

Promoting Accountable and Transparent Decision Making in the Public Sector

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1. Introduction

It is a considerable pleasure to attend this seminar on accountability and transparency in government and to have this opportunity to share a platform with a number of my colleagues who play a critical role in ensuring that government is accountable and transparent.

In my presentation, I will focus on the role of the Ombudsman in promoting accountable and transparent decision making in the public sector. To do so, I have separated my paper into three parts: first, the importance of accountability and transparency in Government, second, the role of the Ombudsman in the accountability and transparency framework, and, finally, the Ombudsman as regulator, including thoughts on principles for good regulation.

2. The importance of accountability and transparency in Government

The first matter I want to address today is the importance of accountability and transparency in government. I do not propose to spend a significant amount of time on this issue. This is principally for two reasons. First, the issue of the importance of accountability and transparency in government is not, I think, a topic crying out for a significant defence. Indeed it is a great credit to the success of government and governance in this State, and Australia more generally, that we largely are able to take as read the idea that government accountability and transparency is important. Second, many of the reasons why accountability and transparency in government is important have already been very well canvassed by other speakers today.

In short, there are very many reasons why accountability and transparency in government is important and very many good reasons to be thankful that we largely take that importance as a universal truth. For today's purposes I simply want to focus on one reason why accountable and transparent government is important. Accountable and transparent government is, in my view, an integral step on the path to creating the most prosperous, productive economies - economies that allow individuals, businesses and governments to create the highest possible standard of living for the highest possible number of people.

In its recent 2009 Prosperity Index, the Legatum Institute assessed 104 countries, representing approximately 90% of the world's population, in terms of a series of

measures, such as whether a country possesses “an honest and effective government that preserves order and encourages productive citizenship” or whether it features “transparent and accountable governing institutions that promote economic growth”.¹

In the 2009 index, Australia finished sixth and only a marginal amount separated us and the number one placed country, Finland. What becomes quickly apparent about those countries at the top of the prosperity index is that they are countries that are prosperous, enjoy high levels of economic and personal freedom, respect for the rule of law and, also critically, high levels of accountable and transparent governance.

Of course, there could be some genuine debate about causation here. Does prosperity precede integrity and systems of accountability and become something that prosperous countries can afford, or do prosperous countries become so in part because of their commitment to the integrity mechanisms of its government and governance institutions? The answer in part is found in the observations of the Legatum Institute study. The Institute observes that “the foundations of prosperity reinforce each other”² and goes on to say that “countries in which sound governance creates satisfied citizens are also the most likely to have the healthiest economic fundamentals and the most entrepreneurial societies”.³ There is, in my view, a very strong correlation between prosperity, the rule of law, democratic institutions, respect for economic and personal freedoms and good governance.

Indeed, using Australia as an example, on one hand, we regularly appear at, or very near, the head of every international table that measures national prosperity, and on the other hand, at, or very near, the head of every international table that measures national integrity. It seems to me that the correlation and co-dependency of the two are irresistible.

3. The role of the Ombudsman in the accountability and transparency framework

Next, I want to turn to the role of the Ombudsman in the accountability and transparency framework. As a first step in doing so, I would like to set out what I mean by this framework. I think it is fair to say that there is not one accepted version of an accountability and transparency framework – in many ways these frameworks are reasonably recent in their inception and evolving at a fast pace.

We can certainly observe that there are a range of agencies that have been created to oversight government action that have considerable histories – the office of the Auditor-General and the Ombudsman immediately come to mind, but there are others. We can also observe that over the last few decades, despite considerable deregulation and privatisation, there has nonetheless been growth in government, including increasing complexity in government services. University of Chicago academic, Professor Richard Epstein, has noted that “...each new extension of government power should be

¹ The 2009 Legatum Prosperity Index™ “is the world's only global assessment of wealth and wellbeing. The Index finds that the most prosperous nations in the world are not necessarily those that have only a high GDP, but are those that also have happy, healthy, and free citizens. Now in its third year, the Index builds on the previous versions with expanded data and refined analysis and assesses 104 nations covering 90 percent of the world's population.” see <http://li.com/ProsperityIndex.aspx> viewed on 22/5/2010.

² <http://www.prosperity.com/findings.aspx> viewed on 22/5/2010.

³ <http://www.prosperity.com/findings.aspx> viewed on 22/5/2010.

examined under a presumption of error”.⁴ While there are many reasons that we might identify to explain our well developed integrity framework, there seems little doubt that the acceptance of the possibility of error occurring with new government powers has supported the development of oversight agencies. Indeed, with this rise in government activity there has been, for the most part, a concomitant rise in the number (and scope) of accountability agencies, so much so that commentators even now talk of a fourth branch of government, the integrity branch, to sit alongside the executive, legislature and judiciary.⁵ It is suggested that this integrity branch of government has been vested with the responsibility to oversight, investigate and educate the public sector in relation to corruption, misconduct, good decision making, avoiding conflicts of interest and the like.

In my view we can now confidently say that the office of the Ombudsman is not only a permanent fixture on the Australian administrative law landscape, but a fundamentally important part of the network of accountability and transparency agencies that play a vital role in maintaining and promoting the integrity of the public service and enhancing the quality of public sector decision-making.

The accountability and transparency framework is, however, much wider than the office of the Ombudsman and, in Western Australia, includes the Auditor-General, the Corruption and Crime Commission and the Office of Public Sector Standards. These three agencies, with the Ombudsman, form the Western Australian Integrity Coordinating Group and each clearly works to protect and promote integrity in government. But the framework of accountability and transparency agencies can be seen as much wider again and would include such agencies as the Information Commissioner, Office of the Inspector of Custodial Services, Office of Health Review, Mental Health Commissioner, Office of the Public Advocate, Equal Opportunity Commissioner, Director of Public Prosecutions and Office of the Inspector of the Corruption and Crime Commission.

Having identified that there is an accountability and transparency framework that operates within and around government, the truth is that there is no one set of values, ethical imperative, mechanism, action, regulation, framework or insight that will, by itself, create a culture of integrity across the public sector. Creating a culture of integrity requires a range of different approaches – governance frameworks, audits, oversight, investigation and prosecution, cultural awareness, incentives, disincentives, regulation and education are a few that come to mind. Indeed, seen in its fullest extent, the scope of our accountability mechanisms designed to enhance public sector integrity can be considered to be very wide, including the parliament, the opposition and minor parties, the judicial and executive branches of government, independent regulators, watchdog agencies, whistleblowers, the media, academia and non-government organisations. All have a role to play in creating and maintaining integrity within the public sector. There will also be a range of ways of implementing these mechanisms – one size is unlikely to

⁴ Richard Epstein, 'Why the Obama stimulus plan must fail', *Forbes*, 21 July 2009, viewed as at 2 August 2009 on the Cato Institute website at http://www.cato.org/pub_display.php?pub_id=10372 For further consideration of a law and economics analysis of administrative law: see, for example, Susan Rose-Ackerman, 'Progressive law and economics – and the new administrative law', 98 *Yale Law Journal* 341 at 342. An understanding of the work of the Ombudsman from this perspective I think is a fruitful area of endeavour.

⁵ John McMillan, 'The Ombudsman and the rule of law' (2005) 44 *AIAL Forum* 1 at 4 and John McMillan, 'Chaos or coherence? Strengths, opportunities and challenges for Australia's integrity systems', available at www.ombudsman.gov.au

fit all, in the same way that one intervention at a given point of time will not create an enduring culture. These mechanisms will also not be immutable – they will evolve and need to be tailored to new learning and challenges.

So what is the role of the Ombudsman in the accountability and transparency framework? I think the Ombudsman plays four principal roles in this framework.

First and foremost, the role of the Ombudsman in this framework is to receive, investigate and resolve complaints from citizens about the administration of government, or perhaps more accurately, alleged maladministration. A mechanism to have the administration of government services independently investigated through the resolution of complaints is both a feature of government systems hallmarked by integrity but also those that are seen to respect the rights of citizens. As immediate former Commonwealth Ombudsman Professor John McMillan, has observed “the right to complain, when securely embedded in a legal system, is surely one of the most significant human rights achievements that we can strive for”.⁶ Last year my office dealt with more than 1000 complaints that represent a ready evidence base of areas for potential improvement in the delivery of government services.

Second, the Ombudsman exercises a very significant proactive jurisdiction - particularly the undertaking of inspections regarding the exercise of coercive powers and the ability, of its own motion, to undertake investigations into how government services are administered.

My office is presently undertaking two projects of our own motion, although they are strongly informed by the complaints that we have received, into how government and local government agencies are handling complaints and a second project examining how government agencies are managing personal information.

Importantly, the lessons that are learned from these investigations, combined with the knowledge gained from resolving individual complaints, represent a powerful tool to work collaboratively with agencies to improve over time the quality of public sector decision-making.

Third, the office of the Ombudsman has expanded to undertake a range of new functions that sit within the broad concept of integrity oversight. The concept of the Ombudsman has spread throughout the world, but the expansion of the Ombudsman institution has not been one of just scale, but also scope. Ombudsmen now undertake a much wider range of activities than was the case traditionally. To use my office as an example, in addition to the “classical” Ombudsman functions, we undertake inspections of telecommunications intercepts, investigation of public interest disclosures (more popularly referred to as whistleblowers’ complaints), investigation of complaints from overseas students and, most recently, reviews of certain child deaths.

Fourth, the Ombudsman has become an important contributor to the maintenance of the rule of law, which itself underpins accountable and transparent government. An Ombudsman model can easily fit with a more protective, interventionist welfare state approach (indeed, much of the growth of the Ombudsman institution this century

⁶ John McMillan, ‘The role of Ombudsman in protecting human rights’ at 3 available at www.ombudsman.gov.au.

parallels the growth of the welfare state).⁷ But at the same time the Ombudsman can fit successfully with a political approach that favours more limited government, but places a central focus on the role of the state to maintain the rule of law. Famous economist Friedrich Hayek has said of the rule of law:

Nothing distinguishes more clearly conditions in a free country than those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all its technicalities this means that government in all its actions is bound by fixed rules and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.⁸

Converting a rather complex topic to a simple, single sentence - the Ombudsman is a contributor to the rule of law because we help to ensure that accountable, transparent laws are accountably and transparently enforced.

4. The Ombudsman as regulator: principles for good regulation

In the final section of my paper, I want to discuss the concept of the Ombudsman as a regulator.

As I have already discussed, modern Ombudsmen perform many functions. They are, first and foremost, complaint resolvers. They are increasingly proactive inspectors of specific powers exercised by government institutions, they are educators about good administration, and they are investigators of potentially systemic and/or serious maladministration, conflicts of interests and abuses of power. In this way, Ombudsmen are properly characterised as watchdogs. They are also, in my opinion, regulators. Ombudsmen, in identifying mistakes in administration, and proposing new ways to administer laws (or indeed, as they case may be, suggesting the removal, variance or creation of laws) are institutions that are regulatory in their nature. In short, Ombudsmen have a role in regulating public administration, and by implication, in regulating the public.

I think we should be confident that there is a very significant public value in, one, the existence of an integrity framework and, two, the value created from the proposed administrative improvements of integrity and accountability agencies.

Similarly though, we need to be aware that our integrity frameworks both cost money and can impose costs.

Integrity frameworks, be they through the encouraging of different organisational cultures, ethics and values education, regulatory controls, incentives or disincentives to change behavioural patterns, can impose regulatory costs on public sector agencies, and by implication, on taxpayers. They may also act undesirably to have a stultifying effect on welcome innovative behaviour creating an undesirable inertia in government administration and dampen positive innovation through excessive risk aversion where

⁷ Roger Douglas, *Administrative Law*, 2nd Edition, Butterworths, 2004 at 279.

⁸ Friedrich Hayek, *The Road to Serfdom*, Routledge Classics, 1944 at 75-76.

some risk taking is actually desirable, or simply burden efficient, timely decision making with excessive red-tape.

When adopting, or imposing, new integrity mechanisms I suggest that it is always important to have a very clear idea of what the benefits and costs of these mechanisms are, so that we are in the best position to be confident that they will have a net benefit to the public. In part to deal with this problem, I suggest that when we adopt new public sector integrity mechanisms we should always be guided, at a minimum, by these four principles:

- (1) there is a need for the mechanism demonstrated by a clear, defensible evidence-base;
- (2) the proposed mechanism will actually remedy a problem that cannot be remedied in a less costly way;
- (3) the proposed mechanism will preserve as much as possible positive public sector decision-making; and
- (4) the costs imposed by the mechanism are outweighed by the benefits of the framework.⁹

In short, although it is not always typical to think of them as such, integrity frameworks, impose regulatory costs and we should be able to clearly demonstrate that the costs are outweighed by the benefits of our actions.

As a final comment on this point, whilst a very large amount of regulatory activity occurs for the right reasons – it is conceived, considered and implemented with unquestionably good intentions, unfortunately, not all of that which is designed with good intentions actually achieves good outcomes. An oft referenced regulatory failure is American prohibition.¹⁰ Prohibition was a perfectly well-intentioned regulation with, unfortunately, spectacularly bad results. A regulation designed to stop alcohol consumption created, among other things, a whole new market for criminals and fraudsters and distorted market forces that led to a proliferation of shoddy and dangerous products. In fact the only thing prohibition most certainly did not achieve was to stop people drinking!

When we design and implement governance frameworks for the public sector we will almost invariably have very good intentions in mind. We must be aware, however, that some of our intended outcomes may not be realised and some unintended outcomes may be achieved.

After all it is clear that it is the existence of imperfect human behaviour that leads to a lack of integrity. We should never begin to think agencies such as Ombudsmen are imperfect and won't make mistakes.

5. Conclusion

In conclusion, a lack of integrity in the public sector damages us all. Governments hallmarked by integrity retain the confidence of the public and contribute significantly to

⁹ Adapted from a framework suggested by me to consider the need for regulation in Chris Field, 'Competition, consumer protection and social justice – providing a consumers' voice', 33 *ABLR* 2

¹⁰ Milton Friedman and Rose Friedman, *Free to Choose*, Harcourt 1980 at 226-7.

stable societies. Conversely, governments hallmarked by a lack of integrity, a lack of an ethical underpinning, corruption, conflict, secrecy, undue favours and unaccountable to its citizens, risk losing their confidence and threatening the very stability of those societies. Further still, there is clear correlative evidence linking economically underperforming nations with a lack of integrity and corruption in government. In short, integrity in the public sector is essential for our ongoing economic prosperity, to protect individuals from inappropriate governmental activity and to optimise the way that the public sector exercises its powers. At its most simple, decision making is not simply improved by accountability and transparency frameworks, the best quality decision making in the public sector is accountable and transparent decision making.

Within this integrity framework the Ombudsman has rightly become a central figure. Whether it is as a protector of the right to complain about government services, an inspector of government powers, or an investigator of its own motion of alleged public sector failure, the Ombudsman protects and promotes integrity.

We can take great solace from the fact that we largely take for granted the fundamental importance of a robust accountability and transparency framework. Although we should not, I think, take it for granted, we can also take great comfort in the fact that Western Australia's public service is largely so free of corruption and maladministration and is, in my experience as the Western Australian Ombudsman for the past three years, comprised of so many dedicated public servants committed to the public interest and serving the public well.

Of course, the highly developed integrity framework that is now a feature of so many countries around the world is neither perfect, nor costless. But to paraphrase Winston Churchill – governments, hallmarked by robust frameworks to protect and promote public sector integrity, are the worst form of government, apart from every other form of government that has ever been tried!¹¹

¹¹ I have adapted this view from that expressed by Stanley Fischer in his paper 'Globalisation and its challenges', *Ely Lecture*, 2003, at 33. The lecture is available at <http://www.iie.com/fischer/pdf/fischer011903.pdf>