

Speech by Western Australian Ombudsman Chris Field to the WA Chapter of the Australian Institute of Administrative Law at the Western Australian Club, 27 September 2007

Early perspectives from Chris Field on his role as the Western Australian Ombudsman

Introduction

It is a pleasure to be here today to speak to members of the Western Australian Chapter of the Australian Institute of Administrative Law. My thanks to Richard Hooker for his kind invitation to attend this event. I should say that it is a particular pleasure to be here today. While the office of the Ombudsman deliberately takes a multi-disciplinary approach to its work, no one aspect is, at least to me, more obviously important for the work of an Ombudsman than administrative law. The opportunity to meet a range of people with an interest and significant expertise in this area of the law is a very valuable opportunity for me.

The organisers have titled my presentation “Early perspectives on the role of the Western Australian Ombudsman” and I am indebted to them for doing so. The title allows me to roam reasonably widely across a range of issues that I have, from my initial observations, thought might be of interest to discuss with you today. The topic also contains its own caveat – it is early days for me, and those thoughts that I have as Ombudsman will, I hope, mature, develop and change over time.

I want to start today by examining the history and purpose of the office of the Ombudsman, with particular reference to the Western Australian Ombudsman. I will then go on to discuss some of the challenges that face my office, the growth and change in the office of the Ombudsman, our relationship with the public sector, before discussing the role of the Ombudsman in working with other integrity agencies in Western Australia. I will then discuss challenges to traditional notions of administrative redress posed by industry-based ombudsman schemes. Finally, I will touch upon a topic suggested to me by the organisers, namely whether the fact that the Ombudsman has recommendatory, rather than determinative, powers impacts on the effectiveness of the office of the Ombudsman.

I plan to speak for approximately 30 minutes, which hopefully will allow a good period of time for questions, but also given the experience and expertise of the attendees here today, some discussion about any of the issues I have discussed. I was informed by the organisers that there may be an interest in asking me a question about my former role on the Economic Regulation Authority and on this role, or my role as a consumer advocate, I would be delighted to talk insofar as it is appropriate for me to do so.

The office of the Ombudsman – History and Purpose

While I am new to the role, the office itself has a considerable history. Indeed, Western Australia led this country in creating the office of the Ombudsman in 1972. Outside of Australia, the office of the Ombudsman has a longer history again. While this year is the 35th anniversary of the Western Australian Ombudsman, in 2009, the Swedish Ombudsman will celebrate its bicentennial. Indeed, alongside ABBA and IKEA, the Ombudsman is the great Swedish export.

The Ombudsman began as a parliamentary inspector of the actions of the bureaucracy and has continued in this role through to today. Indeed, the formal title of the Western Australian Ombudsman is Parliamentary Commissioner for Administrative Investigations.

It is instructive to go back and read the Hansard debates on the creation of the Ombudsman's office – in fact, they make for particularly interesting reading. Back in 1972, the establishment of an Ombudsman was a highly controversial matter, vigorously opposed by many parliamentarians.

The forces that led government to set up the office in 1972 are no less compelling now than they were 35 years ago. Foremost among them was an awareness of the growing powers of public authorities to affect people's daily lives. Coupled with this, was the need to make agencies more accountable, by having a quick, accessible and low cost process for resolving people's concerns about the decisions and actions of officials.

The Ombudsman continues to play an important role in providing access to administrative justice for Western Australians. I am very pleased that thirty five years later, the office is well accepted and widely known, within government and the community. This is a great testament to my predecessors and their staff as well as the willingness of successive governments, and public servants, to embrace the office.

The Ombudsman undertakes two principal functions. First, we seek to resolve complaints that people have with the public service, local governments and public universities. We seek to undertake timely, thorough, objective and impartial investigations of complaints. In recent times I am very pleased that we have been able to significantly reduce older investigation cases on hand while dealing with a more complex caseload in a timely way. A focus on continuing to improve both timeliness and efficiency of our investigations will be of key importance in future years.

Second, we aim to improve public administration for the benefit of all Western Australians. To do so, we undertake a range of activities, including education and liaison with public administrators, investigations arising from complaints made to us, investigations of our own motion and participation in activities designed to improve the delivery of public services.

Challenges for my office

The context of our work has changed dramatically since we were first established, and as government structures and priorities evolve, so the office faces new challenges if we are to remain relevant and effective. I now want to turn to two of these challenges, namely increased complexity of cases and awareness and accessibility.

(1) Increased complexity of cases

The office of the Ombudsman faces a number of pressures on its services over the coming years, arising from a range of matters. One in particular is the increasing complexity of cases. Our office, and Ombudsman offices around the country have reported a significant increase in the complexity of cases they are being asked to resolve. I am not sure that there is particularly rigorous empirical evidence to prove this, and it would not be an obviously easy matter to measure, but certainly the anecdotal view of people with long experience in Ombudsman's offices suggest the trend is correct. There may be many reasons for this. As the complaint-handling processes of agencies approve, you would expect that simpler matters may be dealt with at an early, departmental level – we certainly encourage this process by referring complaints back to agencies in the first instance. We also encourage them to develop these skills and processes as does a range of standards and regulations.

It may also be that matters of public administration are becoming more complex over time, or perhaps complainants are becoming more demanding.

Whatever the reason, greater complexity may lead to less timely resolution, greater cost per case resolved, the possibility of less satisfaction for both complainants and respondents and a need for greater skills for our staff.

(2) Awareness and Accessibility

We will also need to ensure that our office is accessible to all Western Australians and, in particular, specific groups of the population, including regional Western Australians and indigenous Western Australians. How we reach out to these groups, making them aware of our services and ensuring that we are accessible to them, will be a challenge that we will embrace in the coming year.

Growth and change to the office of the Ombudsman

Consistent with experience elsewhere in Australia, the role of Ombudsman in this State has expanded to encompass a wider range of activities than complaints about public authorities.

Since May 2004, we have operated an industry funded Ombudsman scheme dealing with complaints about gas and electricity. I will come back to this shortly.

Following a recommendation of the Ford review of the Department of Community Development, we will soon be taking on responsibility for reviewing child deaths.

The Ombudsman also has functions under new terrorism legislation enacted in this State in 2006. We currently audit the use by the Crime and Corruption Commission and Western Australian Police of telecommunications intercept powers under Commonwealth legislation. There are proposals to extend our audit responsibilities further to cover surveillance devices and controlled undercover operations.

There is also a prospect that the responsibilities of the Ombudsman may be impacted by new privacy legislation, now before the parliament, and by proposed new human rights legislation currently the subject of community consultation.

I welcome these developments. The office of the Ombudsman needs to respond to the evolving needs of citizens and government, and maintain its relevance and effectiveness. As an office, we are committed to delivering timely, efficient and effective services in which parliament and the community can have confidence.

Relationship with the public sector

I would like through my role as Ombudsman to be able to recognise the very significant importance of public administration. A strong and positive relationship with the sector is something that I regard as fundamental to the work of the Ombudsman. Sometimes, the importance of what public administrators do, and how well they do it, can be lost when agencies like mine necessarily spend time focused on things that have gone wrong. It is important for all of us to acknowledge that the overwhelming majority of public administration is done well, by people committed to doing it well. This needs to be recognised and reinforced, in part to ensure that the Western Australian community continues to have confidence in government.

Role of the Ombudsman in ensuring integrity in public administration

One of the significant changes that has occurred over the past 35 years has been the growth in the number of watchdog bodies overseeing the operation of government agencies.

In Western Australia, my office, the Crime and Corruption Commission, the Auditor-General and the office of the Public Sector Standards Commissioner have a role in ensuring integrity in public administration. Those four offices together meet as the Integrity Co-ordinating Group. At the heart of all four of our offices is the concept of integrity in government. Individually and collectively, we exist to make government accountable and give the community confidence that it is operating with high levels of integrity.

One of the purposes of the ICG is to help ensure that we give consistent messages to the public sector, that we share information within the limits imposed by our respective legislation and take a coordinated approach to our activities.

Recommendatory powers versus Determinative powers

In a presentation to the recent 30th anniversary conference of the Commonwealth Ombudsman, a prediction was made that in the next 30 years the Ombudsman's recommendatory powers "will be effectively determinative". This is an interesting prediction and one about which a number of observations could be made. One that immediately occurs to me is whether recommendatory powers are already effectively determinative. Another might be to ask whether in fact it matters. One could also question whether they should be.

The fact is that the Ombudsman makes recommendations and those recommendations are in almost all cases followed. In the rare instances that they are not, there is obviously other mechanisms, such as public ventilation of the issue and reporting to Parliament that an Ombudsman can rely upon.

A matter that is perhaps more important than whether powers are recommendatory or determinative is the process that we use to reach our recommendations. The more rigorous, fair, and transparent the process, the more I would expect that our

recommendations ought to be accepted. In short, determinative powers would certainly not cure a lack of credibility in the way we undertake our work.

The issue of recommendatory powers versus determinative powers for the office of the Ombudsman has certainly become a more interesting question with the rise of industry-based ombudsmen. Those schemes, such as the Telecommunications Industry Ombudsman and the Banking and Financial Services Industry Ombudsman have determinative powers. They, of course, rarely use them, consistent with the observation that recommendations of parliamentary ombudsman are almost always followed.

Beyond the question of recommendatory or determinative powers, I want to raise two other issues that are potential challenges for watchdog agencies, my own included.

Firstly, watchdog agencies have significant powers and operate with a high level of autonomy from executive government. For example the Ombudsman has the powers of a standing royal commission. Without these powers and independence, we could not operate effectively. They are central to our role. I believe that this high level of autonomy must be balanced by appropriate accountability. The Ombudsman and other watchdog agencies operate with taxpayer's money and must be accountable to the Parliament for what they do. We need to be conscious at all times of the trust that is placed in us and that the exercise our extensive powers is undertaken not just impartially and fearlessly, but also responsibly - with great care and humility.

Secondly, I personally place significant importance on the office of the Ombudsman considering the materiality of the matters it pursues. It must also be aware that while revised administrative actions will hopefully be beneficial, revised policies and procedures will have costs – both direct costs and opportunity costs. I think the Ombudsman does have a proper role to consider - in making recommendations for administrative change arising from its reviews - whether the costs imposed on agencies of those matters we recommend are outweighed by greater public benefit.

Conclusion

In a recent speech given to the Commonwealth Ombudsman's 30th anniversary conference, the Secretary of the Department of Prime Minister and Cabinet, Peter Shergold, welcomed the conference as "an opportunity to present my personal view that the Ombudsman is a pain in the bum".¹

In fact he goes on to give what I think is this very good analysis of the role of the Ombudsman. He states:

"The existence of the Ombudsman acts as a powerful reminder to public servants that they have an obligation to ensure that their actions are not infected with administrative error, beyond legal authority, lack proper appropriation, deny natural justice, breach parliamentary convention or undermine public service values. It is a heavy responsibility to bear. Beyond that, the informed evaluation of the Ombudsman helps to drive higher administrative performance. His activities help to

¹ Peter Shergold, 'At least every three decades: Acknowledging the beneficial role of the Commonwealth Ombudsman', 30th Anniversary Conference of the Commonwealth Ombudsman, available at [http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/seminar_notes_Peter_Shergold/\\$FILE/seminar_notes_Peter_Shergold.pdf](http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/seminar_notes_Peter_Shergold/$FILE/seminar_notes_Peter_Shergold.pdf) (viewed 10 September 2007) at 2.

improve the quality of government service delivery and to ensure fair and impartial treatment of recipients – in an environment in which the ever-present danger of internal red-tape, poor record-keeping, bureaucratic and inadequate governance can find expression in administrative drift. The pain in the bum is a small price to pay for identifying and remedying defective administration. It might even increase the trust which citizens need to have in their governments, parliaments and public services”.²

At the heart of the Ombudsman’s office is a simple, but fundamental notion – we exist to serve the Western Australian Parliament and we exist to serve Western Australians. We do so by resolving the complaints and we do so by attempting to improve public administration. Principles of administrative law are at the heart of our credibility and processes, but I also take the view that economics and other social sciences underline and enrich how we understand our role.

I want to close with two thoughts.

First, in these first few months, it has been extremely pleasing for me to observe that the office enjoys the confidence of Parliament and bi-partisan political support. The work of the office is recognised and valued – a great reflection on my predecessors and the staff of the office. I feel confident that we are well placed to deal with the challenges that will face our office, the public sector and good administration generally.

The second, nearly as important as resolving well complaints from Western Australians, will be a good resolution as of approximately 5.00pm EST this Saturday to the AFL Grand Final. As a passionate supporter for my entire life, on this matter I simply say: Go Cats.

² Ibid at 4.

[www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/seminar_notes_AJ_Brown/\\$FILE/seminar_notes_AJ_Brown.pdf](http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/seminar_notes_AJ_Brown/$FILE/seminar_notes_AJ_Brown.pdf)