

## **Investigating corruption**

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Improving administration: the next 30 years**

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I have been asked to speak to you today about current trends in investigating corruption in the public sector, particularly where there may be a fine line in determining whether the wrongdoing is corruption or maladministration.

I don't propose to look at methodologies of investigation, as investigating corruption is something that would rarely be carried out by an ombudsman's office. Rather I will look at how in Queensland we currently handle the interface between the Ombudsman's office and my organisation, the CMC. I am referring to those cases where there is a combination of maladministration and corruption. Or where, at the outset of the investigation, it's unclear whether the complaint involves mere maladministration or extends to corruption.

I will concentrate on what I know best – the situation in Queensland, where we have a public sector ethics and misconduct prevention body as well as an ombudsman. I will also look at situations, which go beyond the classic forms of "corruption", where someone exploits their position of power for personal gain. In particular, I will look at instances of maladministration, which go so far beyond what is reasonably expected that they descend into what we in Queensland classify as "official misconduct".

And the general message I will seek to convey is not that there is any particular new way to investigate. Rather there is a real need for all integrity agencies – Ombudsman's offices, Auditor-General and agencies like the CMC – to cooperate together to most effectively improve and maintain standards of integrity in the public sector.

### **Typical "fine line" case**

I would like to start with a typical example of a complaint made to an ombudsman.

It may concern a decision made by an agency. This is a decision which advantages one party and disadvantages another. The complaint discloses that the actions of the official may go beyond mere bad decision making and may have been made for an improper purpose – perhaps a payment or some other benefit from the party which was gained through the official's decision.

What does the ombudsman do in this case?

Most Ombudsman Acts, on my quick checking, appear to give power to investigate administrative acts that are unlawful or made for an improper motive<sup>1</sup>. So prima facie, there is power to investigate corruption.

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<sup>1</sup> Eg. Ombudsman Act 1976(Cwth) s.15; Ombudsman Act 2001(Qld) s.49(2); Ombudsman Act 1974 (NSW) s.26.

Does the ombudsman's office have the expertise and the powers to investigate corruption? Generally I would suggest no. Often they have some limited powers to obtain documents. They can also require the answering of questions by certain persons. But typically ombudsman's offices have none of the powers needed for a full-scale corruption investigation, such as coercive hearings, search warrant powers or surveillance powers and the resources to implement them.

In Queensland, the Ombudsman Act requires the ombudsman to liaise with a complaints agency, which term includes the CMC, to ensure there isn't a duplication of resources. So, if the complaint raises issues of corruption, the Ombudsman will refer the matter to the CMC.

In a case where a mere allegation of corruption is made, but there is no material to support it, normally the Ombudsman would look into the matter initially and only if some material suggesting corruption is found refer the matter to the CMC.

I will give you an example of a matter involving allegations of both maladministration and corruption where the CMC and the Ombudsman co-operated in the investigation.

In late 2005, the CMC received various complaints against the Mayor of the Douglas Shire Council. Subsequently, as is often the case when complaints receive some publicity, we received a further, separate complaint against the Mayor. The allegation was that he had supported in Council a particular contractor's bid for a Council tender in relation to the vehicular ferry service over the Daintree River, in exchange for that contractor having undertaken earthworks on the Mayor's partner's property at no or at a reduced charge. This complaint alleged corrupt behaviour on the part of the Mayor and was clearly within the jurisdiction of the CMC.

The Ombudsman's office saw the newspaper coverage of this latter complaint and of related allegations of maladministration by various officials of the Council, including the Mayor, in dealing with the tendering process. Following discussions between the Deputy Ombudsman and the CEO of the Council, the Ombudsman decided to commence an own initiative investigation.

The Ombudsman's office contacted the CMC and the two offices agreed to jointly investigate the allegations. The officers from the two organisations worked together on an investigation including jointly conducting some interviews of relevance to both offices.

At the conclusion of the investigation, separate reports were issued by the Ombudsman and the CMC; each report referencing the other.

For the record, I should indicate that the allegations against the Mayor were found unsubstantiated, though the Ombudsman did make some procedural recommendations.

This was a good example of the two agencies working together, to avoid duplication and to make best use of the expertise and powers of the respective offices.

That particular investigation did not call for the exercise of any particular extra investigative powers of the CMC, but many corruption allegations can. This must cause particular problems for those jurisdictions where, unlike Queensland, NSW and Western Australia, there is no public sector anti-corruption agency. I am aware that in some jurisdictions the police fraud squads, because of demand on their services, will not investigate fraud allegations involving less than about \$.5m. Yet corruption of public officials involving just a few thousand dollars can have a very detrimental effect on public confidence in the public sector.

### **Incompetence or corruption**

There are some cases brought to the CMC's attention by the Ombudsman and, more frequently, by the Auditor-General, where it can be very difficult to prove whether problems are caused by maladministration, even incompetence, or by corruption of one form or another.

A good example of this type of case is financial management of very small councils, in particular Indigenous and Torres Strait Island Councils.

I'm not speaking out of place when I say that some councils are found on audit to have money unaccounted for, sometimes in the hundreds of thousands of dollars. Auditor-General reports tabled in the Queensland parliament attest to this.

The Audit is unable to ascertain whether the money is missing because of corrupt activities or through maladministration, principally because proper records are not kept.

Anyone who has ever prosecuted a fraud case knows that the most difficult case to prove is the one where there is no paper trail. Without the paper trail, normally it is impossible to prove what has occurred. Further, with the remoteness of these councils, any form of investigation is very difficult.

Theoretically some form of disciplinary action could be taken against the council staff in charge of the financial records for not ensuring that proper records are kept. However it would have to be taken by the council, which is probably the main cause of the problems in the first case. In Queensland, the only action, which can be taken against the councillors, being elected officials, is a criminal charge.

I reached the conclusion some time ago that some other form of action needs to be taken in these cases, aimed at preventing rather than prosecuting. For the Torres Strait Island councils, the legislation allowed the Director-General of the Department of Local Government to appoint a financial controller to a council, with broad powers. I urged the Director-General to take this action in relation to the worst councils and was pleased to see this was done. Subsequently, the government went further and amended the act to allow for a financial controller to be appointed to a mainstream council, and this has since happened in one council.

The use of this power is less drastic than dismissing the council but it will still be effective in ensuring that proper systems are put in place and acted on. In my view, it is a far better alternative to investigation.

To investigate cases where the outcome is bound to be inconclusive can only serve to embolden any individuals who are being corrupt and to reinforce in them the confidence that they can get away with their illegal activities. In such cases we must look to other ways to curb possible corrupt activities.

### **Breach of trust**

A further area of potential overlap in jurisdiction between the Ombudsman and the anti-corruption agency involves those cases of maladministration which are so severe as to amount to a form of corruption, namely a breach of the trust placed in the public official as the holder of a public office. In Queensland, such conduct, if severe enough as to warrant dismissal, is characterised in the Crime and Misconduct Act as “official misconduct”. This may be investigated by the CMC and prosecuted as an offence before the Misconduct Tribunal<sup>2</sup>.

In the CMC, we have for our own purposes set out what we would consider is the type of conduct, which would constitute such a breach of trust. We characterise it as conduct of the office holder connected with exercising the skill of a professional or engaging in the performance of the specified duties or activities of the office, which is either:

- a course of conduct involving repeated and/or wilful behaviour that undermines the trust placed in the person by virtue of their position; or
- a single incident of behaviour indicating a callous or reckless disregard for, or indifference to, the skills required for the proper discharge of the duties or activities of the office.

A good example of this arose out of the Bundaberg Hospital Inquiry. The Commissioner found that the Director of Medical Services and the District Manager of the hospital could be prosecuted for official misconduct regarding various matters. In particular, he pointed to their failure to take appropriate action to investigate about 20 complaints of clinical malpractice received against Dr Patel over a period of about 18 months. Such inaction could clearly amount to a breach of the trust placed in those officers.

Issues of malpractice such as those in the Bundaberg Hospital Inquiry are a clear case of the complexities that can arise where there are claims of professional malpractice, administrative malpractice and, in the most severe cases, possible criminal conduct, all arising out of the same general set of circumstances.

Unless there exists clear cooperation, and understanding of how that cooperation will occur, between the agencies with responsibilities for dealing with the various aspects of such cases, allegations will not be fully and adequately dealt with. This could lead to the possibility of another scandal like the Bundaberg Hospital case.

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<sup>2</sup> Crime and Misconduct Act 2001 (Q) s14; for NSW see Independent Commission against Corruption Act 1988(NSW) s.7; for WA see Corruption and Crime Commission Act 2003 (WA) s.4.

Now in Queensland we have a new health complaints body, with the resources to assess complaints of clinical malpractice. A very clear memorandum of understanding has been entered into between that body and the Ombudsman, the CMC, the Coroner, the Queensland Police Service, the Medical Board, which registers doctors and the Nurses Board which registers nurses. The memorandum specifies very clearly the role of each agency in dealing with any complaints about doctors in the public sector.

Finally may I stress that this notion of breach of trust in the office can exist in virtually all public sector functions, but it is going to be of most relevance in those functions that can affect the safety or the human rights or the hip pocket of the citizen. Simple examples are officers such as Child Safety officers, whose decisions can affect the safety, and even the life, of children, or to take another topical example, Immigration officials, whose decisions can affect the liberty of individuals.

In conclusion, I have given a snapshot of how the Queensland Ombudsman's office works with other relevant agencies. Without the cooperation between the Ombudsman and these agencies, including the CMC, I truly believe we cannot adequately service the public. In the case of the CMC and the Ombudsman, it's only through working together that both agencies can best utilise resources and powers. This cooperative approach ensures that the fine line between corruption and maladministration is dealt with appropriately and that public resources are not wasted.

Finally, this cooperation assists each of the integrity agencies to have a better overall picture of the integrity landscape of the public sector, and to then make changes and recommendations that benefit the public.