



SPECIAL REPORT OF

**NORMAN GESCHKE
OMBUDSMAN
FOR VICTORIA**

**ON RELINQUISHING OFFICE
ON
28 FEBRUARY 1994**

VICTORIA

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of the

OMBUDSMAN

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28 February 1994

TO

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

The Ombudsman Act 1973, Section 25, provides for the Ombudsman at any time, if he thinks fit, to lay before each House of Parliament a report on any matter arising in connection with the exercise of his functions.

In light of that provision I believe I should make a short report on some matters/issues which are still outstanding or relevant to the future of this Office.

With the exception of a now expressed policy of the Department of Health and Community Services not to accept certain recommendations of the Ombudsman, which I refer to in a section of this report, there has been no significant change during the year which would warrant the inclusion of statistics, case notes or other annual report data; these should then more appropriately be left to my successor to cover in the next Annual Report

Norman Geschke
Ombudsman

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Introduction

The Ombudsman Act 1973 provides for the Ombudsman to, at any time, if he thinks fit, lay before each House of Parliament a report on any matter arising in connection with the exercise of his functions.

While Annual Reports are primarily to meet a legislative requirement of reporting to Parliament for the benefit of Parliament, they have customarily been used to also bring to the attention of the public, Government departments and other agencies, matters which have arisen during the course of investigation either as to practices, legislation or interpretation of legislation, and lesser known issues which may operate to the detriment of citizens in their dealings with Government departments, agencies or municipalities.

This report, occasioned by my retirement, will be my final report to Parliament. It raises some observations during my period as Ombudsman on my relationships with Ministers, departments and municipalities. It also raises the question of whether Parliament has neglected its implied responsibilities in some areas of the Ombudsman Act. I believe these comments should be on record.

Relations with Ministers and Members of Parliament

As Director of Consumer Affairs from June 1974 until September 1980 and then as Ombudsman until the present, I have been involved with many Members of Parliament and Ministers. As Director of Consumer Affairs it was largely in the conciliation or advisory areas or when working on various committees, such as the Hidden Defects in Land Committee, the Working Party to develop the Residential Tenancies Act or the then proposed Credit Act as well as some consumer issues which have involved responsibilities of Ministers other than consumer affairs.

The role of Ombudsman, quite frequently resulted in findings adverse to departments, which are the responsibilities of particular Ministers and, unavoidably, a reflected criticism of a Minister's portfolio administration. Where such an adverse finding was made on the agency's administration or a recommendation to redress the injustice determined, I would, as required by the Act, send a copy of my tentative findings to the Minister with an offer to discuss my report and findings if the Minister wished.

Despite the hundreds of contacts over the 19½ years, in both roles, and despite the findings made as Ombudsman and the repercussions of my tentative recommendations if they were to be confirmed, there was not one occasion in which a Minister sought to unfairly influence my decision. There have been differences of opinion and disagreement as to the quantum or direction of my recommendation but these have been expressed most professionally and from a position as seen by a Minister, responsible for a department or agency.

I particularly want to record my gratitude for this attitude which, not only did not compromise the position of Ombudsman, but enhanced relationships in my knowing that I could freely discuss issues with Ministers with confidence and trust. I could also deal frankly and confidentially with Members of Parliament with the knowledge that sensitive information would not be misused. Without such integrity the role of an Ombudsman would be unacceptably difficult.

Relations with Chief Administrators, Departments and Agencies

In relation to Chief Administrators or Chief Executives, the experience has been generally similar. There have been very few occasions when I believe I have had grounds to wonder about the bona fides of the answers I have received and where there has been a contradiction in evidence suggested by the department or agency head this has been almost invariably the result of an error.

On some other occasions I was convinced that the replies to me had merely been endorsements of the case put to the Chief Executive Officer or from a false loyalty to junior staff without perception or proper investigation. The answers have been clearly not in keeping with the facts or the files. In these cases, rather than there being an attempt to deliberately mis-state facts, I believe it has been a carelessness, a superficial assessment or a blind endorsement of an indefensible action.

It was initially my attitude, until I became wiser, to accept that if a department or agency claimed it was acting on legal advice it was probably unreasonable to criticise an agency in these circumstances. My mind was changed however as I sought to receive copies of that legal advice and more particularly the brief requesting that advice. I very quickly established that often the legal advice was quoted selectively or the response quoted did not specifically relate to the subject of my investigation.

On one occasion the request for advice could be simplified to "The Ombudsman has us over a barrel, how do we get out of this?" This was in relation to whether an agency had carried out an investigation or not and, if so, what were its findings. The initial reply was that there had been no investigation and this reply, no doubt, was to protect the Authority from criticism revealed during its examination. When pinned down they claimed it was just an inquiry (this on advice of solicitors) and not an investigation to which the Ombudsman had referred. A play on semantics, backed by legal game-playing.

After a few more similar incidents I reached the view that I would not accept a legal opinion as being relevant unless it clearly stated the issues to which it related and these were relevant to matters I was investigating.

I have never ceased to be amazed at the semantic aerobatics used by solicitors or counsel to meet the request of the agency head seeking justification of some indefensible situation. Balances of probability, fantasies, oddball dictionary meanings and reference to legal judgements handed down by courts where the nexus is as obvious as the emperor's new clothes have all been quoted. My view that a barrister's opinion does not have the scientific basis or the reliability of a Melbourne weather report stemmed from the assessment of some of these opinions put to me especially when on one matter three legal opinions were that the Ombudsman had jurisdiction and two that he did not.

There has been the argument that the request for the provision of a legal opinion is subject to privilege and not available to the Ombudsman. Whether this is the case or not, and I believe it is not, as Ombudsman I am not prepared to accept a department's view that it has acted on legal advice unless I see that advice and the brief seeking it.

I believe the Ombudsman Act should clarify this point to avoid argument, to facilitate investigation and allow reasonable conclusions to be drawn as to whether an injustice has occurred.

Relations with Local Government

The assistance given by Chief Executive Officers, Town Clerks and Shire Secretaries over the years has been excellent. There have only been a few cases in which I believe I have been deliberately misled or my staff has been intimidated by thorny old engineers or town clerks and shire secretaries who obviously have never before been challenged as to their decisions except by ratepayers who have easily been overridden by bluff intimidation, the quoting of specious arguments or the ubiquitous "confidentiality" of the reasons for the decision.

On a further few occasions I have felt that senior staff have asked the Councillors to make a decision or have said the decision was one of Council and this to avoid the Ombudsman's jurisdiction - Section 13(3)(e) of the Ombudsman Act provides that "the Ombudsman shall not investigate any administrative action taken by a council of a municipality or by a councillor of a municipality acting as such". Detailed inquiries can often determine the bona fides of such claims and I have had no hesitation in ringing Presidents of Shires or Mayors to establish the facts and confirm whether the decision was truly one of the Council and that Council was fully and properly informed on the issue.

Some Australian State Ombudsmen have jurisdiction to investigate the decisions of municipalities made by Councillors but I have not thought it necessary or desirable to have such powers. Councillors are elected by ratepayers who have the ultimate remedy through the ballot box. Further, when decisions are made on margins of one vote after considerable debate it would be arrogance to suggest that an Ombudsman can make a decision which should be supplanted for that of the Council.

I do not believe that appointed Commissioners of municipalities have the same protection, and I have continued to inquire into or investigate complaints about the administrative actions of Commissioners but this issue has not been clarified by Parliament or been the subject of a court challenge to my jurisdiction.

The extension of the Freedom of Information Act to municipalities and councils from 1st January 1994 should further increase the public accountability of council decisions by improving the access of ratepayers or citizens to relevant documentation dealing with the decision making process and the decisions.

On the country visits program, which inevitably leads to some complaints against a municipality, there has been wonderful co-operation from Chief Executive Officers, City Managers, Town Clerks and Shire Secretaries in providing office accommodation, photocopying facilities and other services which has contributed significantly to the success of that program.

In many instances, when issues have arisen in distant places, a call to the Shire Secretary or Town Clerk or the Municipal Engineer has resulted in prompt investigation of the matter and assistance to me. They have sent social workers to evaluate the circumstances of persons when I have received advice of concern as to their health or other situations. Many citizens have benefited from the willingness of municipal staff to assist me.

Without this co-operation and assistance the country visits program could not have been sustained nor could the Ombudsman deal with many issues in distant country areas. I want to record my sincere appreciation for this.

Select Committee of Parliament and the Ombudsman

In my last few reports I have referred to a Select Committee of Parliament to whom the Ombudsman can relate. I believe it is essential in terms of accountability, independence and the furthering of Ombudsman recommendations or the updating of the Acts, that such a Committee exists. Such a Committee would have been useful on many occasions, and probably would have been able to avoid the five year delay in amending the Ombudsman Act, to approve processes and procedures which had become essential in order to cope with the considerably increased volume of complaints. Empowering Acts must be able to adjust to the demands of anomalies and legal interpretations which prejudice the Ombudsman carrying out the wishes of Parliament.

Amendment of Ombudsman Act

The Ombudsman Act has been reviewed by Parliament only once in the last 17 years. I believe it is again time for the Act to be reviewed and this in conjunction with the responsibilities imposed on the Ombudsman by other Acts.

I have at times referred to areas of government administration which are outside the jurisdiction of the Ombudsman. I fully accept that it is for Parliament to decide what functions it wishes the Ombudsman to carry out but there are serious anomalies.

In my 1990 Annual Report I referred to some of these, one of which was the Estate Agents Board, another the Motor Car Traders Licensing Authority which, by virtue of the Act, requiring the Chairman to be a barrister or solicitor, removed the whole of the Board's administration and the Board's staff from the Ombudsman's jurisdiction. A barrister or solicitor may have no experience in administration or other fields of management yet that Board, Commission or Committee is excluded while other Boards, Medical Board, Totalisator Agency Board, and large departments, headed by skilled managers of many years' experience, are not.

I make no criticism of the Chairmen or senior staff of the two aforementioned Authorities - they have been most co-operative. This issue I am raising is one of principle. While there could be some good reasons for removing an agency from the Ombudsman's jurisdiction, that its head is a solicitor or barrister is certainly not one of them.

In a number of my reports under the heading "Challenges to Jurisdiction" I have raised the impediments or challenges which have been placed in the way of the Ombudsman in investigating complaints.

In my 1990 report I referred in detail to the fact that some departments tried to take the stance that if a matter was departmental policy then because of the decision of Mr. Justice Dunn such matters were beyond the jurisdiction of the Ombudsman. I quoted a number of examples and had hoped that Parliament would have addressed this issue to clarify that, on the meaning of policy, it was the intention as expressed by the Honourable Mr. Alan Hunt during the second reading speech on the Act, that it referred to Government policy and not policy adopted by departments or agencies.

Also on the question of jurisdiction it is my belief that such questions should be determined by Parliament. It is for Parliament to decide what it wishes the Ombudsman to do, not the courts. I mentioned that in terms of the challenge of the Equal Opportunity Commissioner the reference to the Supreme Court took fifteen months to mount at a cost of \$7000 and the advice was that another 12-15 months could elapse before the matter was heard. The decision then would depend on an interpretation of words, not of intent, a Gilbertian situation and certainly not in the best interests of efficient administration and use of resources. If the Act allowed a referral to Parliament, through the Select Committee referred to earlier, the decision would be more timely, less costly and truly reflect the intentions of Parliament.

Ex gratia or compensation payments

In many of my reports in the late 1980s I referred to this problem. In my 1989 report I concluded the entry by stating:

"A few days ago I received a copy of the delegation and guidelines which I am advised gives effect to the recommendations of the Interdepartmental Working Committee but I still have some doubts.

I had hoped to properly resolve these matters before completing this Annual Report and, while I have agreement from the Department of Management and Budget that 'ex gratia' means 'compensation' in some areas and that all the recommendations that I have made would be covered either by 'compensation' or 'ex gratia' payments, I am still not completely satisfied. Rather than delay this Annual Report any further while I try and clarify these issues, I have accepted, for the moment, what has been said but will monitor the operation of the delegation as far as it affects Ombudsman recommendations."

In my 1993 report I was forced to again raise the matter and said, *inter alia*:

"My apprehension was not unwarranted - the delegation went not to Chief Administrators (Heads of departments) but to Ministers - still with a limit of \$2,000.

In the last few weeks, ten years after my 1983 report, I have been investigating a case where wrong advice was given by a staff member of the Small Claims Tribunal which resulted in a complainant incurring unnecessary costs of \$125. In this investigation there have been 23 items of correspondence sent or received by me during which I received five refusals to make an ex gratia payment on the basis of lack of justification or that staff acted properly or the claimant acted contrary to advice and there was an inability to make refund.

After a further letter from me to the Minister and the Secretary of the Department of Justice, the complaint was then handled properly and evidence which had been available all the time was taken into account and a decision made to refund the \$125 or return it as an ex gratia payment. The costs by this stage would be a minimum of \$500 and more likely about \$1000.

However, even this was not simple as a recommendation had to be made to the Secretary of the Department of Justice who in turn had to make a recommendation to the Minister for Justice to approve the payment of the \$125.

It is absurd and unbelievable that a Secretary of a Department with a budget of \$1.1 billion does not have the powers to make an ex gratia payment of \$125. I am really back where I started with my recommendation of ten years ago.

One can seriously question whether it is really worth the effort of trying to get reforms to adopt sensible practical economic procedures for redressing injustices. I have again raised with the Department of Finance the issue of appropriate delegation of powers to Chief Executive Officers and Secretaries of Departments to approve ex gratia and compensation payments. Hopefully I may still be alive when this is finally resolved.

Further note: After this case note was completed I received advice from the Secretary of the Department of Finance that the Minister of Finance is currently considering an increase in authority to Ministers and/or departmental heads in relation to ex gratia payments.

This will still not resolve the problem unless the delegation is to departmental heads."

I am certain that the failure to delegate authority to departmental heads, chief administrators or other equivalent has unnecessarily cost many thousands of dollars in time and diversion of resources. It certainly has absorbed an unacceptable amount of my resources which could have been better spent on resolving other complaints.

I again commend this matter to Parliament: reform is long overdue.

Deliberate policy of a department to ignore legislation and the powers of the Ombudsman

The investigation of complaints against the Department of Health and Community Services has not been easy and I have referred to many of these in my Annual or Special Reports. While I fully accept that the role of social workers and other involved departmental staff in dealing with child protection, sexual abuse and other issues is a most sensitive, emotional area, and one which I certainly would not relish, the fact remains that occasionally in examining the procedures or manner in which the department's investigations and actions have been made, it is difficult to reach a view that a Sherman tank would not have greater delicacy.

I am often advised by the Department that interviews/approaches for protection applications should have been handled better. While I appreciate such honesty I am concerned with the effect these at times heavy handed and insensitive dealings have on families.

The powers of social workers to disrupt families is considerable. Social workers seem to have considerable powers which my investigations indicate have been used without supervision or following inadequate superficial inquiries. They can remove children without a warrant and can take other action which can totally disrupt families on evidence which is untested. To counter this parents often have to seek legal advice thus incurring costs. Where demonstrable errors have been made it is not sufficient to just offer an apology. ("We are sorry we burnt your house down" was the official reply to a home owner in Minneapolis whose house was burnt down during a police raid using a stun grenade. I understand they were also sorry that it was the wrong house but of course it was explained that occasionally mistakes occur).

I have now made recommendations on four cases where unsubstantiated and uninvestigated allegations of sexual abuse have led to traumatic situations and families and an unjustifiably dismissed employee have unnecessarily been put to considerable legal expense. I am seriously concerned that the Department has adopted a policy that it will not reimburse legal costs incurred by families in circumstances where no orders have been made by a tribunal or body with powers to make orders on costs.

The effect of this policy is that the Department has taken a decision that it will not accept an Ombudsman recommendation irrespective of the merits of the case if the recommendation is for the reimbursement of legal costs.

In one of the cases the complainant had no opportunity to have costs awarded as the Department closed its actions before the matter went to court. In others, families have incurred substantial legal costs in getting their children back after unsubstantiated, improperly investigated allegations have been made.

When families have unnecessarily incurred legal costs through inadequate administrative actions of departmental officers, they clearly should be reimbursed and there must be provisions for recouping these costs. The "policy" reported to me in two separate responses from the Department is in stark contrast to the decision by the Department to subsidise to a very significant level the legal costs of the parents in the well publicised "The Family" (formerly the Children of God) case.

When compared to police there is little accountability for social workers' actions. Police have both internal and external accountability systems and there is no impediment in terms of police departmental policy to the reimbursement of legal costs for demonstrably incorrect actions.

For social workers, often inexperienced but with similar powers to police, the comparison clearly highlights anomalies which is compounded by the intransigence of the Department's policy not to honour Ombudsman recommendations involving the reimbursement of legal costs.

It is I believe important that Parliament or a Select Committee should investigate this Department's negation of the Ombudsman Act which is tantamount to a rejection of Parliament's intention and allows injustices to be continued without check or conscience.

An observation after 19½ years of involvement

A major concern is that some legislative changes, decisions or complaints instigated by the Ombudsman and departmental policy attitudes tend to reflect the views and/or wishes of bureaucrats rather than the Government or Ministers and these changes are made following meetings of bureaucrats rather than Ministers. In other words, it is the bureaucracy programming what appears to be Government policies or proposals and practices.

I do not say this lightly but having experienced the State meetings of staff and Ministers in my Consumer Affairs days and, more recently, as Ombudsman, the pattern has continued. I have often found that in my discussions with Ministers, following my investigation of complaints, that the proposals put to the Minister have stemmed from the personal views of someone well down the line and I am not really debating the Minister's considered view. I have often been told it is Government or departmental policy that a certain position is taken. On investigation I have found that as yet the issues have not been put to the Minister but are being developed within a department or agency and its promotion stems from one person or a small group who have taken a particular stance. Cells or persons within an agency or department see themselves as experts or crusaders to pursue certain issues which often become enshrined in legislation or practices without proper analysis or consideration of the repercussions.

Occasionally it is not legislation, it is other matters. One example of this concerned a kiosk at Clifton Hill railway station. The kiosk was similar to many wooden kiosks that opened for a few hours each morning to sell newspapers, cigarettes, sweets etc. to train passengers. This one opened at 6 a.m., both summer and winter. A new station was built and the staff of the Public Transport Corporation decided that the kiosk was not up to the standard of the new station and should be demolished. The lady kiosk operator could then sell her wares from a trolley or some other portable fitting. No consideration was given to the condition of Melbourne winters at 6 a.m. or if the woman did not want to operate the portable trolley system in cold winds with a unit which could not handle the volume of items required. It seems that even less consideration was given to the service provided for train travellers. The concern of PTC staff was purely the aesthetic look of the new station and service to passengers should not in their view be allowed to interfere with this.

It seems the Minister's views had not been sought on this issue. The kiosk was only just saved. This was discussed in my 1991 report to Parliament.

The "Yes Minister" syndrome evidenced in Sir Humphrey's view that "its not what Governments or Ministers want but what the public service wants that is important" is too evident at times to be dismissed as just entertainment.

An example of this was the "policy" to phase out "pre fabs" from camping areas. The "pre fabs" were structures erected each year by campers in lieu of tents or caravans. The Department involved was justifiably concerned as to safety aspects of these structures. However, the decision to solve the problem smacked of bureaucracy. It was decided that all "pre fabs" should be phased out rather than consider that there might be a need for this type of unit for certain members of the public. These policy views were put into practice without Ministerial consideration. Eventually, commonsense prevailed and regulations were formulated that allowed for "pre fabs" meeting appropriate standards. Again, the Minister responsible had not been properly briefed or consulted but was being presented with almost a "fait accompli".

The removal and further placement of an inter-country adoptive child and the raid on the dingo farm indicated totally unsatisfactory practices which had quite serious repercussions but the respective Ministers were not consulted before the precipitate action was taken. My Special Reports to Parliament in September 1989 and May 1990 detailed these cases.

I have blamed unrealistic delegations on sensitive issues as a basic cause of the mistakes which have been seriously embarrassing to departments and the responsible Ministers.

Epilogue

Matters outstanding

Regrettably, I leave the Office of Ombudsman with a number of issues still to be resolved and other work to be done. I had vainly hoped that during my term as Ombudsman I would have been able to reduce the causes of complaints and while this was achieved in some areas it was not in others.

In some instances, the practices of departmental officers and those of some agencies improved temporarily, while the memory of causes of complaints remained, but with new staff, faulty interpretation of legislation, thoughtless practices and errors of judgement recurred leading to similar complaints which had been made earlier. Certainly, with some agencies, complaint causes were stopped.

Damages from high voltage injections and burst water mains have been generally accepted as liabilities of the respective agencies except for events beyond their control. The payment of interest on delayed superannuation payouts, improved employment practices and better grievance procedures have led to a reduction in complaints in those areas. There has also been much better communication by departments and agencies with citizens which has also reduced some complaints.

My successor will inherit some problems and difficulties which I was spared. The Ombudsman's budget and staff have been reduced at the same time as the quality of service and staff numbers in the public sector have been reduced. The reduction in quality and promptness of service is providing a higher level of complaints but there are less resources to manage these.

A certain level of administrative care and involvement is necessary by public sector services in a community but increased unemployment and a reduction in community services, now requires a greater involvement of the public service and places a higher demand on community welfare and other facilities. However, without adequate staff and facilities to respond to this increased demand, delays, errors of judgement and injustices have increased leading to a higher workload for an Ombudsman.

My successor will have to meet this challenge but with reduced resources.

Independence of the Ombudsman

In a recent report I dealt with the independence of the Ombudsman expressing my concerns that it was essential and paramount for the Ombudsman to be not only independent but also seen to be independent and answerable to Parliament not the bureaucracy. It was my view that Parliament should select the next Ombudsman.

At the time of writing, my successor has not been named but the interviews were conducted by the Secretary to the Department of Premier and Cabinet, the Public Service Commissioner and an independent person.

A major battle of the Ombudsman to pursue independence has been with the Department of Premier and Cabinet over budgeting matters and, following the Ombudsman's criticism of that Department's handling of a personnel matter, its persuading the then Premier and Public Service Board to review the Ombudsman's Office (how dare he criticise our department's administration?), my fears of the involvement of bureaucracy in the selection of its next monitor have materialised.

Realisation of Ombudsman Recommendations

The Ombudsman Act Section 23(5) provides, inter alia, that where it appears to the Ombudsman that no steps that seem to be appropriate have been taken within a reasonable time of his making a report or recommendation, he may, after considering the comments of the principal officer to whom the report or recommendation was made, send a copy of such report or recommendation to the Governor-in-Council, and Section 23(6) of the Ombudsman Act provides, inter alia, that the Ombudsman may cause to be laid before each House of Parliament a report on such of the matters to which they relate as he thinks fit.

In my last Annual Report I detailed a number of such reports made to Parliament in accordance with the provisions of Sections 23(5) and (6) of the Ombudsman Act. With the exception of one recommendation, debated by the Legislative Council in 1986, there has been no response from Parliament.

I believe that the Ombudsman Act envisages a joint responsibility of Parliament and the Ombudsman and this is embodied in Sections 23(5) and (6) which allows the referral to Parliament for its consideration the cases where the Ombudsman's recommendations have not been satisfied by the department or agency. Without this sanction or interest by Parliament the recalcitrant departments or agencies go unchecked and the injustices are apparently condoned. The review and action by Parliament is an essential complement to a system where the Ombudsman can only recommend.

I am not suggesting that Parliament should endorse all Ombudsman recommendations but I had the obvious forlorn hope that Parliament would at least properly consider the reports and recommendations and take appropriate action.

I would also have expected that when a department, such as Health and Community Services, adopts a policy clearly defiant of the wishes of Parliament when it enacted the Ombudsman Act and a policy which negates absolutely, without consideration of the merits the recommendation of an Ombudsman, there would have been some reaction by Parliament to protect the thrust of an Act it created.

It seems, however, that in regard to the recommendations made to Parliament under Sections 23(5) and (6) of the Ombudsman Act, Parliament has forsaken its obligations and the Ombudsman. Perhaps it is because there is no Minister or Committee with a responsibility relating to the Ombudsman and progress his reports through Parliament.

This scenario is not unique to Victoria but has been satisfactorily addressed by Select Committees of Parliament in a number of countries. I have referred to the need for a Select Committee or other committee to be involved in the Ombudsman Act and the operations of the Ombudsman.