

CRITIQUE AND COMMENT

2019 MELBOURNE UNIVERSITY  
LAW REVIEW ANNUAL LECTURE

**COMMON SENSE AND CLEAN HANDS:  
AN OMBUDSMAN’S VIEW OF JUSTICE**

DEBORAH GLASS OBE\*

*It is sometimes easy to forget that decisions made by public authorities are made by humans, who tend to like clear rules and procedures: some set criteria to make the ‘right’ decision. Mysterious beings as we are, we are not void of temptation to do things the easier way or for ulterior motives. It can be instructive to look at real-life case studies to see how administrative decision-makers can be caught in the dilemma of applying perfect rules to imperfect situations and trying to fit imperfect laws or exceptions to others. No matter how considered a rule or procedure may be, there are always areas of grey that administrative decision-makers cannot avoid, and which necessitate judgement, common sense, and dignity.*

CONTENTS

I	Introduction.....	370
II	A Historical Perspective.....	370
III	What Does an Ombudsman Do?.....	372
	A Complaints.....	372
	1 Unreasonable Decisions.....	374
	2 Lack of Discretion.....	374
	3 Too Much Discretion.....	375
	4 Human Error.....	376
	5 Achieving Broad Resolution.....	376
	B Maladministration and Improper Conduct.....	377
	C Human Rights.....	378

\* Victorian Ombudsman. A version of this lecture was originally presented by the author as Deborah Glass, ‘Common Sense and Clean Hands: An Ombudsman’s View of Justice’ (Melbourne University Law Review Annual Lecture, Melbourne Law School, 2 April 2019).

IV Conclusion .....	382
---------------------	-----

## I INTRODUCTION

No brilliance is needed in the law. Nothing but common sense, and relatively clean finger nails.<sup>1</sup>

You would rightly deduce from my opening quotation that I am not approaching my topic from the standpoint of great legal erudition. To make a change from the usual contribution to this eminent journal I will cite no cases — except one, as I occasionally refer to cases with my name in them, of which there are now a few. It is an interesting way to be immortalised. My legal legacy may well be *Attorney-General (Vic) v Glass*,<sup>2</sup> which went all the way to the High Court until they refused leave to appeal,<sup>3</sup> thus confirming my jurisdiction to investigate Members of Parliament upon referral by Parliament.<sup>4</sup>

But the doings of our elected officials aside, my subjects in this essay are fairness and justice, as opposed to the law — and sometimes they are opposed. I will set out a brief historical perspective on the role of the Ombudsman, as well as an overview of my main functions and powers to illustrate my subject. I do this in the hope that readers of this journal are more familiar with the role of the Ombudsman than I was as a law student: when I studied administrative law a few short years after the *Ombudsman Act 1973* (Vic) ('*Ombudsman Act*') reached the Victorian statute books, I did not notice its presence on the curriculum.

## II A HISTORICAL PERSPECTIVE

I am the fifth Victorian Ombudsman, appointed for a 10-year term in 2014 — and, as it happens, the first woman to do the job. As we approach the end of the second decade of the 21<sup>st</sup> century that should not be a talking point, but, sadly, it still is. There are still too few women in positions of power in Australia, and even a cursory glance at the *Ombudsman Act* will confirm what a powerful position it is.

<sup>1</sup> John Mortimer, *A Voyage Round My Father* (Methuen & Co, 1971) 38.

<sup>2</sup> (2016) 51 VR 381 (Court of Appeal).

<sup>3</sup> *A-G (Vic) v Ombudsman (Vic)* [2017] HCASL 82.

<sup>4</sup> *Ombudsman Act 1973* (Vic) s 16 ('*Ombudsman Act*').

The ‘Commissioner for Administrative Investigations, to be called the Ombudsman’,<sup>5</sup> in effect has the powers of a royal commission, except that she does not hold hearings in public.<sup>6</sup> These powers include the power to issue witness summonses and take evidence on oath;<sup>7</sup> to enter premises occupied by any agency within jurisdiction and inspect anything in or on them;<sup>8</sup> and, perhaps most importantly, the power to table reports directly to Parliament.<sup>9</sup>

While most complaints are dealt with through my enquiry processes rather than formal investigation, agencies are obliged to cooperate: ‘The principal officer of an authority ... must assist the Ombudsman in the conduct of an enquiry.’<sup>10</sup> Whether agencies cooperate because my Act requires it, or because they would rather not be the subject of a formal Ombudsman investigation, does not much matter.

While I am now halfway through my 10-year term, when you start a term of that length it is good to get some historical perspective. The origins of the institution go back hundreds or even thousands of years — the Roman Tribune of the Plebs was a kind of Ombudsman<sup>11</sup> — and the word itself, of course, comes from Sweden, where an Ombudsman has been in existence since 1809.<sup>12</sup> But the real evolution in the Ombudsman business came with the huge growth in bureaucratic decision-making in the second half of the 20<sup>th</sup> century.

New Zealand was the first Commonwealth country to establish an Ombudsman office back in 1962,<sup>13</sup> and there was some fascinating debate in Hansard about the merits, or otherwise, of such an institution.<sup>14</sup>

<sup>5</sup> *Ombudsman Act* (n 4) s 3(1).

<sup>6</sup> *Ibid* pt 4 div 3. Cf *Inquiries Act 2014* (Vic) pt 2 divs 3–6.

<sup>7</sup> *Ombudsman Act* (n 4) s 18(1). See also *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 17–18, as at 27 August 2014.

<sup>8</sup> *Ombudsman Act* (n 4) s 21.

<sup>9</sup> *Ibid* ss 25–25AA.

<sup>10</sup> *Ibid* s 13A(3).

<sup>11</sup> See, eg, Anand Satyanand, ‘The Office of Ombudsman in New Zealand’ (1997) 6(3) *Canterbury Law Review* 470, 470; John Clarke Adams, ‘In Quest of the Ombudsman in the Mediterranean Area’ (1968) 377 (May) *Annals of the American Academy of Political and Social Science* 97, 98.

<sup>12</sup> See, eg, Satyanand (n 11) 470; Walter Gellhorn, ‘The Swedish Justitieombudsman’ (1965) 75(1) *Yale Law Journal* 1.

<sup>13</sup> *Parliamentary Commissioner (Ombudsman) Act 1962* (NZ); Satyanand (n 11) 471.

<sup>14</sup> See New Zealand, *Parliamentary Debates*, House of Representatives, 25 July 1962, vol 330, 1010–35. See also Deborah Glass, ‘How Natural Is Justice? An Ombudsman’s Perspective’ (Geoffrey Sawer Lecture, Australian National University, 17 October 2014).

The idea of an Ombudsman was variously described as ‘a busybody’, a ‘snooper’, or even ‘a menace’.<sup>15</sup> There may be a few Victorian politicians 50 years later who would agree with that.

But the point was made over and again:

The balance between the citizen and the State has over a long period been swinging more and more in favour of the State ... [making it] all the more essential, in a democracy, that the citizen should be protected against the abuses of power ... not ... so much the conscious or malicious abuses of power ... [but] the genuine mistakes, misjudgments, and what may be termed unreasonable decisions which are inevitable wherever power is exercised.<sup>16</sup>

It is clear from the debates that there was some nervousness from MPs about how he — of course it would be a ‘he’ — would do that. But Norman Douglas thought that ‘[t]he very existence of someone to whom the people can turn will be a comfort, and in the case of the chronic malcontents could even be psychotherapeutic. The commissioner might even become known as the “great healer”’.<sup>17</sup>

This passage was quoted in the Victorian debates in 1973, when the Member for Melbourne (the inimitable Barry Jones) added: ‘It did not quite turn out like that.’<sup>18</sup>

Whether or not Ombudsmen are great healers, the function was increasingly recognised as necessary to deal with the challenge of administrative unfairness in complex bureaucracies — because the law is not good enough, or fair enough.

### III WHAT DOES AN OMBUDSMAN DO?

#### A *Complaints*

Let me first set out — going back to the law for a moment — the basis of my own decision-making. I can form opinions that a decision is, among other things, contrary to law or unreasonable.<sup>19</sup> I can also consider whether a

<sup>15</sup> New Zealand, *Parliamentary Debates*, House of Representatives, 17 April 1975, vol 396, 666 (AM Finlay, Minister of Justice).

<sup>16</sup> New Zealand, *Parliamentary Debates*, House of Representatives, 25 July 1962, vol 330, 1010–11 (JR Hanan, Attorney-General).

<sup>17</sup> *Ibid* 1028 (Norman Douglas).

<sup>18</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 April 1973, 4935 (Barry Jones).

<sup>19</sup> *Ombudsman Act* (n 4) ss 23(1)(a)–(b). See, eg, Victorian Ombudsman, *Investigation into the Management and Protection of Disability Group Home Residents by the Department of Health*

decision is inconsistent with human rights,<sup>20</sup> improperly discriminatory, oppressive,<sup>21</sup> or — my personal favourite — just plain wrong.<sup>22</sup> These categories broadly reflect the grounds of review in administrative law, with a few added charms.

But in practice, when I look at administrative decisions, it boils down to the question we ask when, all too often, we see those mistakes, misjudgements, and unreasonable decisions so presciently anticipated in the early parliamentary debates: *what were they thinking?*

Where a court can make orders, I rely on the art of persuasion to make recommendations to remedy an error and improve public administration — helped of course by my royal commission powers and ability to monitor and report to Parliament.<sup>23</sup>

My office gets tens of thousands of complaints a year,<sup>24</sup> and my jurisdiction extends to over a thousand public bodies in the State, including local councils.<sup>25</sup> In many (possibly most) of the complaints, the catchcry is that the decision was not fair.

In fact, many of the decisions we see are fair, although all too often they have been poorly communicated, and occasionally it is the complainant who is unreasonable. But we do see some which plainly fail the ‘what were they thinking’ test — and many of these are about the exercise of discretion.

So I want to reflect on the role the Ombudsman plays in unfair administrative decision-making and the patterns we have observed. We see reasonable rules unfairly applied, unreasonable rules, a failure to make case by case judgments, and our old friends, human error and poor communication.

*and Human Services and Autism Plus* (Parliamentary Paper No 332, 25 September 2017) 85 [369], [372]–[373].

<sup>20</sup> *Ombudsman Act* (n 4) ss 13(2), 23(1)(a). See, eg, Victorian Ombudsman, *Investigation into the Financial Support Provided to Kinship Carers* (Parliamentary Paper No 360, 12 December 2017) 59 [223] (*‘Kinship Carers Investigation’*).

<sup>21</sup> *Ombudsman Act* (n 4) ss 23(1)(b)–(c). See, eg, *Kinship Carers Investigation* (n 20) 59 [223].

<sup>22</sup> *Ombudsman Act* (n 4) s 23(1)(g). See, eg, Victorian Ombudsman, *Investigation into Wodonga City Council’s Overcharging of a Waste Management Levy* (Parliamentary Paper No 388, 24 April 2018) 21 [80].

<sup>23</sup> See above nn 6–9 and accompanying text.

<sup>24</sup> Victorian Ombudsman, *Annual Report 2018* (Parliamentary Paper No 445, 18 September 2018) 16.

<sup>25</sup> *Ombudsman Act* (n 4) pt III; ‘Powers of the Ombudsman under the Ombudsman Act 1973’, *Victorian Ombudsman* (Fact Sheet No 7, September 2016) <<https://www.ombudsman.vic.gov.au/Fact-Sheets/For-Respondents/Fact-Sheet-7-Powers-of-the-Ombudsman-under-the-Omb>>, archived at <<https://perma.cc/8ESN-289V>>.

## 1 *Unreasonable Decisions*

While this case occurred in the time of my predecessor, it remains a compelling example of unreasonable decision-making.<sup>26</sup> It was the week after the Black Saturday bushfires in 2009. A disabled woman living in the Dandenongs had her car clamped by the Sheriff. It was Friday afternoon, and fires were still threatening the area. She rang the Ombudsman's office in a state of considerable distress as she wanted to be able to evacuate but couldn't. The Sheriff wouldn't unclamp her car till the debts she owed were paid.

After Ombudsman officers called the Sheriff and pointed out this was wholly unreasonable, the car was duly unclamped. The woman accepted her liability for the debt and the clamping of her car, but not on a day when it potentially threatened her life.

This action put not only the woman at risk, but also the Sheriff's officers who went into a high fire risk zone to clamp cars. *What were they thinking?*

## 2 *Lack of Discretion*

We also see discretion being expressly permitted in the law but not exercised. Victoria's Office of Housing has discretion to recover compensation from public housing tenants for damage to properties:<sup>27</sup> in itself, entirely reasonable, as people should not get away with damaging public property. But we found a default practice of the Department of Health and Human Services was to raise claims for almost the entire cost of repairing a vacated property, without taking into account the tenant's circumstances.<sup>28</sup>

We dealt with a case of an Aboriginal woman who had been evicted by the Department because it wrongly assumed she had abandoned her property.<sup>29</sup> Officials had gone to her flat in response to her application for a transfer and found it vacant and badly damaged. They assumed she did not live there and initiated proceedings in the Victorian Civil and Administrative Tribunal ("VCAT") to evict her. She did not turn up, because the notice was sent — as happened routinely — to the address she had vacated. So she was evicted and issued a \$20,000 bill. The Department did not know — because they made no

<sup>26</sup> See generally John R Taylor, 'The Experience of the Victorian Ombudsman in Dealing with Disasters' (Conference Paper, World Conference of the International Ombudsman Institute, 15 November 2012) 4–5.

<sup>27</sup> See Victorian Ombudsman, *Investigation into the Management of Maintenance Claims against Public Housing Tenants* (Parliamentary Paper No 343, 30 October 2017) 28 [121]–[125].

<sup>28</sup> *Ibid* 9 [27].

<sup>29</sup> *Ibid* 11–12; Victorian Ombudsman, *Complaints to the Ombudsman: Resolving Them Early* (Parliamentary Paper No 417, 24 July 2018) 14 ('*Complaints to the Ombudsman*').

effort to find out — that the damage had been caused by a violent partner. And she didn't even know about the bill until she applied again for services. *What were they thinking?*

Happily, we were able to save her having to initiate a Supreme Court appeal on a point of law; after our intervention, the Department waived the debt, apologised, and found her alternative accommodation.

I am also happy to report that practices have changed following our report, and we have been advised that cases to VCAT are markedly down: a just outcome for all. It helps that the Ombudsman could consider the applicability of the Department's procedures guiding it to exercise discretion. Tribunals and courts have a narrower remit.

### 3 *Too Much Discretion*

This complaint involved an alcohol interlock device: a good thing to prevent people driving drunk on our roads. This device requires a penalised driver to provide a breath sample randomly when the device sounds, to ensure there is no alcohol in their system. In this complaint, VicRoads had recorded a violation against the licence of a woman with one of these devices.<sup>30</sup>

She had dropped her car off at the car wash to be cleaned and, while there, the device had sounded for a breath test to be provided. Of course, no one provided a sample and the camera recorded a man cleaning the back of her car. As it happened, when she returned to her car, the device sounded again and she was recorded providing a clean sample. Clearly, she was not driving drunk.

But VicRoads recorded a violation and then decided not to revoke it because the regulations say that where it is unclear who is in possession of the vehicle when a sample is not produced, it *could* record a violation. This meant having to keep the device in her car for another six months and at least another \$1,000.

While VicRoads *could* make this decision, *what were they thinking?* I am happy to report that following intervention by my office, VicRoads withdrew the violation.

But why do such things happen? One explanation is that there is a natural nervousness about taking too much into your own hands as a public servant. It's safest to be cautious so you don't get criticised — computer says no. Or it's easiest to assume 'may' means 'must' — that way, you don't have to think.

<sup>30</sup> *Complaints to the Ombudsman* (n 29) 11; Victorian Ombudsman, *VicRoads Complaints* (Parliamentary Paper No 17, 19 February 2019) 37–8.

#### 4 *Human Error*

Moving on to our old friend, human error. We all make mistakes, but sometimes public servants are not keen to admit them.

We see this with disputes of all kinds, and rates notices from local councils are a rich vein. Errors are made and then compounded in the grim determination not to concede the mistake, and in the sometimes frankly rude or clinical manner in which decisions are communicated. Then the unfairness can shift in the person's mind from being about the complaint to the way it's been dealt with.

My 'favourites' are what we call lawyers' apologies — when is an apology not an apology? Usually when it starts with: 'It is unfortunate that ...' — from which you have no sense that anyone is actually sorry for anything except about having to write a letter. And often I hear that agencies don't apologise because of fear of litigation. In my view this is largely a fallacy, but in any event confirms the recommendation I made about amending the *Wrongs Act 1958* (Vic), to prevent apologies being used as an admission of liability in civil proceedings.<sup>31</sup>

There is evidence that a good apology has the power to heal and, in doing so, prevent a dispute escalating. Perhaps the Ombudsman could become the great healer after all?

#### 5 *Achieving Broad Resolution*

My last complaints story is a particularly powerful example of imbalance of power. It's hard to beat the story of a very elderly resident in an aged care home, up against the government.<sup>32</sup>

Allan Lorraine, then aged 91, was living with his wife, who had dementia, in an aged care home that went bankrupt. It was not a government facility, but it was registered with, and supposedly regulated by, the Department of Health (now the Department of Health and Human Services).

The home went into liquidation, taking with it the bonds paid by the residents and their families of around \$4.5 million. The impact this had on residents, many of whom were in their 90s and some into their 100s, is difficult to imagine. It went beyond simple dollars and cents. The residents did not just lose their money: they lost their dignity and their independence.

<sup>31</sup> Victorian Ombudsman, *Apologies* (Parliamentary Paper No 283, 11 April 2017) 13.

<sup>32</sup> Victorian Ombudsman, *Investigation into Department of Health Oversight of Mentone Gardens, a Supported Residential Service* (Parliamentary Paper No 29, 14 April 2015).

So Allan Lorraine had complained to the Department. Something must have gone wrong, he thought, for a regulated facility to go bankrupt like that. However, the Department denied any responsibility. A classic case of stonewalling bureaucracy — it wasn't their problem.

When he complained to my office, we began making enquiries. What we found was so concerning that I launched a formal investigation, and in the report I tabled a few months later, I described the Department's handling of Mentone Gardens as 'a litany of failings'.<sup>33</sup>

While an investigation is all very well, what is the just outcome for people who had lost everything, who had sold family homes to provide for their old age? That seemed obvious, so a key recommendation I made to the government was that it make an ex gratia payment to residents who lost money when Mentone Gardens went out of business.<sup>34</sup>

The point I made to an emotional meeting with the residents and families on the day I tabled the report was that I can't enforce my recommendations. But I could, and would, monitor them. In fact, I had written to the Minister during the investigation, to put him on notice that I was minded to recommend an ex gratia payment — knowing that governments do not, rightly, hand out public money lightly. So, when I tabled the report in April I referred to the letter I'd written the previous December, and formally recommended that the payments be made by the end of June.<sup>35</sup>

I made it clear to the Minister that his response to my recommendations was entirely a matter for him, but that I intended to make it public. And I am happy to report that the government paid out \$4.33 million to the residents and families: everyone entitled to compensation got paid. The persuasive powers of the Ombudsman strike again, and Allan Lorraine received an Order of Australia Medal for his efforts.<sup>36</sup>

### B *Maladministration and Improper Conduct*

I don't just deal with complaints, I also deal with maladministration — usually something short of outright corruption but still wrong. Through this

<sup>33</sup> Ibid 4.

<sup>34</sup> Ibid 52.

<sup>35</sup> Ibid.

<sup>36</sup> Nicholas Payne, 'Advocate, 92, Recognised with OAM for Efforts in Reclaiming \$4.33m', *Mordialloc Chelsea Leader* (online, 29 June 2016) <<https://www.heraldsun.com.au/leader/inner-south/advocate-92-recognised-with-oam-for-efforts-in-reclaiming-433m/news-story/efe40012703bb607994839c8b63a4ddf>>, archived at <<https://perma.cc/2E3Q-Y8RK>>.

work, we come across people acting on their temptation to do things the easy way or for ulterior motives — many who try to justify their actions by claiming the rules don't really apply to them.

Skiers may have heard of this case, which focused on the use of public funds by some of the senior management and board of the popular alpine resort of Mt Buller and Mt Stirling.<sup>37</sup> We found a CEO who thought he could use public funds to entertain his friends and family with free holidays and ski passes, and spend public money on what were primarily family holidays. The CEO thought this was all OK, including using his 'professional network' to provide family holidays to his friends. It wasn't just the CEO: the property manager used over \$24,000 of the public purse on family trips as 'research and development'. He told us he had to take his family because he was researching a family resort.

These types of cases boil down to the core principle that taxpayers' money should not be used for personal gain — whatever the excuse. And part of my role is to look at the cleanliness of the hands — and fingernails — of those who take from the public purse. By the way, neither of those people are still employed in the Victorian public sector.

### C Human Rights

Finally, let me say something about the human rights part of my work. When the Victorian Ombudsman was established nearly 50 years ago, it was part of a worldwide expression of support for values that underpin the protection of human dignity and government accountability. It long predates, but happily now complements, more recent developments in human rights institutions.

While imbalance of power can be felt by anyone dealing with government, it is particularly acute for people in detention — being deprived of liberty must be the ultimate power imbalance.

The *Ombudsman Act* gives my office a power to investigate administrative actions by Victorian state and local government authorities, or bodies acting on their behalf. This includes a power to investigate whether an administrative action is incompatible with a human right set out in our *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter') — Victoria being one of

<sup>37</sup> Victorian Ombudsman, *Investigation into Allegations of Improper Conduct by Officers at the Mount Buller and Mount Stirling Resort Management Board* (Parliamentary Paper No 280, 20 March 2017).

the few places in Australia to have a human rights charter in legislation. I am glad to see that Queensland has recently followed suit.<sup>38</sup>

My jurisdiction covers many of the authorities that detain people in Victoria. The term ‘administrative action’ sounds dry but has a wide meaning: in the context of detention, it could include a decision to search a detainee, a refusal to allow family visits, or a failure to provide reasonable medical care.<sup>39</sup>

My office currently monitors the treatment of detainees in the following ways:

- We take complaints direct from detainees or appropriate representatives. The office has a ‘freecall’ telephone line at all adult prisons and youth justice facilities in the State. Telephone calls and mail to the Ombudsman are exempt from monitoring by authorities.<sup>40</sup>
- We have used the ‘own motion’ powers in the *Ombudsman Act* to investigate systemic issues at places of detention without the need for a complaint, such as the reports I have tabled into the rehabilitation and reintegration of prisoners in Victoria, and youth justice facilities.<sup>41</sup>
- Ombudsman officers have been visiting adult prisons for at least 30 years to take complaints and observe conditions. They have also visited youth justice facilities, ‘secure welfare services’ for children and young people in the child protection system, and Victoria’s secure forensic mental health hospital.

When, in 2017, the Commonwealth government announced that Australia would ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (‘OPCAT’),<sup>42</sup> people might have assumed it would be business as usual in Victoria.

<sup>38</sup> *Human Rights Act 2019* (Qld).

<sup>39</sup> See *Ombudsman Act* (n 4) s 2(1) (definition of ‘administrative action’ paras (a)–(b)).

<sup>40</sup> *Corrections Act 1986* (Vic) s 47(1)(m)(iv); Corrections Victoria Commissioner, *Commissioners Requirements: Prisoner Telephone System* (CR 4.2.1, April 2016) 5 [4.6.1]; ‘Making a Complaint’, *Corrections, Prisons & Parole* (Web Page, 7 May 2019) <<https://www.corrections.vic.gov.au/making-a-complaint>>, archived at <<https://perma.cc/M8QJ-WUMG>>.

<sup>41</sup> Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* (Parliamentary Paper No 94, 16 September 2015); Victorian Ombudsman, *Report on Youth Justice Facilities at the Greenvale Unit of Barwon Prison, Malmsbury and Parkville* (Parliamentary Paper No 263, 6 February 2017).

<sup>42</sup> George Brandis and Julie Bishop, ‘Ratification of OPCAT Caps Year of Significant Human Rights Achievements for Turnbull Government’ (Media Release, 15 December 2017) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressre/1/5689548%22>>, archived at <<https://perma.cc/WD5F-7QV3>>; *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,

Victoria already has a right to protection from torture and other cruel, inhuman or degrading treatment in the *Charter*.<sup>43</sup> The *Charter* also provides for a right to humane treatment for people deprived of liberty<sup>44</sup> and specific rights for children.<sup>45</sup> The State also has multiple monitoring bodies that try to ensure these rights are protected in practice.<sup>46</sup>

For those of us working in this area, however, it was clear that *OPCAT* would require change. It introduces more rigorous standards for local inspections of places of detention by National Preventive Mechanisms ('NPM').<sup>47</sup> By opening detention to United Nations scrutiny, it also demands much closer attention to international standards for the treatment of detainees.

One of the privileges of being the Ombudsman is that I have almost total discretion under my Act to investigate as I see fit, whether or not I receive a complaint, which we refer to as 'own motion' powers.<sup>48</sup> So given the significance of the Commonwealth government's announcement to ratify this treaty, I decided to investigate the practical changes needed to implement *OPCAT* in Victoria.

The investigation mapped places of detention in Victoria and how they are monitored, and compared this against *OPCAT* standards, which among other things require monitoring bodies to have functional independence and the ability to publish reports. It also tested how *OPCAT* inspections might work in practice by conducting a pilot *OPCAT*-style inspection at Dame Phyllis Frost Centre, Victoria's main women's prison.

The investigation report was tabled in the Victorian Parliament on 30 November 2017.<sup>49</sup> The report made a number of findings, including concerns about the high use of force and restraint, the number of women on long-term separation, and routine strip searching of women before and after contact visits.

opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006) ('*OPCAT*').

<sup>43</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10.

<sup>44</sup> *Ibid* s 22.

<sup>45</sup> *Ibid* ss 17(2), 23.

<sup>46</sup> See, eg, *ibid* pt 4, which outlines the functions and powers of the Victorian Equal Opportunity and Human Rights Commission.

<sup>47</sup> *OPCAT* (n 42) arts 17–23.

<sup>48</sup> *Ombudsman Act* (n 4) s 16A.

<sup>49</sup> Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and Inspection of the Dame Phyllis Frost Centre* (Parliamentary Paper No 351, 29 November 2017).

My recommendations are just that: recommendations. I cannot enforce them, and rightly so, as many have a financial or public policy impact. The Ombudsman is not responsible for government policy or the State budget. But I have the power to report on the progress and implementation of my recommendations, and over 95% of my recommendations are accepted, including from the investigation report on the Dame Phyllis Frost Centre.<sup>50</sup>

The preventative nature of *OPCAT* inspections distinguishes them in purpose and methodology from other types of visits, including the more traditional Ombudsman investigations. *OPCAT* shines a light into the dark places of detention not only to prevent abuses, but also to look at how they are working, or not working, towards rehabilitation.

To continue this work, last December I launched a second ‘own motion’ investigation related to *OPCAT*.<sup>51</sup> This investigation features a thematic inspection of the use of practices that may lead or amount to the ‘solitary confinement’ of children and young people in several different closed environments.

In an Australian first, my office has put together an advisory group comprised of leading oversight bodies and civil society organisations to assist the investigation. I have also established a multidisciplinary, multi-agency inspection team to inspect a maximum-security prison, a youth justice centre, and a secure welfare facility. Members of the advisory group have provided staff and other expertise to the inspection team, including expertise in dealing with childhood trauma and mental health.

A thematic inspection across multiple facilities presents a unique opportunity to examine practices across different closed environments, allowing the investigation to identify both examples of good practice and areas for improvement. The inspection team has gathered first-hand observations, including speaking confidentially with children, young people, and staff.

Solitary confinement is known by many names — segregation, isolation, separation, lockdown, Supermax, the hole, the slot — but the *United Nations Standard Minimum Rules for the Treatment of Prisoners* define it as the ‘confinement of prisoners for 22 hours or more a day without meaningful

<sup>50</sup> Ibid; *Annual Report 2018* (n 24) 83; Victorian Ombudsman, ‘Ombudsman to Investigate the Use of “Solitary Confinement” and Young People’ (Media Release, 6 December 2018) <<https://www.ombudsman.vic.gov.au/News/Media-Releases/Ombudsman-to-investigate-the-use-of-solitary-confi>>, archived at <<https://perma.cc/Q9TE-USRD>> (‘Solitary Confinement and Young People’).

<sup>51</sup> ‘Solitary Confinement and Young People’ (n 50).

human contact.<sup>52</sup> Prolonged solitary confinement is taken to be for a period of over 15 consecutive days, after which irreversible harmful psychological effects can occur.<sup>53</sup> There is a growing bank of evidence that suggests long-term isolation can ‘alter the chemistry and structure of the brain.’<sup>54</sup>

We know solitary confinement may be a legitimate response in some circumstances: for example, as a temporary measure to ensure a person is not at risk of harming themselves or others.

But the punishment for crime is deprivation of liberty — not humanity. I doubt we would have seen those shocking pictures of young people restrained in the Don Dale Youth Detention Centre in the Northern Territory if *OPCAT* had been in place. Preventative inspections can ensure that cruel, inhuman, and degrading practices are placed in the spotlight and eradicated.

The Victorian government has not announced which agency or agencies will serve as Victoria’s NPM and where *OPCAT* inspections will take place. Whatever it decides, the NPM needs to be supported by clear legislative powers and protections, adequate funding, and access to information.

The ratification of *OPCAT* is an important symbol of Australia’s commitment to human rights. Its implementation, through setting up, resourcing, or empowering independent agencies, is equally important in ensuring that that commitment is not merely symbolic.

#### IV CONCLUSION

So what does any of this say about the Ombudsman and justice? It’s interesting to reflect that the traditional styles of the law would not have found a solution in the cases I’ve described. But there’s more than one way to peel a potato, as the cat lovers say, and justice comes in many different colours and

<sup>52</sup> *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) annex r 44.

<sup>53</sup> *Ibid*; Juan E Méndez, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/66/268 (5 August 2011) 9 [26].

<sup>54</sup> Maclyn Willigan, ‘What Solitary Confinement Does to the Human Brain’, *Solitary Watch* (Web Page, 4 August 2014) <<https://solitarywatch.org/2014/08/04/what-solitary-confinement-does-to-the-human-brain/>>, archived at <<https://perma.cc/FD2A-8357>>. See also Dana G Smith, ‘Neuroscientists Make a Case against Solitary Confinement’, *Scientific American* (Web Page, 9 November 2018) <<https://www.scientificamerican.com/article/neuroscientists-make-a-case-against-solitary-confinement/>>, archived at <<https://perma.cc/8R85-N8ZU>>.

shades. One of the great joys of the role is not to be bound by precedent, or the rules of evidence, or the limitations of our adversarial system.

To quote the Irish statesman Edmund Burke:

It is not what a lawyer tells me I *may* do, but what humanity, reason, and justice tell me I *ought* to do.<sup>55</sup>

It is the guiding principle of Ombudsmen the world over, and I commend it to you.

<sup>55</sup> Edmund Burke, 'On Conciliation with America' in William Jennings Bryan and Francis W Halsey (eds), *The World's Famous Orations: Ireland 1775-1902* (Funk and Wagnalls, 1906) vol 6, 3, 31 (emphasis in original).