

Owen v The Ombudsman [1999] NTSC 126

PARTIES: OWEN, Warwick George

v

BOYCE, Peter, The Ombudsman

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 162/99

DELIVERED: 19 November 1999

HEARING DATES: 20 October 1999

JUDGMENT OF: MARTIN CJ

REPRESENTATION:

Counsel:

Plaintiff:: S Southwood
Defendant: R Layton QC

Solicitors:

Plaintiff: Ward Keller
Defendant: Hunt & Hunt

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Owen v Boyce [1999] NTSC 126
No. 162 of 1999

BETWEEN:

WARWICK GEORGE OWEN
Plaintiff

AND:

**PETER BOYCE, THE OMBUDSMAN
OF THE NORTHERN TERRITORY OF
AUSTRALIA**
Defendant

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 19 November 1999)

Background

- [1] On 1 June last a reporter from the Northern Territory News sent a fax to the Commissioner of Police which read:

“We understand the professional responsibility group has begun an investigation into allegations against police Superintendent George Owen.

We understand it relates to him tipping off the subject of a search warrant after signing the search warrant himself.

Can you confirm the incident?

Can you explain what action you are taking and has the officer been suspended?

Please explain the process of the investigation.

Is it dealt with internally or as a criminal offence?

We would like a response to these questions today.”

[2] The cover note contained this message:

“Questions in relation to a story we are running”.

[3] At about the same time a copy of the fax was sent to Jane Mundy who, it seems, works as a media officer with the Northern Territory Police, Fire and Emergency Services. The cover note reads:

“Jane,

Questions in relation to a story we will be running. This is the talk of town and we have had four calls just this morning on the matter. Thought I’d save time by sending through questions. I hear you and Mr Bates are expecting media enquiries.

Nikki Voss”

[4] The response of Deputy Commissioner Valentin, conveyed through Ms Mundy, was that the allegations had not been previously made and no complaint had been made to the Police Professional Responsibility Unit. He added that he had directed an enquiry be conducted into the allegations, that the Ombudsman would be advised, and that the results of the enquiry would be reported to the Ombudsman. On 2 June there was published in the newspaper a story headed “Drug raid tip-off: top cop probed”.

[5] The opening paragraph of the report reads:

“Police ordered an inquiry last night into allegations a senior Darwin police officer tipped off a woman that her home was to be raided to search for drugs.

Police ordered the investigation after the Northern Territory News put questions to NT Police Commissioner Brian Bates raised

by police officers and members of the public.

It is understood the senior police officer has been accused of contacting the woman after he was asked to sign a drug squad warrant to search the house.”

- [6] Thus commenced a series of events which led to the Ombudsman summoning the plaintiff to give evidence before him concerning an investigation upon which the Ombudsman had embarked.
- [7] In these proceedings the plaintiff challenges the jurisdiction of the Ombudsman to undertake the investigation and thus the validity of the summons. Essentially the plaintiff says that before the Ombudsman has jurisdiction it is necessary for there first to have been a complaint by an aggrieved person, and neither precondition was fulfilled. For the Ombudsman, it was put that in the circumstances both of those preconditions were met, but if not, then the statute authorises him to conduct an investigation of his own motion and that that is what he is doing.

Legislation

- [8] The *Ombudsman (Northern Territory) Act 1978* (NT) provides for the appointment of an Ombudsman, and defines his functions and powers. There is no dispute as to the appointment of the defendant to that office.

[9] The functions which are relevant to this case are prescribed in s 14 as follows:

“MATTERS FOR INVESTIGATION

- (1) Subject to this Act, the functions of the Ombudsman are –
 - (a) to investigate any administrative action taken by, in or on behalf of any department or authority to which this Act applies; and
 - (b) to investigate any action taken, or refusal or failure to take an action, by a member of the Police Force of the Northern Territory, whether or not that action was an administrative action, where that action was, or was purported to be, for or in connection with or incidental to the exercise or performance of that member's powers, duties or functions as a member of the Police Force.
- (2) The Ombudsman shall not investigate a matter in pursuance of subsection (1)(b) unless that matter –
 - (a) is the subject of a complaint –
 - (i) not made by a member of the Police Force or by a person who is, within the meaning of the *Public Sector Employment and Management Act*, an employee under the direct control of the Commissioner of Police;
 - (ii) made, subject to section 17(3), by the person aggrieved to a member of the Police Force;
 - (iii) concerning a member of the Police Force other than the member to whom it is made; and
 - (iv) referred to the Ombudsman by the Commissioner of Police;
 - (b) is or is alleged to be an action taken by a member of the Police Force in consequence of such a complaint so referred; or
 - (c) is the subject of a complaint concerning a member of the Police Force made direct to the Ombudsman.

(3) As soon as practicable after a complaint about an action referred to in subsection (1)(b) is made to a member of the Police Force, that member shall refer the complaint to the Commissioner of Police who shall, as soon as practicable, refer it to the Ombudsman.

(3A) Where a complaint concerning a member of the Police Force is made direct to the Ombudsman, the Ombudsman shall, before carrying out an investigation, refer the complaint to the Commissioner.

(3AA) Subject to subsection (4), if the Ombudsman and the Commissioner of Police have agreed on administrative arrangements relating to the manner in which complaints referred to the Ombudsman pursuant to subsection (3) may be dealt with, any complaint referred to the Ombudsman in pursuance of that subsection shall be dealt with in accordance with those arrangements.

(4) Where the Ombudsman investigates a matter in pursuance of this section –

(a) his power to investigate the complaint referred to him by the Commissioner of Police includes a power to investigate any action taken by a member of the Police Force in consequence of that complaint; and

(b) for the purposes of the application of this Act, he shall investigate the matter as though –

(i) it was an administrative action; and

(ii) the complaint referred to him by the Commissioner of Police was a complaint made by the complainant to the Ombudsman under this Act and received by the Ombudsman on the date on which it was received by the member of the Police Force to whom it was made,

but the Ombudsman is not required, in pursuance of section 19(1)(a), to inform the Commissioner of Police of his intention to conduct the investigation.”

[10] The plaintiff does not argue that the matter the subject of the allegation about which Ms Voss made enquiries does not fall within s 14(1)(b). He

says that the communications from Ms Voss do not amount to a complaint. It is plain that on the face of those documents they were enquiries made by the reporter as to an allegation which had been made to her.

- [11] The report of 2 June also refers to an enquiry already being conducted into an allegation and identifies the reporter's source of information as being "police officers and members of the public".
- [12] There is in evidence an internal police document headed "Complaint against Police", dated 4 June 1999, which speaks of a complaint having been lodged by the reporter on behalf of the NT News, the substance being "question received from the NT News regarding allegation that Superintendent George Owen had tipped off the subject of a search warrant after signing the search warrant himself." The complaint is stated to have been received by Senior Sergeant Colbrook, who signed that document.
- [13] The acting Commander of the Professional Responsibility Division of the Force directed the matter to Acting Superintendent Rennie for investigation, and on 5 June he wrote to the Acting Ombudsman enclosing papers "forwarded for your information" adding:

"While I appreciate that the attached documents do not provide much information other than an allegation, I do not consider this matter warrants oversight by the Joint Review Committee."

- [14] The Senior Investigation Officer (Police) in the Office of the Ombudsman replied that after consideration the Ombudsman had agreed that the matter

did not need to be subject to the supervision of the Joint Review Committee, “although it would be appreciated if a copy of the investigation file could be forwarded with the report”.

[15] On 7 June Senior Sergeant Rennie interviewed Ms Voss about the allegation made in the newspaper report in relation to the “Drug raid tip-off”. Ms Voss acknowledged that the report of 2 June was hers, but declined to reveal who supplied her with the information.

[16] She said she had no more information or evidence to assist in the police investigation. It has not been agitated that the Ombudsman is not empowered to investigate a matter, the subject of a complaint made by a member of the Police Force (s 14(2)(a)(i)).

[17] Senior Sergeant Rennie told Ms Voss, in the presence of the Managing Director and Editor of a newspaper that “The NT News had been made the complainant in this matter”. None of the newspaper people commented on that. It is clear from the context of the conversation between the Senior Sergeant and the reporter that “the matter” was the report in the newspaper. She was informed that a final report would be made by the Ombudsman.

[18] The report did not make any allegations, all it did was to report upon what the reporter understood to be the state of an investigation already under way. That members of the Police Force considered that the newspaper report was a “complaint” and warranted investigation which would involve the Ombudsman, does not make the report a complaint to found jurisdiction

under s 14 (1)(b) and s 14(2). Whether it was a complaint or not is for the Court to decide.

[19] Even when coupled with the earlier fax to the Commissioner and Ms Mundy and the cover notes, it is my opinion that there is no complaint in any of them or when taken together. All the material is predicated upon an allegation made by an unidentified person or persons to the reporter; the reporter makes no allegation. To use the newspaper vernacular, the reporter had received a “tip-off” that something was afoot and she made enquiries for the purposes of the newspaper, the police responded by commencing an internal investigation, but not in response to a complaint within the terms of the Act.

[20] That is sufficient to deal with the argument about whether there was a complaint. However, I shall deal with the question as to whether the reporter or newspaper was a “person aggrieved”, and if the newspaper report amounted to a complaint whether it was made to a member of the Police Force. I think not, on either account.

[21] The alleged action was that the plaintiff informed an occupier of premises that he had signed a warrant authorising a search of those premises; whether for drugs or otherwise, is immaterial for these purposes. No doubt the public has an interest in ensuring that such an allegation is properly investigated and to know the outcome. The interests of the Police Force itself require no less. But that does not mean that any member of the public

can be regarded as a “person aggrieved”, nor that a newspaper representing the public interest falls into that category.

[22] The Act recognises in s 18(1)(c) that a person claiming to be aggrieved may not have a sufficient interest in the matter raised in a complaint. It is necessary to pay regard to the statutory context in which the words are placed, but the tendency of the courts has been to construe the expression liberally, they are not “enclosed in technical rules”. With respect, I adopt the conclusion of Lockhart J in *Right to Life Association v Secretary, Department of Human Services and Health* (1995) 128 ALR 238. The interest of the person claiming to be aggrieved “must rise above that of an ordinary member of the public”. No authority has been cited which indicates that a newspaper is a “person aggrieved” in the relevant sense.

[23] Nor can it be right to hold that the complaint, if there was one, by the person aggrieved, if there was one, was made to a member of the Police Force. The intention of the Parliament is not to treat allegations at large as falling within the Act, even though police no doubt read newspapers. The complaint must be made to an identifiable member.

[24] The fax from Ms Voss to the Commissioner was to a member of the Police Force, but for reasons already expressed, it did not amount to a complaint and she was not a person aggrieved.

[25] There was a referral to the Ombudsman, but I doubt that it was under s 14(2)(a)(iv) of the Act. That is not to be criticised, there being good

reason why the Commissioner would think it desirable that his investigation into a matter which had the potential to publicly reflect adversely upon the Force, should be reviewed by the Ombudsman.

[26] There is an administrative arrangement as envisaged by s 14(3AA) which comprised in a document titled “Complaints Against Police – Joint Review Committee – Administrative Procedures”, dated 12 March 1985 signed by the then Commissioner of Police and the Ombudsman. Since there was no complaint referred by the Commissioner to the Ombudsman under the Act, the arrangements are irrelevant.

[27] At the conclusion of the police investigation, a report was prepared by Acting Commissioner Mannison and he recommended that the file be forwarded to the Ombudsman for review (with a request that it be expedited given public speculation), that the Ombudsman be requested to advise the General Manager of the newspaper of the result of the review, and that the plaintiff be counselled “that he should not approve applications for search warrants where he has a personal involvement”.

[28] A letter from deputy Commissioner Valentin of 18 June to the Ombudsman, enclosing the interviews with all persons involved, expressed the view that the allegations made by the newspaper were without foundation and that he was satisfied that there was no similar event involving the plaintiff. The letter proceeded:

“However and in view of the seriousness of the allegation against the Detective Superintendent, I would be grateful for your independent consideration of the attached material. I consider this step is necessary to ensure the integrity of our processees and that public confidence in the police force can be maintained”.

[29] On 3 September the plaintiff was informed that the Ombudsman had decided that the matter was to be investigated further, and that the Commissioner had agreed. The witnesses, including the plaintiff, were to be interviewed again by police with a member of the Ombudsman’s staff present. The plaintiff declined to attend when required by a police Superintendent and was confronted by a decision made by the Ombudsman to invoke what he described as his formal investigation functions pursuant to s 16 of the Act.

[30] The plaintiff was served with a summons requiring his attendance at the Ombudsman’s Office to give evidence and produce documents on 15 October. The summons states that it concerned:

“An investigation into the propriety of your conduct in being involved in a police investigation into a suspect (BD) which resulted in the issue and execution of a search warrant on 18 May 1999 for premises situated at Oriole Street, Wulagi in circumstances where you may have placed yourself in a situation of conflict of interest or potential conflict of interest by virtue of a prior association with the suspect and other members of his immediate family.”

[31] These proceedings were then instituted upon the basis that a question has arisen in the course of an investigation as to whether the Ombudsman has jurisdiction to conduct the investigation (s 30(1)).

[32] Enough has been said to demonstrate, in my opinion, that the Ombudsman has no jurisdiction under s 14(1)(b) because there was no complaint made, if

a complaint was made it was not made by an aggrieved person, and if it was made by an aggrieved person, then it was not made to a member of the Police Force.

[33] Notwithstanding that s 14(2) provides that the Ombudsman shall not investigate a matter in pursuance of s 14(1)(b) unless the matter is the subject of a complaint, he asserts jurisdiction under s 16, which reads:

“OTHER INVESTIGATIONS

(1) Any investigation that the Ombudsman is authorized to conduct under this Act, other than pursuant to section 15, may be conducted either of his own motion or on a complaint made in accordance with section 17 or referred to him by the Commissioner of Police pursuant to section 14(3).

(2) An investigation of a complaint made under this Act relating to an action of a department or authority to which this Act applies may proceed, notwithstanding that the complaint may not on its fact appear to be in respect of any administrative action taken by that department or authority, if, in the opinion of the Ombudsman, there is a likelihood that the cause for complaint arose from or as a result of such an administrative action.”

[34] I was assisted by written submission in relation to this aspect of the matter.

It will be noted that the functions of the Ombudsman as described in s 14(1) are subject to the Act, and that s 14(2) provides that the Ombudsman shall not investigate a matter in pursuance of s 14 (1)(b) unless certain conditions are fulfilled. It was not contended that the action of the plaintiff upon which the newspaper report was based was an administrative action to which s 14(1)(a) applies.

[35] To my mind s 14(1)(b) and subs (2),(3A),(3AA) and (4) establish a special regime to govern the Ombudsman’s powers in relation to matters falling

within s 14(1)(b). That regime and the administrative arrangements entered into pursuant to s 14(3AA) recognise that the Police Force stands in a particular relationship to members of the public and that it has its own established statutorily prescribed system of discipline which is found in Pt V of the *Police Administration Act 1979* (NT). Members who commit a breach of discipline may be punished by dismissal or otherwise. The Ombudsman has no such power. He can make a report to the Commissioner with such recommendations as he thinks fit. If the recommendations are not carried out, the Ombudsman may furnish a report to the Minister for presentation to the Legislative Assembly (see generally s 26).

[36] The scheme in s 14 shows that it was the intention of the Parliament that when a complaint is made either to a member of the Police Force, referred on to the Commissioner, or to the Ombudsman, each is to refer it to the other, in the case of the Commissioner “as soon as practicable” and in the case of the Ombudsman “before carrying out an investigation”. Complaints to the Commissioner are to be dealt with under the administrative arrangement. Section 14(4) regulates the Ombudsman’s investigations in so far as complaints are referred to him by the Commissioner and envisages that investigations into the complaint may have been undertaken within the Police Force. The head of no other authority or department is obliged to refer any complaint made to him or her to the Ombudsman.

- [37] The structure of these provisions and the administrative arrangements are specially attuned to deal with complaints against police. They stand alone in the context of the Act.
- [38] The procedural requirements as to complaint contained in s 17 only apply to complaints to the Ombudsman and as with other provisions of the Act based on that avenue of complaint, are of no application here. If there was a complaint, it was made to the Commissioner.
- [39] The defendant submits that s 16 authorises the Ombudsman to investigate whatever is authorised by the Act of his own motion. That is, no complaint is required to found jurisdiction in relation to actions of a member of the Police Force as a member. It appears that no complaint is prescribed as a precondition to investigation by the Ombudsman of administrative actions (as defined) taken by or on behalf of any department or authority, including the Police Force (s 14(1)(a) and the definition of “department”). The distinction in s 14(1)(b), summarised, goes to actions of a member of the Police Force where the action was in the exercise of the member’s powers as a member of the Force (see the *Police Administration Act*, s5 and s6), as opposed to actions which were not in the exercise of those powers. That may be because a member of the Force in the exercise of his powers as a member is not an agent or servant of the Executive, those powers being personal to him and the responsibility for their exercise being his or her’s alone (*Enever v The King* (1906) 3 CLR 969).

[40] The defendant's submissions proceed as follows:

“There is no warrant for reading down the provisions of Section 16 so that it can either not apply at all to 14(1)(b) jurisdiction or only applies when there is a complaint. To do the latter would be an inherent contradiction of the phrase to act “on his own motion” which must mean in the context, a right to act without a complaint having been made.

Even though Section 14(2) states the “the Ombudsman shall not investigate a matter in pursuance of subsection (1)(b) unless that matter-(a) is the subject of a complaint ...”, that subsection is procedural, it is based on the jurisdictional subsection 14(1)(b) and constitutes a code to be followed when a complaint is received. It cannot operate so as to modify a different means of implementing an investigation under section 16 which also has its jurisdictional source in subsection 14(1)(b).

To interpret the Act in a restrictive manner so that there is no ability for the Ombudsman to act of own motion in respect of matters falling within Section 14(1)(b) would be a lacuna. Matters may arise in the performance and exercise of powers duties and functions of a police officer where an inappropriate and they may not be the subject of a complainant as the recipients of the actions may be benefited and have no interest in complaining. Such an outcome is clearly contrary to the spirit and intention of the Act. This becomes even more of deficiency if a restricted interpretation is given to the meaning of complaint which does not permit a public interest complaint to be made by a body such as a newspaper.

For completion of argument, although not directly relevant to this matter, is the provision in subsection 16(2). This subsection also expands the process of investigation to permit the Ombudsman to investigate a complaint even though on its face it does not appear to be in respect of an administrative action if in the view of the Ombudsman there is a likelihood that the cause for complaint arose or resulted from administrative action.”

[41] The submissions of the plaintiff is that the intention of s 16 is to compendiously describe the ways that an investigation can be conducted once jurisdiction is invoked, and that that provision does not give the

Ombudsman power of his own motion to conduct investigations into the matters referred to in s 14(1)(b). That submission is made upon the basis that there is a different regime applicable to actions by members of the Force as members. It is put that s 16(2) is irrelevant.

[42] The construction of the Act on this point is not without its difficulties, but I am persuaded that the plaintiff is right. Very special provisions regarding complaints against members of the Force arising from the exercise of their powers as members must prevail over the general power in the *Ombudsman Act* to conduct an investigation of his own motion. In my opinion, that power is a power which may be exercised in relation to an administrative action referred to in s 14(1)(a). It is suggested in the *Commonwealth Ombudsman and Defence Force Ombudsman's Annual Report 1987/88* the "own motion" power is one which allows broader issues underlying complaints to be investigated, that is, where a number of related complaints are received about a particular matter the Ombudsman may find in the course of investigating them that there are broader issues involved with the administrative action in question which should be investigated. A specific complaint about a matter of administration may, for example, when being investigated, lead to discovery of other matters of administration which an Ombudsman may consider should also be embraced in the course of the investigation being undertaken. Before commencing such an investigation, the Ombudsman is to inform the principal officer of the department or

authority and the responsible Minister in writing of his intention to conduct the investigation (s 19).

[43] The investigative power of Ombudsman under s 16(1) is limited to those authorised by the Act, and those referred to in s 14(1)(b) are not authorised unless there has been compliance with s 14(2).

[44] There will be orders as follows:

1. A declaration that the defendant has no jurisdiction to conduct an investigation into the matter concerning the plaintiff which was referred to the Office of the Ombudsman by the Commissioner.
2. A declaration that the defendant has no jurisdiction to conduct an investigation of his own motion pursuant to s 16 of the *Ombudsman (Northern Territory) Act* into a matter concerning the propriety of the plaintiff's conduct in being involved in a police investigation into a suspect (BD) which resulted in the issue and execution of a search warrant on 18 May 1999 at premises situated at Oriole Street, Wulagi.
3. That the defendant pay the plaintiff's costs of and incidental to the proceedings, certified fit for counsel to be taxed in default of agreement.
