the report.

Unlike the cases above, *JR55* was more akin to conventional litigation involving an aggrieved party and a person alleged to have committed wrong. Arguably, the UK Supreme Court took a stricter approach because the scope of the dispute was narrower, and specific to a single individual, than that of *Bradley* and *Equitable Life* which involved a larger pool of complainants. In Australia, the Commonwealth Scheme for Compensation for Detriment caused by Defective Administration<sup>150</sup> provides recourse for aggrieved individuals to claim remedies on a moral basis for an agency's unreasonable failure to comply with its own administrative procedures, institute appropriate procedures, or give proper advice.<sup>151</sup> Together with the *JR55* reasoning, where the nature of a case becomes like private litigation, Australian courts would be less willing to consider the minute detail of an Ombudsman's findings and, ultimately, give less weight to

148 Webley and Samuels, above n 109, 411; cf Groves, above n 66, 205.

149 The Commonwealth Ombudsman has discretion to request an investigated agency to furnish the report within a specified time. The *Ombudsman Act 1976* (Cth) does not prescribe at what stage of the investigation this will need to occur: see *Ombudsman Act 1976* (Cth) ss 15(4)–(6). Furthermore, the Victorian Ombudsman, for example, must give the investigated person a 'reasonable opportunity' to respond to adverse material in a report: see *Ombudsman Act 1973* (Vic) s 25A(2).

150 See Department of Finance (Cth), *Scheme for Compensation for Detriment Caused by Defective Administration: Resource Management Guide No 409* (2016). The Scheme is available to provide a remedy for all non-corporate Commonwealth entities under the *Public Governance, Performance and Accountability Act 2013* (Cth), with the exception of the Department of Parliament: at 6 [13]–[14].

151 Department of Finance (Cth), above n 150, 6–7 [17]–[18]. However, the Scheme does not oblige decision-makers to approve a payment in any particular case.

public interest.<sup>152</sup> Such a requirement would go against the grain of Australian common law, which holds that there is no general duty to provide reasons for administrative decisions.<sup>153</sup> However, as per *Public Service Board of NSW v Osmond*, it could be considered an 'exceptional circumstance' which requires reasons be provided.<sup>154</sup>

## **G Broader Implications for Other Integrity Bodies**

Requiring the implementation of Ombudsman recommendations, whether fully or partially, may likely interfere with government policy agenda. The sources public sector ombudsmen or other integrity authorities rely on for investigations are arguably limited to document reviews and anecdotal interviews undertaken in an inquisitorial manner. Therefore, they would not necessarily represent viable solutions for redressing maladministration, nor the precise nexus between the relevant conduct and government policy as intended at that point in time.

In practice, it is undesirable for independent agencies to mandate policy, as opposed to procedural, directions for government. The correctness of a government decision is extremely difficult to assess due to its political dimension and may not necessarily align with the desire, or needs, of complainants. Therefore, when exercising the powers under the *Ombudsman Act 1976* (Cth), the Ombudsman should comment on the adequacy and legitimacy of administration leading up to a policy decision, rather than the merits of the outcomes.<sup>155</sup> If otherwise, there may likely be significant delays in processing administrative decisions, in order to consider every way to negate the possibility of potential Ombudsman investigations.

Besides minimising delay, a lack of enforceability of reports can be a strength for other reasons. They include recommendations which may significantly impact the delivery of major services or programs to the public, or provide for outlay of a considerable amount of government money otherwise unbudgeted. In such instances, it appears necessary that governments require the flexibility to reject or alter the manner a recommendation be implemented. The flexibility of government response to Ombudsman reports allows for the relevant portfolio

152 Ibid 15 [88]–[93]. Decisions made under the Scheme caused by Defective Administration are also reviewable by the Commonwealth Ombudsman and are subject to judicial review under the common law. See also Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) ch 12. In this chapter, Weeks notes, among other things, that the principles governing such payments are quite discretionary.

153 See generally *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.

154 Ibid 670 (Gibbs CJ), 676 (Deane J).

155 While public service ombudsmen have generally been cautious in exercising their power to review the merits of decisions, one of the purposes of ombudsmen is arguably to help ensure consistency in decision-making. Parliament's original intention also does not seem to preclude ombudsmen from examining the merits of decisions. See the Second Reading Speech for the Ombudsman Bill 1976 (Cth) in Commonwealth, *Parliamentary Debates*, House of Representatives, 4 June 1976, 3068–70 (Robert Ellicott). Further consideration is required due to the difficulty in demarcating the line between consistency, accuracy and due process adopted in decision-making.



Minister to respond in a way that they deem appropriate for the circumstances.<sup>156</sup> These propositions would equally apply to other integrity agencies, not just ombudsmen.

## IV LEGAL AVENUES TO CHALLENGING PUBLIC SERVICE OMBUDSMAN REPORTS

In common law jurisdictions, it has been confirmed that Ombudsman decisions are amenable to judicial review.<sup>157</sup> Notably, Brown LJ stated:

Many in government are answerable to Parliament and yet answerable also to the supervisory jurisdiction of [the] Court. I see nothing about the [Ombudsman]'s role or the statutory framework within which he operates so singular as to take him wholly outside the purview of judicial review.<sup>158</sup>

### A How Can an Ombudsman's Findings Be Quashed Effectively?

Arguably, there are greater potential political, rather than legal, risks in challenging Ombudsman reports. In Australia, there are very limited precedents relating to the validity of Ombudsman reports. Once a report has been tabled in Parliament, it is covered by parliamentary privilege and cannot be quashed in the normal sense.<sup>159</sup> However, courts can still issue some relief, such as a declaration that the process leading to the report denied natural justice to affected individuals.<sup>160</sup>

In *City of Port Adelaide Enfield v Bingham* ('*Bingham*'),<sup>161</sup> the Supreme Court of South Australia considered the powers and decision-making constraints upon the

156 Richard Kirkham, 'Explaining the Lack of Enforcement Power Possessed by the Ombudsman' (2008) 30 *Journal of Social Welfare and Family Law* 253, 255–6.

157 This depends in part on whether the relevant Ombudsman is governed by legislation that includes a privative clause that limits or excludes judicial review. Such a clause was held to be effective to largely exclude review in *Kaldas v Barbour* [2017] NSWCA 275 ('*Kaldas*'). At the time this article went to press, that decision was subject to an application for special leave to the High Court of Australia. For present purposes, the analysis in *Kaldas* in the Court of Appeal of New South Wales preceded on the assumption that, but for the privative clause, supervisory review would be available against the Ombudsman.

158 *R v Parliamentary Commissioner for Administration; Ex parte Dyer* [1994] 1 WLR 621, 625.

159 Reports tabled in Parliament are used as evidence of parliamentary proceedings, meaning that they cannot be called into question by the courts. Parliamentary privilege enshrined in the *Bill of Rights 1688*, 1 Wm & M sess 2, c 2, art 9 has been incorporated in all Australian jurisdictions. For example, see *Parliamentary Privileges Act 1987* (Cth) s 16. For a detailed explanation regarding the legal framework, see Enid Campbell, 'Parliamentary Privilege and Judicial Review of Administrative Action' (2001) 29 *Australian Institute of Administrative Law Forum* 29.

160 For example, in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, the High Court granted a declaration that the Criminal Justice Commission of Queensland had failed to observe natural justice in compiling a report which seriously damaged the appellant company's reputation. However, since the report was recommendatory in nature, the remedies of mandamus and certiorari were rejected. See 580–2 (Mason CJ, Dawson, Toohey and Gaudron JJ); 594–5 (Brennan J).

161 (2014) 119 SASR 1 ('*Bingham*') (Stanley J).

State Ombudsman. A local council engaged a contractor to dispose of tyres from the Council's depot.<sup>162</sup> The owner of the property where the tyres were dumped complained to the Ombudsman about the Council's decision to engage a contractor with no relevant environmental approvals to operate a waste transfer facility.<sup>163</sup> Within the meaning of the *Ombudsman Act 1972* (SA), the Ombudsman concluded that the Council's actions were wrong.<sup>164</sup> The Ombudsman also found that the Council was required to make enquiries about the approvals of the contractor.<sup>165</sup> The Council sought judicial review of the Ombudsman's decisions.<sup>166</sup> While this decision related to local government, it infers that an Ombudsman's report can be quashed where it falls outside 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law'.<sup>167</sup>

Stanley J found that, while recommendations in the report were not legally binding, the *Local Government Act 1999* (SA) empowered the Minister to take action, including issuing directions to councils. His Honour accepted that the Ombudsman's opinion should therefore be judicially reviewable, due to the possibility of the Minister relying on it to take action under the Act.<sup>168</sup> Furthermore, his Honour applied the *Wednesbury* unreasonableness test and held that '[t]he construction of the policy adopted by the Ombudsman is not open [to such interpretation] ... [and] is not a construction which a reasonable mind could reach'.<sup>169</sup> Together with the other cases in this article, *Bingham* highlights a desire for ombudsmen to provide more sufficient opportunities and knowledge for agencies to consider the gist of proposed findings and recommendations.

## **B Preferred Standards for Rejecting Ombudsman Reports**

Scholars suggest that good decision-making equates to compliance with the grounds for judicial review.<sup>170</sup> This section focuses on how government agencies should prepare a response to Ombudsman findings. Concurrently, it seeks to consider options for reform to the *Ombudsman Act 1976* (Cth). Despite the respect given to ombudsmen and the expertise they possess, one should not assume that they are always correct. Accordingly, there should be mechanisms to measure whether Ombudsman reports are lawful and appropriate. One such way is to use some of the standards of judicial review.

162 Ibid 4 [1].

163 Ibid 4 [2].

164 Ibid.

165 Ibid.

166 Ibid 4 [4]–[5].

167 Ibid 20 [61] (Stanley J).

168 Ibid 8 [17] (Stanley J). The Ombudsman's report was found to operate as a 'precondition to a potential course of action or as a step in a process capable of altering the rights or interests of the plaintiff'.

169 Ibid 20 [61] (Stanley J); See also Natasha Jones, 'City of Port Adelaide Enfield v Bingham: Can Ombudsman Recommendations Be Challenged?' (2014) 13 *Local Government Reporter* 62.

170 John McMillan, 'Can Administrative Law Foster Good Administration?' (Speech delivered at the Whitmore Lecture, Council of Australian Tribunals NSW Chapter, Sydney, 16 September 2009). The grounds for judicial review are codified in the *Administrative Decisions (Judicial Review) Act 1977* (Cth); see above n 27.

## 1 When and How Should the Wednesbury Threshold Be Used?

It is unclear as to what constitutes ‘cogent’ reasons, and with that, how to quantify the degree of reasoning required by the Ombudsman.<sup>171</sup> Depending on judicial interpretation, courts may likely examine whether the government’s rejection of Ombudsman findings was unreasonable using the conventional irrationality test. In *Attorney-General (NSW) v Quin*,<sup>172</sup> Brennan J found that ‘*Wednesbury* unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power’.<sup>173</sup> While the strictness of the reasonableness or *Wednesbury* tests came to be relaxed both in England and Australia, the standard is still a notoriously high hurdle for claimants to establish.<sup>174</sup> Notably, the High Court in *Minister for Immigration and Citizenship v Li*,<sup>175</sup> where the Migration Review Tribunal failed to grant an adjournment to an applicant, held that such a refusal was unreasonable. French CJ suggested that the concept of unreasonableness ‘reflects a limitation imputed to the legislature on the basis of which courts can say that parliament never intended to authorise that kind of decision’.<sup>176</sup> His Honour also explained that, while reasonable minds may reach a different conclusion about the correct or preferable decision, the freedom left by the statute ‘cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense’.<sup>177</sup> The standard proposed by Varuhas<sup>178</sup> would sit comfortably with the wider principles endorsed in *Li*, perhaps more so in light of the facts of that case. *Li* concerned the failure of a tribunal to properly explain a crucial procedural step it had taken, which is an issue that sits comfortably within the established confines of supervisory judicial review. However, rejection of an Ombudsman report by a Minister, presumably with the imprimatur of Cabinet, is a quite different matter and clearly suited to the stricter standard suggested by Varuhas.

171 The nature and standard of reasons required by administrative officials more generally is explained in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6<sup>th</sup> ed, 2017) 625–42 [8.420]–[8.460].

172 (1990) 170 CLR 1.

173 *Ibid* 36 (Brennan J).

174 In *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355, Lord Kerr noted that ‘a final conclusion on the question whether proportionality should supplant rationality as a ground of judicial review challenge’ will have to be ‘frankly addressed by [the] court’ as soon as practicable: at 1444 [271]. A proportionality ground would aim to more broadly assess the suitability and necessity of a decision, striking a fair balance overall: see also Rebecca Williams, ‘Structuring Substantive Review’ [2017] *Public Law* 99, 100–2.

175 (2013) 249 CLR 332 (*Li*).

176 *Ibid* 351–2 [28] (French CJ).

177 *Ibid* 351 [28]. French CJ also suggested that a distinction may arguably be drawn between rationality and reasonableness on the basis that ‘not every rational decision is reasonable’, citing Geoff Airo-Farulla, ‘Reasonableness, Rationality and Proportionality’ in Mathew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 212, 214–15.

178 Varuhas, ‘Governmental Rejections of Ombudsman Findings: What Role for the Courts?’, above n 48, 110–11.

In practice, an investigated body would be required to adequately evaluate the substance of the Ombudsman's proposed report and actively clarify any obscure findings or recommendations with the Ombudsman prior to the report being finalised. As noted, Varuhas argues that an orthodox *Wednesbury* standard should be applied when reviewing a governmental rejection of Ombudsman findings because more searching scrutiny could 'displace Parliament as the central institution for ensuring accountability, and would run against the grain' of the Ombudsman regime.<sup>179</sup> Any reform should therefore consider these limitations to balance the degree of judicial and administrative intervention.

## **2 Procedural Fairness to Affected Parties**

Decision-makers are under a duty to make decisions in accordance with procedural fairness, which has been described as an 'obligation to adopt fair procedures'.<sup>180</sup> Where an investigation is likely to impact on the community's interests, such as the pecuniary interests of pension policyholders in *Equitable Life*, the investigated agency should preferably notify the affected parties of their proposed action. While this practice is not mandatory, it may effectively reduce the possibility of ambushing the relevant stakeholders with both political and policy repercussions. Should individuals be treated fairly and equitably during the decision-making process, they would more likely accept the outcome, even if unsuccessful.<sup>181</sup> Simultaneously, being transparent and presenting options for redressing any adverse impact caused by maladministration may demonstrate the values of good administration. While requesting legitimate or explicit reasons may be appropriate in some situations, requiring the agency to take all reasonable steps, including stakeholder consultation, to mitigate any detrimental effects to aggrieved parties in the light of Ombudsman findings would be the ideal. Such due diligence could therefore substitute requiring cogent reasons for rejection.

### **C Should Ombudsman Reports Be Legally Binding?**

The substance of Ombudsman findings is likely restricted to information provided to the Ombudsman. It is therefore the executive's responsibility to escalate and correct any factual errors contained in a draft report prior to it being finalised. This plausibly assumes a joint responsibility in public administration: the executive branch of government, with subject-matter knowledge, to verify the contents and the Ombudsman, with its investigatory powers, to diagnose the cause of alleged maladministration and suggest improvements.

Should courts be obliged to declare the rationality of ministerial decisions, decision-makers would be forced to accept findings that they genuinely disagree

179 Ibid 111.

180 *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

181 Kees van den Bos, Henk A M Wilke and E Allan Lind, 'When Do We Need Procedural Fairness? The Role of Trust in Authority' (1998) 75 *Journal of Personality and Social Psychology* 1449, 1455–6.

with.<sup>182</sup> There is a risk of casting courts as the primary forum for deliberating the correctness of ministerial decisions, potentially undermining the nature of the Ombudsman process. Furthermore, whilst ombudsmen typically focus on the subject-matter in question, investigated agencies would need to holistically consider any interdependencies with other portfolios in deciding whether, and how, to follow the Ombudsman's recommendations. Recommendations of public sector ombudsmen should therefore continue to be part of the political process as a check-and-balance on administrative power in the absence of court jurisdiction and proceedings.

## D Revisiting the Ombudsman Act 1976 (Cth)

As discussed, whether an investigated authority accepts Ombudsman findings and recommendations mainly depends on its readiness and openness. Because Ombudsman reports aim to promote the moral norms of government decision-making, a legitimate level of collaboration between the Ombudsman and public agencies would be required.<sup>183</sup> Considering the implications of the UK approach outlined above, the *Ombudsman Act 1976* (Cth) will be revisited to explore possible amendments in respect of the Commonwealth Ombudsman's reports. Appendix 1 summarises the UK's current position, as well as the proposed solutions discussed throughout this article, with respect to the rejection of Ombudsman reports.

### 1 Is There a Clearer Distinction between 'Findings' and 'Recommendations'?

As highlighted in *Gallagher*, a clear statutory distinction between 'findings' and 'recommendations' is essential to provide guidance to departments and authorities when reviewing Ombudsman reports. Generally, 'findings' would include both findings of fact and an assessment of whether the facts did or did not amount to maladministration and injustice.<sup>184</sup> 'Recommendations' are the proposals the Ombudsman makes 'as a result of its findings', in order to correct any maladministration or injustice found during the investigation.<sup>185</sup> These terms are interdependent, particularly because 'recommendations' are predicated upon the nature of 'findings'.

The *Ombudsman Act 1976* (Cth) requires a report be written where the Ombudsman is 'of the opinion' that the relevant action had amounted to maladministration,<sup>186</sup>

182 Varuhas, 'Governmental Rejections of Ombudsman Findings: What Role for the Courts?', above n 48, 112.

183 Stuhmcke and Tran, above n 4, 236. It was suggested that '[d]eterminative, as opposed to recommendatory, powers could in fact diminish the co-operative relationship ... between government agencies and the [O]mbudsman'.

184 UK Law Commission, *Public Services Ombudsman*, Law Com No 329 / HC 1136 (2011) 63–4 [5.104]–[5.114].

185 *Ibid.*

186 *Ombudsman Act 1976* (Cth) ss 15(1)–(3)(a).

with the option of making appropriate 'recommendations'.<sup>187</sup> Across Australian jurisdictions, references to 'findings', namely as 'finds',<sup>188</sup> 'opinion',<sup>189</sup> 'is satisfied'<sup>190</sup> and 'considers',<sup>191</sup> are used synonymously. Therefore, even without the consistent and explicit use of these terms, there is effectively a reasonably clear distinction between what are 'findings' and what are 'recommendations' in Australian Ombudsman legislation.

## **2 Introducing a 'Due Diligence' Requirement**

Currently, sections 12(4)–(5) and 15 of the *Ombudsman Act 1976* (Cth) do not clarify how an investigated agency should respond to the Ombudsman's report. These provisions primarily deal with the procedural and administrative requirements relating to furnishing an Ombudsman report.<sup>192</sup> Since it is not mandatory for the Ombudsman to request that a proposed action be prepared and submitted,<sup>193</sup> there appears to be a lack of oversight regarding the progress of implementing or declining the Ombudsman's recommendations.<sup>194</sup> Furthermore, the Ombudsman's reports, when furnished to the relevant authority, are presumably final.<sup>195</sup> However, the *Ombudsman Act 1976* (Cth) does not explicitly prescribe whether, and if so when, a formal draft report is to be made available to the investigated agency.<sup>196</sup> A new provision could therefore be inserted to introduce the step of presenting a provisional report<sup>197</sup> and clearly prescribe the

187 *Ibid* s 15(3)(b).

188 *Ombudsman Act 1974* (NSW) s 26(1).

189 *Ombudsman Act 1989* (ACT) ss 18(1)–(3)(a); *Ombudsman Act 1972* (SA) ss 25(1)–(2); *Ombudsman Act 1978* (Tas) ss 28(1)–(2); *Ombudsman Act 1973* (Vic) ss 23(1)–(2); *Parliamentary Commissioner Act 1971* (WA) ss 25(1)–(2).

190 *Ombudsman Act 2009* (NT) s 59(1).

191 *Ombudsman Act 2001* (Qld) ss 50(1)–(2).

192 *Ombudsman Act 1976* (Cth) ss 12(5)(a), 15(4). As mentioned, the key focus is for the Commonwealth Ombudsman to furnish a report to the investigated department or authority within a specified time.

193 *Ibid* s 15(4). The Commonwealth Ombudsman 'may request the Department or prescribed authority to which the report is furnished to [provide] ... particulars of any action that it proposes to take with respect to the matters and recommendations included in the report'.

194 The Queensland Ombudsman, for example, may ask the agency to supply the 'reasons for not taking ... all the steps ... necessary to give effect to the recommendations': see *Ombudsman Act 2001* (Qld) s 51. Where the Ombudsman considers that no appropriate steps have been taken, it may notify the Premier of Queensland. These procedural aspects are, however, exercised at the Ombudsman's discretion.

195 See *Ombudsman Act 1976* (Cth) s 15.

196 *Ibid* s 12(3). Upon completion of an investigation, the Ombudsman must 'furnish to the complainant and to the Department or authority particulars of the investigation'. It is, however, unclear whether the parties have the opportunity to provide formal comments on such documents, prior to the final report being published.

197 In Victoria, proposed or draft reports relating to Ombudsman investigations are enshrined in *Ombudsman Act 1973* (Vic) s 25B. However, this provision only addresses the disclosure of draft reports. Arguably, a new provision in the *Ombudsman Act 1976* (Cth) would need to clearly provide the purpose of issuing and reviewing draft reports and recommendations.

agency to respond to that report with ‘due diligence’. Such responses could then be attached to the final report, if applicable.<sup>198</sup>

The term ‘due diligence’, while kept deliberately open to a broad interpretation, would include both the providing of appropriate reasons and engagement with affected parties to redress the alleged maladministration. This approach would be more useful than explicitly requiring ‘cogent’ or ‘valid’ reasons, as it is undesirable for courts to assess and quantify the degree of administrative steps the government had taken. The proposed ‘due diligence’ process could also encourage the government to more carefully and proactively verify the content of Ombudsman findings and the feasibility of implementing recommendations as appropriate. Hence, ‘due diligence’ would entail all the necessary steps that the department or authority should undertake, in order to facilitate the Ombudsman’s preparation for the final report, effectively promoting a joint responsibility between the Ombudsman and the executive.

### **3 Assessment by an Independent Committee**

Alternatively, an independent assessment committee could be formed to advise on, and consider, the appropriateness of the Ombudsman’s reports and objections to those outcomes. In the UK, the select committee process allows Ombudsman reports to be ‘open ... to public scrutiny alongside the objections raised by the government’.<sup>199</sup> However, this poses risks of additional resources and delays, while ultimately producing the same results. To some extent, it would be even more difficult to enforce the independent committee’s decision on the designated agency. Nevertheless, an independent committee could rigorously supervise the government’s implementation of, and proposed actions based on, reports. Where the Ombudsman makes vague findings and recommendations, the committee could assist in ascertaining and construing the meaning and implications for the government.

This recommendation is likely to provoke disagreement from both the Ombudsman and agencies. The Ombudsman would probably view such a committee as an improper form of control or unnecessary oversight. Agencies might complain that it adds further burdens, while also requiring them to disclose confidential issues. To mitigate these concerns, a middle position could be periodic reviews by the Auditor-General, who did not make reviews or recommendations in specific cases, examining the quality of both Ombudsman reports and recommendations,

198 For example, see *Auditor-General Act 1997* (Cth) ss 19(7)–(8). Where the relevant agency makes comments on the report, the Ombudsman is required to incorporate these comments in its report only if it takes the matter further by reporting to the Prime Minister and Parliament: see Explanatory Memorandum, *Ombudsman Bill 1976* (Cth) 29 [71].

199 Kirkham, Thompson and Buck, above n 71, 513–14. In relation to the *Occupational Pensions* report, ‘[t]hree separate evidence sessions of [the Public Administration Select Committee] were held and a number of witnesses invited to attend’. This procedure could help parties better understand the basis of Ombudsman findings and recommendations.

and agency responses.<sup>200</sup> If desired, the feasibility of each option could be explored further.

#### **4 Prohibit the Courts Reviewing Questions on Findings and Recommendations**

It may be argued that judgements as to fact and maladministration are the prerogative of the Ombudsman as overseen by courts, but judgements as to implementation remains policy-based.<sup>201</sup> Regarding the contents of Ombudsman reports, this suggestion appears to support the *Bradley* principle, reinforcing the significance of explaining the rationale for rejecting Ombudsman decisions. Varuhas, in contrast, warns that if courts were to ‘engage in searching scrutiny of the government’s response this could displace Parliament as the central institution for ensuring accountability, and would run against the grain of the system of political accountability’ conferred by the legislation.<sup>202</sup> As contended in this article, giving Ombudsman reports added legal authority would undesirably remove the whole of the Ombudsman investigatory process from the political realm within which the scheme was originally intended to operate. Making findings legally binding would remove this safeguard, as public authorities would be forced to pursue strongly held differences of opinion in court. Consequently, this could increase the potential for judicial review.<sup>203</sup> The purpose of judicial review proceedings is to redress flawed administrative decision-making: a last resort where no other opportunities are available. It would be inappropriate for courts to consider the legality of Ombudsman findings by applying ‘in-depth judicial scrutiny of the factors that have been taken into account by the [O]mbudsman in arriving at a conclusion’.<sup>204</sup> The outcomes or remedies applicants are seeking through an Ombudsman are political rather than judicial, making the court an inappropriate jurisdiction. Thus, it may be plausible to consider excluding Ombudsman disputes from being litigated altogether.

200 See *Auditor-General Act 1997* (Cth) ss 17, 18A. Both the Commonwealth Ombudsman’s Office and Commonwealth departments and agencies are subject to the Auditor-General’s performance audit.

201 Richard Kirkham, ‘Implementing the Recommendations of an Ombudsman ... Again’ (2011) 33 *Journal of Social Welfare and Family Law* 71, 78. Kirkham discusses this interpretation of matters of fact for ombudsmen and matters of law for the oversight by the courts, compared to policy-based matters neither the Ombudsman nor the courts have influence or regulation over, as one of three ‘intellectual camps’ concerning Ombudsman enforcement processes.

202 Varuhas, ‘Governmental Rejections of Ombudsman Findings: What Role for the Courts?’, above n 48, 111–12.

203 The removal or significant limitation on judicial review, as suggested by Kirkham and Varuhas, is not possible in Australia because of the constitutionally entrenched nature of judicial review at the Commonwealth and state and territory levels: see Groves and Lee, above n 22, 11–12; *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 566 [55]. The most that is possible in Australia is to amend judicial statutes to exclude review as suggested by these commentators. The *Commonwealth Constitution* allows no more.

204 Kirkham, ‘Implementing the Recommendations of an Ombudsman ... Again’, above n 201, 80, citing Varuhas, ‘Governmental Rejections of Ombudsman Findings: What Role for the Courts?’, above n 48.



## V CONCLUSION

The legal and policy architecture of public service ombudsmen is substantially common worldwide. Through investigations, ombudsmen can provide unsolicited advice to the government on options for improving public administration based on their findings. Such recommendations are, and should continue to be, non-binding on designated government departments and public authorities. As McMillan notes, ‘ongoing contact between [ombudsmen] and ... the whole of government, reinforces the administrative law values of legality, rationality, fairness and transparency’.<sup>205</sup> The government should not deliberately suppress the chance to redress alleged maladministration without due consideration, otherwise ombudsmen’s time and resources would be considered practically redundant, undermining the very basis of the Ombudsman system.<sup>206</sup>

Australian courts have not yet heard a legal challenge specifically involving a failure to endorse an Ombudsman’s findings and recommendations.<sup>207</sup> As such, there has been no opportunity to test the applicability of *Bradley*. There is, however, merit in embedding some of the UK lessons into practice when dealing with Ombudsman reports. In a broader context, legislating to formally provide a provisional proposed response after a thorough review of the report and attempts to adequately consult with affected stakeholders as standard practice is a possibility. Alternatively, the *Bradley* approach explicitly requiring investigated departments to provide ‘cogent reasons’ may be useful guidance for Australia. If so, the scale of cogency would need to be determined on the balance of probabilities, having regard to all relevant circumstances. However, what constitutes cogency would still remain problematic and ambiguous. Consideration should also be given to the potential risks of courts adjudicating the debate between which argument is more convincing and what the appropriate executive action is, rather than focussing on legal uncertainty. This may possibly lead to undue judicial influence regarding everyday executive decision-making, which is undesirable and conflicts with the separation of powers principle.

Additionally, the *Ombudsman Act 1976* (Cth) could be amended to provide clearer procedural requirements when responding to the Ombudsman’s investigations. During this process, both the relevant public agency and Ombudsman would

205 McMillan, ‘Re-Thinking the Separation of Powers’, above n 54, 435.

206 This proposition echoes the UK Public Administration Select Committee’s opinion that the Government should ‘engage with the Ombudsman positively, and start from the presumption that it is [the Ombudsman’s] job to determine whether or not maladministration has occurred’: see Public Administration Select Committee, House of Commons, *The Ombudsman in Question: The Ombudsman’s Report on Pensions and its Constitutional Implications* (2006) 3.

207 For example, in relation to the Department of Family and Community Services (NSW), and certain other service providers, the NSW Civil and Administrative Tribunal has jurisdiction to review a decision to refuse to implement the Ombudsman’s recommendations. This Tribunal (formerly, the Administrative Decisions Tribunal) considered the nature of this power for the first time in *Miller v Director-General, Department of Community Services (No 2)* [2007] NSWADT 140 (25 June 2007) and found that the Department had not substantially complied with the Ombudsman’s recommendations, remitting the matter to the Department: at [54]–[55], [64], [78]. Such a conclusion was reached, arguably, due to the explicit and unambiguous legislative recourse.

review the correctness of findings and take reasonable and prudent steps to amend any inaccuracies. When reviewing Ombudsman reports, it is important to concentrate on factual content, as opposed to the nuance of any criticisms. This proposed approach would minimise the risk of legal challenges like *Bradley*. It is ultimately up to an agency's preparedness and openness to consider Ombudsman reports from a holistic perspective and take the opportunity to carefully review its internal administrative practice. It is therefore a joint responsibility between the government and public service ombudsmen to ascertain factual and accurate findings to redress any alleged maladministration, thereby advancing public confidence.

**APPENDIX 1 – SUMMARY OF UK POSITION AND PROPOSED SOLUTIONS FOR AUSTRALIA**

	Outcome sought / Purpose of challenge	Current position in the UK	Proposed solution presented in this article
<p><b>Departments &amp; public authorities</b></p>	<p><i>Quash incorrect findings</i></p>	<ul style="list-style-type: none"> <li>Parliamentary and Health Service Ombudsman findings are not legally binding (rather, presumed to be valid), however, must be rationally rejected by the government for ‘cogent reasons’.</li> <li>LGO findings are prima facie binding and can be challenged by way of judicial review (<i>Gallagher</i>).</li> <li>The Draft Public Service Ombudsman Bill 2016 (UK) is silent on reconciling the two approaches.</li> <li>Recommendations do not have any legal effects.</li> </ul>	<ul style="list-style-type: none"> <li>Findings and recommendations not to carry any legally binding effects.</li> <li>A ‘due diligence’ provision in the legislation to require the government to actively verify the Ombudsman’s provisional report (ie early detection and prevention of potential errors).</li> <li>Allow judicial review proceedings where the government’s rejection of findings and recommendations are unreasonable per <i>Wednesbury</i>, consistent with <i>Varuhas</i>’ argument.</li> </ul>
	<p><i>Quash unfavourable findings and recommendations</i></p>	<ul style="list-style-type: none"> <li>Parliamentary and Health Service Ombudsman findings are not legally binding. Thus, the contents of the report are not reviewable.</li> <li>LGO findings are prima facie binding and can be challenged by way of judicial review (<i>Gallagher</i>).</li> <li>Recommendations do not have any legal effects.</li> </ul>	<ul style="list-style-type: none"> <li>Findings and recommendations not to carry any legally binding effects.</li> <li>Departments and authorities to take reasonable steps, including early stakeholder engagement, to plan redressing and remediating alleged maladministration, in order to prevent ambush.</li> </ul>
<p><b>Aggrieved claimants</b></p>	<p><i>Quash the government’s decision to reject findings and recommendations</i></p>	<ul style="list-style-type: none"> <li>The government’s rejections without ‘cogent reasons’ are reviewable by way of judicial review in line with <i>Bradley</i> and <i>Equitable Life</i>. If successful, the government will need to reconsider its decision to reject the findings.</li> <li>Whether a specific type of compensation is permitted to be granted is construed under relevant legislation (<i>JR55</i>).</li> <li>The Draft Public Service Ombudsman Bill 2016 (UK) does not seek to codify a list of possible remedies that can be recommended by the proposed Ombudsmen.</li> </ul>	<ul style="list-style-type: none"> <li>Allow judicial review proceedings where the government’s rejection of findings and recommendations are unreasonable per <i>Wednesbury</i>, consistent with <i>Varuhas</i>’ argument.</li> <li>The Commonwealth Scheme for Compensation for Detriment caused by Defective Administration already provides recourse for aggrieved parties to claim, on a moral basis, remedies for an agency’s unreasonable failure to: (a) comply with its own administrative procedures; (b) institute appropriate procedures; or (c) give proper advice.</li> <li>Thus, consider excluding Ombudsman disputes from being litigated altogether.</li> </ul>
	<p><i>Obtain compensation from the government</i></p>		