

THE YEAR OF LIVING (RELATIVELY) UNEVENTFULLY

I am, I fear, a poor substitute for the Ombudsman who has asked me to speak in his place. And, of course, anything I say should not be taken to represent the opinions of the Ombudsman or the Commonwealth.

The first time I became aware of human rights in an ombudsman context was during the mid-1980s when a complainant, unsatisfied by what the counter officer had achieved in a couple of telephone calls, called out that he was making a human rights complaint. The counter officer looked at the person, looked again, thought (he told me) about the good result he had obtained and said that he thought the complainant was not qualified for human rights. No-one would do that today.

What the Act does

The Ombudsman has commented previously that the ACT's *Human Rights Act 2004* has had only a limited impact. The Act, as he has pointed out¹, sets out the rights to be protected in a more accessible form than in the international instruments and creates a power for the Supreme Court to make declarations that a law of the ACT is incompatible with a protected human right. (Those declarations require a political, but not legislative, response² to be provided to the ACT Legislative Assembly).

The Act also gives the Attorney-General³ and the Human Rights Commissioner⁴ the power to intervene in proceedings raising human rights issues – although for practical purposes the role would presumably be limited to:

- addressing any issue of ambiguity or lack of clarity which might be resolved by the application of the interpretational principle⁵; or
- addressing any question arising from a proposed declaration of incompatibility⁶.

The Act sets up a process to ensure that human rights issues can be considered in the making of primary legislation⁷. This may be less effective when dealing with the great mass of delegated legislation that sets out the detail of any proposal.

In litigation

The Act has been cited only a few times in litigation since its passage, and that probably weighs against any criticism before commencement that it was likely to judicialise, extend and complicate disputes about conduct. My inexpert search of Austlii threw up a handful of cases, some simply observing the Act's passage and some containing a discussion of the balance between rights recognised in the Act and other powers and duties. As to the more substantial cases:

- *YL*⁸ and *Martiniello*⁹ dealt with the right to a fair and prompt trial and *YL* with its balance with the rights of a child;

¹ *The Ombudsman and the Rule of Law*, speech by Professor McMillan, Public Law Weekend 2004

² *Human Rights Act 2004* (ACT) s33

³ *Human Rights Act 2004* (ACT) s35

⁴ *Human Rights Act 2004* (ACT) s36

⁵ *Human Rights Act 2004* (ACT) s30

⁶ *Human Rights Act 2004* (ACT) s34

⁷ *Human Rights Act 2004* (ACT), Part 5 and note application only to bills

⁸ *R v YL* [2004] ACTSC 115

- *Firestone*¹⁰ dealt with the need for a protection order to be least restrictive of personal rights, specifically those dealt with in the Human Rights Act;
- *O’Neill*¹¹ considered double jeopardy from the perspective of the Human Rights Act;
- *Merritt*¹² pointed out that the Act is an interpretational aid not a substitute;
- *Szuty*¹³ identified the balance between the right to fair comment (as an element of freedom of expression) and the right to reputation; and
- *Robertson*¹⁴ noted that it created a right to reasons for criminal detainees but not for mental health detainees.

It may be that, as cases proceed through the courts and as the legislation becomes better known (especially if it is repeated in other jurisdictions creating a larger body of precedent), lawyers will become more inclined to introduce arguments based on human rights.

For the Ombudsman

Nor has the Act been raised much, if at all, in the work of the Ombudsman. While final figures for the year will be some weeks away, it appears that the Ombudsman will have received about 1000 complaints about ACT agencies and ACT policing and finalised about the same number. The defects in official action identified will be similar to those identified in every previous year – delay, insensitivity, questionable discretionary decisions, failure to live up to expectations and misunderstanding of legal obligations. It is unlikely that any actions that would previously have been found acceptable will be found defective because of the passage of the Human Rights Act. Few if any complainants will have referred to the Human Rights Act as the source of a standard from which they believe there has been a departure. If an action is somehow wrong under the Human Rights Act, it is likely to be found to have been wrong for other reasons in previous years and to continue to be wrong for those other reasons.

The Ombudsman has been given functions by the Ombudsman Acts (Commonwealth and ACT) and the *Complaints (Australian Federal Police) Act 1988* that enable investigation of administrative actions and police conduct, whether or not there has been a complaint¹⁵. Incidental to that, the Ombudsman has acted to encourage the development of high-quality internal complaint systems within agencies¹⁶. As well, the Ombudsman has inspection functions and a role of “proper authority” to receive whistleblowing allegations under the ACT’s *Public Interest Disclosure Act 1994*¹⁷.

⁹ *R v Martiniello* [2005] ACT 9

¹⁰ *Firestone v Australian National University* [2004] ACTSC 76

¹¹ *R v O’Neill* [2004] ACTSC 64

¹² *Merritt and Commr for Housing* [2004] ACTAAT 37

¹³ *Szuty v Smyth* [2004] ACTSC 77

¹⁴ *Robertson v Australian Capital Territory* [2005] ACTSC 35

¹⁵ See s5(1), *Ombudsman Act 1989* (ACT) and Part III, *Complaints (Australian Federal Police) Act 1981*, including s21A

¹⁶ See, for example, the *Good Practice Guide to Complaint Handling* available at www.ombudsman.gov.au

¹⁷ See *Public Interest Disclosure Act 1994* (ACT) s12-14

There is every reason why the Human Rights Act may not have a great impact on the work of the Ombudsman, at least in the short term. Some of the rights protected are rights referable to the fair trial of criminal proceedings – an area where the Ombudsman’s role is often very limited¹⁸. Some other rights protected by the Act are substantively similar to those already dealt with in the *Ombudsman Act 1989* and other administrative review legislation. It is likely that any departure from the rights protected in the Human Rights Act would generate a response from the Ombudsman based on the subjective opinion that the action would produce in the Ombudsman.

For example:

- an action that breaches equality before the law¹⁹ or that offends the freedom of thought, conscience, religion or belief²⁰ would probably also offend the Ombudsman Act standard permitting a report where an action is improperly discriminatory²¹;
- degrading treatment of a member of the public²² is clearly both “unreasonable”²³ and “in all the circumstances, wrong”;
- the right to privacy²⁴ is protected by the *Privacy Act 1988* – the Ombudsman can deal with those matters, although they are usually transferred to the specialist Privacy Commissioner;
- arbitrary arrest and detention would offend the standards in the AFP Complaints Act²⁵ and both that Act and the Ombudsman Act refer to cases where reasons should have been given²⁶ ;
- the Ombudsman regularly investigates and reports on the quality of remand and similar facilities in the ACT²⁷, and this protects the right to humane treatment of those deprived of liberty;
- a law that might warrant a declaration of incompatibility by the Supreme Court²⁸ might also lead the Ombudsman to express the opinion that an action was lawful, but that the law itself was in some way defective²⁹.

The power of the Ombudsman to refer a complaint to another office holder³⁰ (such as the Discrimination and Human Rights Commissioner) permits the Ombudsman to pass cases raising human rights or other specialist issues to the agency best placed to deal with them. But the Ombudsman is probably uniquely placed to assess human

¹⁸ See s5(2)(b) and (c), *Ombudsman Act 1989*. While the Ombudsman can probably investigate the actions of prosecutors, the office only seldom does so, because of the linkage to the role of the courts and the high level of discretion involved in prosecution decisions

¹⁹ *Human Rights Act 2004* (ACT) s8

²⁰ *Human Rights Act 2004* (ACT) s14

²¹ *Ombudsman Act 1989* (ACT) s18(1)(a)(ii)

²² *Human Rights Act 2004* (ACT) s10

²³ *Ombudsman Act 1989* (ACT) s18(10)(a)(ii)

²⁴ *Human Rights Act 1989* (ACT) s12

²⁵ *Complaints (Australian Federal Police) Act 1981*, s31

²⁶ *Complaints (Australian Federal Police Act 1981*, s31(1)(c)(ii) and s31(2)(e) and *Ombudsman Act 1989*, s18(1)(c)(ii) and s18(2)(f) and see s18(3), *Human Rights Act 2004*

²⁷ See, for example, reports on AFP management of intoxicated persons and note 1998-1999(p7) and 1999-2000 (p14) annual report references to reports on Quamby and the use of force at the Belconnen Remand Centre

²⁸ *Human Rights Act 2004* (ACT) s32

²⁹ *Ombudsman Act 1989* (ACT) s18(1)(a)(iii)

³⁰ *Ombudsman Act 1989* (ACT) s6A

rights issues (for example, equality in the way offenders are treated) against the administrative and public interest issues in different treatment in different cases.

The Human Rights Act may over time become more central to the Ombudsman's work in that it provides another source that might help to inform assessments of whether an action could reasonably be considered to provoke an expression of adverse opinion by the Ombudsman. Its fresher language will sharpen the awareness of the Ombudsman's staff to the kind of action that might raise a human rights issue. And it may increase the sensitivity of agencies so that, in their daily work, they realise they are doing more than carrying out a set of functions limited by legislation and executive control – they may over time become aware that they need to consider the human rights dimension when they act. Human rights considerations are more likely to percolate into the work of the Ombudsman than suddenly to become an important factor because they have become express.

The rest of administrative law

The Ombudsman is, of course, only one element in the Australian administrative law system. But what has been said of the Ombudsman as a human rights body can equally be said of the other elements:

- the Privacy Commissioner and the protection of privacy;
- Freedom of Information and the rights to political representation and to political expression;
- the courts and tribunals which have done so much, especially in recent years, to facilitate access so that artificial and procedural barriers are removed.

I note Professor Creyke's comment³¹ that the existing review and human rights regime at Commonwealth level provides considerable protection for individual rights and freedoms. The Australian model operates with few barriers to access and, generally, by persuasion.

A human rights institution?

Some Ombudsman offices have express human rights roles – some examples include the Mexican national Commission of Human Rights, the Ghanaian Commission on Human Rights and Administrative Justice. The union of the Ombudsman and human rights role is not an accident, or a reflection of the need to make the best use of available talent. I would suggest it is because there is a compatibility between the protection of human rights and the examination of administrative conduct.

As Professor McMillan has observed on a few occasions³², the Ombudsman is in the human rights business. He has pointed to the range of legislation which protects the rights of members of the public - anti-discrimination legislation being the most

³¹ *Administrative Justice: Beyond the Courtroom Door*, speech to conference in Capetown.

³² See, for example, *Key Features and Strengths of the Ombudsman Model*, a speech to seminars conducted by the Indonesian National Ombudsman Commission in June 2004, and *Adapting to Change – the Contemporary Role of the Ombudsman*, a speech to the Joint Initiatives Group in July 2004. Both raised the protection of the right to complain, describing it as one of the most fundamental rights.

obvious, but also including codified criminal law and evidence legislation and legislation that protects the public from arbitrary administrative action.

The Ombudsman and staff apply human rights standards on a daily basis when operating as the Commonwealth, ACT, Defence and Taxation Ombudsman. The Ombudsman and delegates try to act in ways which respect human rights³³, and to overcome any concern that the bureaucracy as a whole is not concerned to protect those rights. The Commonwealth Parliament has given the Ombudsman a range of inspection and reporting functions intended to provide assurance that the Commonwealth acts lawfully and fairly when exercising contentious or intrusive powers (in the areas of telecommunications interception³⁴, law enforcement controlled operations³⁵, the use of surveillance devices³⁶, the exercise of powers by the Building Industry Task Force³⁷ and the long-term detention of unlawful non-citizens³⁸). Each of those Commonwealth activities can involve the qualification or abridgement of rights – for example, to privacy or to liberty or to the choice of associations. In the ACT, the Ombudsman is a “proper authority” to deal with public interest disclosures – a protection, in at least one sense, of the right to freedom of expression.

Just as importantly, one of the main bases for the Ombudsman’s existence is to facilitate the exercise of a fundamental right that is not expressly reflected in the Human Rights Act - the right to make a complaint, on whatever ground, and to be confident that it will be considered impartially and that there will be no unfair retribution³⁹. The right is exercisable in any way in which the person can communicate; its exercise involves no cost and very little formality – even a lack of standing is a mere matter of discretion. It removes the implied discrimination and imbalance that can intrude when any individual confronts the massive edifices of officialdom. It may or may not secure the outcome sought by the complainant, but it will provide a reasonable observer with confidence that the complainant has been treated fairly and equally with others. The right to complain is, along with the right to political representation, the most certain antidote to tyranny.

³³ See, for example, the Service Charter at www.ombudsman.gov.au

³⁴ *Telecommunications (Interception) Act 1979*

³⁵ *Crimes Act 1914*, Part 1AB

³⁶ *Surveillance Devices Act 2004*

³⁷ *Workplace Relations Act 1996*, Part VA

³⁸ Migration Amendment (Detention Arrangements) Bill 2005

³⁹ A right to complain may, of course, be implied from, for example, Article 2 of the International Covenant on Civil and Political Rights which requires remedies for those whose rights have been violated.