Submission No 47

Your Ref:

Our Ref:

Queensland
OMBUDSMAN
Parliamentary Commissioner for Administrative Investigations

23 March 1999

Spec Inq

Mr G Fenlon MLA
Chair
Legal, Constitutional & Administrative
Review Committee
Parliament House, George Street
BRISBANE Q 4000

Dear Mr Fenlon

RE: STRATEGIC REVIEW - QUEENSLAND OMBUDSMAN'S OFFICE

I refer to my recent discussions with the Committee and in particular to the Committee's invitation to submit other items of a strategic nature not addressed in the Strategic Review report.

I am pleased to respond to that invitation. I will confine my submission to possible reforms of specific legislation or specific provisions of legislation which come within the Committee's area of responsibility.

A. Parliamentary Commissioner Act 1974

1 S.4 - Administrative action to specifically include policy

I believe the definition of "administrative action" in s.4 of the Act should be expanded to make clear that "administrative action" of agencies includes their policies. From time to time agencies argue that the policies they have developed as guidelines for the exercise of administrative discretions are not within my jurisdiction as they are not administrative actions. Such a view appears to be based on the provision in the *Parliamentary Commissioner Act* that Cabinet policy is outside jurisdiction. A view seems to be taken that because of this all policy is outside jurisdiction. It is obviously futile to examine the exercise of administrative discretions if I can't examine the policy guiding or dictating the exercise of that discretion.

Strategic Implication : Such an amendment would prevent agencies from needlessly raising jurisdictional arguments based on a non-existent distinction between administrative action and policy.

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2 S.12(2) - Administration in Queensland Police Service (QPS)

This section provides that I have no jurisdiction in relation to "a person who is a police officer in the person's capacity as a police officer". The section is primarily designed to exclude from my jurisdiction the actions of police officers in the course of their operational duties (eg arresting persons/ investigating crime, etc). This is appropriate because the CJC has jurisdiction in that regard.

However the problem is that much administrative action within the QPS is done by police officers rather than civilians, and under the relevant legislation applying to the employment of police officers, police officers undertaking administrative duties are deemed to be acting as police officers in so doing. The CJC has no jurisdiction in relation to maladministration.

The end result is that purely administrative action within the QPS being carried out by a police officer is outside the jurisdiction of my Office (and that of any other review body) and there is no sound reason why this should be so. Furthermore the situation is compounded in that police officers and civilians working side by side can be doing similar administrative work and the actions of one are reviewable but not the other. Again there is no sound policy reason why this should be so.

I understand s.12(2) was originally drafted on the assumption that police officers didn't do purely administrative work. This assumption is I believe not correct now, if it ever was.

Strategic Implication : Potentially defective administration in the Queensland Police Service is going unreviewed and the affected public are without a remedy.

3 S.13(5)(d) - Public Trustee

S.13(5)(d) of the *Parliamentary Commissioner Act 1974* provides that the Commissioner is not authorised to investigate any administrative action taken by a person in the capacity as trustee under the *Trusts Act 1973*.

The *Trusts Act* specifies the Public Trustee as a trustee and on this basis successive Public Trustees, whilst cooperating with our investigations, have made it clear that they regard themselves as out of jurisdiction and may well take that line if unfavourable recommendations are made.

This interpretation of s.13(5)(d) is at odds with the original *Parliamentary Commissioner Act* which listed the then Public Curator in a schedule as being an agency within jurisdiction. In a later plain English redraft of the Act, the schedule was dropped, but the intent of the Act was not to change.

It is possible to argue that the Public Trustee should be regarded as within jurisdiction for actions other than those taken as a trustee. Such actions would be basically staff related matters and to all intents and purposes the administrative actions of the Public Trustee in the furtherance of his or her responsibilities would be out of jurisdiction.

Technically the Supreme Court can be asked to supervise the administration of any trust, but for 99% of persons affected by the administration of trusts by the Public Trustee, this

is not a financial option. If our Office does not have jurisdiction then such matters are basically unregulated and no practical accountability exists in the system.

It may be argued that s.13(5)(d) was predicated on the basis that persons dissatisfied with the Public Trustee's actions as a trust had a right of appeal to the Supreme Court but if that were the reasoning s.13(5)(d) would be unnecessary because s.13(3) already excludes such matters from jurisdiction.

It could also be noted that the Public Trustee derives powers from sources other than the *Trusts Act* eg the *Public Trustee Act*, the *Mental Health Act*, other associated legislation, wills, powers of attorney, etc. It becomes very difficult in a given case to track down the source of the Public Trusts' power. It is also problematic as to whether the test is the source of the power, or whether the Public Trustee can argue that he/she is a trustee under the *Trusts Act* and whenever he/she acts he/she does so in that capacity even if the powers used derive from other legislation or documentation.

As such the matter is unclear.

Strategic Implication : Persons aggrieved by the administration of trusts by the Public Trustee are essentially without recourse. Whilst a high degree of cooperation currently exists between my Office and the Public Trust Office, it may be that the Public Trust Office is out of jurisdiction in which case any recommendation I might make can be legally defeated for that reason, thus rendering my review role null and void.

4 S.13(5)(e) - Actions by court staff

S.13(5)(e) provides that I have no jurisdiction to investigate any administrative action taken by a master in equity, a registrar within the meaning of the Rules of the Supreme Court, and a registrar of a District Court or of a Magistrates Court.

This provision appears to have stemmed from a somewhat dated view that the administrative actions of public servants within the judicial branch of government should not be subject to the Ombudsman's scrutiny. The end result is that such administrative actions are not subject to any scrutiny, as the court system deals with legal, not administrative issues.

It is also likely that the provision applies to the staff of the registrar or to the registrars also.

There is no logical reason why the administration of the courts, as opposed to the hearing and adjudication of matters before the courts, should be excluded from the Ombudsman's jurisdiction. A registrar is no different from any other public officer in performing administrative functions. There is no reason why the administration of the court system should not be made accountable.

Strategic Implication : Persons who are adversely affected by decisions within court registries eg unconscionable delays, misplacement or loss of files or documents, poor advice as to hearing dates and associated matters, failure to follow relevant legislation in various ways, effectively having no remedy if s.13(5)(e) is read literally.

5 S.22 - Secrecy provisions

Currently under s.22 of the Act I cannot disclose information obtained in the course of or for the purpose of an investigation except for the purposes of an investigation or a report or recommendations relating thereto (or for any proceedings under the *Commissions of Inquiry Act*, a rare event). This provision severely inhibits my ability to comment on matters of public interest, because any such comments will inevitably be based upon information obtained in the course of an investigation and making public comment would not be for the purpose of an investigation or in a report relating thereto.

Indeed one former interstate Ombudsman used to resort to the artifice of making reports to Parliament specifically for the purpose of enabling him to make public comment.

Unless I have something of interest to say amounting to more than vague generalities, the media will not be interested. Media exposure, in my opinion the major technique for lifting the public profile of my Office - a factor identified by the reviewer as being desirable - will continue to be minimal unless this restrictive provision is ameliorated?

On the other hand care would have to be exercised as many complainants don't want their affairs aired in public.

Strategic Implication : The ability to make appropriate comment in the media, particularly on systemic issues, will enhance the Office's profile and hence its relevance to the community.

6 S.32(9) - Natural justice on strategic review

This section provides that if a strategic reviewer proposes to include in a review report reference to a matter that in the reviewer's opinion is a "matter of significance" the reviewer must, inter alia, give the Parliamentary Commissioner written advice of the matter and include his/her comments in the report.

Of course, once the report is published it is too late to do anything about it. As such it appears that the section is basically unenforceable as it presently stands.

In my view the section should be amended to provide that a draft report be submitted to me before publication and I be given 21 days to give a written response to any matter which I regard as being significant and that such comments be included in the report. In that way publication cannot occur until natural justice as envisaged by the current s.32(9) has been observed.

Should it be argued that the comments may be too lengthy, it is noted that under the current provision no limit is set on the length of any response I may make to any matters of significance that are brought to my attention.

Strategic Implication : The Premier, the Parliamentary Committee, or any person or authority considering a review report will have a greater appreciation of the issues.

7 Ordering a stay of proceedings

I believe the Office needs the power to be able to order an agency to stay a proposed action for a reasonable period pending the outcome of an investigation. Regrettably, on occasions agencies have declined to withhold proposed action notwithstanding that a complaint has been made to my Office about the matter. By the time an investigation is undertaken it is too late to reverse the decision or action and the investigation essentially becomes an exercise in futility.

The awarding of contracts to tenderers is a case in point. Once a contract has been awarded and a binding contract entered into, the outcome cannot be changed and a deserving party may be left without remedy.

A power to stay would probably involve 45 days and be subject to Ministerial override if eg the circumstances were certified to be urgent and/or the agency stood to lose significant revenue or face significant legal action if it couldn't or didn't proceed.

Strategic Implication : Ombudsman's investigations will not be frustrated by pre-emptive agency action.

8 Determinative powers

Perhaps one of the major criticisms of my Office, and something that will become more relevant as the field of administrative review evolves, is the fact that I lack determinative powers. I have gone on record as saying this is not fatal to the success of my Office, but there is no doubt that the public, and even many agencies, prefer some form of determinative review to recommendatory relief.

A recurring concern of agencies in opposition to such a proposal is that an Office such as mine might attempt to "run" their agencies and make decisions having wide ranging operational and financial implications. Another objection is that currently informal investigations could become "bogged down" in legal challenges and technicalities.

My proposal is that my Office be given determinative power in certain circumstances and subject to a Ministerial override. These circumstances might well be where an amount of under $5,000 is involved, either in a one-off case or in the aggregate (if a systemic issue affecting a number of citizens is involved). To retain Ministerial control in such cases, my decisions could be subject to Ministerial override to be tabled in Parliament. In the local government area a decision could be subject to override by the Minister for Local Government to be tabled also in Parliament.

Agencies probably spend considerable amounts in officer time arguing about the relatively minor matters I have in mind.

It could be noted that the UK Ombudsman has power to order compensation payments of up to $5,000.

Strategic Implication : Resolution of minor matters will occur more quickly.

9 Name "Ombudsman"

Due to an apparent oversight the *Parliamentary Commissioner Act 1974*, when drafted in 1974, omitted to bestow on the Office of Parliamentary Commissioner for Administrative Investigations the title of Ombudsman by which it is universally known today.

Strategic Implication : Another Parliamentary Commissioner has recently been appointed and in both the legislation and the media she is referred to as the "Parliamentary Commissioner" even though her full title is "Parliamentary Criminal Justice Commissioner". This will cause unnecessary confusion as administrative review evolves.

B. Other legislation

10 Legal Ombudsman

I believe the Legal Ombudsman should be renamed Legal Services Commissioner as that position does not by its legislation demonstrate the classic hallmarks of an Ombudsman ie security of tenure (two years only, dismissible for no reason); full investigative powers (no royal Commission powers); stand alone resourcing (reliant on the Department of Justice); and no immunity against suit by complainants or other persons.

Strategic Implication : The image of my Office should not be linked with that of a dissimilar body not having the same powers or independence.

11 Government Owned Corporations

The *Government Owned Corporations Act* may need to be reviewed vis-a-vis my jurisdiction. Currently I have no jurisdiction in relation to Cabinet government owned corporations and no jurisdiction in relation to commercial policy decisions and commercially competitive activities of statutory government owned corporations. Commercial policy is not defined and the situation is open for statutory government owned corporations to argue that any decisions they make having any financial implications are commercial policy matters. The situation has not arisen to any great extent as yet but the potential is there.

Strategic Implication : People with bona fide grievances against government owned corporations are without redress because the action complained of can by stretching the definition be regarded as commercial policy decisions. Definitions need to be toned to ensure that only those decisions which truly relate to commercial policy or to commercially competitive activities are excluded and that the terms don't include actions and decisions which don't affect a government owned corporation's profitability or ability to compete.

12 Criminal Justice Act

Recent amendments to the Criminal Justice Act have given greater power to the Parliamentary Criminal Justice Committee to review complaints against the Criminal Justice Commission, a jurisdiction which I currently assert. The Criminal Justice Commission has disputed my jurisdiction on the basis that the amendments have created an alternative accountability mechanism. I have asserted that the alternative

accountability mechanism does not exclude all other accountability mechanisms such as my own. The conflict needs to be resolved.

Strategic Implication : Complainants against the Criminal Justice Commission are not entitled as of right to complain directly to the Parliamentary Criminal Justice Commissioner and are being denied their right of administrative review by my Office in respect of their grievances in favour of a Parliamentary body which may or may not have the resources to conduct administrative review.

13 Notification of appeal rights generally

The *Legislative Standards Act* requires that new legislation creating administrative discretions should wherever possible include provision for appropriate review. Perhaps any new legislation should include a requirement that agencies notify people of their rights of review when notifying them of a decision. This concept is common in the Commonwealth sphere and has been recommended by a number of authorities, including the former Electoral and Administrative Review Commission and the Commonwealth Administrative Review Council. S.49(e) of the *Administrative Decisions Tribunal Act* (NSW) requires decision makers to notify affected persons of any appeal rights they have in respect of "reviewable decisions".

Similar provisions apply in WorkCover, Freedom of Information, and Children's Commission legislation.

Strategic Implication : My Office would be spared the time consuming task of advising people of such rights when they complain to me.

14 Auctioneers & Agents Act

Under the *Auctioneers & Agents Act* a person who claims to have suffered loss as a result of the defalcation or other improper conduct of a real estate agent/salesman or a used car dealer can apply to the Auctioneers & Agents Committee for a payment by way of compensation out of the Auctioneers & Agents Fidelity Guarantee Fund. If the Committee rejects the application the applicant then has six months to sue the Committee in court.

A problem has arisen with the investigation of such matters. The Committee has taken the view that because of an unsuccessful applicant's right to sue the Committee, having made its decision the Committee is then "*functus officio*" ie no longer able to review the matter. This view has been given some support in a single judge district court decision.

Whilst it might be argued that applicants with a right of appeal, or at least a right to sue, should exercise that right rather than complaining to the Ombudsman, ss.13(3) and (4) of the *Parliamentary Commissioner Act 1974* clearly envisage that aggrieved persons can approach the Ombudsman notwithstanding that they have a right of appeal, reference or review to a court or tribunal. S.13(4) in particular makes it clear that I can assume jurisdiction in such circumstances if I think recourse to law is unreasonable or the matter requires intervention to avoid injustice. A typical case would be where a clear error had been made but the cost of taking legal proceedings would be disproportionate to the amount involved, particularly for complainants in impecunious circumstances.

Whilst to some extent the Committee's view may be based on the particular provisions of the *Auctioneers & Agents Act*, it flies in the face of s.13(4) of the *Parliamentary Commissioner Act*. It may also open the flood gates for all other agencies to argue that if a complainant has a right of appeal then once a decision has been made against that complainant the decision-making body is *functus officio*. An Ombudsman investigation will be an exercise in futility if the decision-making body has no power to reconsider the matter and change its decision.

Such an attitude conflicts with the underlying principle that in certain circumstances the Ombudsman's Office is to provide informal and inexpensive administrative review for affected citizens instead of forcing them to engage in expensive, stressful, problematic and time consuming litigation.

I would therefore suggest that the *Auctioneers & Agents Act* be amended to make it clear that decisions can be reconsidered and changed. Otherwise investigations by the Ombudsman of that agency, and potentially many others, will be rendered impotent.

Strategic implication : The public will be deprived of the Office's services, and the Office will lose significant portions of its jurisdiction and hence its relevance, if agencies are able to argue *functus officio* and thereby frustrate the investigation of complaints against them.

OVERALL

The legislative changes outlined in this submission are, I believe, important for the strategic direction of the Queensland Ombudsman's Office to ensure the Ombudsman can properly discharge his statutory responsibilities and thus contribute more significantly to the enhancement of public administration in this State.

I would be happy to expand on any of the above legislative reforms either orally or in writing should the Committee so desire.

Yours faithfully

F N Albietz
Commissioner