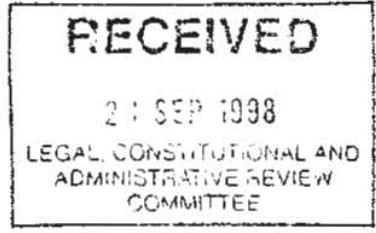


Submission No 24
Spec 14-1



ALTERNATIVE
DISPUTE
RESOLUTION
BRANCH

Ref: g..omborep



17 September 1998

Gary Fenlon MLA
Chair
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
BRISBANE 4000

Dear Sir

STRATEGIC REVIEW OF THE OMBUDSMAN

I refer to your letter of 13 August 1998 enclosing Executive Summary and Recommendations of the Report of the Strategic Review of the Queensland Ombudsman and inviting the comments of the Community Justice Mediation Programme (now Alternative Dispute Resolution Branch).

The Alternative Dispute Resolution Branch (which forms part of the Administration of Justice Program in the Department of Justice and Attorney General), has prepared comments on some of the issues raised in the Report of the Strategic Review, and a copy of these is enclosed herewith.

The Committee may wish to amend its records to show that the Alternative Dispute Resolution Branch is located at Level 13, Central Courts Building, 179 North Quay, BRISBANE, 4000.

Yours sincerely,

Peter Condliffe
Peter Condliffe
Executive Manager

CENTRAL COURTS BUILDING
179 NORTH QUAY
BRISBANE Q 4000
GPO BOX 149 Q 4001
PHONE: (07) 3239 6269
FAX: (07) 3239 6284



**COMMENTS ON REPORT OF THE STRATEGIC REVIEW
OF THE QUEENSLAND OMBUDSMAN**
Issued by
**THE LEGAL CONSTITUTIONAL AND ADMINISTRATIVE REVIEW
COMMITTEE OF THE QUEENSLAND LEGISLATIVE ASSEMBLY**

Introductory

Whilst it is accepted that the public sector has become considerably more complex in the 24 years since the inception of the office of the Parliamentary Commissioner for Administration ("Ombudsman") the fundamental purpose of the office has not changed.

The fundamental purpose of the Ombudsman is to afford to the citizen a means of redress against those actions of the administration which are unfair, unjust or unduly delayed. The then Premier, in introducing the Bill to establish an Ombudsman in Queensland, described the role and purpose of the office as follows -

"....It is from this feeling of the ordinary man against the administration that the concept of the ombudsman has evolved. *He is the champion of the rights of the ordinary man.* He is somewhat like a judge - part of the democratic process, but to one side of it with special powers and immunities to examine and correct administrative mistakes and wrongs....." (Author's italics)¹

Perhaps the most noticeable aspect of the Review is the desire that the Ombudsman become more proactive. ("It is essential for the Queensland Ombudsman to follow interstate and international trends to become less reactive and less orientated to individual complaints, and become more proactive".) However, the object of such activity on the part of the Ombudsman is not stated to be to give speedier redress to aggrieved citizens, but rather to provide a management tool to assist the administration in improving its management techniques (or, in the words of the Review "becom[ing] more of a consultant to government agencies and work[ing] with them to identify and eliminate basic causes of maladministration"). Whilst this might in the long run mean that there would be less grounds for complaints to be made to the Ombudsman by individual citizens it might also mean that the *raison d'être* for the Ombudsman was no longer the remedy of private grievances as, to put it at its most extreme, he could become a tool of management.

It was to avoid such a situation that the legislation requires that the Ombudsman report to Parliament, not the Premier or a Minister. The intention of the legislation is that, on receipt of an adverse report from the Ombudsman, the Department concerned should put in train the necessary steps to right matters. If a systemic problem is exposed, it should be for the Department or agency to call in the necessary management expertise. The legislation states that if no action is taken by the Department, the Ombudsman can refer the matter to the Premier and Parliament for determination..

The benefits arising from investigations are seen by the Ombudsman to be² -

- ▶ Full and rational explanations of administrative actions

Even in cases where a complaint is not upheld, the complainant is entitled to a full and rational explanation of the reasoning and circumstances behind the decision or action in dispute. As successive Ombudsmen have noted over the years, Departments and Authorities must be more

forthcoming with the public concerning their activities as a substantial portion of the population are suspicious of Government and "the bureaucracy" generally.

- ▶ Specific remedial action

Investigations by the Ombudsman's Office frequently lead to remedial action by the Department or Authority concerned. This remedial action can range from the simple reversal of a decision through the carrying out of remedial works to the payment of considerable sums of money sometimes amounting to tens of thousands of dollars.

- ▶ Changes in administrative practice

An investigation and recommendation can lead to the amendment of a particular administrative practice

- ▶ Legislative action

Investigations can lead to the amendment of legislation or reinforce the intention of Departments and Authorities to seek amendment of their legislation

The three goals of the Ombudsman's office (as expressed in the Ombudsman's 1994/95 Annual Report³) are

- to provide as effective and timely a complaint resolution service as possible
- to provide all residents of Queensland with as wide a range of avenues for awareness of and contact with the office as possible
- to improve the quality of both State and Local Government administration in Queensland

The strategies to be adopted in achieving the first of these goals to provide effective and timely complaint resolution service were expressed as

- ▶ improving screening criteria and procedures
- ▶ encouraging input from complainants, agencies and staff in the enhancement of service delivery
- ▶ enhancing management systems monitoring case handling, performance and workloads
- ▶ establishing clear targets for staff performance
- ▶ training staff, particularly in areas of specialisation
- ▶ reviewing and revising the role, function and powers of the Parliamentary Commissioner in *accordance with community needs* and changes in administrative law
- ▶ liaising with other review bodies on common concerns
- ▶ implementing best practice and TQM where appropriate
- ▶ encouraging commitment by all staff to the goal

The italics are the author's mine, and serve to emphasise that the Ombudsman considered that changes in his role should flow from community needs and changes in administrative law rather than from the requirements of managerial practices of the Executive.

Recommendations 6 to 10

It is noted that in the Review two general complaints are highlighted, namely delay and the lack of frequent contact between staff of the Ombudsman's office, clients and agencies. Other complaints include -

- lack of awareness of the Office, and the service it performs
- confusion about the Ombudsman's role, both in relation to the Ombudsman's jurisdiction vis-a-vis other administrative appeals processes in Queensland and his role in investigating the merits of a decision as opposed to the process involved
- too much formality in the handling of complaints (in particular, the excessive interchange of letters)

- that the Ombudsman acts as an advocate for the complainant rather than as a neutral arbiter; and
- that the approach adopted by the Ombudsman is too legalistic, with staff resorting to the quotation of legislation, precedents and legal requirements, as well as advocating the engagement of Counsel

Suggestions are made in the Review for the remedying of many of these complaints. For example, the Review suggests the increased use of publicity to explain the role of the Ombudsman, who receives too many time-consuming calls which relate to matters outside the jurisdiction of the Ombudsman's office.

The complaint that the Ombudsman acts as an advocate for the complainant seems to imply a misunderstanding of his role, for it is his duty to investigate the complaint on behalf of the citizen. If it is felt that the process of investigation is too one-sided, this may be an argument in favour of the use of mediation (see comments below).

Inasmuch as the Ombudsman's difficulties are caused by a lack of resources, the Review points to the paradox that although the Ombudsman is ostensibly an independent agent and an officer of the Parliament, the resourcing of the office is essentially controlled by the Executive, and this can have a substantial influence on the Ombudsman's operations. The watchdog has to be fed, but its food comes from the potential intruder. Any Executive, particularly one operating in a system where Parliament is able to exercise only limited power over it, will seek to ensure that money voted for the operation of an office which is intended to place controls on the exercise of power by the Executive is used, as far as possible, in a manner which reflects the Executive's current management practices and accords with the Executive's own priorities. This may be regarded as causing a creative tension within the office of the Ombudsman, but it is also likely to lead to a departure from the original role of the Ombudsman.

Thus, whilst it is not unreasonable for a government department to "remain open to entrepreneurial opportunities and pursue those which can make good use of the expertise of the (Department) but which do not cause any fundamental distraction from the main purpose of the (Department)" is it desirable for the Ombudsman's Office to do so? Would such a recommendation be made in respect of the judges of the Supreme Court?

Nevertheless, it is of course desirable to eliminate perceived inefficiencies in the Office of the Ombudsman. In particular it would appear that three problems in particular need addressing.

- ▶ Firstly, the workload could be reduced if the public were more aware of what the Ombudsman can and cannot do. This requires education and advertising.
- ▶ Secondly, the workload could be reduced if complaints of the same type could be handled by the Department concerned in accordance with a complaints-handling scheme devised by the Office. This suggestion is made in the Review, but the impetus for the scheme should come from the Office as a result of complaints previously made to the Office, and the outcome of any internal investigation carried out under the scheme should be monitored by the Ombudsman if the initial complaint were made to him⁴.
- ▶ Thirdly, communication between the public and the Office should be improved if possible. The Review suggests that the approach of the Office is unduly legalistic and implies that the complainants are for a long period unaware as to what has happened to their complaint.

Would the use of mediation help? (Recommendation 10)

It is in relation to this third problem that the use of mediation, or mediation techniques might be considered. The success of such an approach would depend on what the complainant was seeking. If the complainant simply requires rectification of a problem that has arisen with a department or agency, mediation may provide an avenue to a faster solution. If, on the other hand, the complainant is adamant that a systemic problem exists and it can only be remedied by a full investigation by the Ombudsman's Office, then the Office will have to proceed accordingly.

Mediation allows both the complainant and the organisation that has been complained against an on-the-spot chance to hear each other's story and to resolve their differences by themselves. The ultimate aim is to encourage a "win-win" situation in line with the Ombudsman's aspiration that a problem be resolved rather than fault be found.

The use of alternative dispute resolution techniques, including mediation has been used by Ombudsmen in several jurisdictions. Some examples are given in an article by Tom Stodulka in the ADR Bulletin for June 1998; they include the Hong Kong Ombudsman, the Northern Territory Ombudsman (in relation to minor complaints against the police) and the NSW Ombudsman. In NSW matters are most frequently referred to mediation in the fields of environment and land use matters, where two or more government departments are involved, in freedom of information matters and where there are a number of complaints against one organisation such as a school or hospital⁵. It also appears that the N.T., Western Australian and Victorian Ombudsmen, who also act as Health Services Commissioner in their respective states, use or are about to use alternative dispute resolution techniques in resolving complaints.

The Hong Kong Ombudsman commented⁶ when discussing the use of alternative dispute resolution methods in resolving complaints that the classical approach by Ombudsmen for resolving complaints is by investigation, but went on to say -

"However, obviously not all investigable complaints merit investigations, for resource or other reasons. For instance, the problems raised may be capable of speedy resolution, the complainants may be more concerned with resolving the problems or the matters do not involve major administrative faults."

The legislation under which the Queensland Ombudsman operates does not preclude the use of mediation in the resolution of complaints made to him. Clearly enough details need to be obtained from the complainant to determine whether mediation would be suitable, and the consent of the complainant to the use of mediation should be obtained. When details of the complaint are forwarded to the respondent, the respondent's view as to the suitability of mediation need to be obtained.

Early Intervention (recommendations 17 and 18)

It is accepted that although the Office of the Ombudsman should be "user-friendly" as it is, after all, dealing with complainants who are dissatisfied with an administrative process as applied to them, nevertheless there should be "careful sifting and sorting of complaints with a view to their speedy resolution".⁷ It is noted that following an organisational review in 1991 the Queensland

Ombudsman experimented with the use of a designated intake officer to sift the inquiry/complaints calls as they were received from the public. This procedure was discontinued, apparently for staffing reasons, but the Review is clearly of the view that the use of intake officers would be of benefit to the Office, and sets out some guidelines.

The Dispute Resolution Centres operated by the Alternative Dispute Resolution Branch under the *Dispute Resolution Centres Act 1990* rely on the use of Intake Officers to determine whether those members of the public calling the various Dispute Resolution Centres (DRCs) in fact require or desire the services of our mediators, or merely require some advice or need to be referred to some other agency. The Intake Officers, many of whom are social science graduates, are given "in house" training. The South East Queensland DRC (which handles approximately half the volume of work arising in Queensland) received approximately 20,000 incoming calls in 1997-98; of these some 6,000 required some form of action on the part of the Intake Officers. However, only 1,600 files were actually opened (and of these 500 resulted in completed mediations).

We believe that the experience of the ADR Branch in this field may be of assistance to the Office of the Ombudsman should it be decided that an Intake system be established. The ADR Branch also has the expertise and experience to provide accredited and neutral community mediators to help disputing citizens and officials manage disputes. The Branch would be willing to discuss such a proposal.

Training (recommendation 21)

The remarks made in the Review regarding the training of staff in the Ombudsman's Office are noted. The ADR Branch organises training courses for personnel in the Department of Justice and Attorney General, other government departments and outside organisations covering topics which, to a degree overlap the potential requirements of the Office, and has the expertise to develop additional material specifically tailored to the needs of the Office.

SUMMARY OF COMMENTS

- The ADR Branch notes the recommendations of the Review and comments in particular that
- while there is scope for greater intervention by the Ombudsman into the management practices of Departments that are the subject of complaints, the original purpose of the Ombudsman as an officer who handles complaints from citizens who cannot obtain redress elsewhere should not be forgotten;
 - consideration should be given to the Ombudsman adopting alternative dispute resolution techniques, particularly mediation, in resolving those complaints which may be suited to the process.
 - there are some similarities in the interface with the public of the Ombudsman and of the ADR Branch and the Branch may be able to offer advice and training, particularly of Intake Officers, to the Office.

1. Queensland Parliamentary Debates (Hansard) 1974 pp 3188-9 (23rd March 1974)
2. Extracted from Seventeenth Report of the Queensland Parliamentary Commissioner (1990/91) at pages 5-6
3. The Queensland Ombudsman 21 Years On (1994-95 Annual Report) page 3.
4. A program of this type was introduced by the Hong Kong Ombudsman in January 1996 (see (1998) 1 ADR Bulletin 29)
5. Conversation with Ms Natasha Serventy of the NSW Ombudsman's office.
6. In an address to the 16th Australasian and Pacific Ombudsmen Conference, Darwin, August 1997
7. See paragraph 7.7.2 of the Review.