**Australian Ombudsmen: Drafting a blueprint for reform**

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*The ombudsman institution was introduced across all Australian jurisdictions from the 1970s as a central piece of administrative law reform. The original role of the office was to scrutinise administrative decision making and to promote government accountability through the resolution of citizen complaints. However since the 1970s all Australian governments have undergone significant change. Government has expanded involvement into areas such as whistle blower and disability protection and human rights. Government also increasingly outsources decision-making to private companies, leading to the introduction of private industry ombudsman and the removal of control from the purview of administrative law transparency mechanisms. This article argues that this transformation necessitates discussion as to reform of the ombudsman institution and suggests a new blueprint for such reform.*

Ombudsmen are a litmus test for the changing operation of government. In Australia we have witnessed three waves of Ombudsmen reform. The first was the 1970s creation, across all Australian jurisdictions, of government ombudsmen as an institution of administrative law to render government accountable to the citizen. The second was the introduction from 1989 of industry ombudsmen, instruments of consumer law to render industries such as telecommunications and gas accountable to the consumer of such services. The third wave of change is characterised by both increasing diversity of operation of ombudsmen with a growing shared focus upon the institutions role in standard setting to ensure public and private organisations which deliver services to citizens and consumers act reasonably and lawfully. This is a result of new functions being given to existing bodies rather than proliferating new watchdog type bodies.

This neat classification of the historical development of Australian ombudsmen into three waves belies the reality of the transformation of the institution. The more significant changes wrought to Australian ombudsmen have been incremental, ad hoc, reactive to government change and brought about through a top-down legislative reform approach rather than a bottom-up evaluation based on stakeholder need. Ombudsman bodies and functions have been both established or disestablished on the basis of fast moving (and sometimes conflicting) political, legal, social and commercial regulatory goals.[[2]](#footnote-2) Moreover it is questionable as to whether some dispute resolution bodies should carry the title ‘ombudsman’. For example, some new industry ombudsmen are outside the membership criteria of the Australian and New Zealand Ombudsman Association (ANZOA), an organisation which operates a ‘light touch accreditation scheme’.[[3]](#footnote-3) The grant of the title ‘ombudsman’ to such bodies has resulted in applicants being refused ANZOA membership[[4]](#footnote-4) with ANZOA most recently opposing the creation of the ‘Australian Small Business and Family Enterprise ‘Ombudsman’.[[5]](#footnote-5) Even the traditional government ombudsmen now perform a wide variety of functions which depart from their core focus of individual dispute resolution, these offices are less available as a democratic corrective for the individual citizen complainant.[[6]](#footnote-6) The result is that today’s government ombudsmen, originally introduced as a citizen’s defender, is instead characterised as a citizens’ defender[[7]](#footnote-7) with a multiplicity of roles and a focus on improving whole of government administration.

This article steps into the mire and argues the need for a fourth wave of proactive reform. Part 1 examines why this is necessary and why it should happen now. While the diversification and proliferation of Australian ombudsmen symbolises the success of the institution in adapting to new requirements,[[8]](#footnote-8) it also confirms a shrinking state and a changing role of government, factors which necessitate reconsideration of the role of administrative law institutions and private bodies who provide dispute resolution services to the public. Australia is falling behind with respect to holistic review of the ‘ombudsmen enterprise’.[[9]](#footnote-9) Internationally Ombudsman have been the subject of comprehensive review with ongoing reform advocated in the United Kingdom, with calls for review coming from a variety of quarters, including ombudsmen themselves.[[10]](#footnote-10) This article advocates for similar range and depth of review which will encompass all Australian jurisdictions.

Australian ombudsmen have rarely been the focus of holistic review. [[11]](#footnote-11) Part 2 outlines the ‘access to justice’ inquiries which took place 1994 and 2014, the only independent and holistic reviews of Australian ombudsmen.[[12]](#footnote-12) Points of similarity and difference between the reviews are examined with a view to exploring whether the two decades of change between the reviews impacted upon the conceptualisation of the role of the institution and reform suggestions. While both external inquiries have resulted in important reform recommendations to the Ombudsman institution it is argued that there is continuing need for a nuanced and targeted approach beginning with close analysis of the purpose of Australian ombudsmen.[[13]](#footnote-13) This is necessary as the three waves of reform have repurposed the institution. Indeed although the first and second waves of change were largely driven by the need for a democratic or economic accountability mechanism whereby ombudsmen handled the individual complaints of citizens and consumers the third wave has moved beyond this notion of individual public benefit to a more collective conceptualisation of the public. Any reform suggestions made must therefore begin from a changed conceptualisation of the institution – one which is not evident in either the 1994 or 2014 reform inquiry.

Against this backdrop of change, Part 3 suggests a blueprint for Ombudsman reform. It sets out both broad ranging and deep changes to the Australian ombudsman model. Rather than accepting that we have entered a post 1970s Ombudsman world this Part grasps the opportunity to view the transformation of the institution as marking ‘a tipping point where the model requires a major rethink’.[[14]](#footnote-14) These reforms include protecting the title of the institution; creating large ‘one stop shops’ which merge public and private ombudsmen; locating all government ombudsmen within the legislative arm of government; recognising formally the standard setting role of ombudsmen; securing funding for government ombudsmen; improving the selection and removal process of the individual ombudsman and requiring government and industry to take on Ombudsman recommendations.

**Part 1 – Why reform and why now?**

One constant within the three waves of change is the government preference to promote and utilise ombudsmen.[[15]](#footnote-15) Evidence of this is the proliferation on the number of ombudsman-like bodies. This proliferation has centred industry ombudsmen. The 2014 Productivity Commission *Access to Justice Report* (hereafter referred to as the ‘2014 Report’) identified 71 Ombudsman and complaint bodies – 22 nationally and 49 in States and Territories.[[16]](#footnote-16) The Commission identified 26 organisations in Australia with the word ‘ombudsman’ in their titles, and a further 40 that have similar complaints functions but are called commissions or use other names and noted that these organisations resolved around 542 000 complaints in 2011-12.[[17]](#footnote-17) Government promotion of ombudsmen seems set to continue as apart from legislative restrictions in South Australia, there are few Australian limitations on the use of the title. Such limitations which do exist are not directed towards limiting institutional use, such as section 37 of the NSW *Ombudsman Act 1974*  which provides protection against somebody claiming they are the Ombudsman, but does not prevent organisations establishing a body with the title ‘Ombudsman’. Despite the push from the Australian and New Zealand Ombudsman Association[[18]](#footnote-18) there is no political will towards rationalising or systematising the institution.

Public confusion[[19]](#footnote-19) and lack of trust[[20]](#footnote-20) have been identified as outcomes of this fast changing landscape of dispute resolution. As early as the 1994 Access to Justice Advisory Committee, [*Access to justice: an action plan*](http://find.lib.uts.edu.au/search?R=OPAC_b1279900)Report (hereafter referred to as the 1994 Report) it was suggested that ‘[I]f used loosely, the term ‘ombudsman’ could mislead the public, rather than protect them’. [[21]](#footnote-21) Public confusion has since been confirmed as an issue in Australia[[22]](#footnote-22) and declining public trust has been identified as an issue by in the United Kingdom,[[23]](#footnote-23) a system which bears similarities to our own with respect to a variety of choice of ombudsmen. This negative public experience diverges from the positive institutional perception of change of ombudsmen themselves where both government and industry ombudsmen point to the fact that they increasingly do more with less and also to consumer satisfaction surveys which indicate high average rates of customer satisfaction.[[24]](#footnote-24) This divergence is puzzling and while not directly the focus of this discussion it does signal the need for empirical investigation as to whether and why this is occurring. One possible explanation for the divergence in experience between the ombudsmen and their citizen or consumer complainant may be an absence of clear vision for the role of Australian ombudsmen – or perhaps an absence of public communication about that purpose.[[25]](#footnote-25)

Yet, without empirical evidence this remains a mere assertion. And, without holistic and systematic reform the future of Australian ombudsmen seems set to continue in an ill-thought through and fragmented manner. As a result public confusion grows, as the 2014 Report observes ‘[M]any consumers are not well informed of the services that ombudsmen offer in resolving disputes. In some cases, the small scale of ombudsmen can contribute to a lack of visibility.’[[26]](#footnote-26) This very issue of proliferating small ombudsmen and public confusion also exists in the United Kingdom. In that jurisdiction however, as noted earlier, holistic reviews and calls for such review of Ombudsman are ongoing. For example a recent UK report recommended bringing together the jurisdiction of the ‘Parliamentary and Health Ombudsman, the Local Government Ombudsman and the Housing Ombudsman, to create a clearer pathway for complainants, to ensure the Ombudsmen can respond effectively to changes in the shape of public services, and to help the Ombudsmen operate more efficiently for the taxpayer.’[[27]](#footnote-27) Such willingness to review and reform the Australian ombudsman system is called for here.

**Part 2 – External Review: The nature and purpose of Australian Ombudsmen**

Of course reform and review has already occurred, albeit to a limited degree. As noted in Part 1 the first holistic review of the role of Ombudsman in the Australian justice system was undertaken in 1994 titled *Access to Justice: An Action Plan* or the Sackville Report[[28]](#footnote-28)and the second in 2014 resulted in the Commonwealth Productivity Commission *Access to Justice Report*.[[29]](#footnote-29) Each review differs from evaluation of individual ombudsman offices as the focus of each was upon the entirety of the system of dispute resolution and therefore encompassed discussion as to both private and public ombudsmen. Each Report devoted one chapter to ombudsmen and similar complaint handling mechanisms.

In the 1994 Report and the 2014 Report the relevant chapter begins with a statement as to nature and purpose of the institution. However in the two decades between the reports this description of the purpose of the office alters only with respect to recognition of the systemic role performed by the institution (see further below). This is at odds with reality where the waves of reform have brought about fast paced and significant institutional change. The 1994 Sackville Report stated that:[[30]](#footnote-30)

The core features of governmental ombudsmen are that they are independent bodies that receive and investigate complaints and, when they consider a complaint to be justified, attempt to seek redress through processes akin to mediation or conciliation…Recent industry-based ombudsman schemes…have picked up most of the core features of governmental ombudsmen.

Similarly, in 2014, the Australian Government Productivity Commission *Access to Justice Arrangements* Report[[31]](#footnote-31) in response to the question “What do ombudsmen do?” states that

Ombudsmen are impartial organisations that receive and resolve complaints, and conduct inquiries into individual or systemic cases based on those complaints. Ombudsmen services are provided at no cost to the complainant.

While the observation that the purpose of the institution is to be independent or impartial individual complaint handler is almost identical, the one significant difference between the reports is the mention in the 2014 *Access to Justice* Report of the systemic focus of the institution. The systemic function was addressed in the 1994 Sackville Report in the context of the Commonwealth Ombudsman,[[32]](#footnote-32) with the question being asked as to ‘whether the Ombudsman should focus more upon the identification and correction of systemic problems than upon the resolution of individual complaints.’[[33]](#footnote-33) The Sackville Report answered this question in the negative but noted that a ‘focus on systemic problems could be a useful, if largely invisible, improvement in access to justice for many disadvantaged Australians.’[[34]](#footnote-34) In 2014 the Productivity Commission adopted a much broader approach to systemic work in relation to government and industry ombudsmen stating that the term includes: complaint-driven systemic issues investigations; own motion investigations; public interest reports that use complaints data to inform the community and assist regulators and other bodies in performing their functions; and formal submissions to inquiries.[[35]](#footnote-35) In particular the 2014 Report observes that systemic investigations provide access to justice as they ‘represent an efficient form of dispute resolution since they address all instances of wrong treatment in one investigation.’[[36]](#footnote-36)

The explicit inclusion of this broad brushed approach to the systemic role of ombudsmen in the 2014 *Access to Justice* Report acknowledges the re-purposing of Australian Ombudsman over the last two decades. It evidences how the third wave of reform has remodelled the institution as one which provides benefit to a collective conceptualisation of the public. This confirms the growing emphasis of all Australian ombudsmen, both public and private, upon standard setting and enforcement[[37]](#footnote-37) a shift flagged as important in 1994 as ‘…a much stronger focus on standards will ultimately pay off in terms of better decisions and less complaints about the handling of complaints and an overall better service to the customer.’[[38]](#footnote-38)

Also significant is that both reports omit description of the nature and purpose of the Ombudsman. Most obviously there is a lack of attention given to firstly, the evolving disparity between Australian government ombudsmen and secondly, the convergence of private industry ombudsmen and government ombudsmen functions. Extensive examples of both changes now exist.[[39]](#footnote-39) An example of the growing diversity amongst government ombudsmen is the 2007 grant of power to the Victorian Ombudsman to enquire into whether an administrative action of a public authority is incompatible with a human right.[[40]](#footnote-40) An example of convergence is section 34 of the Western Australian *Parliamentary Commissioner Act 1971* which now allows the WA Ombudsman to act as industry ombudsmen and to give binding decisions and deliver ‘private’ dispute handling services for consumer contracts. Such significant changes are mirrored by private industry ombudsman. For example the Financial Ombudsman Service was created in 2008 following the merger of the Financial Industry Complaints Service (FICS) with the Banking and Financial Services Ombudsman (BFSO) and Insurance Ombudsman Service (IOS); all of which were Industry Self-Regulatory bodies. This has resulted in FOS becoming the largest external dispute resolution scheme in Australia.

The result of change without coherent planning and vision for the role of the institution is that Australian ombudsmen increasingly defy simple categorisation.[[41]](#footnote-41) This is an ever present issue. Indeed both the 1994 Report and the 2014 Report observe the difficulty with unrestricted usage of the title ‘ombudsman’ and advocate the use of criteria for the grant of the title. The 2014 report accepting the basic premise put forward by ANZOA[[42]](#footnote-42) that the ‘The term Ombudsman should only be used if six key criteria are met. Those criteria are independence of the Ombudsman from those whom the Ombudsman has the power to investigate, accessibility, fairness, public accountability, effectiveness and efficiency.’ However despite this being the practice and while the criteria are useful to characterise what an ombudsman institution should be, this agreed criteria has resulted in anything but a simplified ombudsman system.[[43]](#footnote-43)

In the United Kingdom the word ‘enterprise’ was chosen by Buck et al[[44]](#footnote-44) to reflect the growth and proactive role of ombudsman. Here the argument is made that ombudsmen should be grouped as a system, that there is a need to view the institution as one which must be protected and scrutinised. Such an approach has not yet happened at a policy level in this country. Indeed, while the 2014 Report contextualised ombudsmen within the civil justice system, the relevant chapter of the report was titled ‘Ombudsmen and other complaint mechanisms’ thus contextualising the institution as one of many in a landscape of complaint-handling schemes including human rights commissioners, health complaint bodies and fair trading or consumer affairs offices.[[45]](#footnote-45) While other mechanisms should not be ignored the reforms below are not inclusive of other access to justice complaints mechanisms. The suggestion is that ombudsmen, despite their differences, be treated as a stand-alone system, the aim being to improve access to justice for the individual and to elevate, protect and scrutinise the ombudsmen system as recognition of its unique and effective role in complaint handling across government and industry.

**Part 3 – The Reforms**

While the disparity between Australian ombudsmen is created by varying jurisdictional requirements it is overwhelmingly the direct result of governments following a course of selective intervention. This intervention is simultaneously caused by and has resulted in a fragmented and ill-coordinated policy towards ombudsmen.[[46]](#footnote-46) Ombudsman jurisdiction has evolved through reactive management with ever-increasing decisions being made to counter the unforeseen outcomes of earlier policies. [[47]](#footnote-47) The interventions are piecemeal, increasingly shaped by government need to protect the perceived interests of vulnerable groups within the community.[[48]](#footnote-48) Under this type of reactive reform the purpose of the institution in meeting the goals administrative justice— which are so important to improve the government administration and enrich the lives of individuals and the community—has not been centred.

This article promotes proactive reform. This is termed a ‘blueprint’ as this concept has much traction in the area of public administration, where it has been observed that ‘[R]eform is driven from the top…’.[[49]](#footnote-49) Accordingly there is a need for top-down, thoughtful and detailed system wide reforms. In 2011 the Law Commission, recommended that the United Kingdom Government ‘establish a wide-ranging review of the public services ombudsmen and their relationship with other institutions for administrative redress, such as courts and tribunals.’[[50]](#footnote-50) The reforms suggested here are a similar initiative.

The following reforms are suggested to equip ombudsmen to meet future challenges. These are both short term and long term reforms with the driver being to encourage longer term thinking in policy making around the ombudsman institution. Outlining how these will be put into effect is beyond the scope of this article however it is noted that some long term changes may be difficult to implement and/or there may be a lack of political will and resourcing. However this is not intended as a ‘wish list’ of reform, many of the suggestions below are based on calls for reform which have often been repeatedly called for from the establishment of ombudsmen in the 1970s. Further the 1994 Report had one Action Point recommending minimum standards for industry-based consumer complaint bodies and for government review. The 2014 Report made a total of 4 out of 83 major recommendations for change to public and private ombudsmen. The suggestions below address these recommendations and other proposals made by scholars and external reviews of individual ombudsman offices.[[51]](#footnote-51) The aim of the suggested reforms is to:

1. Deliver better services to the individual citizen or consumer by ensuring that the ombudsman institution in Australia is easy to access and understand;
2. Retain the individual specialisms of existing ombudsmen while synthesizing and emphasizing similarity of processes; and
3. Ensure institutional independence, capability and effectiveness by examining the constitutional role of ombudsmen and take steps to reform appointment and removal processes.
4. *Recommendation 1: Protect the title*

The recommendation here is that statutory restrictions be imposed upon the use of the title ‘Ombudsman’ in Australia. The title should be protected through statute. [[52]](#footnote-52) The most effective mechanisms to achieve this would be the passing of uniform legislation across all jurisdictions. This suggestion is far from new. The lack of controls on the use of the title has been subject to wide-ranging discussion in Australia,[[53]](#footnote-53) particularly in the late 1980s with the introduction of the first private industry Ombudsman scheme, the Australian Banking Industry Ombudsman.[[54]](#footnote-54) For example in the 1991–92 Commonwealth Ombudsman Annual Report Mr Alan Cameron, the then Ombudsman, noted that[[55]](#footnote-55):

There is no doubt that there is already some confusion within the community about the different ombudsman who are appearing. My concern is that elements which are critical to the traditional concept of an ombudsman could be confused, and damage done to the institution as a result. These elements include that the ombudsman is independent — an internal ombudsman cannot be independent; and that the ombudsman has the power to recommend and to publicise, but not make a binding decision — an industry ombudsman, within certain limits, usually has that power.

Similarly to this observation by Mr Cameron the 1994 Report observed that ‘If the word is used to describe systems that do not meet these basic criteria, there is a danger that the term will lose credibility.’[[56]](#footnote-56)

It is curious that the debate and concern over the use of the title in this country has not led to statutory protection. Of course Australia is not alone in this outcome. Apart from New Zealand there is a similar lack of protection across other common law jurisdictions such as Canada and the United Kingdom. Also similarly in both those jurisdictions concerns have also been raised over the unrestricted use of the title. The concerns being that unrestricted use: will undermine the brand name; that the title will be misused by institutions which are not independent, accessible and impartial; that it will lead to increased public confusion and therefore reduced Public awareness of the right place complain[[57]](#footnote-57); and create confusion over the set of agreed principles which drives ombudsmen.[[58]](#footnote-58)

Of course this reform suggestion thus marks a battle fought and lost. As outlined in Part 3, Australian debate on the ombudsman title is now dominated by the view that criteria should govern the grant of the title to an institution. This approach is adopted by the 2014 Report endorsing the light handed regulatory touch of ANZOA and approval of that organisation’s criteria.

However the practical effect of the application of criteria is to broaden both the breadth and scope of the Ombudsman role. The title now includes a broad spectrum of institutions which may be public or private or a hybrid of both, which may be both statutory and voluntary and which each has its own culture and practices.[[59]](#footnote-59) Local councils, universities and companies have created an internal ombudsman, sometimes called by that name. Further, industry bodies have created their own ombudsman such as the Produce and Grocery Industry Ombudsman which functions not to resolve public complaints from the public but to mediate industry disputes. Moreover there are bodies which exhibit the criteria yet do not bear the title ombudsman. For example the 2014 Access to Justice report states:[[60]](#footnote-60)

The difference between ombudsmen and tribunals is not always clear, however, in general, tribunals require an application to conduct an investigation and have the power to resolve disputes through rulings, whereas ombudsmen can conduct own motion investigations and most cannot make binding decisions. Some bodies are difficult to classify, for example the Superannuation Complaints Tribunal, which initially attempts to resolve complaints much like an ombudsman does, but, if that is not successful, will conduct a formal review of the complaint and issue a determination.

This role of the Superannuation Complaints Tribunal bears close similarity to the role of many industry ombudsman adding weight to the observation of Professor John McMillan, a former Commonwealth Ombudsman and Acting NSW Ombudsman that ‘calling a body an ombudsman, or calling it by some other name, does not mean that it is better or worse at what it does than a body with a different title. For example, depending on which jurisdiction you are in, a complaint against police would be made to an ombudsman, a law enforcement ombudsman, a police complaints authority, a crime and corruption commissioner, a crime and misconduct commissioner, or an integrity commissioner.’[[61]](#footnote-61)

One practical reason to accept criteria and the light regulatory touch of ANZOA is that such a proposal to restrict usage of the title comes at a time when the ombudsman landscape is now established as diverse and incoherent. However while difficult to implement, the current disadvantages to the wide ranging use of the title outweigh the advantages. In the United Kingdom a report proposing reforms to the public services ombudsmen observed that[[62]](#footnote-62)

The public should not have to make complex determinations about who is accountable for delivering a service and to whom they should turn for redress if the service deliverer fails to address their complaint to their satisfaction. Growing complexity in public service delivery should be balanced by determined and imaginative efforts to ease access to redress.

In Australia as in the United Kingdom, there is ‘increasing convergence between public and private ombudsman schemes’ and this commonality needs recognition and protection by formal statutory protection and conferral of the title.[[63]](#footnote-63) The conceptualisation of ombudsman as professionals governed by a professional body, will assist in evaluating schemes which should not be using the title. Here it is worth considering ANZOA as a professional body – with the power to protect and discipline its members as with any professional organisation such as a law society. The use of ANZOA as a body to regulate professional conduct will sanction the exclusion b that organisation of bodies which do not adhere to its six industry benchmarks (noted above and supplemented by a further eight pages of ANZOA guidance and explanation on how those benchmarks apply to ombudsman schemes). It can also ensure Ombudsman perform assisted dispute resolution and undergo appropriate professional training.

*B. Recommendation 2: Create ‘one stop shops’ for complainants*

There are at least three approaches to a holistic framework for an ombudsmen system. Firstly, things can continue as they are with the advantage that relationships are already established. This has the advantage of being familiar and easy. However as outlined in Part 1 this approach is untenable as the most common criticism of the ombudsman system is growing public confusion and distrust of an institution which is generally not well understood.[[64]](#footnote-64) As Adam Sampson, the United Kingdom Legal Ombudsman stated in 2013 when referring to the large number of ombudsmen and complaints systems in the UK, ‘our complaints system is a mess’ and the cost of maintaining multiple systems is ‘startlingly high’. He went on to suggest that government should ‘bring some order and efficiency into what is an unwieldy, expensive and confusing world. If that means combining some schemes and eliminating others–so be it.’[[65]](#footnote-65)

If change is going to occur then the remaining two approaches will involve a degree of proactive reform. The choice between the two is micro or macro reform. The macro approach could be the creation of a new end to end system. All offices could be integrated into a ‘new’ single ombudsman. This ombudsman would deliver services to citizens and consumers. One benefit of this approach is that it requires a broad rethinking of the ombudsman role – should such an office have the power of determination for public and private complaints? Should it be a standard setting body? Are there advantages in having one institution staffed multiple public and private ombudsmen? However it also has disadvantages. It is risky, this system doesn’t exist and it is not known if it will work. It therefore has huge potential to undermine the tradition, credibility and respect of the institution.

It is a micro approach, which is favoured here. This is an approach raised by the NSW Ombudsman,[[66]](#footnote-66) is to impose a layer of integration between the ombudsmen and the public. The concept is to situate Australian ombudsmen within a framework that creates a ‘whole greater than its parts’[[67]](#footnote-67) thus satisfying the Sampson push for order and efficiency.

This suggestion includes establishing a single recognisable contact point for everyone in the community which will act as a 'triage' station, referring complaints and information to the relevant body, who could then make contact with the complainant and take any appropriate action. However the NSW Ombudsman stressed that ‘this contact point would not subsume the roles of the various oversight and integrity bodies, who would all maintain their independence and particular roles and responsibilities.’[[68]](#footnote-68) There is also good reason to keep the expertise and specialism of ombudsman offices, thus satisfying the NSW Ombudsman suggestion. The public should not have to make complex determinations about whom to complain to and Ombudsman should also be free of having to make complex jurisdictional decisions or to rely upon organisational goodwill to determine who resolves complaints.[[69]](#footnote-69) In the Australian context this would mean one triage point in each jurisdiction. This suggestion has also been made in the United Kingdom where the Public Administration Select Committee observed that ‘the Government should create a single point of contact for citizens to make complaints about government departments and agencies’.[[70]](#footnote-70)

This approach has benefits as it retains the original system with a single look and feel. It is also ‘business as usual’ with an integration layer, low initial cost and low risk. The disadvantage of this approach is that it is simple, a little clunky with ‘old dogs in new collars’ has little customatisation and will need resourcing as in effect the suggestion is for a ‘front of house’ clearing mechanism. This can be conceptualised as an amalgamation of ombudsmen similar to that which has been undertaken in Victoria, NSW[[71]](#footnote-71) and Western Australia with respect to tribunals. This revives the well-worn path of historical recommendations for a holistic government approach to complaint resolution, as alluded to by the Administrative Review Council,[[72]](#footnote-72) and suggested by the former Commonwealth Ombudsman, Professor Dennis Pearce[[73]](#footnote-73). We have already seen amalgamation of public ombudsmen functions, such as the 2003 merging of the NSW Ombudsman and the Community Services Commission and a combining of both private industry ombudsman and public functions in government ombudsman such as in Western Australia. The ‘one stop shop’ is attractive as it provides service to the public as simple and seamless as possible while preserving the variety and subtlety in the practices and procedures of ombudsmen. [[74]](#footnote-74) Chaney has argued that in terms of tribunal amalgamation the benefits are accessibility, efficiency, flexibility, accountability, consistency, and quality.[[75]](#footnote-75) Like the ‘super-tribunals’ the purported benefits of a ‘one stop ombudsman shop’ may be: a whole of government approach to support and recommend improved decision-making; stability of staff of the offices; and simplicity of approach for the public; consistency in practices and decisions; and the visibility of the establishment of a single ombudsman with the title being restricted to such a body. [[76]](#footnote-76)

Ombudsmen are of course not tribunals and this suggestion is not without problems and nor will it be without opposition. In 2007 the Banking and Financial Services Ombudsman Limited, the Insurance Ombudsman Scheme and the Financial Industry Complaints Scheme objected to such a proposal in Victoria, arguing that ombudsmen already have their own central telephone referral point and an ‘additional gateway will not have the industry-expertise of the schemes currently operating in this area’. [[77]](#footnote-77) Further work must therefore be undertaken as to this proposal including its rationale; a cost-benefit-analysis; an options appraisal; an audit of changes to legislation; the likelihood of legislative change; and a risk assessment.[[78]](#footnote-78) However it does have initial appeal:

* A single ombudsman contact point should reduce the confusion individuals experience with services increasingly being delivered via the public and private sectors.[[79]](#footnote-79)
* The size of such an institution is manageable, at last estimate there are currently more than 700 people employed in ombudsman offices across the country, handling in excess of 400,000 complaints from the public each year.[[80]](#footnote-80)
* The institution could be ‘headed’ by multiple Ombudsman, much like the Swedish office[[81]](#footnote-81) and also akin to the model developed by FOS where there are lead ombudsmen for divisions such as insurance, banking and finance.
* The system will allow retention of differing processes and procedures, for example the fee for service approach taken by industry ombudsman will not apply to government ombudsmen,[[82]](#footnote-82) neither will the binding nature of industry ombudsmen determinations.

Importantly, this reform also allows for the retention of differences between industry and government ombudsmen. There is thus no need to dismantle the body of law which is developing around private industry ombudsman powers and which cannot apply to public ombudsmen.[[83]](#footnote-83)

1. *Recommendation 3: Parliamentary protection and oversight of government ombudsmen*

All government ombudsmen should be afforded the statutory responsibility of being appointed by and reporting to Parliament – for oversight and protection. This is to separate the institution of ombudsman from the executive arm of government and promote its independence. There is currently an absence of uniformity across Australian ombudsman. For example some ombudsmen are appointed by the Governor, such as the Western Australian Ombudsman; the Victorian Ombudsman and the Tasmanian Ombudsman (see: *Parliamentary Commissioner Act 1971* (WA), s 5(2); *Ombudsman Act 1973* (Vic), s3; *Ombudsman Act 1978* (Tas), s5). Whereas in Queensland the Governor in Council must consult with a parliamentary committee (see *Ombudsman Act 2001* (Qld), ss 58, 59) and in South Australia the appointment occurs by the Governor , on a recommendation made by resolution of both Houses of Parliament (*Ombudsman Act 1972* (SA), s 6) and in NSW similarly by the Governor upon address of both Houses of Parliament and with veto over the appointment given to Joint Committee *Ombudsman Act 1974* (NSW), ss 6, 6A). In the Northern Territory appointment is made upon recommendation by the Legislative Assembly (*Ombudsman Act 2009* (NT) s 132) and in the ACT by the Speaker of the Legislative Assembly (*Ombudsman Act 1989* (ACT), s22) and the Commonwealth Ombudsman is appointed by the Governor-General (*Ombudsman Act 1976* (Cth), s21). The aim of this suggestion is that offices be established by an Act of Parliament; with ombudsmen are appointed and dismissed with parliamentary involvement; overseen by a statutory parliamentary committee which is also responsible for budget approval; and required to report to a specific parliamentary committee. [[84]](#footnote-84)

Due to the absence of a separation between the executive and the legislature in Australia this recommendation that Ombudsman be officers of parliament may appear superfluous. Australian parliaments generally have been unable to free themselves of executive domination except when the government has been in a minority in the upper house, or when it has been dependent on the support of independents or minority parties in the lower house. As early as 1974 it was observed that ‘most of the Australian parliaments have become mere rubber stamps of approval for legislation and other enactments formulated by cabinet.’[[85]](#footnote-85) In Australia, particularly at the state level it has been questioned as to whether there is even any point discussing what parliament does so as to suggest it acts independently of government.[[86]](#footnote-86) The means, normally adopted to achieve reform and power up the parliament, is to strengthen the committee system. Further, the capacity of Parliament to criticize and scrutinize has been enhanced through the investigative functions of offices such as the Ombudsman and the Auditor-General.[[87]](#footnote-87)

It follows that despite clear demarcation between the legislature and the executive the constitutional placement of the ombudsman under the legislature is important. This is highlighted by the 2011 resignation of the Commonwealth Ombudsman, Mr Allan Asher. Resignation of an Australian Ombudsman is a rarity. In the case of the resignation of Mr Asher in 2011, 14 months into his five year term, the constitutional positioning of the Commonwealth Ombudsman within the executive arm of government contributed to the assertion that his actions had resulted in ‘…government concerns over his impartiality.’[[88]](#footnote-88) This resignation highlights conflict between the statutory responsibility of an Ombudsman to investigate administrative action by government and the need to remain independent of the political process.

Mr Asher resigned after admitting he scripted questions for a Greens senator Sarah Hanson-Young to ask at a Senate estimates hearing. The questions concerned Ombudsman powers of immigration audit with the consequent suggestion made that ‘the real reason for the assault on Asher is the poisonous politics of immigration’[[89]](#footnote-89) Nonetheless, his action was viewed as compromising the independence of the ombudsman. Mr Asher’s choice of pathway to publicise the sensitive issues troubling the office in terms of immigration oversight[[90]](#footnote-90) was seen as ‘unwise’ and one that ‘…compromised the independence of his office by actively colluding with the Greens, but [Mr Asher] said he had no other way to air his concerns about government policy’.[[91]](#footnote-91)

This choice to approach a minority party with such damaging policy information (damaging to the government) is important as it is attributable to deeper structural flaws flowing from the constitutional positioning of the office within the executive arm of government. Relevantly Mr Asher attributed his actions to Government ignoring his concerns over office funding and (in)ability to oversee immigration detention and the fact that he ‘believed that his job as a decent person in his role was to look after the very vulnerable people who had no other voice.’[[92]](#footnote-92) Further, it was argued that ‘[I]n the absence of a parliamentary oversight committee with whom he can raise issues of concern, it is not unreasonable for the Ombudsman to raise such issues direct with individual MPs or senators.’[[93]](#footnote-93) In this instance P**arliament granted the Commonwealth Ombudsman legislative powers to investigate sensitive issues and then, in the case in the case of the Commonwealth Ombudsman, the Government refuses to respond to criticism. This event goes to the heart of Ombudsman independence highlighting** conflict between the statutory responsibility given to an Ombudsman to independently investigate the government and the Parliament or Government marginalizing the Ombudsman.

This suggestion that the all Ombudsman report to parliament,[[94]](#footnote-94) replicates what occurs in States.[[95]](#footnote-95) However, this recommendation is far from a silver bullet. Recent events in NSW highlight the relative powerlessness of the ombudsman institution within either the executive or the legislative arm of government. Here the dual NSW parliamentary investigations into Operation Prospect are particularly relevant. Operation Prospect commenced in late 2012 under the former Ombudsman, Bruce Barbour and continues under the Acting Ombudsman, Professor John McMillan. It is an investigation of allegations concerning the conduct of officers of the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission between 1998 and 2002.[[96]](#footnote-96) While the NSW Ombudsman reports to Parliament via the Parliamentary Joint Committee, in the case of Operation Prospect there were two separate legislative inquiries into the allegedly slow and expensive conduct of the NSW Ombudsman’s investigation.

This parliamentary review of Operation Prospect illustrates that locating an ombudsman within parliament is perhaps more important for perception than practice. It is possible that the Legislative Council actions, being independent of the established Ombudsman parliamentary reporting line may be cast as the upper house acting without democratic authority.[[97]](#footnote-97) Indeed such independent parliamentary inquiry by the Legislative Council indicates that reporting to Parliament is by no means a panacea for effective ombudsman oversight. This is despite the fact that ombudsmen may be safeguarded by legislative provisions which provide that they have complete discretion in the performance or exercise of their functions and powers.[[98]](#footnote-98)

While the practical effectiveness of situating the ombudsman in the legislature may not be improved, the symbolism of such placement should not be overlooked. Placement of ombudsmen within the legislative arm of government confirms the office should not be viewed as merely another government department.[[99]](#footnote-99)

There are five additional reforms which will further assist in maintaining independence of government ombudsman through parliament:

1. Appoint an Ombudsman by unanimous resolution of parliament,[[100]](#footnote-100) thus obtaining dual party support that is essential to a parliamentary appointment.[[101]](#footnote-101) If decided to be too problematic in practice (given the possibility that both Houses may not agree) the NSW model may be adopted where the decision about the appointment of the Ombudsman may be vetoed by relevant Parliamentary Committees established by statute. This may achieve the cross party support necessary.
2. The term of office for Australian Ombudsman should be reviewed. Such terms are currently variable.[[102]](#footnote-102) The ideal term for individuals holding these positions of scrutiny should be longer than the usual term of a Parliament.[[103]](#footnote-103) Here an 8 year term with the option of the Parliament, or its delegate, extending the appointment for a further period that would take it into the middle of the next election cycle is proposed as desirable.[[104]](#footnote-104)
3. Once in office stable tenure is critical to independence. Across Australian jurisdictions the standard process is for Ombudsman to be removed with the approval of Parliament with reasons generally listed for removal in the enabling legislation. Most jurisdictions refer to disability, misconduct, incompetence, bankruptcy, neglect of duty, conviction of crime as reasons for removal.[[105]](#footnote-105) To enhance the protection of individual Ombudsman all Australian jurisdictions could adopt provisions such as in South Australia where the *Ombudsman Act 1972* (SA) s10 allows cases of suspension for incompetence and misbehaviour to be terminated and the ombudsman restored to office if parliament has not requested removal.[[106]](#footnote-106) This legislation affords parliamentary protection in the case of removal. The basic premise being that removal of an Ombudsman should be similar to that of removal of judges, requiring input from both houses of Parliament.
4. Funding to Australian Ombudsman offices should be guaranteed, as ‘To have an Ombudsman makes a government look good. To underfund the office ensures it is not too troublesome.’[[107]](#footnote-107) This will change the model of funding currently used whereby money is generally allocated in state and federal budgets and therefore the process is determined by government, subject to approval by parliament. There must always be a temptation for the Executive, not to abolish the Office but to trim the resource to the point where the Office ceases to be effective as it might be. That is less likely to happen if funding is coming through the Parliamentary vote. New Zealand also offers an alternative where the budgets of the Officers of Parliament are decided before the NZ budget is decided meaning that the Officers of Parliament Committee can determines the budget of the Ombudsman before Parliament decides allocations.[[108]](#footnote-108)
5. The model of independent evaluation applied to the Queensland Ombudsman under Division 4 of the Ombudsman’s Act 2001 (Qld) should be applied to all Australian Ombudsman . This will allow for ongoing parliamentary oversight and the benefit of an independent evaluation of office practice.

This reform recommendation does not include the relocation of the industry ombudsmen to the legislative branch of government. Historically industry ombudsmen and the industries they take complaints about have had a high degree of self-regulation. While industry ombudsmen are variously constituted no industry ombudsman reports directly to Parliament. For example, to take the two largest federal private industry bodies. Firstly, the Telecommunications Industry Ombudsman is established under Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, section 128 of which states that the ‘The Minister may, by legislative instrument, determine standards for the TIO scheme purposes of subsection’. Secondly, the Financial Ombudsman Services Limited (FOS) is approved by ASIC under the Corporations Act and the National Consumer Credit Protection Act. The issue as to whether such reporting should be put in place is beyond the scope of this article.

1. *Recommendation 4: Articulate the purpose of ombudsmen*

One challenge to a holistic approach to an ombudsman system is that the difficulties faced by ombudsman will be both shared and dissimilar.[[109]](#footnote-109) Recently, the notion of an integrity system of which ombudsmen are a part, has been articulated as the normative purpose of ombudsmen. This integrity function has led to wide debate as to the role of ombudsmen. In 2013 The Hon Wayne Martin AC, Chief Justice of Western Australia, discussed the issue of a fourth integrity branch of government in his 2013 Whitmore Lecture.[[110]](#footnote-110) To the surprise of those within integrity agencies[[111]](#footnote-111) His Honour used the descriptor of ‘alarm bells’ ringing at the thought of a fourth arm of government stating:

This article is a response to various suggestions made over the last 10 years or so to the effect that various statutory agencies with different functions and responsibilities should be collectively regarded as a fourth arm of government, united in the discharge of a shared responsibility. It appears to me that there may be significant dangers in this proposition, including the risk of distraction from the specific language used by the Parliament in conferring functions upon each agency, and in defining the standards to be applied and observed by each agency. The collection of these agencies in one grouping creates the risk… that the efficacy of the checks and balances that have characterised relations between the three recognised branches of government, and which have stood the test of time, may be undermined.

Up until this point debate had been overwhelmingly in favour of recognising the growth of the integrity arm of government. In 2004 Chief Justice Spigelman had argued that an integrity branch of government would include agencies such as the auditor-general, ombudsmen, director for public prosecutions etc.[[112]](#footnote-112) This notion was supported by the Rt Hon Dame Sian Elias, the Chief Justice of New Zealand who suggested that this branch could include the integrity functions of the judiciary.’[[113]](#footnote-113) The case for an integrity branch of government has been taken up by various commentators[[114]](#footnote-114) and past and present ombudsmen.[[115]](#footnote-115)

In Western Australia the Chief Justice’s concerns have informed the Western Australian Parliament[[116]](#footnote-116) and promoted fresh debate. For example Chris Wheeler, the Deputy Ombudsman of NSW, rejected the views of Justice Martin arguing that the case put forward was based on [[117]](#footnote-117)

what could be described as a false premise – that the historical arrangements or relationships between the existing three branches of government are still adequate to ensure an appropriate balance between the executive, legislative and judicial branches. Such a view would not appear to recognise that there has been a radical, and still ongoing, shift in these relationships over the past 100 years or so, primarily due to changes in the powers and the functions of the executive branch.

Of course, given the long slow absence of change in Australian federal constitutional history, the question as to whether this increasing growth of executive power can be stymied through the creation of an integrity arm of government is of more theoretical than practical relevance.

However while theoretical, this debate over an integrity arm of government, raises three current and practical issues for Ombudsman. Firstly, what is the role for government and industry Ombudsman within and amongst other integrity agencies?[[118]](#footnote-118) Secondly, as the range and nature of such agencies grows[[119]](#footnote-119) and as delivery of services is transformed to what extent must or should the institution change to accommodate these shifts? Thirdly, as ‘There is a natural tendency in any surveillance mechanism to come to believe that the administration of government exists for the purposes of being investigated’ or in other words[[120]](#footnote-120) that integrity agencies must not lose sight of their purpose being one to hold truth to power within the constraints of their legislative mandate and not to become a de-facto policy creator or rule maker. These issues intersect around the question as to what is the purpose of an Ombudsman

In establishing a clear role for an Ombudsman core principles must be considered. Firstly, the jurisdiction of ombudsmen must be streamlined and clear. Consideration of the place of the citizen and consumer in the role of the institution in preserving the ability of the individual to complain to ombudsmen is central. Secondly, it is appropriate for the function of ombudsmen to change however careful consideration should be afforded to how and when this is to be done. Should it be left to Ombudsman to ask the courts to decide the validity of their jurisdiction[[121]](#footnote-121) or should a test for the grant of such powers be developed? One possible litmus test for the grant of new functions to Ombudsman may be to assess whether the functions are a good fit with the core role of individual complaint-handling. As Gill has noted a good fit is one where the function may ‘help to simplify a complex redress landscape from the perspective of the citizen’[[122]](#footnote-122) or consumers. Finally, the role of the institution as a standard setter must be explicit. This suggestion is not new.[[123]](#footnote-123)

Any explicit justification as to the grant of new functions will require that the purpose of an Ombudsman is clearly articulated. For example, currently the grant of new functions to Ombudsman occurs due to ad hoc push-pull factors - the Ombudsman desire to take on new powers and Government will that this occur.[[124]](#footnote-124) This can be clearly seen in the current ongoing escalation of what Ombudsman have termed a ‘whole of government’ or ‘whole of industry’ role is. Ombudsman suggest that a wide range of roles assist them to improve administration and/or industry ,[[125]](#footnote-125) claiming that their offices act as integrity agencies for the whole of government.[[126]](#footnote-126) The integrity claim is interesting as it simultaneously aligns the reputation of institutions such as ombudsmen with broad notions of administrative justice while highlighting the ambiguous and even contentious nature of the institution.[[127]](#footnote-127) Indeed, that purpose has not been made explicit. To remove this ambiguity the ombudsman role in setting standards for complaint handling could be made explicit and be enshrined in legislation such as in Scotland (see the [*Public Services Reform (Scotland) Act 201*0](http://www.legislation.gov.uk/asp/2010/8/contents)).[[128]](#footnote-128)

Importantly, the purpose of the Ombudsman must be contextualised within the structural limitations of the office.[[129]](#footnote-129) While there are structural differences between the capacity of industry and government ombudsmen to enforce decisions, the 2014 Report recommended mandating government and industry take-up of the recommendations made by ombudsmen. This outcome may be achieved in practice through timely review and subsequent follow-up by a parliamentary committee or government establishing its own key performance indicators. This is necessary as government agencies are busy and

‘With the best will in the world an agency will undertake to implement a recommendation, or to review its administrative practices, but the undertaking will be overtaken by other pressures and languish. (Sometimes, too, with the most scheming will in the world an agency will give such an undertaking and quickly bury it!).’[[130]](#footnote-130)

Finally, considering the purpose of the institution will involve opening the operational aspects of Ombudsman to review.[[131]](#footnote-131) This is beyond the scope of this article however further issues which could be examined include: the secrecy and privacy of ombudsman investigations; the more controversial suggestion as to the use of determinative powers by government ombudsmen; [[132]](#footnote-132) success rates of freedom of information applications by ombudsman clients.[[133]](#footnote-133) Any operational review must include empirical research to inform change.

CONCLUSION

Australian Ombudsman were never intended to be a ‘system’. Each institution has grown to be increasingly idiosyncratic. Arguably this has reached a tipping point. Confusion must be reduced and emphasis placed upon adoption of ‘best practice models’ rather than differentiation. There are hints of this occurring. For example the NSW Ombudsman model for the child protection related reportable conduct scheme is now being copied in other jurisdictions, with the ACT and Victoria investigating its applicability[[134]](#footnote-134) and creative models for ombudsmen such as hybrid operations between public ombudsman and industry complaint handling have been introduced in both Tasmania where the Ombudsman is also the industry Energy Ombudsman and Western Australia where the Government Ombudsman is also the industry Energy and Water Ombudsman.

However these shifts continue to be sporadic and reactive. Each of the three waves of reform have shared that characteristic and have therefore created unintended problems for the institution. The first and second waves of reform have been based upon an Australian ombudsman institution which primarily deals with individual complaints. Government Ombudsman in the 1970s and the industry Ombudsman in the late 1980s were tasked with promoting government and industry accountability through individual complaint handling. Each of these waves of reform raised operational difficulties for ombudsmen. For example the first wave of reform has raised systemic issues such as the absence of constitutional recognition of government ombudsman and the second wave of reform has resulted in ongoing discussion as to the reach of administrative law institutions into the private sector and the quasi-regulatory role of private industry ombudsmen. Similarly the third wave of reform has recast and refined the operation of the institution and has led to two central issues, the first to do with the nature and the second the purpose of the institution. The first issue raises scale. Public confusion as to complaint avenues highlights complexity raised due to the number of offices as well as competition among ombudsmen offices. The second issue raises scope of operations, particularly, whether the primary purpose of the institution is as a complaint-handler or as a quality controller.

To be effective and to proactively improve the operation of ombudsmen the fourth wave of reform must identify the best parts of ombudsman practice through an evidence based approach. For this an ‘all of government’ approach to review, specific to ombudsmen like that in the United Kingdom, is required across all Australian jurisdictions. The first step of such review must be to re-identify the nature and purpose of Australian ombudsmen. Review must occur so that an effective process is developed to ensure that Ombudsman are ‘...adequately resourced and meet accepted levels of accountability without their independence being compromised by executive government.’[[135]](#footnote-135) To date this has not occurred in any Australian jurisdiction let alone holistically across all Australian ombudsmen. This challenge is immediate and ongoing. To respond to the concerns raised above, two broad sets of reforms have been advocated in this article: to refine and systematise the strategic direction of the Ombudsman and to remedy the perennial problems that have plagued the institution since inception.

1. \* I would like to thank an anonymous reviewer for comments, all errors are of course my own. I would also like tp thank Chris Wheeler, Chris Gill and Rick Snell for comments on an earlier version of this article. [↑](#footnote-ref-1)
2. Legal Affairs and Community Safety Committee, Parliament of Queensland, *Oversight of the Office of the Queensland Ombudsman* (2014) 5. Change is rapid paced and ongoing – for example the Commonwealth Ombudsman from 1 July 2015, takes complaints about [private health insurance](http://www.phio.gov.au/). These complaints were previously directed to the Private Health Insurance Ombudsman. Conversely from 1 May 2015, most complaints about the [Australian Taxation Office](https://www.ato.gov.au/About-ATO/About-us/Contact-us/Complaints%2C-compliments-and-suggestions/Complaints/) must be directed to the Inspector-General of Taxation (IGT) and not the Commonwealth Ombudsman. [↑](#footnote-ref-2)
3. John McMillan, ‘What’s in a name? Use of the term ‘ombudsman’’,

(Speech delivered at the Australian and New Zealand Ombudsman Association, Melbourne, 22 April 2008). [↑](#footnote-ref-3)
4. Commonwealth Ombudsman, *Fair Work Ombudsman: Exercise of Coercive Information-Gathering Powers*, Report No 9 (2010) (Commonwealth Ombudsman Report);Tess Hardy and John Howe, ‘Accountability and the Fair Work Ombudsman’ (2011) 18(3) *Australian Journal of Administrative Law* 127. See also theQueensland Health Ombudsman http://www.oho.qld.gov.au/ [↑](#footnote-ref-4)
5. Australian and New Zealand Ombudsman Association, Submission No 3 to Senate Standing Committee on Legal and Constitutional Affairs, *Australian Small Business and Family Enterprise Ombudsman Bill 2015 and the Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015*, 15 July 2015. [↑](#footnote-ref-5)
6. Anita Stuhmcke, ‘“Each for themselves” or “One for all”? The Changing Emphasis of the Commonwealth Ombudsman’ (2010) 38(1) *Federal Law Review* 143. [↑](#footnote-ref-6)
7. Chris Wheeler, ‘Being difficult or experiencing difficulty?’ (Paper presented at Commonwealth Ombudsman National Conference, Barton, 24 September 2009). [↑](#footnote-ref-7)
8. In 2014 the Access to Justice Report observed that ‘Ombudsmen provide independent, timely and accessible dispute resolution in particular areas and industries. Ombudsmen and other complaint bodies resolve close to 550 000 disputes each year, compared to around 1 million disputes resolved by tribunals and courts together’ Productivity Commission, *Access to Justice Arrangements*, Inquiry Paper No 72 (2014) 311. [↑](#footnote-ref-8)
9. Trevor Buck, Richard Kirkham, and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate, 2011). [↑](#footnote-ref-9)
10. Nick O’Brien, ‘What Future for the Ombudsman?’ (2015) 86(1) *The Political Quarterly* 72, 74. [↑](#footnote-ref-10)
11. Reviews have been undertaken of single Ombudsman offices such as the 1991 Senate Standing Committee on Finance and Public Administration, Review of the Office of the Commonwealth Ombudsman,. Such reviews are not included due to their single organisational focus. [↑](#footnote-ref-11)
12. It is arguable whether the 1994 Access to Justice Review should be included here as an independent review given that it was an advisory committee commissioned by the then Attorney-General Michael Lavarch and Minister for Justice Duncan Kerr, led by Ronald Sackville QC. There have been two other holistic civil justice reviews which might be also included but are excluded due to their limited focus on ombudsmen: Report by the Access to Justice Taskforce, Attorney-General’s Department, *Strategic Framework for Access to Justice in the Federal Justice System*, (2009) (which is excluded from this article as it only focuses upon two federal ombudsman – the Commonwealth Ombudsman and the Telecommunications Industry Ombudsman); Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system,* Report No 89 (1999) (which is excluded as it only incidentally dealt with ombudsmen and made recommendations concerning the Legal Professional Ombudsman). State reviews such as the Victorian Law Reform Commission, *Civil Justice Review,* Report No 14 (2008) are also excluded due to their singular institution focus. [↑](#footnote-ref-12)
13. This call is being made in the United Kingdom as well; O’Brien above n 9 at 74. [↑](#footnote-ref-13)
14. Thanks to Rick Snell for this point and the wording. [↑](#footnote-ref-14)
15. See eg, Recommendation 7.1 of the Access to Justice Taskforce, Attorney-General’s Department, *Strategic Framework for Access to Justice in the Federal Justice System* (2009), 90. This recommendation stated that the ‘The Attorney‑General should work with responsible ministers to examine options to increase the range of consumer disputes which have access to an industry ombudsman or external dispute resolution service’. [↑](#footnote-ref-15)
16. Productivity Commission above n 7, 5. This finding relies on 2011-2012 data – a modest count which would exclude university and other internal ombudsmen. The previous inquiry was undertaken in 1994 by Ronald Sackville as Chair to Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Australian Government Publishing Service, 1994) (Sackville Report). [↑](#footnote-ref-16)
17. Productivity Commission, above n 7 at 312. [↑](#footnote-ref-17)
18. Australian and New Zealand Ombudsman Association, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review*, 25 May 2016. [↑](#footnote-ref-18)
19. Productivity Commission, above n 7, 165. [↑](#footnote-ref-19)
20. Naomi Creutzfeldt, ‘What people expect from ombudsmen in the UK: a report on the findings of the project on ‘Trusting the middle-man: impact and legitimacy of the ombudsmen in Europe’’ (University of Oxford, 2015). Whether the UK position is indicative of the position in Australia must be evidenced by empirical research in this country (thank you to Chris Wheeler for this point). [↑](#footnote-ref-20)
21. Productivity Commission above n 7, 329-330; Sackville Report above n 15 at 315. [↑](#footnote-ref-21)
22. Productivity Commission above n 7; also in the United Kingdom. [↑](#footnote-ref-22)
23. Creutzfeldt, above n 19. This empirical investigation of the individual’s experience of public and private ombudsman, found that public ombudsman were far more negatively regarded than private industry ombudsman with 57% of people stating that the overall satisfaction with the procedure was ‘unfair’ or ‘very unfair’ compared to 25% of dissatisfaction with private schemes. [↑](#footnote-ref-23)
24. Australian and New Zealand Ombudsman Association, Submission No 133 to the Productivity Commission, *Access to Justice Arrangements*, 10 December 2013, stating of the six offices that took part the satisfaction rate was 86%. [↑](#footnote-ref-24)
25. Buck above n 8 at 94. [↑](#footnote-ref-25)
26. Productivity Commission above n 7 at 36. [↑](#footnote-ref-26)
27. UK Cabinet Office, *A Public Service Ombudsman: A consultation*, Cabinet Office (2015) 2; See also Lorne Crerar, *The Crerar Review: Report of the Independent Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland*, Scottish Parliament (2007). [↑](#footnote-ref-27)
28. Sackville Report, above n 15. [↑](#footnote-ref-28)
29. The Australian Productivity Commission, with its community wide focus: Productivity Commission, *From Industry Assistance to Productivity: 30 Years of ‘The Commission’* (Canberra, 2003). [↑](#footnote-ref-29)
30. Sackville Report above n 15 at 303. [↑](#footnote-ref-30)
31. Productivity Commission above n 7 at 312. [↑](#footnote-ref-31)
32. Sackville Report above n 15 at 318-319. [↑](#footnote-ref-32)
33. Sackville Report above n 15 at 318. [↑](#footnote-ref-33)
34. Sackville Report above n 15 at 319; the Committee noted it was unfortunate it could not consider this issue. [↑](#footnote-ref-34)
35. Productivity Commission above n 7 at 316. [↑](#footnote-ref-35)
36. Productivity Commission above n 7 at 317. [↑](#footnote-ref-36)
37. Here in relation to industry ombudsmen note the adoption of the *Benchmarks for Industry-Based Customer Dispute Resolution* (the CDR Benchmarks) (2015). The CDR Benchmarks are now in two parts and available from the website of The Treasury, Australia: http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/benchmarks-ind-cust-dispute-reso [↑](#footnote-ref-37)
38. Sackville Report above n 15. [↑](#footnote-ref-38)
39. See for example the Private Health Insurance Ombudsman which is with the Office of the Commonwealth Ombudsman <http://www.ombudsman.gov.au/making-a-complaint/private-health-insurance>. [↑](#footnote-ref-39)
40. *Charter of Human Rights and Responsibilities Act 2006* (Vic); see Anita Stuhmcke, ‘The role of Australian Ombudsmen in the protection and promotion of human rights’ (2010) 16(1) *Australian Journal of Human Rights* 37. [↑](#footnote-ref-40)
41. For example the South Australian Office of the Police Ombudsman website states that the system created by the *Police (Complaints and Disciplinary Proceedings) Act 1985* (SA) ‘deliberately follows the model of ‘external monitoring of internal investigation,’ rather than creating a truly independent investigative agency.’: South Australian Office of the Police Ombudsman, *History of the OPO*, Police Ombudsman http://www.policeombudsman.sa.gov.au/history-of-the-opo/. [↑](#footnote-ref-41)
42. Australian and New Zealand Ombudsman Association, *Rules and Criteria* (January 2014) Australian and New Zealand Ombudsman Association http://www.anzoa.com.au/assets/anzoa\_rules\_january2014.pdf. [↑](#footnote-ref-42)
43. This is further discussed below in Part 4. [↑](#footnote-ref-43)
44. Buck above n 8. [↑](#footnote-ref-44)
45. Productivity Commission above n 7, 331. [↑](#footnote-ref-45)
46. It is interesting here to reflect upon the Productivity Commission – see Alf Rattigan, *Industry Assistance: The Inside Story* (Melbourne University Press, 1986) 272. [↑](#footnote-ref-46)
47. Such as the removal of police from the jurisdiction of the NSW Ombudsmen following Operation Prospect [↑](#footnote-ref-47)
48. Government has increasingly used the Ombudsman as a place to rest difficult issues such as immigration detention; child sexual abuse; Indigenous justice issues; prisons. [↑](#footnote-ref-48)
49. Advisory Group on Reform of Australian Government Administration, *Ahead of the Game: Blueprint for the reform of Australian Government Administration* (Australian Government Department of the Prime Minister and Cabinet, 2010), v. Due to space limitations the most obvious and central reforms are canvassed here. [↑](#footnote-ref-49)
50. UK Law Commission, *Public Services Ombudsmen*, HC (2011–12) 1136, cited in Public Administration Select Committee, *Time for a People’s Ombudsman Service*, House of Commons, Paper No 14, Session 2013-14 (2014)*.* [↑](#footnote-ref-50)
51. See eg, the review of the Commonwealth Ombudsman (Senate Standing Committee on Finance and Public Administration, Commonwealth Parliament, *Review of the Office of the Commonwealth Ombudsman* (1991)); and those of the Queensland ombudsman (Henry Smerdon, *Strategic Review of the Office of the Queensland Ombudsman* (2006); Henry Smerdon, *Strategic Review of the Office of the Queensland Ombudsman* (2012)) [↑](#footnote-ref-51)
52. Only in South Australia and in New Zealand are there legislative guidelines on the use of the title Ombudsman. In South Australia the internal use of the title by a government agency is prohibited: *Ombudsman Act 1972* (SA), s32; *Ombudsman Act 1975* (NZ), s28A(1). Since 1991 in New Zealand it has been necessary to have a statutory appointment or permission of the Chief Ombudsman before the title is used; this has been given to two industry Ombudsmen in New Zealand. [↑](#footnote-ref-52)
53. The issues pertaining to use of the title by the private sector are regularly discussed in Commonwealth Ombudsman Annual Reports. For example, in the Commonwealth Ombudsman, *Annual Report* (1988–89) two pages (18–20) were devoted to discussion about the use of the name ‘Ombudsman’, the issue being instigated by the proposed introduction of the first national private industry Ombudsman, the Australian Banking Industry Ombudsman. There are opposing views on whether the use of the title ‘Ombudsman’ by industry will confuse the public or whether thewider use of the term ‘Ombudsman’ would benefit the official public office as it would familiarise the public with the expression and the idea. For example, it has been suggested that the adoption of the title ‘Ombudsman’ which belongs to the public sector is a deliberate tactic used by the industry Ombudsman schemes to emulate the ‘prestigious public review bodies’: see Jeffrey Barnes, ‘Administrative Law’ (1993) 21 *Australian Business Law Review* 66, 68. [↑](#footnote-ref-53)
54. NSW Ombudsman, *Annual Report* (1989). South Australian Ombudsman, *Twenty-Fifth Annual Report* (Government Printers Adelaide, 1997). [↑](#footnote-ref-54)
55. Commonwealth Ombudsman, *Annual Report* (1991–92), 4. [↑](#footnote-ref-55)
56. Sackville Report above n 15. [↑](#footnote-ref-56)
57. A 2013 study by Queen Margaret University highlighted the challenges faced by ombudsmen in raising their public profile and cementing themselves in the minds of the public as an alternative source of redress. Chris Gill, Jane Williams, Carol **Brennan,** and Nick O’Brien, The future of ombudsman schemes: drivers for change and strategic responses (UK Legal Ombudsman, 2013). [↑](#footnote-ref-57)
58. This is also made difficult by the message ombudsmen have to sell - they are forceful in pursuing legitimate complaints but do not act as advocates for complainants: McMillan, above n 2 at 5. [↑](#footnote-ref-58)
59. For similar developments, see the United Kingdom study by: Margaret Doyle, Varda Bondy and Carolyn Hirst, *The use of informal resolution approaches by ombudsmen in the UK and Ireland: A mapping study* (Hot off the Press, 2014) 4. [↑](#footnote-ref-59)
60. Productivity Commission above n 7 at 314. [↑](#footnote-ref-60)
61. McMillan above n 2 at 5. [↑](#footnote-ref-61)
62. Robert Gordon, *Better to Serve the Public: Proposals to restructure, reform, renew and reinvigorate*

*public services ombudsmen – A report to The Rt Hon Oliver Letwin MP, Minister for Government Policy and Chancellor of the Duchy of Lancaster* (2014), 13. [↑](#footnote-ref-62)
63. Gill, Williams, **Brennan,** and O’Brien above n 56 at 6. [↑](#footnote-ref-63)
64. Commonwealth Ombudsman, *Annual Report 2010-2011* (2011) viii: ‘66% of respondents were aware of the Ombudsman (consistent with previous surveys). Of note was that young people, particularly those aged 18–24 years, were less likely to be aware of our services.’ [↑](#footnote-ref-64)
65. Adam Sampson, *‘*Time to streamline Britain’s Complaints system’, *The Guardian* (London) 26 November 2013, cited in Public Administration Select Committee above n 49 at 36. [↑](#footnote-ref-65)
66. This went as far as draft legislation. [↑](#footnote-ref-66)
67. Administrative Review Council, *Review of Commonwealth Merits Review Tribunals*, Discussion Paper No 39 (1994) 5. [↑](#footnote-ref-67)
68. NSW Ombudsman, Submission No DR295 to Productivity Commission, *Access to Justice Arrangements*,

23 June 2014. [↑](#footnote-ref-68)
69. There is a need to refine jurisdictions. For example the South Australian Ombudsman - Problems with conflicts between non-traditional ICAC and Ombudsman; South Australian Ombudsman, *Annual Report 2013-2014*, (2014). [↑](#footnote-ref-69)
70. Public Administration Select Committee, *More Complaints Please*, House of Commons, Paper No 12, Session 2013-14 (2014), 4. [↑](#footnote-ref-70)
71. For example NCAT was the amalgamation of 22 pre-existing tribunals and bodies and divided into 4 divisions. [↑](#footnote-ref-71)
72. Administrative Review Council, *Access to Administrative Review: Stage One — Notification of Decisions and Rights of Review*, Report No 27 (1987). [↑](#footnote-ref-72)
73. Dennis Pearce, ‘The Fading of the Vision Splendid? Administrative Law: Retrospect and Prospect’ (1989) 58 *Canberra Bulletin of Public Administration* 20. [↑](#footnote-ref-73)
74. This has been an outcome for tribunal amalgamation see Robertson Wright ‘The work of the NSW Civil and Administrative Tribunal’ (2014) 26(10) *Judicial Officers Bulletin* 87. [↑](#footnote-ref-74)
75. John Chaney, ‘Comparing Australia's super-tribunals’ (2013) 35(7) *Bulletin (Law Society of South Australia),* 16, 18. [↑](#footnote-ref-75)
76. Of course this suggestion will require careful consideration. Pitfalls must be guarded against such as the possibility that this may signal a movement towards responsive regulation and away from accountability see: Geoff Airo-Farulla & Steven White, ‘Separation of Powers, ‘Traditional’ Administration and Responsive Regulation’ (2004) 4 *Macquarie Law Journal* 57. [↑](#footnote-ref-76)
77. See Banking and Financial Services Ombudsman Limited, Financial Industry Complaints Service, and Insurance Ombudsman Scheme, Submission No 22 to Victorian Parliament Law Reform Committee, *Alternative Dispute Resolution Discussion Paper* (23 November 2007); and Appendix 1 Banking and Financial Services Ombudsman Limited submission to the Victorian Law Reform Civil Justice Enquiry. [↑](#footnote-ref-77)
78. #  Evidence to Public Administration Select Committee, House of Commons, London, November 2013, 37 (Bernard Jenkin).

 [↑](#footnote-ref-78)
79. #  This point was made by Bernard Jenkin, ‘Time for a People's Ombudsman Service - HC 655’

By Great Britain: Parliament: House of Commons: Public Administration Select Committee, [↑](#footnote-ref-79)
80. McMillan, above n 2. [↑](#footnote-ref-80)
81. Bertil Von Friesen, *The Institution of the Swedish Ombudsman, a Means for ensuring Citizens’ Rights* (Inter-Parliamentary Bulletin No I, 1968) 16. [↑](#footnote-ref-81)
82. Productivity Commission above n 7 at 50. The most recent Federal Government Access to Justice report recommended that government ombudsman be modelled on the private ombudsman ‘fee for service’ where “governments should consider where it might be appropriate to impose a fee on government agencies for ombudsman services, particularly to encourage improved in-house complaint resolution. [↑](#footnote-ref-82)
83. The case of *Financial Ombudsman Service Limited v Pioneer Credit Acquisition Services Pty Ltd* [2014] VSC 172 decided that FOS is not required to correctly decide a question of law which it is required to decide and can determine disputes by referring to matters beyond the applicable law. ‘In common law jurisdictions the role of an arbiter of disputes (a court) is to interpret the law, not to make it. From a lawyer's perspective, the role of FOS seems to encompass both the role of courts and the role of the legislature.’ [↑](#footnote-ref-83)
84. See here (Irish Ombudsman, Submission on constitutional recognition of the Office of the Ombudsman, Office of the Ombudsman <<https://www.ombudsman.gov.ie/en/About-Us/Policies-and-Strategies/Submissions-and-Proposals/Constitutional-recognition-Ombudsman/>>) the recent call for constitutional recognition by the Irish Ombudsman arguing it will increase public confidence as well as requiring the public service to ensure its engagement with the Office is genuinely co-operative.  And that: ‘[t]he symbolism of the term “constitutional” should also not be underestimated.  Whether a matter or institution has constitutional status or not can affect the behaviour and decisions of those able to make and implement decisions – be it politicians, officials or others’

While constitutional recognition for all ombudsmen is desirable it is highly unlikely that this will occur given that the only Australian Ombudsman who is a constitutionally entrenched independent officer of parliament is the Victorian Ombudsman (Constitution Act 1975 (Vic), ss18(1B)(o), 94E).

Indeed as Weeks has noted the constitutional protections are minimal as the powers of the ombudsman are subject to legislative amendment. See: Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016). [↑](#footnote-ref-84)
85. Kenneth Wiltshire, *An Introduction to Australian Public Administration* (Cassell Australia, 1974), 89. Note the more modern observation that a significant problem is that even if given a legislative mandate for the role of overseeing Ombusdman that parliamentary chambers and committees may be unable (due to over commitments) to give the serious focus and attention to Ombudsman issues. Thank you to an anonymous reviewer for this pojnt. [↑](#footnote-ref-85)
86. David Solomon, ‘The integrity branch – Parliament’s failure or opportunity?’ (2013) 28(2) *Australasian Parliamentary Review* 36, 41. [↑](#footnote-ref-86)
87. Richard Mulgan, ‘The Processes of Public Accountability’ (1997) 56(1) *Australian Journal of Public Administration* 25 at 34. Mulgan notes however that the power of Parliament to enforce its criticisms through controlling and directing is weak – such power is confined to situations where the opposition parties in the senate will combine and force legislative amendment upon the government. [↑](#footnote-ref-87)
88. Michelle Grattan, ‘Embattled ombudsman Allan Asher resigns’ *Sydney Morning Herald*, (Sydney) 20 October 2011. [↑](#footnote-ref-88)
89. Although this point has been raised see Ben Eltham, ‘Why the Ombudsman is Being Punished’ *Newmatilda.com*, (Online) 20 October 2011 https://newmatilda.com/2011/10/20/why-ombudsman-being-punished/ . [↑](#footnote-ref-89)
90. It was characterised as not necessary see: Stephen Bartos, ‘Who will guard the guard themselves?’ *The Drum,* (Online) 17 October 2011 http://www.abc.net.au/news/2011-10-17/bartos-who-will-guard-the-guard-themselves/3575150. [↑](#footnote-ref-90)
91. Phillip Coorey, ‘Question ploy unwise’ *The Sydney Morning Herald*, 14 October 2011 (Sydney). [↑](#footnote-ref-91)
92. Australian Broadcasting Corporation, ‘Hanson-Young defends pre-scripted questioning’, *Lateline*, 20 October 2011, Tony Jones and Sarah Hanson-Young. <http://www.abc.net.au/lateline/content/2011/s3344736.htm> [↑](#footnote-ref-92)
93. Matthew Franklin, ‘How the Ombudsman Allan Asher and Senator Hanson-Young cooked up an estimates fix’ *The Australian* (Sydney) 13 October 2011. [↑](#footnote-ref-93)
94. John Wood, ‘Time for an Independent Ombudsman’ *Inside Story* (Online) 20 October 2011, <http://insidestory.org.au/time-for-an-independent-ombudsman>. [↑](#footnote-ref-94)
95. Eg: *Parliamentary Commissioner Act* (WA). [↑](#footnote-ref-95)
96. NSW Ombudsman, *Operation Prospect*, (15 June 2016) Ombudsman New South Wales https://www.ombo.nsw.gov.au/what-we-do/our-work/operation-prospect. [↑](#footnote-ref-96)
97. For commentary on the expansive powers of this committee see: Beverly Duffy and Sharon Ohnesorge, ‘Out of step? The New South Wales *Parliamentary Evidence Act 1901*’ (Paper presented at the Australasian Study of Parliament Group 2015 National Conference, Wellington, 2 October 2015). [↑](#footnote-ref-97)
98. For example see *Ombudsman Act 2001* (Qld) s 13. [↑](#footnote-ref-98)
99. Roger Wettenhall, ‘Integrity agencies: the significance of the parliamentary relationship. (2012) 33(1) *Policy Studies* pp 65, 67-68. [↑](#footnote-ref-99)
100. This occurs in New Zealand and South Australia. [↑](#footnote-ref-100)
101. Note this is not uniformly the case amongst Australian ombudsmen: *Parliamentary Commissioner Act 1971* (WA), s 5(2) – appointed by the Governor; *Ombudsman Act 1973* (Vic), s3 – Governor in Council; *Ombudsman Act 2001* (Qld), s58 – by Governor in Council the Minister must consult with a parliamentary committee, see s59; *Ombudsman Act 1972* (SA), s 6 – Governor may, on a recommendation made by resolution of both Houses of Parliament; *Ombudsman Act 1974* (NSW), s6 – by Governor upon address of both Houses of Parliament and s6A veto given to Joint Committee; *Ombudsman Act 1978* (Tas), s5 – the Governor may appoint an Ombudsman; *Ombudsman Act 2009* (NT) s 132 – a recommendation of the Legislative Assembly; *Ombudsman Act 1989* (ACT), s22 – Speaker Legislative Assembly; *Ombudsman Act 1976* (Cth), s21 – Governor-General. [↑](#footnote-ref-101)
102. *Parliamentary Commissioner Act 1971* (WA) s 5 – 5 year term with possibility for reappointment, the Commissioner vacates office on attaining the age of sixty-seven years; *Ombudsman Act 1972* (SA), s10(1) – ‘shall be appointed for a term expiring on the day on which he or she attains the age of 65 years.’; *Ombudsman Act 1973* (Vic), s3 – 10 years and is not eligible to be reappointed; *Ombudsman Act 2001* (Qld), s6 – provides that the ombudsman holds office for a term of not more than five years and may be reappointed and s61(2) provides that any reappointment should not be for a total of more than ten years; *Ombudsman Act 1974* (NSW), s6 – seven year term and eligible for reappointment not eligible if above 65, the former NSW Ombudsman Bruce Barbour’s 15 year term is one of the longest terms of any Ombudsman, he was continuously reappointed for 3 terms; *Ombudsman Act 1978* (Tas), s5(1A) – for a term not exceeding 5 years ‘and may from time to time be reappointed for a further term, not exceeding 5 years, as may be so specified’; *Ombudsman Act 2009* (NT) s134(1) –the Ombudsman is appointed for 7 years and under 134(2) is not eligible for re-appointment; *Ombudsman Act 1989* (ACT) s23 – 7 years and may be reappointed . *Ombudsman Act 1976* (Cth), s22 – not exceeding 7 years, as is specified in the instrument of his or her appointment, but is eligible for re-appointment. [↑](#footnote-ref-102)
103. Charles Manga Fombda, ‘The Enhancement of Good Governance in Botswana: a Critical Assessment of the Ombudsman Act, 1995’ (2001) 27(1) *Journal of Southern African Studies* 57, 63. [↑](#footnote-ref-103)
104. Public Accounts and Estimates Committee, Parliament of Victoria, *Report on a Legislative Framework for Independent Officers of Parliament* (2006) 72. [↑](#footnote-ref-104)
105. For an overview see Michael Frahm, *Australasia and Pacific Ombudsman Institutions*, International Ombudsman Institute (ed), (Springer, 2013); *Parliamentary Commissioner Act 1971* (WA), s6 – by the Governor on addresses from both Houses of Parliament; *Ombudsman Act 1972* (SA), s10; *Ombudsman Act 1973* (Vic), *Ombudsman Act 2001* (Qld) Part VII Div II; *Ombudsman Act 1974* (NSW) s 5 - removed from office by the Governor upon the address of both Houses of Parliament; *Ombudsman Act 1978* (Tas), s6; *Ombudsman Act 2009* (NT), Pt 9; *Ombudsman Act 1989* (ACT) s 28A; *Ombudsman Act 1976* (Cth) s 28. [↑](#footnote-ref-105)
106. See also Victoria – both jurisdictions allowing for reinstatement by both houses of parliament. *Ombudsman Act 1973* (Vic), s4. [↑](#footnote-ref-106)
107. #  Professor Denis Pearce cited in Roger Wettenhall, ‘Integrity agencies: the significance of the parliamentary relationship’ (2012) 33(1) *Policy Studies* 65, 66. See also Professor Dennis Pearce, ‘The Commonwealth Ombudsman: Present Operation and Future Developments’

(Papers on Parliament No 7, Parliamentary Library, Commonwealth Parliament, 1990). [↑](#footnote-ref-107)
108. #  ,Roger Wettenhall, ‘Parliaments Executives and Integrity Agencies’ (2007) 22(1) *Australasian Parliamentrayt* Review, 115, 128

 [↑](#footnote-ref-108)
109. For example, industry ombudsmen face a continuing decline in numbers of complaints This is attributed to industry improvement and changes in rules to protect consumers see Allie Coyne, ‘Australia’s telco ombudsman cuts workforce by 10 percent’ *IT News* (Online) April 15, 2015 http://www.itnews.com.au/news/australias-telco-ombudsman-cuts-workforce-by-10-percent-402759. [↑](#footnote-ref-109)
110. Wayne Martin, ‘[Forewarned and four-armed: Administrative law values and the fourth arm of government](http://www.westlaw.com.au.ezproxy.lib.uts.edu.au/maf/wlau/app/document?docguid=Ieca9382d96a511e39f3ef83c25a5d2b7&&src=doc&hitguid=Ica50ccd496a511e39f3ef83c25a5d2b7&snippets=true&startChunk=1&endChunk=1" \l "anchor_Ica50ccd496a511e39f3ef83c25a5d2b7)’ (2014) 88 ALJ 106. [↑](#footnote-ref-110)
111. Chris Wheeler, ‘Response to the 2013 Whitmore Lecture by the Hon Wayne Martin AC, Chief Justice of Western Australia’ (2014) 88 *Australian Law Journal* 740, 742: ‘The Whitmore Lecture sparked considerable concern across Australian integrity agencies that their purpose and the value they add to our system of government had been misunderstood and unfairly devalued.’ [↑](#footnote-ref-111)
112. James Jacob Spigelman, ‘Judicial Review and the Integrity Branch of Government’ (Speech delivered at the World Jurist Association Congress, Shanghai, 8 September 2004); James Jacob Spigelman, ‘The Integrity Branch of Government’ (2004) 78 ALJ 724. [↑](#footnote-ref-112)
113. Sian Elias, ‘Life Beyond Legality’ (Speech delivered at the Australian and New Zealand Ombudsman Association, Wellington, 6 May 2010). [↑](#footnote-ref-113)
114. Anita Stuhmcke and Ann Tran, ‘The Commonwealth Ombudsman – An Integrity branch of government’ (2007) 32(4) *Alternative Law Journal* 233. [↑](#footnote-ref-114)
115. John McMillan, ‘Future Directions – The Ombudsman’ (Speech delivered at the AIAL National Administrative Law Forum, Canberra, July 2005). [↑](#footnote-ref-115)
116. Peter Wilkins, John Phillimore and David Gilchrist, ‘Collaboration between watchdogs: Learnings from the Western Australian Experience’ (John Curtin Institute of Public Policy, 2015) http://www.curtin.edu.au/research/jcipp/local/docs/collaboration-between-watchdogs-report-nov-2015.pdf [↑](#footnote-ref-116)
117. Wheeler, above n 111, 742 [↑](#footnote-ref-117)
118. Wilkins, Phillimore and Gilchrist, above n 116. [↑](#footnote-ref-118)
119. Chris Field, ‘The Fourth Branch of Government: The Evolution of Integrity Agencies and Enhanced Government Accountability’ (2012) 72 *AIAL Forum*  24, 27. [↑](#footnote-ref-119)
120. Spigelman ‘The Integrity Branch of Government’, above n 112. [↑](#footnote-ref-120)
121. This is recently the case in Victoria. [↑](#footnote-ref-121)
122. Chris Gill, ‘The Evolving Role of the Ombudsman: A Conceptual and Constitutional Analysis of the “Scottish Solution” to Administrative Justice’ (2014) 7 *Public Law Review* 662. [↑](#footnote-ref-122)
123. Focusing on the strategic review of the office in 2006, recommendation 12 stated that ‘Consideration be given to amending the Ombudsman Act 2001 to provide the necessary power and authority for the Ombudsman to develop and set appropriate complaint management standards governing complaint management systems and for the monitoring thereof; Recommendation 13: Consideration also be given to establishing a Complaints Standards Authority within the Office of the Ombudsman to develop, implement and monitor the standards set. See: Smerdon, above n 50;Legal, Constitutional and Administrative Review Committee, Queensland Parliament, *Report of the Strategic Management Review of the offices of the Queensland Ombudsman and the Information Commissioner Report* (2006). [↑](#footnote-ref-123)
124. These decisions can be both explicit and implicit. For example, in 2015 the Queensland Ombudsman cited the abolition of the children’s commission as a reason for increase complaints to its office. This administrative reform in one area can have unintended consequences of affecting administrative practices in another. [↑](#footnote-ref-124)
125. ‘Our work on complaints, inspections and detention review enables the office to undertake an integrated approach to the oversight of immigration administration. The range of functions allows for flexibility in the way we take up issues, including through own motion investigations, informal dialogue with DIAC, engagement in various DIAC client forums and sharing a systemic issues register with DIAC.’ : Commonwealth Ombudsman, Submission No 33 to Senate Standing Committee on Legal and Constitutional, *Inquiry Into Migration Amendment (Immigration Detention reform) Bill 2009* (July 2009). [↑](#footnote-ref-125)
126. Anita Stuhmcke, ‘Ombudsmen and Integrity Review’ in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State* (Hart Publishing, 2008) 354. [↑](#footnote-ref-126)
127. Spigelman, ′The Integrity Branch of Government′ above n 112. [↑](#footnote-ref-127)
128. This approach has been criticized in the Australian context see: University of Queensland, Submission No X to Legal Affairs and Community Safety Committee, *Strategic Review of the Office of the Queensland Ombudsman*, 10 August 2012. Note other factors which may be worth discussing more fully elsewhere such as the contradictions in the role of an Ombudsman, where most Australian ombudsmen train and offer specialist courses in complaint-handling to the same government officials they investigate. [↑](#footnote-ref-128)
129. Lance Tibbles, ‘The Ombudsman: Who Needs Him?’ (1970) 47 *Journal of Urban Law* 1, 44-45 lists four limitations: not a reformer; does not shape legislative policy; is not a super-administrator; cannot settle factual disputes; see also Tao Pai-Chuan, ‘The Chinese Ombudsman and the Control System’ (1966-67) 41 *St John’s Law Review* 362. [↑](#footnote-ref-129)
130. John McMillan, ‘How Ombudsmen Review and Influence Public Administration’ (Paper presented at the International Intelligence Review Agencies Conference, Sydney, 10 March 2010), 6. [↑](#footnote-ref-130)
131. There is interesting research being undertaken in the United Kingdom into ‘examining activist consumer groups who – based on negative experiences with ombudsman schemes – have set up online protest groups to highlight their concerns about the operation of ombudsman schemes and campaign for change.’ see Naomi Creutzfeldt and Chris Gill, *Online Critics of the Ombudsmen* (September 2015) Oxford Faculty of Law https://www.law.ox.ac.uk/research-and-subject-groups/online-critics-ombudsmen. [↑](#footnote-ref-131)
132. Philippa Smith, ‘Red Tape and the Ombudsman’ (Speech delivered to the Australian Senate’s Occasional Lecture Series, Canberra, 17 April 1998) 13; see *Cromwell Securities Ltd v Financial Ombudsman Services Ltd* [2013] VSC 333. [↑](#footnote-ref-132)
133. *DZ and Commonwealth Ombudsman* [2014] AICmr 137, [13]. [↑](#footnote-ref-133)
134. #  Christopher Knaus, ‘Scheme set to prevent cover-up of institutional child abuse in ACT’ *Canberra Times* (Canberra), June 9 2016 .

 [↑](#footnote-ref-134)
135. Scott Prasser, ‘Australian integrity agencies in critical perspective’ (2012) 33(1) *Policy Studies* 21*,* 29. [↑](#footnote-ref-135)