

The Commonwealth Ombudsman: How to balance an individual's right to fair treatment with issues of wider public interest such as ensuring administrative efficiency?

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Introduction

Today, extensive public administration reform¹ and a mature administrative law system mean that the 1970's approach of administrative law reform which was to centre the individual as the focus of review and to assume that improvements to the system will grow out of protecting individual citizen rights is no longer apposite. This change is identified by peak bodies such as the Administrative Review Council² although evidentiary proof that it is occurring is rare.³ This talk redresses this lack of proof by providing empirical data and analysis which shows that the individual complaint handling operation of the Commonwealth Ombudsman has dramatically altered since the Office commenced operations in 1977.

Specifically, the quantitative data confirms that the Commonwealth Ombudsman is increasingly using its discretion to refer the individual complainant away from its complaint services. Qualitative material, such as Annual Reports of the Office indicate that while individual

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¹ Rose Verspaandonk, 'Shaping relations Between Government and Citizens: Future Directions in Public Administration?' *Research Paper* No.5 (2001-02) at i.

² Gabriel Fleming, 'Administrative Review and the "Normative" Goal – Is Anybody Out There?' (2000) 28 *federal Law Review* 61, 61 and see Linda Pearson, 'The Impact of Administrative Law Review: Tribunals' [2007] *University of New South Wales Law Research Series* 53, 53 citing the 1995 Australian Review Council's *Better Decisions Report*.

³ Australian Law Reform Commission, *Managing Justice: continuity and change in the federal justice system*, 31 December 1999, ALRC Report No 89 (1999) [1.43]

<<http://www.austlii.edu.au/au/other/alrc/publications/reports/89/ch1.html#Heading10>> at 27 March 2007.

as the Australian Law Reform Commission states '[T]here traditionally has been limited academic interest and activity in empirical research into the justice system in Australia' Such oversight has begun to be reversed with some notable attempts to empirically evaluate administrative law processes and institutions in Australia Exceptions include Robin Creyke and John McMillan, 'Executive Perceptions of Administrative Law — An Empirical Study' (2002) 9(4) *Australian Journal of Administrative Law* 163.

complaints remain its core focus the role of the Ombudsman is diversifying to increasingly offer systemic improvement and audit functions to government administrators.

It is concluded that the role(s) of the Commonwealth Ombudsman therefore increasingly encompass what may be broadly termed the quality control⁴ of government administration. While this is a desirable objective, more difficult to evaluate is the impact which promoting improvements to overall administrative decision-making and increasing audit functions will have upon protecting individual review rights and therefore upon notions of democratic accountability. Is it optimal to achieve accountability through correcting defective decisions which concerns the individual citizen? Or is it best to increase administrative efficiency and justness through improving the system of overall decision-making and thus assuring the public that the rule of law is safeguarded? On such questions there is a pressing need for future empirical work.

In the opinion of this author it is however critical that the Commonwealth Ombudsman retain its current core focus upon the individual complainant. To stray too far down the path of quality improvement may mean that the Office will fail, or be perceived to fail to protect the individual complainant and thus remove an important avenue for citizens to hold government democratically accountable.

The Commonwealth Ombudsman and the Individual Citizen

The establishment of the Commonwealth Ombudsman occurred within a legal framework where democratic accountability equates to individual rights. This individual rights approach fits ideologically with the 1970s and 1980s, decades where the individual held centre stage.⁵ Any impact that redress of individual grievances may have had upon improving the overall system of administrative review was seen as ‘incidental’⁶ to the process of reform.⁷ The Explanatory

⁴ This is supported by international commentators on international ombudsman such as M Seneviratne, *Ombudsmen: Public Services and Administrative Justice* (2002).

⁵ See for example Charles Sampford, ‘Law, Institutions and the Public/Private Divide’ (1991) 20 *Federal Law Review* 185, 185 referring to the 1980’s. This may be broadened into a discussion of classical versus new liberalism see for example Martin Loughlin, ‘The Functionalist Style in Public Law’ (2005) 55 *University of Toronto Law Journal* 361.

⁶ See also Linda Pearson, ‘The Impact of External Review: Tribunals’ August 13, 2007, UNSW Law Research Paper, No. 2007-53.

Memorandum to the *Ombudsman Act 1976* describes the essential features of the Ombudsman as being ‘...to investigate complaints made to him about administrative functions of officials...’.⁸

While the *Ombudsman Act 1976* contains powers to allow the Ombudsman to investigate matters of his or her own motion and to make recommendations for systemic change (not limited to the individual case in question) this role was not prioritised by the policymakers of the day.

Today, the Commonwealth Ombudsman maintains an on-going self-proclaimed focus upon individual complaints, stating that its ‘...essential business...is to handle complaints and enquiries from members of the public about government administrative action’.⁹ This traditional individual centric focus is evidenced in a myriad of ways:

- every Annual Report of the Office contains a detailed statistical report of individual complaints;¹⁰
- since the early 1990s the Office has instigated the long-term collection and recording of data through consultants carrying out client satisfaction surveys for individual complainants;¹¹ and
- nearly 500,000 grievances handled with over a twenty-five year period by the Office – a large number when compared to the number of Federal Court applications for administrative law matters being less than 10,000 (in the same period) and the combined administrative review caseload of the major Commonwealth tribunals since they were established being over 400,000 decisions.¹²

Individual complaint handling statistics (1977-2005)¹³

7 Indeed commentary as to the improvement of the system was confined to the need to balancing ‘...the desirability of achieving justice to the individual and the preservation of efficiency of the administrative process ...’. Commonwealth, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971) [12].

8 Commonwealth Ombudsman, *Annual Report (1977–78)* 3. See also Commonwealth, House of Representatives, Second reading speech Ombudsman Bill 1976, *Hansard*, 4 June 1976, 3068 (Mr Ellicott).

⁹ Commonwealth Ombudsman, *Annual Report (2007–2008)* 2.

10 The statutory duty to issue an annual report has two main external functions: to provide information and to render account. See Marten Oosting, ‘The Annual Report of the Ombudsman’ in Linda C Reif (ed) *The International Ombudsman Yearbook* (Vol 2, 1998) 86, 86.

11 For example: Roy Morgan Research Centre, *Public Awareness Survey* (June 1992); AGB McNair, *Complainant Satisfaction Survey* (May 1994).

12 Robin Creyke, ‘The Performance of Administrative Law in Protecting Rights’ in T Campbell, J Goldsworthy (eds) *Protecting Rights Without a Bill of Rights*, (England Ashgate) 2006, 101–36, 119.

¹³ The detailed data finishes at 2005 (on 28 November 2005 the Commonwealth Ombudsman issued a ‘Public Statement; Changes to Ombudsman’s work practices’).

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

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

To facilitate data analysis the statistics have been divided into two time periods which correlate with individual Ombudsman. The first period of sixteen years, from 1977-1993, is contained in Table 1; the second period of twelve years, from 1994-2005, is contained in Table 2 (discretion rates are noted separately below for 2006, 2007 and 2008 due to changes in the work practices of complaint recording by the Office).

In both Tables the total number of finalised complaints includes the number of complaints where discretion was used by the Office *not* to investigate that complaint. This is necessary as the legislation administered by the Office provides the discretion not to investigate a complaint in particular circumstances.¹⁴ This use of discretion by the Ombudsman does not leave a complainant without further avenues to pursue. For example, apart from using discretion to refer an individual complainant back to the agency they are complaining about the Office may

<www.ombudsman.gov.au/commonwealth/publish.nsf/Content/mediarelease_20> at 2 March 2009 which notes that ‘..upcoming work practice and systems changes will affect our statistical recording...it may mean that our complaint statistics for 2005-2006 are not representative or comparable with those for previous years.’

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

Commonwealth Ombudsman, *Annual Report* (2003–04) Chapter 3.

also use the discretion to transfer complaints to other bodies¹⁵ and also transfer complaints to another Commonwealth or state or territory authority.¹⁶

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

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

YEAR	OMBUDSMAN	TOTAL FINALISED (OMBUDSMAN COMPLAINTS)	DISCRETION NOT TO INVESTIGATE	%
1992/1993	AC	14,362	4,506	31%
1991/1992	AC	15,237	4,590	30%
1990/1991	DP	12,721	3,968	31%
1989/1990	DP	9,646	2,304	24%
1988/1989	DP	10,779	2,536	24%
1987/1988	GK	11,180	2,631	24%
1986/1987	GK	10,279	2,571	25%
1985/1986	JR	11,563	2,222	19%
1984/1985	JR	12,864	2,011	16%
1983/1984	JR	10,130	1,306	13%
1982/1983	JR	7,148	1,468	21%
1981/1982	JR	6,483	1,285	20%
1980/1981	JR	6,845	1,327	19%
1979/1980	JR	5,493	1,036	19%
1978/1979	JR	2,146	343	16%
1977/1978	JR	1,030	199	19%
TOTALS		147,906	34,303	23%

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

16 *Ombudsman Act 1976* (Cth) s 6A.

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

YEAR	OMBUDSMAN	TOTAL FINALISED (OMBUDSMAN COMPLAINTS)	DISCRETION NOT TO INVESTIGATE	%
2004/2005	JM	16,192	11,755	73%
2003/2004	JM	16,297	11,881	73%
2002/2003	RM	18,814	13,170	70%
2001/2002	RM	18,036	14,242	79%
2000/2001	RM	20,967	16,657	79%
1999/2000	RM	19,156	15,224	79%
1998/1999	RM	23,306	15,558	67%
1997/1998	PS	20,341	12,750	63%
1996/1997	PS	21,283	11,720	55%
1995/1996	PS	18,451	8,409	46%
1994/1995	PS	14,281	6,651	47%
1993/1994	PS	14,340	6,668	46%
TOTALS		221,464	144,685	65%

A longitudinal comparison¹⁷ of the data in Tables 1 and 2 reveals a startling change in office practice. Over the Office's history there is a dramatic increase in the use of the discretionary powers to decline to deal with a complainant. To take for example Table 2, which identifies the period of 1993-2005 during which Philippa Smith, Ron McLeod and the current Ombudsman Professor John McMillan hold office. Table 2 provides the numbers of finalised complaints dealt with in each year under the *Ombudsman Act 1976* by the relevant ombudsman and the numbers of those complaints where the Ombudsman used discretion not to investigate. – meaning that in the year 2004/2005 Professor John McMillan used discretion to not investigate 73% of approaches to the office. Table 2 shows the discretion percentage not to investigate has increased from 46% in 1993/1994 to 73% in 2004/2005. This rate has remained steady, in

¹⁷ This paper uses standardised statistics and itemises them into portfolio, year and individual Ombudsman to allow meaningful analysis and comparisons of the longitudinal operation of the Office. For an overview as to the methodology use to create this data see: Anita Stuhmcke 'Changing Relations between Government and Citizen: Administrative Law and the Work of the Australian Commonwealth Ombudsman' (2008) *The Australian Journal of Public Administration* 67(3) 321-339.

2005/2006 the discretion rate was 75%¹⁸, in 2006/2007 it was 78%¹⁹ and in 2007/2008 it was 75%.²⁰ When compared with Table 1, this trend is clearly different from that of the first four Ombudsman who held Office between 1977-1993. During this sixteen year period a total of 23% or 34,303 complainants were subject to the use of discretion.

The data therefore identifies a tripling in the use of discretion by the Office since inception.²¹ In Table 1 the 16 year period from 1977-1993 has an overall percentage of 23% of complainants or 34,303 people being turned away' (this phrase includes complaints redirected back to an agency or referred to other complaint bodies) from the office while in Table 2 the 12 year period between 1993 and 2005 reveals an overall percentage of 65% or 144,685 individuals making a complaint to the Office being subject to the exercise of discretion. The most pertinent point being that this increasing use of discretion to turn away complaints results in a declining number of actual complaints being investigated.

Why has the Office increased the rate of discretion?

There are two interrelated reasons for this strategy: firstly, resources and external pressures being brought to bear upon the Office; and secondly, the internal strategic choice of the most recent three Ombudsman to pursue a more active role in audit and own motion investigations.

External resource allocation by government will have a critical impact upon the operations of the Office. The Office is a 'one stop shop'. This means that if the resource allocation to the Office is reduced the internal allocation and decision making must find budget cuts from somewhere and realistically this will be done by the Office 'managing' its reactive complaint-driven role.

External pressure also has a role to play in the increasing rate of discretion. In the early 1990s, coinciding with the rise in the use of discretion, several external events impacted upon the Office. Firstly, an Administrative Review Council report of its Multicultural Australia Project recommended the Ombudsman 'take a leading and coordinating role in the promotion of administrative review ...' and secondly, the 1991 Review by the Senate Standing Committee on Finance and Public Administration which investigated the effectiveness of the operation of the Commonwealth Ombudsman stated that while the 'principal role of the Office should remain

¹⁸ Commonwealth Ombudsman, *Annual Report* (2005–06) at 23.

¹⁹ Commonwealth Ombudsman, *Annual Report* (2005–06) at 2.

²⁰ Commonwealth Ombudsman, *Annual Report* (2007–08) at 19. As noted above the data for the years from 2006 onwards is not included in tabular form due to changes in Office work practices.

²¹ Removal or aggregation of the data to take into account the four year difference between the time periods being compared does not significantly impact upon this finding.

the investigation and resolution of complaints by individuals' the Office should improve administration by providing feedback to departments on complaints trends, by reviewing its complaint systems and by establishing a specialist investigation unit within the office to investigate major complaints.²²

This assertion is supported through analysis of the individual Ombudsman who utilise increased discretion rates. For example Table 1 shows Philippa Smith, the Ombudsman between 1993 and 1998, applying discretion rates of 46-63%. The period where she is the incumbent Ombudsman marks the start of the trend to escalate the use of discretion. From the beginning of her term she prioritised non-complaint handling roles – in particular the system-fixing role. Philippa Smith argued that it was this capacity to review practices, legislative provisions, and procedures which was unique in the administrative review arena and therefore set the Ombudsman apart from other institutions of administrative review. She observed that a '...priority is the identification and correction of the underlying causes of complaints'²³ and that 'this preventive role is a key part of the modern Ombudsman's role'.²⁴

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

YEAR	OMBUDSMAN	TOTAL FINALISED (OMBUDSMAN COMPLAINTS)	DISCRETION NOT TO INVESTIGATE	%
2004/2005	JM	16,192	11,755	73%
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2001/2002	RM	18,036	14,242	79%
2000/2001	RM	20,967	16,657	79%
1999/2000	RM	19,156	15,224	79%
TOTALS		109,462	82,929	76%

This observation is implicit in the increasing rates in the use of discretion since she left Office, as Table 3 shows between the years of 1999 to 2005, the discretion rate is at 70% and above. It confirms that the average discretion rate for these six years is 76% meaning that of the

22 Senate Standing Committee on Finance and Public Administration, 66, 69.

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

24 Commonwealth Ombudsman, *Annual Report* (1994–95) 7. This report is the first to start listing submissions made to government.

109,462 complainants that came to the Office only 26,533 had their complaint investigated. The remaining 82,929 were subject to the use of discretion.

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

The recent escalation in the use of the discretion rate and the diversification of the roles of the office seemingly contradicts the traditional and ongoing self-proclaimed focus on the individual complainant. The primary justification for this increasing use of discretion is that the Office has improved complaint-handling at the departmental level. The logic is therefore that as agencies improved their complaint-handling, complaints about those agencies to the Office should both decrease and a complainant should be able to be referred back to that agency at first instance to have their matter reviewed. The aim is therefore twofold: reduce overall individual complaints through improving agency complaint handling skills *and* thereby raise the profile of the Office as an agent of last resort.

Two steps have been used to improve agency complaint handling, the introduction of each step coinciding with Philippa Smith becoming the incumbent Ombudsman. The first step is that from 1994 the Office has positioned itself as the standard setter for good complaint-handling and thus entrenched the notion of good complaint-handling within government agencies. The second step is to address the lack of effective government agency internal complaint mechanisms with the Office stimulating the creation within agencies of internal complaint-handling units. The establishment of effective and efficient complaint handling platforms at an agency level justifies the increasing use of discretion as an operational choice of the Office. Once the Office has established these platforms in the 1990's it is then able in the decade following from 1999 onwards to use discretion at the rate of 70% and above to refer complainants back to agencies.

A critical flaw in the justification however, is that despite the above evaluative efforts of the Office which aim to examine the impact upon the individual complainant of the policy of referring them back to agencies, the Office has only 'guesstimates' as to the numbers of individual complainants who fail to continue with their complaint following being told by the Office that they must go back to the agency they are complaining about. Of course such evaluation is open to criticism, as the Office itself observes, '[S]tatistics, of course, tell only part of a story. It is the way they are interpreted that conveys the real message... While it is difficult

to be definitive, the discussion of these possibilities will be better informed if there is contextual data available on how people perceive the office.²⁵

Is this a transition from individual complaint handler to quality controller?

The Commonwealth Ombudsman is diversifying its roles. The decreasing numbers of individual complaints coincides with an increasing focus upon systemic improvement and audit role. This reflects the movement of other ombudsmen across Australia²⁶ where many of the public law Ombudsmen offices have diversified in terms of their roles and functions.²⁷

While this diversification is legitimate, Professor Dennis Pearce warns that '[T]here is a danger in Australia that the original purpose for the establishment of the office is being lost'.²⁸ The danger Professor Pearce points to is the possibility of resources increasingly being diverted from the core functions of ombudsman. The issue raised is not one of whether the movement to embrace auditing or systemic improvement should or may occur. Rather the danger lies in the degree to which such a shift or an ever expanding jurisdiction will involve the Commonwealth Ombudsman in moving away from its core function of individual complaint handling.

While it is not suggested that the Commonwealth Ombudsman be forever shackled to its historical aims and origins, it is argued that the grundnorm of ombudsmen not be subverted or lost as the founders' intentions as to the new administrative law do have continuing relevance.²⁹ Ombudsmen were created to deal with the 'persistent bureaucratic maladies'³⁰ of insensitivity,

²⁵ Chapter 9 Annual Report 2003-2004

²⁶ ,In addition to the federal Office Australia has eight public law Ombudsmen — six state Ombudsmen and two territory Ombudsmen.

²⁷ For a good overview of developments see K Del Villar, 'Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsman' (2003) 36 *ALAL Forum* 25.

²⁸ Dennis Pearce, 'The Jurisdiction of Australian Government Ombudsmen' in Matthew Groves (ed), *Law and Government in Australia* (2005) 138.

²⁹ See for example in *Allan v Transurban Link* (2001) 183 ALR 380 at [65] the joint judgment of Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ referred to the Kerr Committee report to justify the '...general trend of Australian federal legislation in recent years to enlarge the scope of rights to initiate administrative review. This was certainly the intention of those who planned the creation of the AAT.' And Wilson J at [572] in *Public Service Board of NSW v Osmond* (1986) 63 ALR 559 'Furthermore, some significance must attach to the time when these statutes were enacted, coming at the end of a decade of extraordinary executive and legislative activity in Australia directed to the improvement of efficiency and procedural fairness in public administration: see, for example, the 1971 Report of the Commonwealth Administrative Review Committee (the Kerr Committee).'

³⁰ R C Cramton, 'A Federal Ombudsman' (1972) 1 *Duke Law Journal* 1, 2.

poor service, arrogance, inflexibility, haste or rudeness by a government department.³¹ The Commonwealth Ombudsman must not travel so far on its current trajectory of improving the quality of public administration that it is in ‘danger’ of losing this original purpose.

Recognition of this issue is fundamental to the effective operation of the Ombudsman and therefore to ensuring democratic accountability. That said, the danger need not be one where the Office actually loses, or has lost sight of its commitment to the individual citizen. Indeed such a conclusion would ignore the current rhetoric of the Office which is to reinforce the importance of the individual complaint-handling role, as noted by Professor John McMillan ‘...the core activity of the office remains the handling of complaints and enquiries from members of the public about government administrative action.’³² Instead the danger may be one of shifts in perception – indeed the perception that the individual citizen holds of justice and accessibility is just as critical as the actuality of the delivery of services. The broader issue, then, is whether the Office will, through an increased use of discretion, lose the confidence of the public and the government. To put it bluntly, as Laking states:

Inevitably the pressures on any Ombudsman towards conformity and absorption in the governmental machinery are heavy and continuous. To resist them without at the same time forfeiting the confidence of either the public or the administration calls not only for a certain agility of approach but also an awareness of the changing nature of society and the changing base of government within society.³³

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

³¹ Today the office of ombudsmen has diversified. For example it protects and promotes human rights in developing countries: B Von Tigerstrom, ‘The Role of the Ombudsman in Protecting Economic, Social and Cultural Rights’ in Linda C Reif (ed) *The International Ombudsman Yearbook* (1998); enhances private industry dispute resolution schemes: Anita Stuhmcke, ‘Resolving consumer disputes: out of the courts and into private industry’ (2003) 31 *Australian Business Law Review* 48 and R James, *Private Ombudsman and Public Law* (1997).

³² Commonwealth Ombudsman, *Annual Report* (2006-2007) 2.

³³ G Laking, ‘Address at the opening of the Sixth Conference of Australasian and Pacific Ombudsman 1982’ in Appendix C Commonwealth Ombudsman, *Annual Report* (1982–83) 145.

The assumption behind this suggestion is that there is a point at which the ombudsman institution is transformed so that it departs from its original role and function and thus implicitly loses credibility with respect to the protection of the interests and rights of an individual citizen. Importantly this is an assumption. The claim is not made that the Commonwealth Ombudsman has reached that point. To date the Commonwealth Ombudsman has increased its use of discretion to decline to deal with an increasing number of individual complainants without fracturing the institution. Indeed the institution has grown in relevance and stature over the last thirty years.³⁴ July 2007 marked the 30th anniversary of the establishment of the office of the Commonwealth Ombudsman which was widely hailed as three decades of success as evidenced by its:

- longevity;³⁵
- the high numbers of citizen complaints about government administration which the office has dealt with;³⁶
- the Senate Standing Committee finding that the office has made a ‘positive contribution to Australian public administration’;³⁷
- positive commentary by external observers and ombudsmen;³⁸ and
- the ongoing expansion of jurisdiction of the office supported by successive federal governments.³⁹

Any evaluation of the Commonwealth Ombudsman must be cognizant that both the institution of the ombudsman⁴⁰ and administrative law are ‘in perpetual motion’.⁴¹ Perhaps the broader

³⁴ Commonwealth Ombudsman, *Annual Report* (2006–07) 2.

³⁵ Dennis Pearce, ‘The Jurisdiction of Australian Government Ombudsmen’ in M Groves (ed), *Law and Government in Australia* (2005) 138 stating ‘[T]he ombudsman is now a well established part of the Australian government scene...no government would now act to abolish the office.’

³⁶ Professor John McMillan in the Annual Report celebrating three decades of operation observes that over its thirty years of operation the Office ‘...has dealt with more than 600,000 complaints’ see Commonwealth Ombudsman, *Annual Report* (2006–07) 6.

³⁷ Senate Standing Committee on Finance and Public Administration.

³⁸ Sir Anthony Mason, ‘The 30th Anniversary: A judicial Perspective’ *Admin Review: Thirtieth Anniversary Issue* 13, 15, stating that ‘...[O]f the major reforms, the Ombudsman has been perhaps the most successful; indeed more successful than I expected Ombudsman have succeeded in dealing expeditiously and effectively with a very large number of complaints at very low cost...’.

³⁹ The Commonwealth Ombudsman has many roles: Commonwealth Ombudsman, ACT Ombudsman, Defence Force Ombudsman, Taxation Ombudsman, Immigration Ombudsman, Postal Industry Ombudsman, and Law Enforcement Ombudsman: Commonwealth Ombudsman, *Annual Report* (2005–06) 1.

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

40 Bennett, in a comparative study across OECD countries of the introduction of Ombudsman, freedom information legislation and information privacy law, has termed this the 'ripple effect', noting that policymakers draw inspiration from their counterparts in other jurisdictions: they 'draw lessons; they learn; they borrow; they emulate; they even "pinch" and "copy"' in C.J. Bennett, 'Understanding Ripple Effects: The Cross-National Adoption of Policy Instruments for Bureaucratic Accountability' (1997) 10(3) *Governance: An International Journal of Policy and Administration* 213.

41 Sean Ellias 'Administrative Law For Living People' (2009) 68(1) *Cambridge Law Journal* 47, 47. This has been described as the 'indeterminacy of modern administrative law' see Justice Keith Mason 'Sunrise or Sunset? Reinventing Administrative Law for the New Millennium, Keynote address, 2000 Administrative Law Forum, 15 June 2000, Adelaide, <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_mason_150600>. See also observations by Thomas Poole, 'The Reformation of English Administrative Law' (2009) 106 68(1) *Cambridge Law Journal* 142-168 noting that 'the discipline is undergoing profound change'.