



**Ensuring independent checks and balances:
Western Australia takes a backwards step**

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On 7 April 2006, the Western Australian Salaries and Allowances Tribunal (WASAT), an independent statutory authority, released its determination on the classifications and remuneration applicable to the 84 positions under its jurisdiction in the Western Australian public sector. Most of the recommendations involved salary increases of between seven and 24 per cent and were heavily criticised in the Western Australian (WA) media.¹ For example, the Director General of Health, Dr Fong, has, most unusually, been contractually charged with the authority to choose his own salary increase within the range mentioned. It has been well documented that Dr Fong is already the highest paid civil servant in Australia on a salary of \$565,272 a year. However, one of WASAT's more controversial determinations was to downgrade the classifications of the Information Commissioner, the Commissioner for Public Sector Standards and the Electoral Commissioner. By downgrading these positions, newly appointed Commissioners will be retained on a reduced salary with commensurate reduced standing within the public sector.² WASAT downgraded ten of 84 positions in total within the sector in its recent determination. This paper addresses concerns attached to the salary downgrading of the Information Commissioner and the Commissioner for Public Sector Standards. It also examines the causal effects of downgrading these positions. The appropriateness or otherwise of executive government input into salary grading and office funding of independent watchdog authorities is also addressed.

The positions of the Information Commissioner and the Commissioner for Public Sector Standards were both established on the recommendations of the 1992 Royal Commission into Commercial Activities of Government and Other Matters (WA Inc). Both the Information Commissioner and the Commissioner for Public Sector Standards are independent officers who report directly to Parliament, not the government of the day. The main function of the Information Commissioner is to deal with complaints made about agencies' decisions in respect to access applications and applications to amend personal information. Other responsibilities relate to the operation of the Freedom of

¹ *The West Australian*, 11 April 2006

² It should be noted that the incumbent commissioners will not incur a reduced salary.

Information (FOI) Act.³ The Commissioner for Public Sector Standards is responsible for the WA public sector's code of ethics and human resource management standards, as well as compliance with the code. It assists and monitors compliance with the *Public Interest Disclosure Act 2003* and advises ministers on the suitability of CEO appointments to government agencies.⁴ The position of Electoral Commissioner needs no introduction; however, it should be noted that at this time the Electoral Commissioner is working towards the introduction of one-vote one-value reforms in Western Australia and significant redistributions will be required. The new boundaries are due for public release in mid-2007. It therefore seems a strange time to downgrade the position.

No specific reasons for downgrading these positions were given by WASAT. A letter from the Director General of the Department of the Premier and Cabinet (DPC) to the Chairman of WASAT (dated 17 February 2006) supported the downgrading of the Public Sector Standards Commissioner, opposed the downgrading of the Electoral Commissioner and made no comment on the downgrading of the Information Commissioner. In a written communication with the author, the DPC Director General indicated he was not aware of WASAT's intention to downgrade the Information Commissioner's position. The DPC came under criticism in the media for its role in supporting the downgrading of the Commissioners (*The Australian*, 13 April 2006).⁵ An internal briefing note written by the DPC Director General's office indicated that on 10 April 2006 the Commissioner for Public Sector Standards wrote to the Chairman of WASAT to complain about the downgrading of her position.⁶ Her concerns about the downgrading, contained in the letter, were tabled in Parliament on 13 April 2006. They included the suggestion that the advice provided by the DPC concerning the downgrading of her position was inappropriate. The Information Commissioner also wrote to the Chairman of WASAT expressing similar concerns.

³ <http://www.foi.wa.gov.au/About.htm>

⁴ <http://www.wa.gov.au/opssc/>

⁵ It should be noted that the report in *The Australian* incorrectly identifies that the Department of the Premier and Cabinet supported the downgrading of all three Commissioner positions, where in fact it only supported the downgrading of the Commissioner for Public Sector Standards.

⁶ This internal briefing note was referred to in *The Weekend Australian*, 15 April 2006.

The DPC provides advice to WASAT as is provided for in the *Salaries and Allowances Act 1975*. Section 10 (3) of the Act states that: '(t)he Minister may, if he thinks fit, appoint a person or persons to assist the Tribunal [WASAT] in an inquiry'. This section indicates that the appointment of a person or persons is not required under the Act. Rather, it is simply provided for. This is an important point: the decision to appoint someone to assist the tribunal is discretionary. Section 10 (4) (b) of the Act states that: '(w)ithout limiting the provisions of subsection (3) the Minister shall – appoint a person nominated from time to time in writing by the chief executive officer of the department principally assisting the Minister in the administration of the *Public Sector Management Act 1994* to assist the Tribunal in an inquiry...'. In essence this section clarifies that if the relevant minister chooses to make an appointment to assist WASAT at least one of the appointees, in this case, must be the person nominated by the DPC Director General. The fact that Section 10 (4) is prefaced with the phrase '(w)ithout limiting the provisions of subsection (3)' preserves ministerial discretion over whether an appointment is in fact to be made at all.

In the case of WASAT such appointments have continuously been made since the Act was introduced in 1975. The convention that appointments be made has evolved into a bureaucratic stipulation that it is a requirement under the Act rather than an option. An internal briefing note for the DPC written by the Director General's office titled *Commissioner for Public Sector Standards Allegations* stated that: '(t)he Department provides advice to the Salaries and Allowances Tribunal **as required to** under the *Salaries and Allowances Act*, which has been required since the Act was introduced in **1975**'.⁷ This interpretation by the Director General's office is plainly incorrect. The provision of advice is procedurally allowed for in Section 10 (4) (b) (an issue of itself), but it is certainly not required (as per Section 10 (3)).

Watchdog commissioners are important in maintaining public confidence in our democratic political system. The downgrading of WA commissioners raises two

⁷ Emphasis in the original.

important questions: are the positions able to effectively function with lowered status? And, is the role of the DPC in advising on their ongoing status appropriate?

Maintaining an appropriate level of seniority as well as status for watchdog commissioners is necessary to attract appropriate candidates into the positions as well as to give the commissioners the clout they need to exercise their oversight roles. The positions of Commissioner for Public Sector Standards and Information Commissioner held level with the Auditor General prior to WASAT's recommendation to downgrade them. An equal importance was therefore given to the independent roles of monitoring financial and performance accountability (Auditor General), monitoring integrity in official conduct and standards (Public Sector Standards) and maintaining freedom of information (Information Commissioner). WASAT's decision to downgrade the two commissioners' positions suggests that ethical and privacy concerns are not as important as financial management. It is surprising that in the aftermath of WA Inc a DPC Director General would support the downgrading of a watchdog authority set up less than two decades earlier on the recommendations of the WA Inc royal commission.

The downgrading of these positions raises the question of whether the process used to make decisions about remuneration of independent officers should be reviewed. WASAT stated that 'meetings were held with the Department of Premier and Cabinet to enable the Tribunal to consider the views of the employer on the work value assessment of the positions under review'.⁸ In her letter to WASAT, the Public Sector Services Commissioner acknowledged it is appropriate for the DPC to have a role in providing advice in relation to chief executive officer positions where the employing authority is the Minister for Public Sector Management; however, she highlighted there is a difficulty with advice being received from the DPC in relation to the work value of independent statutory officers reporting to Parliament. The Commissioner raises an important issue: whilst an argument could be mounted that, from a work value perspective, the Auditor General should be more highly graded than either the Information Commissioner or the

⁸ Office of the Public Sector Standards Commissioner letter to WASAT. Tabled in Parliament 13 April 2006.

Public Sector Standards Commissioner because of the larger staff and portfolio responsibilities, the DPC should not be involved in the determination process.

Where independent watchdog authorities are directly responsible to parliament, it is not appropriate that they are assessed by the executive arm of the political system. In fact, it is often the executive arm whose decisions they are most likely to scrutinise. For example, decisions made by the DPC Director General may, from time to time, come under examination by either of the watchdog commissioners whose status has been downgraded. Whilst advice provided by the DPC, and its Director General in particular, may be impartial, it certainly cannot be seen to be impartial. It is therefore suggested that the role of the DPC in providing advice to WASAT as is provided for in Section 10 (4) (b) of the *Salaries and Allowances Act 1975* be altered.

This raises the further issue of the source of funding for independent watchdog authorities. Under the current arrangements in Western Australia, independent watchdog authorities obtain their funding by approval from the executive arm of government rather than the parliament to which they are theoretically responsible. This somewhat curious arrangement should be amended so that, for example, a parliamentary committee is responsible for recommending funding allocations for independent watchdog authorities, thereafter requiring parliamentary approval. Such a process is established with respect to the UK National Audit Office.

Downgrading watchdog positions, as has occurred in WA, is inconsistent with the global trend to build public trust in government activities. By downgrading the salaries and status of the Information Commissioner and Commissioner for Public Sector Standards, Western Australia has taken a step backwards in public accountability. As pointed out by the inaugural Commissioner of the NSW Independent Commission Against Corruption, Ian Temby, '(w)hen relations between a particular government and an independent officer....become strained, then protection and support must be vouchsafed by

Parliament'.⁹ Relations between WA's watchdog Commissioners and the WA Government have become strained. The Commissioner for Public Sector Standards concerns over the downgrading of her position have now been tabled in Parliament. We wait with interest to see the course of action the WA Parliament takes in response.

⁹ Ian Temby Q.C., 1993, 'Safeguarding Integrity in Government', in 'Parliament and the Constitution: Some Issues of Interest', *Papers on Parliament No. 21*. Canberra: Department of the Senate.