

Freedom of Information and the Tasmanian Ombudsman, 1993-1996

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The importance of the Tasmanian Ombudsman as external reviewer of agency decisions under the Tasmanian *Freedom of Information Act* 1991¹ cannot be underestimated. Rowat has argued that one of the most controversial questions about Freedom of Information (FOI) schemes has concerned the kind of body which should consider appeals against refusal of requests for government-held information.² Australian jurisdictions have chosen a wide range of review options (see Table 1). In Tasmania the Ombudsman forms the only independent and determinative administrative review mechanism for the Act. This model resulted from a mixture of cost considerations and the absence of any State level Administrative Appeals Tribunal (AAT). The dangers of such a model include the greater concentration of power and a greater possibility of bias. In addition, in Tasmania there is the need for clear and comprehensive FOI review precedents, as the number and frequency of FOI determinations by a State Ombudsman as compared to the Federal AAT will inevitably be small.³ Furthermore, the pivotal role of this office in determining access to government held information is then subject to the constraints of staffing, resources and the mindset of the particular reviewer.

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1 Hereafter referred to as the FOI Act.

2 DC Rowat, 'Freedom of Information: The Appeal Bodies Under the Access Laws in Canada, Australia and New Zealand', (1993) 52 *Australian Journal of Public Administration*, 215-221.

3 See E Biganovsky, 'Reinventing Freedom of Information: A State Focus', 1994 National Administrative Law Forum, 'Are the States Overtaking the Commonwealth?' 7-8 July 1994, Brisbane, published in S Argument (ed) *Administrative Law: Are the States Overtaking the Commonwealth?* p 190.

Table 1: External Review Mechanisms in Australian Jurisdictions⁴

Jurisdiction	Internal Review	External Review
Commonwealth	s 54	Ombudsman, s 57; AAT, s 55.
Victoria	s 51	Ombudsman ss 27 and 57; AAT, s 50.
Australian Capital Territory	s 59	Ombudsman, s 54; AAT, s 60.
New South Wales	s 34	Ombudsman, s 52; District Court, s 53.
South Australia	s 38	Ombudsman, s 39; District Court, s 40.
Tasmania	s 47	Ombudsman, s 48.
Queensland	s 52	Information Commissioner, s 71.
Western Australia	s 39	Information Commissioner, s 54.

This paper concludes that a deliberate choice of informality linked with the pressures and limitations of reduced resources has damaged the effectiveness of the Ombudsman as the sole external review mechanism for the FOI Act. While this paper is highly critical of the quality of the Ombudsman's performance as the external reviewer of the Tasmanian FOI scheme during the 1993-1996 period, the handling of his case load has been exemplary. A heavy workload and staff cut-backs may have encouraged the Ombudsman to take a low key, informal approach to his review task under FOI. The central concern of this article is that the Ombudsman's discernible predisposition towards non-disclosure and a failure to seriously tackle openly and fully the issue of public interest deliberation has critically weakened any attempt to achieve the objectives of the legislation.

Research undertaken by students at the Law School, University of Tasmania since 1993 suggests that severe reductions in funding and

⁴ Based on information in M Campbell, 'Freedom of Information Legislation in Australia: A Comparison', in McMillan J, *Administrative Law: Does the Public Benefit?*, Proceedings of the Australian Institute of Administrative Law Forum (Panther Publishing, 1992).

resources and the relocation of the Ombudsman to the Department of Justice's portfolio have caused serious problems for the Ombudsman in undertaking his duties under the Tasmanian FOI Act.⁵ A number of recent research studies have concentrated on the problems facing the Ombudsman's Office in the areas of:

- Adequacy of reasons statements after weighing public interest considerations.
- Interpretation of the Cabinet exemption provision (section 24).

The research papers conclude that the Tasmanian Ombudsman produced reasons statements for decisions which, in comparison with those compiled by the Information Commissioners in Queensland and Western Australia, were significantly inferior in length and in treatment of public interest considerations. Further, the papers argue that the Ombudsman has interpreted section 24 of the FOI Act widely and expansively, resulting in an application of the section which strongly favours agencies seeking to restrict access to government-held information.

This apparent expansive interpretation of section 24 has taken on increased importance in light of the recent report by the Legislative Select Committee on the Freedom of Information Amendment Bill (1994). This report recommended significant reforms to the Cabinet exemption, and in particular the widening of the exemption to cover a greater number of documents. Significantly, should the proposed recommendations go ahead, and if the Ombudsman continues to endorse an expansive interpretation of section 24, the accessing of any remotely sensitive information will be virtually impossible in Tasmania.

5 See M Barry and C Hollingsworth 'The Effectiveness of the Ombudsman in Relation to Departmental Response', *1994 Principles of Public Law Research Paper*, held at the Law School, University of Tasmania; E Saramo and C Narasia 'The Tasmanian Ombudsman - a Critical Review', *1993 Principles of Public Law Research Paper*, held at the Law School, University of Tasmania; M Jarman 'The Tasmanian Ombudsman: the Problems of Resource Allocation', *1994 Principles of Public Law Research Paper*, held at the Law School, University of Tasmania; S Pennicott 'The Tasmanian Ombudsman Office - is it's Jurisdiction Shrinking? An Analysis of the Tasmanian Ombudsman's Jurisdiction in Relation to the Recent Phenomena of Government Business Enterprises, and the Role of the Auditor-General', *1995 Principles of Public Law Research Paper*, held at the Law School, University of Tasmania; H Locke 'The Tasmanian Ombudsman: Out of Date or Out of Pocket? Ten Years in Review', *1996 Principles of Public Law Research Paper*, held at the Law School, University of Tasmania.

During the period in which the Freedom of Information Amendment Bill was under review, the Ombudsman deliberately chose to adopt a relatively informal approach to the process of review under the FOI Act. In his 1996 Annual Report, the Ombudsman noted that 'the Act does not specify the method or process of review, and it is my practice to deal with them as informally as possible'.⁶

Resource restrictions, an expansive interpretation of section 24, and a pursuit of informality are further compounded by an approach to section 27, relating to internal working documents, which allows agencies to restrict access to a significant corpus of information concerning policy formulation. This approach unintentionally constructs a non-disclosure haven within which most agencies can weather the threat of access to policy information.

This article contends that whether it be by design, omission or lack of resources, the first three years of Ombudsman review in Tasmania have resulted in an access regime which is incapable of achieving the objectives of the *Freedom of Information Act* 1991. In a system where only a small number of external reviews are available for determination, an external reviewer, such as the Tasmanian Ombudsman, needs to use every review as a precedential foundation upon which the objectives of the legislation can be built. Failure to set high standards of review and to carefully restrict the potential exploitation of statutory loopholes by a public service and Government relatively hostile or at least indifferent to FOI is a very serious shortcoming of an external review body.

Background

The original design for the FOI regime in Tasmania did not include a review function for the Ombudsman. Appeals under the Freedom of Information Bill 1990, tabled in the Tasmanian Parliament by Independent Green member Bob Brown, were to be heard by the Supreme Court.⁷ Advice from the Communications Law Centre resulted in the appeals process being transferred to the Ombudsman, in time for the tabling of the Freedom of Information Bill (No 2) 1990.⁸ The Communications Law Centre recommended:

⁶ Tasmanian Ombudsman, *Annual Report for the Year Ended 30 June 1996*, p 49.

⁷ Freedom of Information Bill 1990, ss 46-48.

⁸ Communications Law Centre, 'Tasmanian Freedom of Information Bill 1990', *A Report Prepared for the Green Independents in Tasmania*, 1990, p 7.

That the Supreme Court should not be the first independent body to review decisions under the FOI Act, and that, at the same time as you introduce the FOI legislation, you introduce or foreshadow separate legislation to establish an Administrative Appeals Tribunal for Tasmania.⁹

Meanwhile, negotiations between the Greens and their Accord partners, the Australian Labor Party (ALP), revealed that cost factors and other considerations made the proposed role of the Supreme Court as a review body a non-viable option.¹⁰ The Communications Law Centre warned that if the Ombudsman was expected to take on a wider review role, he would need adequate resources:

The role of the Ombudsman in FOI can be significant only if he or she is given adequate resources. In practice the Commonwealth Ombudsman has not played a large role in the history of FOI so far. On several occasions the Ombudsman has complained that he was being denied the resources necessary to do his FOI tasks.¹¹

During the first three years of FOI in Tasmania, the Ombudsman was bedevilled by inadequate resourcing of his general functions, let alone the added responsibilities assumed under the FOI Act. Rhetorical support given by the ALP Opposition and the Greens for FOI has failed to result in any extra resources or powers for the Ombudsman. This failure in support continued despite the ALP and Tasmanian Greens majority in the House of Assembly in 1996 and 1997.

Tasmania chose the Ombudsman model for FOI external review as it would keep review costs low and avoid the problems with a court supervised appeals process. Other Australian jurisdictions, in comparison, chose an Ombudsman model because it was 'argued that giving courts the power to order release of documents would interfere with ministerial responsibility in a parliamentary system'.¹²

The Freedom of Information Amendment Act 1992

In early December 1992, a few days before the commencement of the FOI Act on 1 January 1993, the Tasmanian Government pushed a series of amendments through the Tasmanian Parliament.¹³ At the time the Government and its advisers proved extremely reticent in justify-

9 Id, at p 62.

10 Personal communication with Chris Harries, Green adviser on FOI, 12 March 1997.

11 Communications Law Centre, note 8 above, at p 65.

12 Rowat, note 2 above, at p 215.

13 H Townley, 'Recent Developments', (1992) 42 *FOI Review* pp 78-79.

ing the changes. A few months later the argument was advanced that the changes were to correct a series of anomalies in the principal Act.¹⁴

In retrospect, the *Freedom of Information Amendment Act 1992* signalled the Government and bureaucracy's approach to information access over the next three years. Whether it was the Government's initial intention, or merely their reaction to the idea of open government, the Amendment Act helped the Government to neutralise the potential of the FOI Act. The changes to the FOI Act contained within the FOI Amendment Act were formulated in secrecy and introduced quickly into Parliament. The changes were accompanied by minimal explanation and were dubiously justified as 'finetuning.' The determination of the Government to render the FOI Act less effective was clear.

Supporters of the FOI Act were compelled to respond to these changes with no forewarning or consultation. The passage of the Bill through Parliament was uncharacteristically swift and left little opportunity to rationally evaluate the merits of the changes. The changes included:

- Removal of the Ombudsman's power to release exempt information (s 48(5)).
- Extension of the trade secrets exemption (ss 31 and 32).
- Amendment of personal information (s 37).
- Exemption of information communicated from other Governments (s 26).
- Exemption of information likely to threaten endangered species etc (s 35A).
- Change of official responsible for issuing conclusive certificates (s 24(3)).
- Minor amendments to wording of certain sections.

The deletion of section 48(5)(b), which conferred power on the Ombudsman to release exempt information, was probably the most significant of the amendments. At the time it was argued, especially by the Green Independents, that the amendment was excessive, because sections 51 and 48(7) already effectively prevented the Ombudsman from providing information to an applicant, other than indirectly

¹⁴ D Needham, 'Tasmania's Freedom of Information Amendment Act 1992', (1993) 43 *FOI Review* pp 7-8.

through the agency or Minister concerned. However, the actual power to recommend release of documents claimed as exempt was not curtailed by these limitations.

As there is no longer any provision conferring power on the Ombudsman to require the release of exempt information, release remains totally within the discretion of the agency concerned and is subject to no general public interest test. The controversial Legionnaires' Disease outbreak in 1989 at the Burnie Public Hospital,¹⁵ and the subsequent handling of the matter by the Tasmanian Government, demonstrated the restriction that this amendment placed on the Ombudsman's ability to use FOI to hold successive governments accountable for their actions, inaction and attempts to dodge scrutiny.

The Government justified this amendment in December 1992 on the basis that it removed an extraordinary power from the hands of a non-elected official. Yet events such as the Legionnaires Outbreak demonstrate that there must be a counterbalance to the power of other unelected officials to use secrecy as a shield to hide shameful deeds or merely uncomfortable facts. The Victorian AAT and the NSW Ombudsman have the ability to use this safety valve mechanism to allow release of otherwise exempt information.¹⁶ The exercise of this power has been circumspect and infrequent.¹⁷ The Canadian Information Commissioner considered that this power should be expanded to require that:

Government institutions be required to disclose any information, with or without a formal request, whenever the public interest in disclosure clearly outweighs any of the interests protected by the exemptions.¹⁸

'Less Money, Less Staff and Less Independence': an Ombudsman's Lament

The Tasmanian Office of the Ombudsman, after receiving responsibility for external reviews under the FOI Act, experienced a 37% reduction in its staffing establishment in 1992-93. This cut was made only a few months after the Government had committed itself to providing an extra staff member to the Ombudsman to deal exclu-

15 This is discussed below in the section headed 'Case Studies'.

16 *Freedom of Information Act 1982* (Vic) s 50(4); *Freedom of Information Act 1989* (NSW) s 52.

17 See I Caldwell, 'Compelling Public Interest vs Public Curiosity', (1996) 61 *FOI Review* pp 5-7.

18 Canadian Information Commissioner, *Annual Report 1994*, pp 21-22.

sively with FOI matters.¹⁹ This resource restriction on the Ombudsman placed an effective clamp on the nature and quality of response which the office could bring to the external review process for FOI applications. Over the first three years of operation of the FOI Act, this resource starvation ensured that FOI in Tasmania became a very poor piece of the institutional furniture of public administration. The emasculation of the Ombudsman, either intentionally or as a by-product of general cost cutting in the public service, seriously hampered the ability of that office to perform anything other than a limited reactive role. Similar, and more critical, observations have been made about the impact of these types of restrictions on the role and operations of the New South Wales Ombudsman in effective FOI supervision.²⁰

The problems associated with this funding restriction have been highlighted in the Tasmanian Ombudsman's *1993 Annual Report*.

Although every effort had been made and continues to be made to streamline procedures and resolve complaints by more creative and decisive means, I expressed some disquiet at our growing inability to address the larger questions of systemic deficiency. By restricting our activities to the resolution of immediate complaints, we were continuing to treat symptoms rather than causes and not, in my view, contributing, as I believe the Office of Ombudsman should and can, to the improvement of public administration in this State. With inadequate funding, we are in danger of being reduced to little more than what the Commonwealth Ombudsman referred to as a *'fly-swatting'* function.

... The Ombudsman assumed responsibility under the Act (FOI) for hearing and determining appeals against decisions of agencies not to release information sought by members of the public. In accordance with advice given to the Parliament that the Ombudsman would be provided with an additional staff member to handle Freedom of Information matters, I have sought the provision of such an officer by the Secretary for the Department of Justice but, regrettably, he has been unable to meet that request ...

The service I am offering now is necessarily inadequate in terms of the proper functions of an Ombudsman and falls far short of the potential provided for by the Ombudsman Act. I am simply unable to carry out any *'own motion'* inquiries or systemic investigations and am obliged to apply fairly harshly the provisions of the Act which allow me to decline complaints or require complainants to pursue other avenues of redress.²¹

19 'Comment', (1992) 40 *FOI Review* p 41.

20 B Smith, 'The Demise of FOI in New South Wales', (1994) 49 *FOI Review* pp 4-5.

21 Tasmanian Ombudsman, *Annual Report for the Year Ended 30 June 1993*, p 7.