

The Ombudsman

**Presentation to University of Western Australia
Administrative Law Students**

Chris Field
Ombudsman

Adjunct Professor, Faculty of Law, University of Western Australia

13 October 2016

Ombudsman Western Australia
Serving Parliament – Serving Western Australians

Overview

- The Western Australian Ombudsman
- Investigation of complaints
- Deaths of Certain Children
- Reviews of Family and Domestic Violence Fatalities
- Own Motion Investigations
- Other Functions
- Access to justice
- Integrity
- The Rule of Law and Democracy
- The economics of administrative law

The Western Australian Ombudsman

- Western Australia led the country in introducing the office of the Ombudsman in 1972. This was followed by the establishment of an Ombudsman in each State/Territory and at the Commonwealth level.
- Outside of Australia, the office has a longer history again – the office of the Ombudsman is over 200 years old, originating in Sweden in 1809.

The Western Australian Ombudsman (cont.)

- The Parliamentary Commissioner for Administrative Investigations (but universally referred to as the Ombudsman) is an impartial officer and independent of the government of the day.
- The operation of the office of the Ombudsman is governed by the *Parliamentary Commissioner Act 1971 (PCA)* and a range of other legislation.

The Western Australian Ombudsman (cont.)

Principal functions

Investigating and resolving complaints

Receiving, investigating and resolving complaints about State Government agencies, local government and universities.

Reviewing certain deaths

Reviewing certain child deaths and family and domestic violence fatalities.

Undertaking own motion investigations and promoting improvements to public administration

Improving public administration for the benefit of all Western Australians through own motion investigations, and education and liaison programs with public authorities.

Other functions

Undertaking a range of additional functions, including statutory inspection and monitoring functions.

Investigation of complaints

- A key function of the Ombudsman is the investigation of administrative action taken by or on behalf of certain departments and authorities.
- Stated broadly, the Ombudsman investigates whether the administration of the laws of Parliament is lawful, just, reasonable and correct.

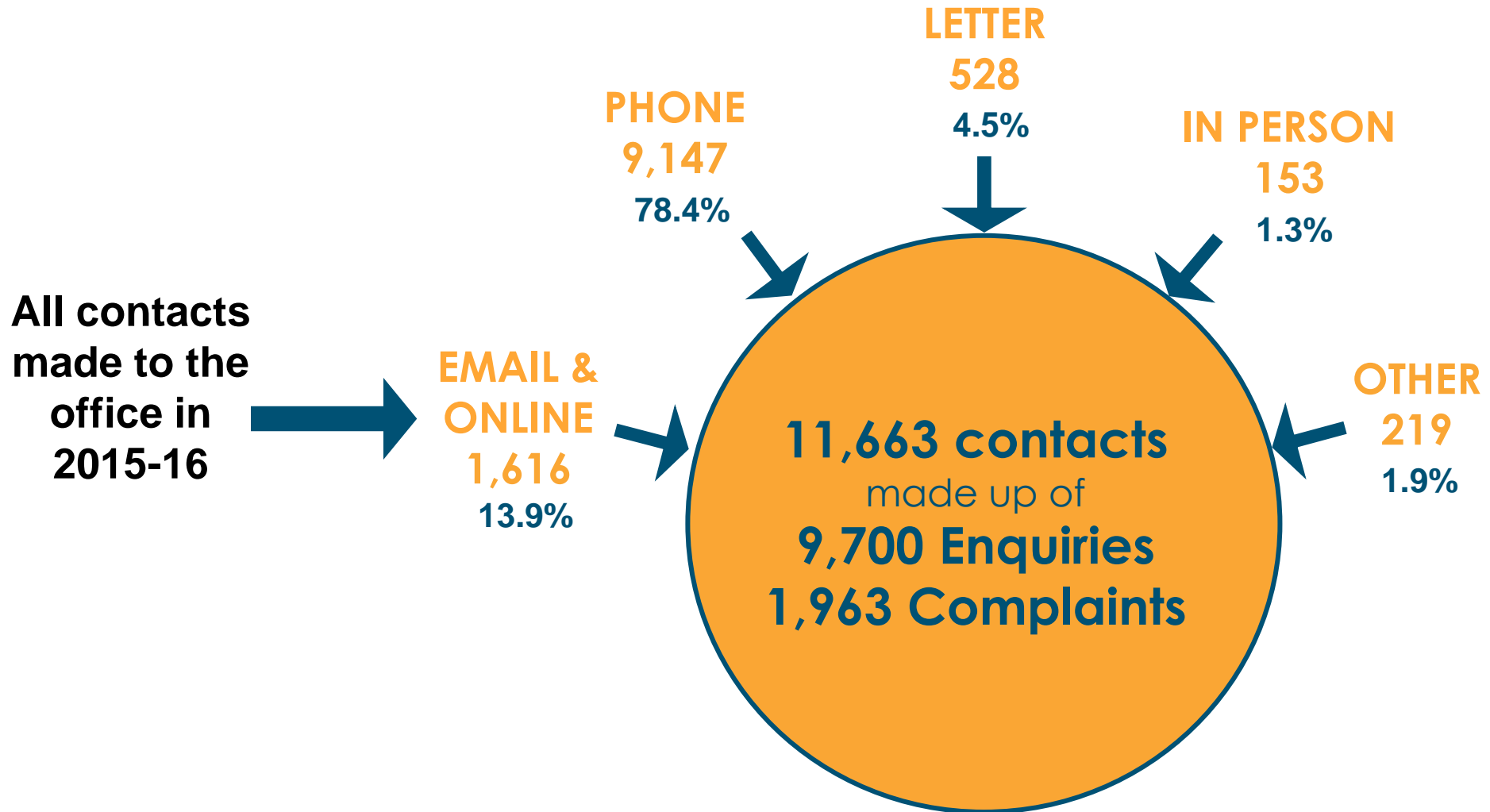
Investigation of complaints (cont.)

- We have jurisdiction to investigate the administrative actions of nearly all public authorities which includes government departments, statutory bodies, public universities and local governments.
- See Long Title, ss 13 and 14, and Schedule 1 of the PCA.

Investigation of complaints (cont.)

- We do not investigate:
 - Parliament (its Houses, Committees, Members, Officers or staff);
 - The Courts (or the State Administrative Tribunal or the Coroner);
 - The Governor (or a member of the Governor's Establishment); or
 - A limited number of agencies provided for in Schedule 1 of the PCA.
- See s 13 PCA

Investigation of complaints (cont.)



Investigation of complaints (cont.)

Dealt with 1,963
complaints in
2015-16

Breakdown of complaints within jurisdiction

| | |
|------------------|-----|
| Public Sector | 72% |
| Local Government | 22% |
| Universities | 6% |

Complaints by agency group within the public sector in 2014-15

- **Corrective Services** 29%
- **Housing** 14%
- **Police** 13%
- **Transport** 11%
- **Education** 7%
- **Child Protection** 6%
- **Other Departments** 10%
- **Other Statutory
Authorities and Agencies** 10%

Investigation of complaints (cont.)

- Complaints to the Ombudsman about matters of administration must be made:
 - In writing (s 17(1) PCA)
 - By people personally affected by the action to which the complaint relates (s 17(2) and s 4 PCA)
- Where unable to act for themselves, a complaint may be made by a personal representative or family member or other suitable individual (s 17(2) PCA).

Investigation of complaints (cont.)

- The Ombudsman “shall not conduct an investigation ... [into] (a) any action in respect of which the person aggrieved has or had a right of appeal, reference, or review to or before a tribunal ... and (b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law.” (s 14(4) PCA)
- Unless the Ombudsman “is satisfied that, in the particular circumstances, it is not reasonable to expect him to resort, or to have resorted, to it.” (s 14(5) PCA)

Investigation of complaints (cont.)

- “Except where the [Ombudsman], in the special circumstances of a case, otherwise determines, a complaint shall not be entertained under [the PCA] unless it is made not later than 12 months from the day on which the person aggrieved first had notice of the matters alleged in the complaint.” (s 17(5) PCA)

Investigation of complaints (cont.)

- The Ombudsman “may refuse to entertain a complaint, or ... continue the investigation if...
 - (a) the matter ... is trivial; or
 - (b) the complaint is frivolous or vexatious or is not made in good faith; or
 - (c) the person aggrieved has not a sufficient personal interest in the matter...; or
 - (d) having regard to all the circumstances of the case, the investigation, or the continuance of the investigation of the matter raised in the complaint, is unnecessary or unjustifiable.” (s 18(1) PCA)

Investigation of complaints (cont.)

- The Ombudsman “has all the powers, rights and privileges that are specified in the *Royal Commissions Act 1968...*” (s 20(1) PCA)
- “For the purposes of conducting an investigation ... the [Ombudsman] may, at any time, enter any premises occupied or used by any department or authority ... and inspect those premises or anything for the time being therein.” (s 21 PCA).

Investigation of complaints (cont.)

- “Any person who —
 - (a) without lawful excuse, wilfully obstructs, hinders, or resists the [Ombudsman]; or
 - (b) without lawful excuse, refuses or wilfully fails to comply with any lawful requirement of the [Ombudsman]; or
 - (c) wilfully makes any false statement to, or misleads, or attempts to mislead, the [Ombudsman],
is guilty of an offence.” (s 24 PCA)

Investigation of complaints (cont.)

- Investigations shall be conducted in private (s 19(2) PCA)
- Notifications of investigations are given (ss 19(1) and 19(1a) PCA)
- The Ombudsman can conduct informal investigations (s 19(1a) PCA)
- Hearings do not need to be held and persons involved in the investigation may be represented by counsel (s 19(3) PCA)

Investigation of complaints (cont.)

- “Information obtained by the [Ombudsman] ... in the course of, or for the purpose of, an investigation ... shall not be disclosed, except –
 - (a) For the purposes of the investigation...
 - (b) For ... any proceedings for any perjury or any offence under the *Royal Commissions Act 1968*...
 - (c) As authorised by section 22A or 22B [regarding consultation with, or disclosure to, certain bodies in relation to their functions]”

(s 23(1) PCA)

Investigation of complaints (cont.)

- The Ombudsman “may direct a person to whom a document is sent ... not to disclose to any other person any information contained in the document except for the purposes of the investigation to which the document relates” (s 23(1a) PCA).
- The Ombudsman may “disclos[e] information, or mak[e] a statement, to any person or to the public if it is in the interests of any department or authority ... or of any person, or is otherwise in the public interest (s 23(1b) PCA).

Investigation of complaints (cont.)

- “The [Ombudsman] shall not, in disclosing information..., set out opinions that are, either expressly or impliedly, critical [unless given the] opportunity to appear before him and to make submissions ... or disclose the name of a complainant ... unless it is fair and reasonable in all the circumstances to do so” (ss 23(1d) and (1e) PCA).

Investigation of complaints (cont.)

- “Any document that is sent to ... or by the [Ombudsman] in the course of, or for the purposes of, an investigation ... and was prepared specifically for the purposes of the investigation shall be privileged and be not admissible in evidence in any proceedings other than proceedings for perjury or any offence under the *Royal Commissions Act 1968* or under this Act” (s 23A).

Investigation of complaints (cont.)

- “If, at any time during the course of an investigation, it appears to the [Ombudsman] that there may be grounds for making a report on that investigation that may affect or concern any department or authority to which [the PCA] applies he shall, before making that report, afford to the principal officer ... an opportunity to comment on the subject matter of the investigation.”
(s 19(4) PCA)

Investigation of complaints (cont.)

- Section 30A Protection of complainants etc

“A person is not liable to any civil proceedings in respect of (a) making a complaint under [the PCA] or (b) providing information in the course of, or for the purpose of, an investigation under [the PCA] ... [unless] the complaint was made, or the information was provided, in bad faith.”

Investigation of complaints (cont.)

- Section 30B Victimisation

“(1) A person shall not [(3) and shall not intend to, or incite another person to] (a) prejudice, ... (b) intimidate or harass, ... or (c) do any act that is, or is likely to be, to the detriment of, another person because the other person —

(d) has made or will or may ... make a complaint ... ;

(e) has provided, is providing or will or may ... provide information in the course of, or for the purpose of, an investigation ... ; or

(f) has exercised [or will or may exercise] a power conferred by [the PCA] on the other person or has performed [or will or may perform] a duty imposed by [the PCA]...

Investigation of complaints (cont.)

- The Ombudsman is an exempt agency under Schedule 2 of the *Freedom of Information Act 1992*.

Investigation of complaints (cont.)

- Section 25 Procedure on completion of investigation

Where, as a result of an investigation ... the [Ombudsman] is of the opinion that the action ...

(a) appears to have been taken contrary to law; or

(b) was unreasonable, unjust, oppressive, or improperly discriminatory; or

(c) was in accordance with a rule of law or ... a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or

Investigation of complaints (cont.)

(d) was taken in the exercise of a power or discretion, and was so taken for an improper purpose or on irrelevant grounds, or on the taking into account of irrelevant considerations; or

(e) was a decision that was made in the exercise of a power or discretion and the reasons for the decision were not, but should have been, given; or

(f) was based wholly or partly on a mistake of law or fact; or

(g) was wrong,

he shall, as in the circumstances of the case he thinks fit, carry out the duties imposed on him by subsection (2).

Investigation of complaints (cont.)

- Section 25 (cont.)

Where in such a case as is referred to in subsection (1) the [Ombudsman] is of the opinion —

(a) that the subject matter of the investigation should be referred to the appropriate authority for further consideration; or

(b) that action can be, and should be, taken to rectify, or mitigate or alter the effects of, the action to which the investigation relates; or

(c) that any practice in accordance with which the action was taken should be varied; or

Investigation of complaints (cont.)

(d) that any law in accordance with which, or on the basis of which, the action was taken should be reconsidered; or

(e) that reasons should be given for the action; or

(f) that any other steps should be taken,

the [Ombudsman] shall report his opinion, and his reasons therefor, to the principal officer of the appropriate authority, and may make such recommendations as he thinks fit.

Investigation of complaints (cont.)

- Where the Ombudsman “makes any report or recommendations to the principal officer of an authority under subsection (2), he shall send a copy thereof to the responsible Minister.”
(s 25(3) PCA)

Investigation of complaints (cont.)

- “Where it appears to the [Ombudsman] that no steps that seem to him to be appropriate have been taken within a reasonable time of his making any report or recommendations..., the [Ombudsman], after considering the comments ... of the principal officer ... may ... send to the Premier of the State a copy of the report and the recommendations... [and] may lay before each House of Parliament such report on the matters to which they relate as he thinks fit.”
(ss 25(4) and (5) PCA)

Investigation of complaints (cont.)

- The Ombudsman “shall not in any report ... make any comment defamatory of or adverse to any person unless that person has been given an opportunity of being heard in the matter and his defence is fairly set forth in the report” (s 25(7) PCA)

Investigation of complaints (cont.)

- “Where the [Ombudsman] conducts an investigation on a complaint ... he shall inform the complainant, in such manner and at such time as he thinks proper, of the result of the investigation and may from time to time if he thinks it proper, at any time prior to the conclusion of the investigation, inform the complainant in such manner as he thinks proper of the progress then made in the conduct of the investigation” (s 26 PCA)

Deaths of certain children

- Our function to review certain child deaths is set out in ss 19A and 19B of the PCA.
- The Ombudsman's functions in relation to investigable child deaths are to:
 - Review the circumstances in which and why the deaths occurred;
 - Identify any patterns and trends in relation to the deaths; and
 - Make recommendations to any department or authority about ways to prevent or reduce investigable deaths.

Reviews of family and domestic violence fatalities

- On 1 July 2012 the Ombudsman commenced an important new function to review family and domestic violence (**FDV**) fatalities.

Own Motion Investigations

- The Ombudsman may initiate an investigation by his own motion (s 16(1) PCA).
- These investigations are referred to as own motion investigations.

Own Motion Investigations (cont.)

- Some of our own motion investigations include:
 - *The Management of Personal Information - good practice and opportunities for improvement (2011).*
 - *Planning for children in care: An Ombudsman's own motion investigation into the administration of the care planning provisions of the Children and Community Services Act 2004 and made 23 recommendations about ways to prevent or reduce child deaths (2011).*

Own Motion Investigations (cont.)

- *Investigation into ways that State Government departments can prevent or reduce sleep-related infants deaths* – tabled in Parliament in November 2012 and made 23 recommendations about ways to prevent or reduce sleep-related infant deaths.
- *Investigation into ways that State government departments and authorities can prevent or reduce suicide by young people* – tabled in Parliament in April 2014 and made 22 recommendations to four government agencies about ways to prevent or reduce suicide by young people.

Own Motion Investigations (cont.)

- *Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities* – tabled in Parliament on 19 November 2015 and made 54 recommendations to four government agencies about ways to prevent or reduce family and domestic violence fatalities.

Other functions

- The Energy and Water Ombudsman Western Australia resolves complaints about electricity, gas and water services providers. The Ombudsman undertakes the role of the Energy and Water Ombudsman. The costs of the Energy and Water Ombudsman are met by industry members.
 - *Electricity Industry Act 2004*
 - *Energy Coordination Act 1994*
 - *Water Services Act 2012*
 - *Energy and Water Ombudsman (Western Australia) Limited Constitution*
 - *Charter of Energy and Water Ombudsman (Western Australia) Limited*

Other functions (cont.)

- Under the relevant national code, the Ombudsman can receive complaints or appeals by overseas students.
 - *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007*
- The Ombudsman can receive disclosures of public interest information.
 - *Public Interest Disclosure Act 2003*

Other functions (cont.)

- Under a service delivery arrangement with the Australian Government, the Ombudsman can investigate complaints from residents of the Indian Ocean Territories (Christmas and Cocos (Keeling) Islands) about public authorities in the Ombudsman's jurisdiction.
 - *Indian Ocean Territories (Administration of Laws) Act 1992*
 - *Christmas Island Act 1958 (Cth)*
 - *Cocos (Keeling) Islands Act 1955 (Cth)*
- Persons detained under relevant terrorism legislation can make a complaint to the Ombudsman.
 - *Terrorism (Preventative Detention) Act 2006*

Other functions (cont.)

- The Ombudsman inspects eligible authority's records to ascertain the extent of compliance by the authority's officers with the relevant provisions of the telecommunications interception legislation.
 - *Telecommunications (Interception and Access) Act 1979 (Cth)*
 - *Telecommunications (Interception and Access) Western Australia Act 1996*

Other functions (cont.)

- The Ombudsman is to keep under scrutiny the exercise of powers conferred on WA Police under the *Criminal Organisations Control Act 2012*, and report annually, for a five year monitoring period (ss 157 and 158 of the *Criminal Organisations Control Act 2012*)
- The Ombudsman “is to keep under scrutiny the operation of” the Infringement Notices provisions of *The Criminal Code* and report on the first 12 months of operation (s 723 of *The Criminal Code*)

Access to justice

- The creation of the Ombudsman in Australia was part of the 'new' administrative law of the 1970s.
- The creation of Ombudsmen paralleled the growth in concern for access to justice and interest in alternative dispute resolution.
- I do not think that it is overstating the case to say that Ombudsmen have played a significant role in increasing access to justice in Australia.

Access to justice (cont.)

- The Productivity Commission, in its recent *Access to Justice Arrangements* Inquiry, found:
 - “In the context of the broader civil justice system, ombudsmen and other complaint bodies resolve a large volume of complaints at low cost.”¹

¹ Productivity Commission, *Access to Justice Arrangements*, Report No. 72, 5 September 2014 at 324.

Integrity

- Integrity has clear intrinsic value. It also has, in my view, clear practical consequences.
- In its most recent 2015 Prosperity Index, the Legatum Institute assessed 142 countries in terms of a series of measures.
- Australia finished seventh overall and only a marginal amount separated us from those countries above us.

Integrity (cont.)

- What becomes quickly apparent about those countries at the top of the Index is that they are countries that have fundamental adherence to the rule of law, a significant absence of institutionalised corruption and high levels of integrity in governance.

Integrity (cont.)

- History has decisively demonstrated that societies that enshrine integrity in their public institutions are the ones that are the most stable and successful. They are the societies where prosperity is the greatest.
- Greater prosperity gives us the capacity to provide the best societal outcomes.

Integrity (cont.)

- In my view, integrity agencies such as the Ombudsman now play an important role in ensuring the very high levels of integrity and effectiveness, and concomitant public confidence, that are a hallmark of modern Australian public administration.

The rule of law and democracy

- The rule of law is a complex notion, but, in the words of the great Austrian economist, Friedrich Hayek:
 - [it] means that government ... 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.
- Integrity agencies are not essential to the rule of law – for example, we would readily accept that America strongly respects the rule of law but the institution of the Ombudsman is not a significant feature of the American governance landscape.

The rule of law and democracy (cont.)

- Nonetheless, where integrity agencies do exist, they have become, in my view, a strong protector and promoter of the rule of law.

The economics of administrative law

- There are many benefits of administrative review, such as provided by the Ombudsman, including:
 - High quality, timely, cost-effective resolution of disputes about public administration;
 - Achieving improvements to public administration;
 - Accountability, transparency and integrity of government; and
 - Supporting the maintenance of the rule of law.

The economics of administrative law (cont.)

- In short, very significant public value is created through administrative review. We do, however, need to be mindful of any regulatory burden that review could create.
- Resources are limited and, therefore, costs are important. Administrative review must be undertaken in this context.

The economics of administrative law (cont.)

- These costs might be one-off implementation costs or ongoing compliance costs.
- Similarly, in considering cost, we do need to consider the value that the community places on the various choices that can be made with limited resources.

The economics of administrative law (cont.)

- It might be not particularly costly to fix a problem but if the expenditure of money to fix the problem comes at the opportunity of expenditure in an area more valued by the community, it still may not be desirable.

The economics of administrative law (cont.)

- Ultimately, the vast majority of administrative review occurs for the right reasons and achieves the right outcomes.
- But not all that is done with good intent always achieves good outcomes.

The economics of administrative law (cont.)

- American Prohibition
- Prohibition was a perfectly well-intentioned regulation with, unfortunately, spectacularly bad results.

Questions