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**Submission: Ombudsmen and other complaint mechanisms (Chapter 9 of Draft Report)**

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**Background:**

I am limiting my comments to Chapter 9. I have researched and published on the topic of ombudsman over the last 15 years. I include a select list of publications at the end of this submission.

**Draft Recommendation 9.1**

Agreed.

**Draft Recommendation 9.2**

While I agree with the general sentiment that there is an overuse of the title ‘ombudsman’ and that identifiable unnecessary costs should be reduced, I disagree with firstly, the use of “efficiency” as the goal of these services and secondly the use of individual complaint numbers as the primary unit of measurement of ombudsman performance.

Here is important to observe what the then Chief Justice Spigelman stated in 2002 with respect to the courts and output measurement, that:

*‘concentration on outputs, which are readily measurable and less costly to monitor, gives an inappropriate significance to considerations of efficiency over those of effectiveness’.*<sup>1</sup>

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<sup>1</sup> Justice Ronald Sackville, ‘From Access to Justice to Managing Justice: The Transformation of the Judicial Role’ (Paper presented at AIJA Annual Conference, ‘Access to Justice — the Way Forward’, 12–14 July 2002), 20.

In order to measure ‘effectiveness’ (rather than efficiency) it is not sufficient to cost individual complaints. More detailed evaluation is required.

This is necessary as the costing of individual complaints ignores important factors which include: overall complaint management (such as referral of matters to other bodies prior to investigation); varying complexities of complaints; changing department structures and names (and changing industry members) over time; and the impact and effect of ombudsman functions which are non-complaint focused (such as community education, human rights).<sup>2</sup>

I would urge that other more varied and nuanced mechanisms of evaluating effectiveness be developed prior to rationalisation of ombudsman services.

### Examples:

Historically ombudsmen have developed more nuanced measures of their own internal systemic operations. Two of which are briefly identified here:

#### 1. Cost-benefit analysis, explained by a former Commonwealth Ombudsman, Philippa Smith:

[T]his major project and policy work represented between 10 and 20 per cent of the Ombudsman’s overall activity. I estimate that through our major proposals and policy work alone, the Ombudsman’s office has delivered around \$35 million worth of investigations to the Government — this has happened with a current appropriation of only \$7.5 million.<sup>3</sup>

With respect to improving underlying systemic defects, the Office first used its Annual Report<sup>4</sup> in 1999–2000 to provide a budget estimate of costs of ‘Provision of advice to government to improve administration’. The estimate is \$1.6 million with an actual expense of \$1.7 million in 1999–2000. Such estimates become useful with respect to application of a cost-benefit analysis to staffing where the Office has attempted to cost staffing and systemic improvement. The importance of staffing with respect to a systemic role is noted in the 1994–95 Annual Report:

[W]e have identified about 150 important systemic issues from complaints about various agencies, and 25 have been taken up as major projects ... Connected with this work has been the establishment of the Policy and Public Affairs Section to provide legal and other policy advice, and to develop better data analysis, quality assurance and reporting. The Policy and Public Affairs Section has enabled the office to participate in a range of government inquiries and to prepare a number of discussion papers and speeches ... This in turn has helped to promote broader debate as to what represents ‘good’ public administration.<sup>5</sup>

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<sup>2</sup> See for example empirical research in Stuhmcke A, Changing Relations between Government and Citizen: Administrative Law and the Work of the Australian Commonwealth Ombudsman (2008) 67 *Australian Journal of Public Administration* 321-339; ‘The Role of Australian Ombudsmen in the Protection and Promotion of Human Rights’ (2010) 16 *Australian Journal of Human Rights* 37-62.

<sup>3</sup> Philippa Smith, ‘Red Tape and the Ombudsman’ (1998) 88 *Canberra Bulletin of Public Administration* 18, 20.

<sup>4</sup> Commonwealth Ombudsman, *Annual Report* (1999–2000) 18.

<sup>5</sup> Commonwealth Ombudsman, *Annual Report* (1994–95) 45–6.

2. There are instances where an ombudsman office uses the evaluative technique of comparative complaint analysis to measure its performance. Generally this involves comparing individual complaint numbers to systemic investigations. The extract below refers to 22,000 individual complaints being compared to the number of systemic investigations undertaken under section 15 of the *Ombudsman Act 1976* (Cth):

Usually the Ombudsman's office can investigate and resolve complaints quickly. Indeed we deal with most complaints in less than a month, and the Ombudsman rarely needs to issue a section 15 report to the agency. This year the office received about 22000 complaints and only issued 9 section 15 reports.<sup>6</sup>

A further example is noted by Philippa Smith: '[I]n my last year as Ombudsman I released about twenty-five reports. This is against 25 000 complaints...'<sup>7</sup>

### **Draft Recommendation 9.3**

I **disagree** that

- *government agencies should be required to contribute to the cost of complaints lodged against them*

In their Annual Reports Ombudsman currently do:

- *report annually any systemic issues they have identified that lead to unnecessary disputes with government agencies, and how those agencies have responded*

Government Ombudsman also comply with the following (see Annual Reports):

- *government ombudsmen should be subject to performance benchmarking.*

I **disagree** with government agencies being required to contribute to the cost of complaints lodged against them. I believe industry funded private ombudsman (where this model is generally used) and government ombudsman are fundamentally different.

While in the majority of Australian jurisdictions the legal independence of the ombudsman institution does not exist in a formal constitutional sense (with exception such as Victoria) the ombudsman institution is now deeply rooted within Australian jurisdictions. The longevity and significance of the institution is such that it is now well understood as a mechanism of independent redress by citizens. To extend this notion the public law ombudsman now meets a community expectation in the same way that we have shared normative understandings of the role of tribunals and courts.

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6 Commonwealth Ombudsman, *Annual Report* (1995–96) 5.

7 Smith, above n 3.

Against this background I see the problem with introducing the concept of agency funded complains as threefold:

1. It is, as a matter of practical implementation, difficult to justify. The majority of complaints to government ombudsman arise from very few agencies. This is not because their complaint handling processes are poor but rather because these agencies deal with administrative decision making which affect almost all Australians and which many people feel strongly about (such as social security and taxation). It therefore seems to be no economic or efficiency benefit in requiring such agencies to pay for complaint resolution.
2. The recommendation ignores the differentiation between self funded industry ombudsman and government ombudsman. Simply put, government agencies do not face competition in the same way that an industry member may (such as Telstra). This means that a citizen may not 'vote with their feet' and go to a new agency with better complaint handling – which is one of the policy assumptions behind industry funded ombudsmen.
3. It potentially frustrates the ability of public law ombudsman to promote the same objectives as courts and tribunals (such as the rule of law). By this I mean that such an arrangement will make contracts for services between government agencies and the ombudsman (see here for example what recently occurred in the industry ombudsman decision in *Financial Ombudsman Services Limited v Pioneer Credit Acquisition Services Pty Ltd* [2014] VSC 172)). Such an outcome will not result in good administrative decision making for the citizen but rather may have unintended consequences such as altering the complaint management style of ombudsman and altering the working relationship between departments and ombudsman.

In terms of quick, free and efficient redress an independent government ombudsman is now a permanent institution of dispute resolution which offers assurance that intrusions on individual liberty do not contravene principles such as the rule of law. I believe that this should be maintained and that any potential threats to this, such as agencies paying for their own complaints, not enacted.

Thank you for the opportunity to make this submission,

Yours Sincerely,

Professor Anita Stuhmcke

### Select List of Publications

Stuhmcke A, 'Each for themselves' or 'One for all'? The Changing Emphasis of the Commonwealth Ombudsman' (2010) 38 *Federal Law Review* 143-167.

Stuhmcke A, 'The Role of Australian Ombudsmen in the Protection and Promotion of Human Rights' (2010) 16 *Australian Journal of Human Rights* 37-62.

Stuhmcke A, 'Ombudsmen and Integrity Review' in Carol Harlow, Linda Pearson and Mike Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson*, Hart Publishing, 2008, 349-376.

Stuhmcke A, 'Changing Relations between Government and Citizen: Administrative Law and the Work of the Australian Commonwealth Ombudsman' (2008) 67 *Australian Journal of Public Administration* 321-339.

Stuhmcke A, 'Privatisation and Corporatisation: What now for the Commonwealth Ombudsman?' (2004) 11 *Australian Journal of Administrative Law* 101-114.

Stuhmcke A, 'The Corporatisation and Privatisation of the Australian Telecommunications Industry: The Role of the Telecommunications Industry Ombudsman' (1998) 21 *University of New South Wales Law Journal* 807-833.