

A Snapshot in Time: The Changing Systemic Role of the Australian Commonwealth Ombudsman¹

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Abstract— The role of the Australian Commonwealth Ombudsman has changed. This change has occurred through operational decision-making rather than through legislative reform. Similarly to many classical ombudsman institutions the Commonwealth Ombudsman has two traditional roles – proactive system fixer and reactive individual complaint handler. Since the office was introduced in Australian in the 1970s, the emphasis placed upon systemic reform has increased. This change is noteworthy as it is generally assumed that these dual roles are related in that improvements produced by one role will impact upon the other. Here it is most often implied in public law literature, that the correction by an ombudsman of a systemic administrative deficiency through its systemic function will reduce numbers of individual complaints. Using empirical data based upon a ‘snapshot in time’ study of the Australian Commonwealth Ombudsman this article argues that this traditional assumptions as to the relationship between the two roles is flawed. The findings of the study presented in this article will impact upon the operation of the ombudsman institution and provide insight into ways in which the role and performance of such a growing international integrity review body may be strengthened.

Keywords- *dispute resolution; government; public administration; ombudsman*

I. INTRODUCTION

Traditional commentary, evaluation and description of the public law ombudsman¹ institution focuses upon the role of reactive individual complaint-handler.² The general assumption is that improvements made by ombudsmen to systemic issues of maladministration will reduce numbers of individual complaints.³

Such focus is of course commensurate with the individual complaint-handling role being the core function of the ombudsman institution. Conversely, studies which examine the function of the ombudsman institution as a proactive systemic change agent are rare.⁴ This is unsurprising as it reflects a perhaps unintended but nonetheless secondary emphasis which is traditionally placed by the classical ombudsman institution upon its system-fixing role. It also incorporates an implicit assumption that systemic reform to government administration may often be the result of individual complaints.

Essentially this article tests existing assumptions made in ombudsman literature as to the relationship between the system-fixing role and the individual complaint-handling role. One example of an international oft-repeated assumption is that:

if the Ombudsman were to focus more on systemic issues than individual complaints, complaints that are made will advantage not only the complainants but all people in similar circumstances including many people who may never, or only rarely, make complaints. In this way a focus on systemic problems could be a useful, if largely invisible, improvement in access to justice.⁵

While this point - that an individual citizen’s complaint may be turned to advantage and be transformed into a valuable quality improvement tool providing a stimulus for appraisal and revision of work practices - is given some attention in comparative complaint literature⁶ it has not been subject to scrutiny with respect to the operation of ombudsman. This article fills this gap through empirical exploration of the relationship between the dual proactive and reactive functions

¹ The word, Ombudsman, is a Swedish word meaning representative or agent of the people or a group of people. It is used in this article as a gender neutral term, although the plural ‘ombudsmen’ is used throughout.

² See L.B. Hill, *The Model Ombudsman: Institutionalizing New Zealand’s Democratic Experiment* (Princeton: Princeton University Press, 1976) and more recent works such as M. Seneviratne *Ombudsmen: Public Services and Administrative Justice*, (London: Butterworths Lexis Nexis, 2002).

³ This claim is international see for example with respect to UK ombudsman M. Seneviratne *Ombudsmen: Public Services and Administrative Justice*, (London: Butterworths Lexis Nexis, 2002) 17.

⁴ See B. Danet, ‘Toward a Method to Evaluate the Ombudsman Role’ (1978) 10(3) *Administration and Society* 335; Stuhmcke (2012) The evolution of the classical ombudsman: a view from the antipodes. *International Journal of Public Law and Policy*. 2(1): 83-95

⁵ Commonwealth Ombudsman, *Annual Report* (1993-1994) at 1-2 citing the Access to Justice Advisory Committee, *Access to Justice: an Action Plan*, (Canberra: AGPS, 1994). This claim is international see for example with respect to UK ombudsman M. Seneviratne *Ombudsmen: Public Services and Administrative Justice*, (London: Butterworths Lexis Nexis, 2002) 17.

⁶ Such as K. Anderson, D. Allan & P. Finucane, ‘A 30-month study of patient complaints at a major Australian hospital’ (2001) 21 *J. Qual. Clin. Practice* 109.

using the case study of the Australian Commonwealth Ombudsman.

This article debunks the prevailing assumption that there is a link between the two roles insofar that systemic reform reduces individual complaints. It argues that the dual roles of the ombudsman – of individual complaint handling and systemic administrative improvement - while interconnected, serve very different functions.

This recognition and analysis of the system-fixing role within the ombudsman institution is imperative for four primary reasons:

1. Internationally, Ombudsmen give increasingly serious regard to their system-fixing role. As one example, from 2004 the Ombudsman of Korea began publicising statistics recording systemic impact.⁷ In Australia the New South Wales Ombudsman is actively restricting the number of individual complaints taken in order to focus upon its system fixing role of improving administrative justice⁸ and in 2002 the a private industry ombudsman, the Australian Telecommunications Industry Ombudsman appointed a full-time ‘systemics officer’ to monitor and review its systemic impact.⁹
2. In light of the principles of democratic governance and accountability a lack of analysis of the system-fixing role is undesirable for an institution which, in its classical conception, itself aims to be an instrument of integrity to ensure accountability of government decision-makers.
3. Explicit recognition of the systemics role will provide for the work of an ombudsman to be improved through informed empirical evaluation and efficient resource allocation.
4. Finally, the ‘balance’ and relationship between the complaint-handling role and the system-fixing role may (re)define the function and operation of an ombudsman institution.

Part II of the article outlines the traditional dual roles of ombudsmen. It defines what is meant by the system-fixing function of the ombudsman institution and highlights the dearth of existing empirical evaluative methodologies of ombudsman. Part III then scopes the background and the application of the study to the Australian Commonwealth Ombudsman. Part IV then provides the data which evidences that systemic improvement does not reduce individual complaints.

⁷ The Ombudsman of Korea website <<http://www.ombudsman.go.kr/sub.asp?page=311314>> at 19 May 2007.

⁸ NSW Ombudsman, *Annual Report* (2005-2006) 1.

⁹ TIO website <http://svc180.wic006v.server-web.com/publications/TIO_talk_issues/issue_28.8.htm> at 5 December 2007.

II. THE DUAL ROLE OF GOVERNMENT OMBUDSMEN

The modern ombudsman institution is universally accepted as originating from the creation of the Swedish Parliamentary Ombudsman (Riksdagens ombudsman) in 1809.¹⁰ The fundamental aim of the original ombudsman institution is to provide an independent mechanism of accountability which allows a citizen to access free, efficient, informal dispute resolution for their complaints about government administration.

Consistent with the function of holding the executive accountable is the core work of the ombudsman – providing a complaint resolution option for any person aggrieved by an act or omission in the carrying out of government administration.¹¹ This core role is traditionally supplemented by a second role - the power of ombudsman to undertake own motion investigations,¹² which allow an ombudsman to investigate defective administration without receiving a specific complaint. This ability to rectify systemic problems in public administration is characterised as a proactive approach to prevent future complaints which will, over time, ‘lift the standard of government performance’.¹³

At its most general the systemics role of the ombudsman institution refers to the functions of an ombudsman which transcend the individual complainant. It includes the recommendations and investigations which may improve procedures, policy or legislation. In essence the systemics role impacts upon many more people than a single individual complainant. Through this role a classical ombudsman aims to improve the normative decision-making processes of government administration.¹⁴

This dual role of ombudsman - of conflict resolution and conflict prevention, or in other words to investigate individual complaints and to rectify systemic administrative failures – is echoed in judicial dicta. The clearest formulation of such

¹⁰ This is the official name of the Institution, but it is more commonly known as JO or the Justitieombudsman: see the Swedish website of the Parliamentary Ombudsman <<http://www.jo.se>> .

¹¹ This Part refers to the following sections (excluding schedules) which cover the jurisdiction of the Ombudsman in each jurisdiction: *Ombudsman Act 1976* (Cth) ss 3, 3A, 5, 6; *Parliamentary Commissioner Act 1971* (WA) ss 4, 4A, 13, 14; *Ombudsman Act 1972* (SA) ss 3, 5, 13-15; *Ombudsman Act 1973* (Vic) ss 2, 13, 14; *Ombudsman Act 2001* (Qld) ss 7-10, 14-16, 18; *Ombudsman Act 1974* (NSW) ss 5, 12-14; *Ombudsman Act 1978* (Tas) ss 3, 4, 12, 14-16; *Ombudsman Act* (NT) ss 3, 10-14; *Ombudsman Act 1989* (ACT) ss 3, 5, 6.

¹² As to the own motion powers see: *Ombudsman Act 1976* (Cth) s 15; *Parliamentary Commissioner Act 1971* (WA) s 25; *Ombudsman Act 1972* (SA) s 25; *Ombudsman Act 1973* (Vic) s 23; *Ombudsman Act 2001* (Qld) s 49; *Ombudsman Act 1974* (NSW) s 26; *Ombudsman Act 1978* (Tas) s 28; *Ombudsman Act* (NT) s 14; *Ombudsman Act 1989* (ACT) s 18.

¹³ M Oosting, ‘The Ombudsman: A Profession’ in L Reif (ed), *The International Ombudsman Yearbook* (1997) 80.

¹⁴ This article confines its discussion to classical or public sector ombudsman however its findings may similarly be applied to other forms of ombudsman institutions such as private industry ombudsman.

support in an early common law decision on public sector or classical ombudsman is made in Alberta, Canada in 1970, Chief Justice Milvain states in *Re Ombudsman Act (1970)* (72 W.W.R. 176, 190 and 192):

the basic purpose of an Ombudsman is provision of a 'watchdog' designed to look into the entire workings of administrative cases. ... [he] can bring the lamp of scrutiny to otherwise dark places even over the resistance of those who would draw the blinds. If [his] scrutiny and reservations are well founded, corrective measure can be taken in due democratic process, if not no harm can be done in looking at that which is good.

This sentiment is reflected in Australian judicial dicta, for example in the New South Wales Court of Appeal decision *Botany Council v The Ombudsman* ((1995) 37 N.S.W.L.R. 357, 363), Kirby P (as he then was) states:

Those powers, as the Ombudsman Act reveals are, as they ought to be, extremely wide. They are not powers which this Court should read down. They are beneficial provisions designed in the public interest for the important object of improving public administration and increasing its accountability, including to ordinary citizens...

Notably however there is however no international prescription that an ombudsman must have a system fixing role as well as a complaint-taking role. For example the definition of a seminal author on ombudsman, Rowat, excludes any mention of a system-fixing function:

citizen's defender, grievance man, or public watchdog. His (sic) job is to receive complaints from citizens about the way in which they have been treated by government officials, to investigate these complaints and, where he finds them justified to seek a remedy.¹⁵

As do other definitions, such as that by the Forum of Canadian Ombudsman:

an independent, objective investigator of people's complaints against government agencies and other organizations, both

¹⁵ Rowat examined ombudsman particularly from a United States perspective: D.C. Rowat, *The Ombudsman Plan: The Worldwide Spread of an Idea* (Toronto: McLelland & Stewart, 1973) vii.

public and private sectors. After a fair, thorough review, the ombudsman decides if the complaint is justified and makes recommendations to the organization in order to resolve the problem.¹⁶

From the above it is apparent that there is no 'requirement' that an ombudsman exhibit a duality of roles of being both a system fixer and a change agent in order to be an ombudsman. To take both extremes this means that an ombudsman may be solely an individual complaint handler, and conversely, may be wholly a systemic reformer. In actuality most ombudsman lie somewhere between those two end points.¹⁷

This lack of prescription as to the definition and application of the systemic role arises because while the word 'ombudsman' itself is a powerful brand or 'trade name'¹⁸ it actually contains no prescription as to usage. This point is crisply made through acknowledging the lack of restriction upon the use of the title 'ombudsman' in Australia where it is now used in private industry at a Federal, State and local level and also in public institutions such as universities to describe units that act to resolve disputes.¹⁹ The result is a universal absence of definition or description of the systemics role. This is evidenced by taking the example of national and international umbrella organizations which seek to identify the criteria of what it means to be an ombudsman. As an example of this, system fixing or 'administrative improvement' did not originally not appear on the list of criteria of the *British and Irish Ombudsman Association (BIOA)*. BIOA²⁰ summarise four key conditions to be met before the term ombudsman may be used: independence of the Ombudsman from the organisation the Ombudsman has the power to investigate; effectiveness; fairness and public accountability.

While some caution must be employed in making too much of an absence of a systemic role (as the role may be implicit in the above criteria of 'effectiveness') - the point is that the systemic role hereto is an undefined and under valued part of the operation of an ombudsman office.

¹⁶ Canadian Ombudsman Association, online: <www.ombudsmanforum.ca> (the association was formed in 1998).

¹⁷ W. Haller, 'The place of the ombudsman in the world community' *Fourth International Conference Papers* (1988) 29 and a worldwide survey of ombudsman in 1988 where 41 of the 43 ombudsman interviewed said that one of their functions was to improve administrative practices.

¹⁸ T.C. Bingham, "Ombudsman: "The Dayton Model"" (1972) 41 *University of Cincinnati Law Review* 807.

¹⁹ 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) s 32 *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 ombudsman in New Zealand.

²⁰ BIOA, established in 1993, is an association of ombudsman from both the public and private sectors other organisations and individuals, such as voluntary bodies and academics interested in the work of ombudsman. Online: <<http://www.bioa.org.uk>>.

III. THE NEED FOR THIS STUDY

Despite the proliferation and diversification of the ombudsman institution, legal international empirical studies of ombudsman are rare. Such lack of legal empirical study seems to be part of a more general lack of interest in external scrutiny being applied to the evaluation of the ombudsman institution. In Australia, the academic Rick Snell argues that the ombudsman is an enigma and that the 'office for too long has been neglected by Parliament, academics, lawyers and others.'²¹

While empirical evaluation of ombudsman is rare, studies of the systemics function of ombudsmen are even rarer. Indeed one of the only precursors to this current study was a 1983 study of the then Alaskan Ombudsman²² which qualified itself at the outset:

"Our study is inevitably impressionistic simply because not until we were almost finished did we develop useful categories and distinctions to which hard quantitative data could be related. Our most difficult task was to calculate long-term systemic impacts."²³

The data analysis of the dual roles of ombudsman presented in this article is unique.²⁴ It presents a snapshot of the systemic and individual complaint handling operations of the Australian Commonwealth Ombudsman.

The Australian Commonwealth Ombudsman established by the *Ombudsman Act 1976* (Cth) is the case study chosen by this article as the institution to develop and apply the methodology to and thus allow analysis of the interaction between the dual roles. The Commonwealth Ombudsman (also referred to as 'the Office' throughout this article) is chosen as it is typical of many international government ombudsman. The Office is an independent, non-enforceable decision maker which is not a 'legal' control of government action.²⁵ Also typical is that the Commonwealth Ombudsman uses investigatory procedures rather than the judicial and adversarial model of the traditional legal system²⁶ having strong investigatory powers such as the power to obtain

²¹ Snell, 'Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma' in Chris Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (2000) 188.

²² S.E. Aufrecht & G. Brelsford, 'The Administrative Impact of the Alaskan Ombudsman' in G.E. Caiden (ed) *International Handbook of the Ombudsman: Country Surveys* (London: Greenwood Press, 1983) 231. The actual office of the Alaskan Ombudsman has been abolished.

²³ *Ibid*, 231.

²⁴ It contains material not included in a more general report of the study published in the International Ombudsman Yearbook see : A Stuhmcke , 'Evaluating Ombudsman: A Case Study in Developing a Quantitative Methodology to Measure the Performance of the Ombudsman' (2006) 10*The International Ombudsman Yearbook* 23-83

²⁵ J.Goldring, 'The Ombudsman and the New Administrative Law' (1985) 12(4) *CBPA The Ombudsman through the looking glass 1977-1985* 286, 291.

²⁶ D.McBarnet, 'Ombudsman in search of a role' (1978) 41 *Modern Law Review* 446, 448.

information and documents.²⁷ Unlike legal controls, the Office: lacks determinative powers; relies upon persuasion and/or publicity to resolve matters; may decline to investigate; may reopen investigations at any time; may investigate a matter upon his/her own motion and is quick, cheap and informal. Complaints may be made by telephone or in person as well as in writing²⁸ and in investigating complaints the Office is not bound by strict rules of law being able to inquire and investigate 'in such manner as he thinks fit'.²⁹ Relevantly, the Commonwealth Ombudsman embodies the 'norm' of the ombudsman institution with respect to the operation of its duality of roles in that its core role is the handling of individual complaints. The systemic role is secondary.³⁰

Further, the Commonwealth Ombudsman is an interesting case study as it also typifies the adaptability and versatility of the institution. Since introduced in Australia, as part of the 'new administrative' law package in the 1970s the stature and importance of ombudsman has grown. The Commonwealth Ombudsman now has a staff of over 150 and has diversified in terms of its functions, for example increasingly taking on additional functions such as audit to ensure agencies comply with legislative requirements.

IV. THE RESULTS OF THE DATA ANALYSIS

The study examines a 28 year history of the Commonwealth Ombudsman from 1977- 2005. Table 1 sets out the overall results in relation to the data coded and collated. There are two sets of data: one for systemic investigations (231 coded investigations over 28 years) and the other for the data on individual complaints over the same period. This allows for longitudinal comparison internally in the data sets and also comparison between the two sets of data.

The first two lines of figures in Table 1 contain the numeric breakdown of the total 231 systemic investigations by portfolio. For example, in the Social Security portfolio there have been 21 systemic investigations undertaken over the 28 years of study. This number equates to 9% of the total 231 systemic investigations. The third and fourth lines of Table 1 identify individual finalized complaints numbers. For example, Table 1 illustrates that the Commonwealth Ombudsman has received 182, 221 individual finalized complaints in the Social Security portfolio.³¹ When this is compared to the total 390,375 of individual finalised complaints over the 28 year period it equates to 47% of all such complaints.

²⁷ *Ombudsman Act 1976* (Cth) s 9.

²⁸ The process of handling complaints orally received specific legislative recognition in amendments to the *Ombudsman Act 1976* (Cth) in 1983: *Ombudsman Act 1976* (Cth) s 7.

²⁹ *Ombudsman Act 1976* (Cth) ss8(2), (3).

³⁰ What is 'defective' is listed in s15 of the *Ombudsman Act 1976* (Cth) (eg: where the action appears to be contrary to law or is 'wrong').

³¹ These individual complaint numbers are sourced from each individual Annual Report of the Office throughout the period from 1977-2005 see <www.comb.gov.au>.

In relation to systemic investigations the data in Table 1 is based upon the coding by the author of 231 systemic investigations carried out by the Commonwealth Ombudsman over this 28 year period. It is based upon systemic investigations (own motions and formal reports) completed by the Commonwealth Ombudsman and the Australian Capital Territory Ombudsman pursuant to the following legislative powers:

- sections 5, 15, 16, 17, 18 and 35A of the *Ombudsman Act 1976* (Cth);
- section 18 of the *Ombudsman Act 1989* (ACT);
- sections 46, 31, 34, 36 and 50 of the *Complaints (Australian Federal Police) Act 1981* (Cth).

As noted above the coded data represent a finite and measurable part of the Ombudsman's role. As the investigation powers analysed by this study are used sparingly by the office the list of systemic investigations amounts to only 231 over the entire 28 year period (that list includes submissions to law reform bodies as well as non formal reports and also includes the Ombudsman acting within its jurisdiction with respect to the Australian Federal Police and also as the Australian Capital Territory Ombudsman).

A simple analysis of Table 1 using averages identifies a lack of correlation between individual complaint numbers and systemic investigations. For example, to take the ratio of individual complaints to systemic investigation, which is the division of the total individual complaints of 390,735 by the total number of systemic investigations of 231, in terms of averages it translates to an assumption that for every 1,692 individual complaints there should be one systemic investigation. If this ratio is applied Social Security should have 108 systemic investigations and the Australian Federal Police ('AFP') should have 8 systemic investigations over the 28 year period. Clearly this has not occurred in practice where the AFP has around 6 times more systemic investigation than the average warrants (having had 51 systemic investigations) and Social Security has around 7 times less (having had 21 systemic investigations)..

The comparison of systemic investigations and finalized individual complaints by portfolio reveal that of all the portfolios Immigration has the closest parity of general percentages with 5% of individual complaints and 7% of systemic investigations. Most portfolios, especially the AFP and Social Security, contain large variances between the two data sets.

A. *Why is there an apparent lack of correlation between individual complaint numbers and systemic investigations?*

The first point arising from the analysis of the data set is that systemic investigations do not necessarily take place where there are large numbers of complaints. To take for example, the portfolios of the AFP and of Social Security – the AFP

having a comparatively high number of systemic investigations per individual complaint and Social Security a low number of systemic investigations per individual complaint. Why is there a lack of correlation between the two forms of investigation in those portfolios? While at first blush this outcome may seem surprising on closer examination the following argues that this disparity reveals the unique nature of systemic investigations as opposed to investigations into individual complaints.

To take first the example of Social Security, as Table 1 identifies, there have been 21 systemic investigations into Social Security when, on average individual complaint numbers you would expect there to have been five times more the number of systemic investigations. Indeed Social Security is the portfolio where almost half of all individual complaints have been resolved by the Commonwealth Ombudsman. This extremely high figure of 182, 221 or 47% of all individual complaints belonging to the Social Security portfolio means that 'there are literally millions of decisions made yearly or even weekly'.³² Given that so many decisions about individuals welfare are made by Social Security and that often the government decision makers are dealing with complex and difficult legislation the extremely large numbers of individual complaints – 47% of all complaints dealt with is therefore not surprising. This point has been can be explained by Professor John McMillan (a former Commonwealth Ombudsman):

- The complaints to the Ombudsman's office arise mostly in areas where there is a high volume of decisions or transactions (numbering in the millions) being undertaken by large agencies that employ thousands (in some cases tens of thousands) of staff, such as Centrelink, the Australian Taxation Office, the Child Support Agency, Australia Post and the Australian Defence Force;
- The laws being administered in those areas are highly complex, and are often not well-understood by those at the front-line, or even at times at the back desk; and
- The government clients frequently have an ongoing relationship with the agency, for example, in receiving a benefit or paying taxation.³³

32 P. Bayne, 'The Commonwealth System of Non-judicial Review' in P. Bayne, H. F. McKenna & J. R. Nethercote (eds) 'Administrative Law Retrospect and Prospect' (1989) 58 *Canberra Bulletin of Public Administration* 45.

33 J. McMillan, "Future Directions for Australian Administrative Law – the Ombudsman" (paper presented at Administrative Law Forum, Canberra, 2002).

Table 1: Number and percentage of individual finalized complaints and systemic investigations by portfolio

		Social Security	Taxation	Tele-communication	Immigration	Australian Federal Police	Defence	ACT	All	Other
Total systemic investigations	231	21	14	12	16	51	28	24	8	57
	%	9%	6%	5%	7%	22%	12%	10%	3%	25%
Total individual complaints finalised	390,735	182,221	43,628	49,614	21,264	13,255	23,749	9,711	0	47,292
	%	47%	11%	13%	5%	3%	6%	2%	0%	12%

This then, in part,³⁴ assists to explain why the AFP has a relatively high number of systemic investigations 51 or 22% as opposed to 13,255 or 3% of all individual complaints. To explain further, during her time in Office Philippa Smith, a former Commonwealth Ombudsman developed a 'Matrix' Process³⁵ used for the selection of projects. This process involved consideration of the issues raised by the possible systemic investigation. The matrix of considerations included impact; materiality; organisational significance; coverage; priority and any more appropriate body for the issue. The aim was to take into account listed issues which would involve consideration of all aspects such as resources, skill sets, whether the investigation would be likely to effect change and whether it is liberty, money or physical harm involved.³⁶ As the role of the AFP is centrally concerned with liberty and prevention of physical harm it is clear that the policing portfolio may be subject to more frequent systemic investigations that other high traffic individual complaint portfolios. For example, some of the systemic investigations into the AFP include: the use of police powers following the decriminalization of public intoxication in the ACT;³⁷ the use of medical certificates under the witness protection program,³⁸ and the policing of domestic violence.³⁹ Each of these systemic investigations have the capacity to prevent physical harm and prevent interference with liberty.

On the other hand Table 1 shows that during the same period there is a total of 21 systemic investigations in the Social Security portfolio. One example of these 21 systemic investigation was carried out in 1998,⁴⁰ the executive summary of which states:

This is a report of the Commonwealth Ombudsman's investigation of the Child Support Agency's practices for recovering amounts of child support overpaid to custodial parents.

Many of the people who contact the Ombudsman's office to complain about child support overpayments are aggrieved at being asked to repay money they received in good faith and spent for the benefit of their children. This view is understandable, but the situation is largely unavoidable, given the retrospectivity inherent in the child support legislation. However the Commonwealth's procedures for dealing with these overpayments should have regard to the special nature of the overpayment and the often precarious financial position of the family that will be obliged to repay the debt. Recovery of the debt should not simply be a triumph of 'bean counting' over the financial needs of the parents and their children.

The above extract makes clear that the focus of a systemic investigation is to represent a move away from the fixing within the system (which is that of individual complaints) to focus upon the external nature and policy of the system itself - as to how to oversight and improve the system of administration. The above extract from the systemic investigation also illustrates how the focus of the Commonwealth Ombudsman is upon the integrity of the system and the pursuit of higher order goals such as ensuring

³⁴ The phrase 'in part' is added as there may be additional structural explanations such as the Australian Capital Territory police being counted in the AFP figures and the separate yet integrated role of the Commonwealth Ombudsman as the ACT Ombudsman.

³⁵ Internal office document titled: 'Major Projects: Planning and Processes'

³⁶ Interview with Philippa Smith, Sydney, 12 January 2007.

³⁷ Report Into The Use Of Police Powers Under The Intoxicated persons (Care And Protection) Act 1994 In The ACT, Report under section 41A of the *Complaints (Australian Federal Police) Act 1981*, 1998, [http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/rep_orts_1998_afp.pdf/\\$FILE/Intox_Persons.pdf](http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/rep_orts_1998_afp.pdf/$FILE/Intox_Persons.pdf)

³⁸ Investigation into the issue of substitute medical certificate under the *Witness Protection Act 1994*

A Special Investigation pursuant to sub-Section 46(1)(e) of the *Complaints (Australian Federal Police) Act 1981*, 2003 [http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/rep_orts_2003_afp.pdf/\\$FILE/execsummary-medcerts-witnessprotection-oct03.pdf](http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/rep_orts_2003_afp.pdf/$FILE/execsummary-medcerts-witnessprotection-oct03.pdf)

³⁹ Policing Domestic Violence, Own Initiative Investigation into the Policing of Domestic Violence in the ACT, 2001, Report released under section 41A of the *Complaints (Australian Federal Police) Act 1981* July 2001 [http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/rep_orts_2001_afp_domviol.pdf/\\$FILE/ACT-DVjul01.pdf](http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/rep_orts_2001_afp_domviol.pdf/$FILE/ACT-DVjul01.pdf)

⁴⁰ Report under section 35A of the *Ombudsman Act 1976* (Cth) titled 'Child Support Overpayments: A case of give and take?' [http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/rep_orts_1998_csa.pdf/\\$FILE/CSA_Overpayments_Report.pdf](http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/rep_orts_1998_csa.pdf/$FILE/CSA_Overpayments_Report.pdf)

administrative justice distributed across the many rather than an individualistic approach to rectifying administrative error.

It is therefore suggested that the two roles perform very different functions. In summary, it is possible that systemic investigations and individual complaints may differ due to both their aims and intended outcomes. Up to this point it is has generally been assumed in ombudsman literature that the difference between the roles of ombudsman is proactive versus reactive and substantial versus procedural. The data analysis in this study now suggests that the difference is far more nuanced. It may be that the difference is due to the two investigative roles serving different objectives of administrative justice - the systemic role is one of the ombudsman institution turning its focus to rectifying system problems in government agencies while the individual complaint handling role rectifies issues for individual citizens. Following this line of argument then, in terms of proactive identification systemic investigations will have no impact upon the reduction of individual complaints because they target areas administrative deficiency where individual citizens do not or will not complain. The agencies generating the most individual complaints, such as Social Security, are technical and subject to difficult and complex legislation. Rectifying such technicalities is not the purpose of systemic investigations which improve administrative deficiencies in systems.

It is possible then that the lack of a relationship between the roles occurs as systemic investigations address areas where individuals do not complain because they are unable to do due to administrative disadvantage such as: race; class; location and privilege. Philippa Smith, a former Commonwealth Ombudsman, states that “for every complaint made perhaps as many as 12-20 other people experienced the same problem. The ratio is worse for the disadvantaged or the inarticulate who tend not to lodge complaints.”⁴¹

This may explain the choice of systemic investigations as deliberately being focused away from the more privileged members of the Australian population. Of course this is not to imply that the ombudsman institution is ‘a social reformer’.⁴² Rather the Office through systemic investigations may choose to represent the disadvantaged and underprivileged in terms of improving administrative processes. It follows that if a systemic investigation improves the quality of an agencies performance in servicing those unable to complain that the actual impact and relationship with overall individual complaint numbers will be negligible.

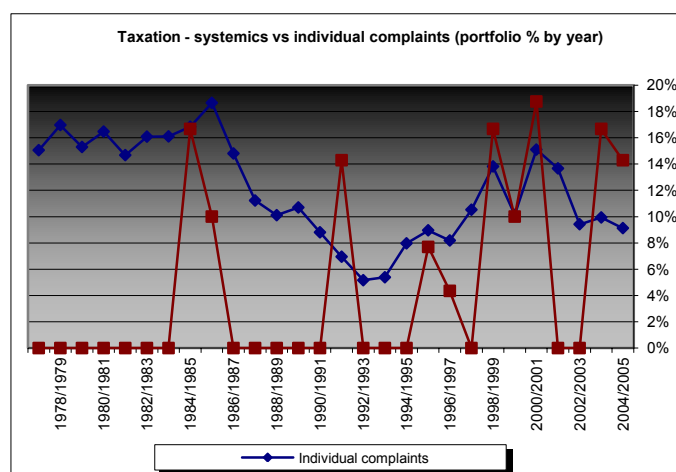
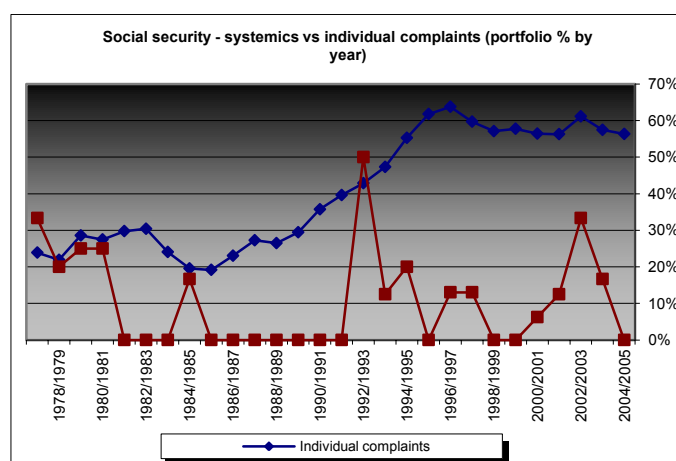
⁴¹ P. Smith, “Red tape and the Ombudsman” (1988) 88 Canberra Bulletin of Public Administration 18 at 7.

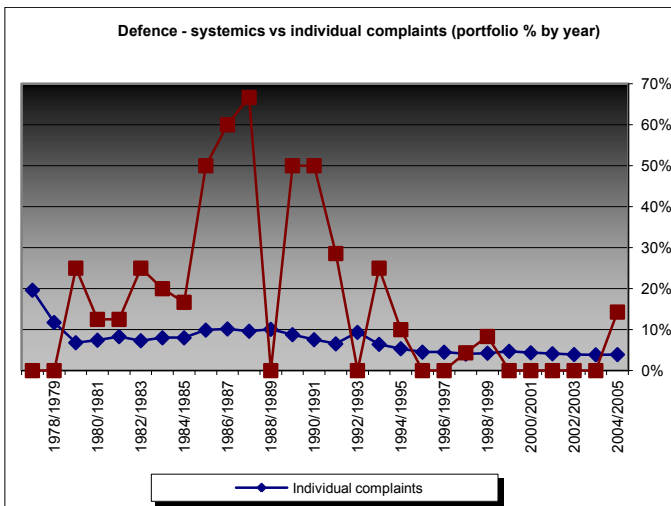
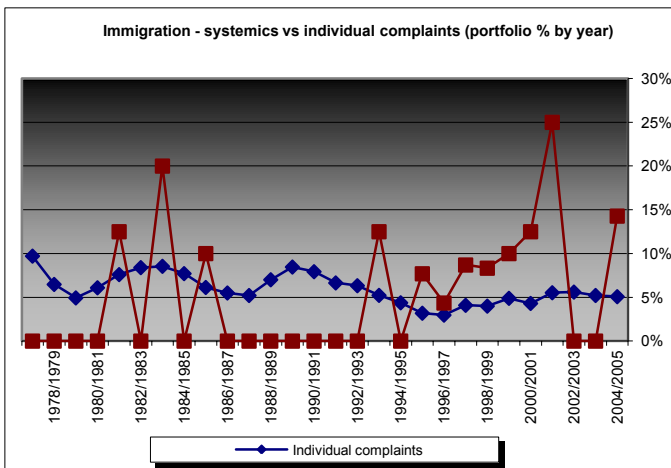
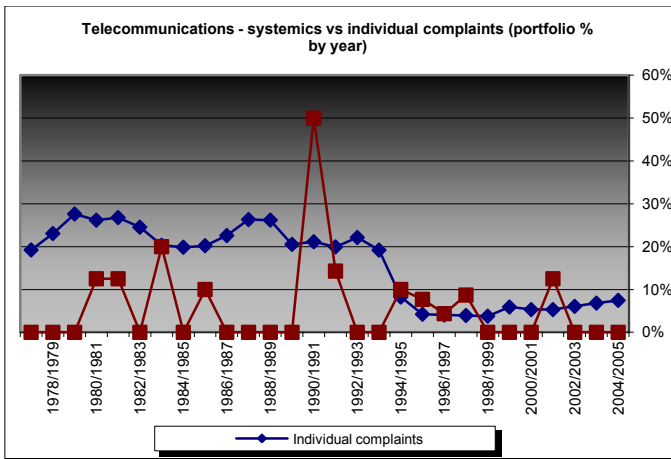
⁴² H.S. Doi, “Reply” *Conference of Australian and Pacific Ombudsman* (Paper presented at Wellington New Zealand, 19-22 November 1974) at 8.

B. Is there a statistical interaction between individual complaint numbers and systemic investigations?

Statistical testing shows no correlation between systemic investigations and individual complaint numbers. This is the case across all portfolios. As a systemic investigation will not have an immediate effect – especially as policy and/or legislative change may take years to process and implement - this test was repeated with time lags. Again there was no significant statistical correlation at 1 , 2, 3, 4, and 10 year intervals. While the highest interaction was identified at 10 years again the interaction was not statistically significant. The same test was then applied to determine if individual complaints cause systemic investigations. Again the test revealed no statistical significance between individual complaint numbers causing systemic investigations.

Graph 2 Selected individual portfolio comparison of individual complaints and systemic investigations by year





From the above Graphs it may be suggested that the answer for the lack of statistical interaction between the dual roles is actually more complex than stating that it exists because they

perform different functions. There are additional critical external factors which shape the data.

For example, the telecommunications portfolio in Graph 2 above clearly shows the lack of correlation between systemic investigations and individual complaints. There is an overall decline in individual complaint numbers in that portfolio and a spike in the number of systemic investigations in the early 1990s (explained by the relatively small number of systemic investigations throughout the period under study). This portfolio is an excellent example of the relevance of external impact upon portfolio changes to any comparative evaluation of systemic investigations and/or changes in individual complaint numbers. This is the case as a critical factor influencing the data with respect to the role of the Commonwealth Ombudsman in telecommunications complaints is the creation of the national Telecommunications Industry Ombudsman Scheme. The ‘TIO Scheme’ appointing the world’s first federal telecommunications private industry ombudsman in August 1993 was established in Australia on 1 December 1993. Since inception the TIO Scheme has handled an increasing number of individual complaints and systemic matters which were previously within the jurisdiction of the Commonwealth Ombudsman. The growth rate of cases in the early years was around 12% per quarter or nearly 50% per annum. In the quarter ending March 1997 the Ombudsman handled 11, 963 cases - an 11.12% increase on the previous quarter.⁴³ For the purposes of this study the relevant figures are those ending 2005. The TIO handled 97,798 contacts in 2004/05 – a 28.8% increase on the previous year’s total of 75,904.⁴⁴

The impact then on individual complaints to the Commonwealth Ombudsman is clear – there has been a marked decline in individual telecommunications complaints because of the external impact of the reduction in jurisdiction of the office. As both the Commonwealth Ombudsman and the TIO have jurisdiction over telecommunications since the 1990s individual complaints fall while the systemic investigations carried out by the Office have remained constant, if sporadic. The constancy of systemic investigation numbers may be explained by that portfolio including more than just Telstra (Telecommunications) and also including agencies such as Australia Post and the ABC, government television etc. A close analysis of the area of systemic investigation does reflect a movement away from telecommunications within this portfolio for, as noted in the Introduction to this article the TIO has also appointed a systemic officer – a world first. It therefore also follows that there has been a reduction in systemic investigations into Telstra (the government owned part of Telstra). The data reflects that the roles of the ombudsman cannot be isolated from wider changes in the government and private sector.

⁴³ Telecommunications Industry Ombudsman, *1994 Annual Report* at 2.1.

⁴⁴ TIO *Annual Report* (2004-2005), online: <www.tio.com.au/publications/annual_reports/>.

This interaction between systemic investigations and external forces is further evidenced in Graph 2 in the Taxation portfolio where there are clear peaks in numbers of systemic investigations at various times throughout 1977-2005. To take one of those peaks in 200-2001 this period represented the Australian Taxation Office responding to the implementation and management of new taxation arrangements. The systemic investigations 'reflected some difficulties with the new systems'.⁴⁵ The result was increased interaction between the Commonwealth Ombudsman and the taxation field – particularly as the Commonwealth Ombudsman acts as the Taxation Ombudsman. Immigration is another portfolio that shows a sharp increase in systemic investigations around 2000-2001. This portfolio raises a further factor which impacts upon a lack of statistical interaction between individual complaint numbers and systemic investigations – and that is the strategic focus of the Ombudsman and government policy change. As the then ombudsman Ron McLeod states in his 2000-2001 Annual Report that '[I]ncreases in the number of people held in immigration detention facilities and some disturbances in certain centres focussed considerable public attention on immigration detention during the year.'⁴⁶

Defence is another portfolio which also shows large variations in systemic investigations numbers throughout the history of the Office. Graph 2 shows peaks in systemic investigations in the late 1980s and early 1990s. While there is no clear explanation for these peaks there is commentary by Professor Dennis Pearce, the then Ombudsman in the 1989-1990 Annual Report⁴⁷ as to the 'breakdown in communications' between the Commonwealth Ombudsman and the Department of Veterans' Affairs (part of the Defence portfolio). This highlights a further possible explanation for the lack of statistical interaction between individual complaint numbers and systemic investigations – particular agencies within portfolios may be problematic in terms of raising matters of systemic defective government administration. This means that the Commonwealth Ombudsman has to spend a disproportionate amount of time attempting to rectifying the behaviour of the agency in order to improve administrative justice and efficiency for the general community. This seems to have been the case with the Defence portfolio in the late 1980s and early 1990s.

V. CONCLUSION

The expectation for the findings of the empirical investigation into the systemic investigations role of the Commonwealth Ombudsman and its relationship to individual complaints was that a significant statistical interaction between systemic investigations and individual complaints would be found. This expectation was based upon the assumption that systemic

investigations undertaken successfully by the Commonwealth Ombudsman will decrease individual complaint numbers within the relevant portfolio. It was also based upon the assumption that large numbers of complaints in certain areas trigger systemic investigations into their causes with the aim of eliminating the wider administrative injustice and thereby reducing individual complaint numbers. Indeed these are traditional assumptions of the operation of the Commonwealth Ombudsman, as Ron McLeod a former Ombudsman states:

Most major projects entail the investigation of systemic issues, using my own motion power...[t]his potentially reduces the number of complaints we receive from the agencies clients...⁴⁸

The data did not however bear out such assertions. This empirical quantitative study reveals no statistical significance between numbers of individual complaints and the numbers of systemic investigations per portfolio. One conclusion to draw from this is that systemic investigations within a government agency or area do not impact upon reducing numbers of individual complaints within that area. So, for example systemic investigations into Social Security do not result in a decreasing number of individual complaints in that area of government administration. Conversely high number of complaints in particular portfolios do not necessarily result in high numbers of systemic investigations.

The study suggests however that despite this finding, there remains a clear and close relationship between the two roles of the ombudsman institution. Clearly systemic investigations have been triggered by large individual complaint numbers about certain issues within portfolios and it is plausible (although difficult to prove) that the proactive nature of systemic investigations means that individual complaints are prevented. This study evidences that the lack of statistical significance between the two roles may be explained by: (a) the contrasting nature of systemic investigations and individual complaint taking; (b) the strategic focus of ombudsman using their own motions to target portfolios and (c) external factors such as government policy change.

While the data presented in this study is specific to the Australian Commonwealth Ombudsman both its methodology and conclusions are applicable to the growing international community of classical, private, hybrid and organizational ombudsman. There are some simple points which can be applied from this article to all ombudsman. Firstly, it is not possible to measure the performance of the systemic investigations role of an ombudsman institution by reference to individual complaint numbers. Secondly, nor is it possible to evaluate the 'success' of an ombudsman merely by reference to individual complaint statistics which has been the past model traditionally applied to ombudsman offices.

⁴⁵ Commonwealth Ombudsman, *Annual Report (2000-2001)* 1.

⁴⁶ Commonwealth Ombudsman, *Annual Report (2000-2001)* 1.

⁴⁷ Commonwealth Ombudsman, *Annual Report (1989-1990)* 57.

⁴⁸ Commonwealth Ombudsman, *Annual Report (1999-2000)* 82.

Thirdly, and perhaps most importantly, the identification of correcting systemic administrative deficiency as a distinct role of the ombudsman institution elevates and confirms the existence of the systemics role. Through defining and revealing the nature, the impact and the import of systemic investigations by the Australian Commonwealth Ombudsman this study facilitates other ombudsman offices to make better informed and resource principled decisions about the focus of their work. This result has important ramifications for the micro-level internal planning of ombudsman office resources and for the macro-level issues as to how the ombudsman institution may effectively perform its role as a democratic corrective.

Indeed, without such objective empirical evaluation there is no measure of value and therefore little basis upon which to make rational assessments of government funding to the systemic role of ombudsman. The absence of effective measures as to how to value and prove economic significance is a major difficulty which haunts ombudsman as well as other institutions in the wider system of the administration of justice. This point, well made by Chief Justice Gleeson of the Australian High Court, is that if something is impossible to measure it is treated as if it does not exist.⁴⁹ Chief Justice Gleeson's observation, which applies to the funding of courts, may be extended to ombudsman.

The importance of viewing this empirical study as the beginning of creating such an effectiveness measure is very apparent given its use of quantitative analysis. A quantitative study is however only a partial unlocking of the ombudsman enigma as it does not attempt to measure the quality of the contribution made to public administration by the Office. This article therefore provides a small but yet significant step forward in valuing and evaluating the significant and expanding integrity institution that is the ombudsman.

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⁴⁹ Honourable M. Gleeson, 'Managing Justice in the Australian Context' (Speech to Australian Law Reform Commission Conference, Sydney, May 19, 2000) <www.hcourt.gov.au/speeches> 9 March 2005.

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AUTHOR'S PROFILE



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