

# THE OMBUDSMAN AND THE RULE OF LAW

Address by Prof. John McMillan, Commonwealth Ombudsman, to  
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*'If the courts do not control these excesses, nobody will'*<sup>1</sup>

*'[T]he courts are the only defence of the liberty of the subject against departmental aggression'*<sup>2</sup>

*'[O]fficers or departments of central government ... are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge'*<sup>3</sup>

*'In the area of refugee law, the Australian judiciary can, quite patently, be the last bastion against executive tyranny for the dispossessed and the reviled. At risk is life, liberty and the Rule of Law – not just for the refugee, but for all of us'*<sup>4</sup>

*'The rule of law is a dry and dusty concept. ... Independent courts, operating according to law, in accordance with fair procedures and resistant to political or public pressure – these are more important to a free society, than democracy'*<sup>5</sup>

*'Section 75(v) of the Constitution [is] the means by which the rule of law is upheld throughout the Commonwealth'*<sup>6</sup>

## INTRODUCTION

There can be no doubting the role played by the judiciary in upholding the rule of law in Australia. The political and social history of Australia is replete with examples of landmark instances in which courts have confined the legislature to its constitutional competence and have brought unlawful executive action under control. Bedrock principles that ensure both procedural and substantive fairness in the exercise of governmental power owe their origin to judicial initiative. The development over three decades of a vibrant system of Australian administrative law is studded with instances of judicial creativity and achievement.<sup>7</sup>

This paper does not question the reality and importance of that judicial role. The issue taken up is not whether we have misconstrued the judicial role, but

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<sup>1</sup> *Paradise Projects Pty Ltd v Gold Coast City Council* [1994] 1 Qd R 314 at 321 per Thomas J.

<sup>2</sup> *Dyson v Attorney-General* [1912] 1 Ch 158 per Farwell J.

<sup>3</sup> *Inland Revenue Commissioners for National Federation of Self-Employed and Small Businesses* [1982] AC 617 at 644 per Lord Diplock. Note also the observation of Lord Roskill (at 663) that the role of the UK Parliamentary Commissioner was 'to redress administrative wrongs, not remediable in the courts'.

<sup>4</sup> M Crock, 'Refugees in Australia: of Lore, Legends and the Judicial Process', Paper to the Judicial Conference of Australia, Seventh Colloquium, 30 May 2003 ([www.jca.asn.au](http://www.jca.asn.au)).

<sup>5</sup> M Costello, 'Don't blame the courts for Bali trip-ups', *The Australian*, 27 August 2004 at 13.

<sup>6</sup> *Re Carmody; Ex parte Glennan* (2000) 173 ALR 145 at [2-3] per Kirby J. Gaudron J observed similarly in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [68] that s 75(v) 'provides the mechanism by which the Executive is subjected to the rule of law'. Cf Gleeson CJ in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 noting of s 75(v) only that 'It secures a basic element of the rule of law'.

<sup>7</sup> For examples see the entries on 'Administrative Law' and related topics in T Blackshield, M Coper & G Williams, *The Oxford Companion to the High Court of Australia* (2001)

whether we have mis-stated the way that accountability operates and the rule of law is upheld in the Australian legal system. I will develop this point by looking at the Ombudsman's contribution to protecting the rule of law. The same point could as effectively be made by instead looking at a similar contribution made by administrative tribunals – or, for that matter, the media, regulatory agencies, and numerous other non-judicial bodies and processes. In summary, the theme of this paper is that we need to realign the way we portray and understand accountability and the rule of law in Australian law and government.

The quotations given earlier set the context for this paper in presenting a view of the judicial role that, while tendentious, is reflected strongly in Australian legal discourse. Whether it is a mainstream view, it is certainly one that is fashionable and deeply-rooted. As the quotations illustrate – and there are many others of similar tone – it is a view that is consistent both over time and across authors. This view of the judicial role is reinforced in other ways. References to the 'rule of law' in legal judgments are now frequent, especially in recent years.<sup>8</sup> Law journal articles on administrative law display an overriding emphasis on the importance of judicial power. Even where a topic is distinctly open to a non-judicial perspective – for instance, whether government agencies should be bound to honour their advice<sup>9</sup> – the usual approach in legal scholarship is for the discussion to look only at doctrines that could be enforceable in the courtroom.

If the theme of this paper is correct – that there is an imbalance in the way that accountability and rule of law issues are addressed in Australian public law – larger issues arise, that are taken up at the end of this paper. Two in particular are whether legal scholarship on the protection of individual rights is wrongly focussed, and whether traditional thinking about the separation of powers needs adjustment. First, though, it is useful to look at different ways in which the office of Ombudsman can make a solid contribution to advancing the rule of law. The analysis begins with a brief discussion of the meaning and scope of the rule of law.

## THE RULE OF LAW

Discussion of the rule of law typically acknowledges that it is a protean concept, invoked for effect as much as for meaning. There is, nonetheless, some common ground.<sup>10</sup>

<sup>8</sup> For example, High Court cases between 2000-04 that mention the rule of law include *Fejzullahu* (2000) 74 ALJR 830, *Carmody* (2000) 173 ALR 145, *Coal and Allied* (2000) 203 CLR 194, *Enfield* (2000) 199 CLR 135, *Jia* (2001) 205 CLR 507, *Yusuf* (2001) 206 CLR 323, *Patterson* (2001) 207 CLR 391, *Allan* (2001) 208 CLR 167, *Plaintiff S157/2002* (2003) 211 CLR 476, *Eastman* (2003) 198 ALR 1, *Palme* (2003) 201 ALR 327, *Dossett* [2003] HCA 69, *Appellant S395/2002* (2003) 203 ALR 112, *Behrooz* [2004] HCA 36, *Electrolux* [2004] HCA 40, *Al-Kateb* [2004] HCA 37. See also the more frequent treatment of the issue in legal papers, below n 10.

<sup>9</sup> This topic is invariably addressed as one to be resolved by the development of a public law doctrine of estoppel. Providing a remedy for incorrect agency advice is a major focus of ombudsmen, as illustrated by some own motion reports of the Commonwealth Ombudsman: *Issues Relating to Oral Advice: Clients Beware* (1997), *Balancing the Risks* (1999), and *To Compensate or not to Compensate* (1999).

<sup>10</sup> Contemporary essays discussing the rule of law include K Mason, 'The Rule of Law' in P Finn (ed), *Essays on Law and Government*, Vol 1 (Law Book, 1995) 114; D Dyzenhaus (ed), *Recrafting the Rule of Law: the Limits of Legal Order* (1999); C Saunders & K Le Roy, *The*

The focus of the rule of law is upon controlling the exercise of official power by the executive government. The foundational principle is that agencies and officers of government, from the Minister to the desk official, require legal authority for any action they undertake, and must comply with the law in discharging their functions. Government is not above the law, but is subject to it. This contrasts with the position of members of the public: they too are subject to the law, but are free to engage in any activity that is not specifically prohibited. Unlike government, individuals need not point to a source of law in order to move and operate in the world.

Because of that essential difference between government and the governed, the relationship between the two is a key element of the rule of law. This is borne out in many areas of law. One such area is the principles of statutory construction, which require government to have express statutory authorisation – ‘a clear expression of an unmistakable and unambiguous intention’<sup>11</sup> – for activities that are coercive, punitive, intrusive or threatening in nature. To like effect are legal doctrines that allow any member of the public aggrieved by government action to institute proceedings for declaratory, injunctive and compensatory remedies. Administrative law plays a similar role, by prescribing as a condition of the validity of executive action that it is authorised, performed by an authorised officer, made for an authorised purpose, not based on impermissible considerations, and takes account of the adverse impact that official action can have on those to whom it applies.

Some definitions of the rule of law go much further, and stipulate minimum standards of fairness and justice that legal rules must conform to. It is unnecessary in this paper to enter that debate. Suffice to say that the rule of law, on any definition, is concerned at one level or another with safeguarding individual liberty and integrity against government oppression.

For that safeguard to be a reality there must be a legal mechanism by which the rule of law can be upheld. Specifically, there must be a forum to which disputes can be taken about the validity of government action. The forum – or dispute resolution body – must have sufficient independence, integrity and professionalism that it can reach an unbiased decision that will be accepted by others and implemented. Support and respect for the dispute resolution body should permeate government and society.

The body that best fits that description is, unquestionably, the judiciary. In the exercise of judicial power, courts are able to reach a conclusive finding on any issue of law.<sup>12</sup> There is a duty upon others, also enforceable by judicial order, to respect and implement a judicial decree. Moreover, there is a strong tradition in Australia of judicial independence and impartiality, bolstered at the federal level by the constitutional separation of powers. Not surprisingly, most rule of law theory is heavily focussed – at times exclusively so – on the role of courts. Discussion of the rule of law in Australian legal and academic circles often has more to say about the role of courts than about the true focus of the doctrine, which is the behaviour and thinking of governments.

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*Rule of Law* (Federation Press, 2002), M Gleeson, ‘Courts and the Rule of Law’, in Saunders & Le Roy, *ibid*; Spigelman CJ, ‘Rule of Law: Human Rights Protection’, Conference Address, 10 Dec 1998.

<sup>11</sup> *Coco v R* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron & McHugh JJ.

<sup>12</sup> *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

Are courts the only mechanism that fulfils rule of law objectives? And, in terms of practical steps to safeguard the rule of law, are there gaps that courts and judicial power cannot fill?

### **The Ombudsman Contribution to Upholding the Rule of Law**

The following discussion will point to ways in which the office of Ombudsman plays a forceful role in safeguarding the rule of law in Australia. There are admittedly distinct limitations on the role, meaning that the Ombudsman can only ever complement and not supplant the judicial role. As is well-known, the Ombudsman cannot make a declaration of invalidity, and must rely on recommendation, persuasion and publicity to effect change.<sup>13</sup> Nor can the Ombudsman injunct an agency, command action, or award compensation for defective administration. There are also significant jurisdictional limitations on what the Ombudsman can investigate: notable exclusions are Ministerial actions and decisions, the conduct of security intelligence bodies such as ASIO, and employment action in the public service.<sup>14</sup>

Those limitations are important, but they too easily assume centre-stage in discussion of what the Ombudsman is able to do. Following are some aspects of the Ombudsman's role that can contribute to safeguarding the rule of law.

#### ***Dealing with complaints against government***

Ombudsman offices have now been established for thirty years in Australia, handling complaints against every tier of government – national, State, Territory and local. The number of complaints handled each year is an impressive total. The Commonwealth Ombudsman, for example, received 17,496 complaints and 9,036 other inquiries in 2003-04<sup>15</sup> (the respective totals for the previous year were 19,850 and 11,178). Across Australia, the public sector Ombudsmen receive in excess of 60,000 complaints each year against government.

That total is important in its own right, as an indication of the frequency with which people turn to the Ombudsman for assistance and the number of queries and grievances against government that are addressed each year. In jurisprudential terms the total is significant in another way. It signifies that, through the mechanism of the Ombudsman, the notion is now embedded in Australia that people have a right to complain against government, to an independent agency, without hindrance or reprisal, and to have their complaint resolved on its merits according to the applicable rules and the evidence. Acceptance of this notion permeates both popular thinking and the practice of government.

From a rule of law perspective, complaint handling by the Ombudsman bolsters the notion that government is bound by rules, and that there can be an independent evaluation of whether there has been compliance with the rules. Government accountability and the right to complain go hand in hand. That this notion is taken for granted in Australia should not overshadow the

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<sup>13</sup> *Ombudsman Act 1976* (Cth) ss 12(3), 15, 16.

<sup>14</sup> *Ombudsman Act 1976* (Cth) s 5(2).

<sup>15</sup> Commonwealth Ombudsman, *Annual Report 2003-04* at 15.

importance of the fact that it can be taken for granted. The example of other countries in which the struggle for democracy is still vigorous provides a reminder that public disagreement with government decisions is a disputed right in many parts of the world. Recognition of the right can be an important marker of whether democracy and the rule of law are being practised.

Another sign of institutional acceptance of the right to complain in Australia is the spread of the Ombudsman model in the private sector. Major utilities and public services are subject to oversight by – to name a few – the Telecommunications Industry Ombudsman, Banking and Financial Services Ombudsman, Energy and Water Ombudsman (NSW and Victoria), Private Health Insurance Ombudsman, Public Transport Industry Ombudsman (Victoria), and (soon) a Postal Industry Ombudsman. In the last year alone, proposals have been made by parliamentary committees, political leaders and public commentators for the creation of an aviation ombudsman,<sup>16</sup> children's ombudsman,<sup>17</sup> small business ombudsman,<sup>18</sup> aged-care ombudsman,<sup>19</sup> media ombudsman,<sup>20</sup> arts ombudsman,<sup>21</sup> franchising ombudsman<sup>22</sup> and sports ombudsman<sup>23</sup>.

The spread of the Ombudsman model internationally over the last thirty years has been just as great. Whereas fewer than 20 jurisdictions had an Ombudsman in 1970, over 100 countries have now established an office by one name or another. It is perhaps the fastest growing (or widely copied) institution in the modern era. Viewed in that light, the establishment of a large number of Ombudsman offices in Australia is part of a global trend that crosses political, cultural and language barriers.

### **Resolving legal issues**

The rule of law is especially concerned with whether there is legal compliance by government. Ostensibly this is the only issue of concern to a court undertaking judicial review. What of the Ombudsman?

Before that question is addressed specifically, it is useful to place it in context, by recalling that issues of law, fact, procedure, discretion and judgment often shade imperceptibly into each other. A study of judicial review cases undertaken by the author and a colleague showed that two of the legal grounds most likely to be argued by applicants and accepted by courts were failure to take a relevant consideration into account and breach of natural justice.<sup>24</sup> While those are legal errors that can invalidate a decision, they are

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<sup>16</sup> House of Representatives Standing Committee on Transport and Regional Services, *Making Ends Meet: Regional Aviation and Island Transport Services* (2003) at 207.

<sup>17</sup> Senate Community Affairs Committee, *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children* (2004) at [8.146], [8.167].

<sup>18</sup> A Gome, 'Labor names its targets', *Business Review Weekly*, 19 February 2004 at 38 (policy proposal by ALP).

<sup>19</sup> S Maher, 'Latham plans 3000 more aged beds – Election 2004', *The Australian*, 2 October 2004 (election policy proposal by ALP).

<sup>20</sup> M Wenham, 'Premier gives the media a bad review', *The Courier-Mail*, 1 October 2004.

<sup>21</sup> J Rankin-Reid, 'Warning bell: A vision ignored at our peril', *The Sunday Tasmanian* 3 October 2004.

<sup>22</sup> P Switzer, 'An Ombudsman would ensure fair play for all', *The Australian* 7 Sept 2004.

<sup>23</sup> R Messenger, 'Sports Drug Agency "incompetent"', *Canberra Times*, 23 March 2004 at 3.

<sup>24</sup> R Creyke & J McMillan, 'Judicial Review Outcomes – An Empirical Study' (2004) *Aust Jnl of Admin Law* 82 at 97. In the nearly 300 cases analysed in this study, failure to consider relevant matters was argued in 48.3% of cases and upheld in 35.3%, and breach of natural justice was

also administrative shortcomings that are not unlike the errors that are routinely the focus of Ombudsman investigations. A similar observation holds true for immigration cases in Australian courts, in which probably the single most common line of attack by applicants is against the analysis of evidence by tribunals in their reasons for decision.

Turning more specifically to the Ombudsman's role in ensuring legal compliance, it is undoubtedly the case (as noted later in this paper) that complaints to the Ombudsman are more about matters of administrative style and fact-finding than about legal errors. Nevertheless, the law is never far from the sphere of investigation. This point was made in my annual report for 2003-04 in relation to debt recovery by Centrelink, which was the largest single source of complaints for that year. After observing that legislation authorised Centrelink to recover debts, the report observed that '[t]he focus of our concern is that debt recovery policies and procedures developed and implemented by Centrelink are not only authorised by those laws, but also have regard to the position of special needs of Centrelink customers and are not heavy handed'.<sup>25</sup>

The same point can be illustrated many times over, in relation to taxation, immigration, child support, law enforcement and countless other areas. A common cause of the complaints that people have against government is that legislative schemes of entitlement and regulation are nowadays detailed, complex, specific and sometimes rigid and harsh. The rule of law is as much concerned with explaining to a person why an adverse decision was made and is unimpeachable as it is with examining whether a decision was legally proper. A chief responsibility of the Ombudsman's office is to discharge that mixture of functions in an integrated fashion.

There are occasions too when the office plays a role that is indistinguishable, at least as to the result, from the role played by courts. A recent example was action taken by my office to ensure payment of the \$600 child bonus family payment to some parents who were eligible but had not received the payment.<sup>26</sup> The Department of Family and Community Services had initially taken the view that some parents were not eligible at that stage because of the terms of the family assistance legislation. My office had a different view as to how the legislation should be construed, and this view was ultimately accepted by the Department. Significantly, too, the legal entitlement enforced in this example resulted in a payment to a large number of people, and did not require initiation of legal proceedings by any one or more of them.

As that example illustrates, the Ombudsman is often well-placed to resolve legal issues affecting a large number of people, in circumstances where cost, complexity or lack of information inhibit the commencement of legal proceedings.<sup>27</sup> Another recent example is of action taken by an ACT government agency to repay a camera detected speeding penalty to

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argued in 38.5% and upheld 34.2%. The more common ground was error of law (including misinterpretation of legislation) which was argued in 49.3% and upheld in 42.3% of cases. Commonwealth Ombudsman, *Annual Report 2003-04* at 39.

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<sup>26</sup> See Commonwealth Ombudsman, 'Families should get \$600 per child bonus payment sooner', Press Release, 2 August 2004 ([www.ombudsman.gov.au](http://www.ombudsman.gov.au)).

<sup>27</sup> For other examples see D Pearce, 'The Ombudsman and the Rule of Law' (1994) 1 *AIAL Forum* 1.

approximately 470 motorists, when doubts about the adequacy of traffic warning signs were raised by my office in the course of an own motion investigation into traffic infringement notices.<sup>28</sup>

A different facet of the legal compliance role the Ombudsman can play is in drawing attention to gaps and anomalies in the legal framework. An example taken once again from the annual report for 2003-04 concerns an aspect of the migration legislation that can result in unfair and unreasonable consequences for individuals.<sup>29</sup> The problem exposed was that a student studying in Australia may not, for reasons beyond their control, be able to meet the time limit for renewing their student resident visa, and unavoidably will have to leave the country to lodge a fresh visa application. We took the issue up with the Government, which agreed to legislative change affecting 19 visa subclasses that came into operation in December 2004.

### ***Other accountability functions of the Ombudsman***

The traditional and still the core function of the Ombudsman is to investigate, on complaint or of the Ombudsman's own motion, whether there has been defective administrative action. Over the years a number of other functions have been conferred on the office that are significant from a rule of law perspective.

Many Ombudsmen in Australia have been designated with a special role under whistleblower protection and freedom of information legislation. The thrust of both legislative schemes is to ensure transparency and accountability in government: whistleblower protection does so by providing legal protection to a person who discloses information about unlawful or improper official action; and freedom of information does so by providing a right of public access to government documents. My own office (in its guise as ACT Ombudsman) has a lead role under the *Public Interest Disclosure Act 1994* (ACT) as a 'proper authority' to which protected disclosures can be made and investigated (s 13).<sup>30</sup> Freedom of information legislation also makes special mention of the Ombudsman's role in investigating complaints about denial or processing of FOI requests.<sup>31</sup> The office has always proclaimed a special interest in FOI matters, which has included the conduct of own motion investigations into FOI administration by Commonwealth agencies.<sup>32</sup>

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<sup>28</sup> This will be reported in the 2004-05 annual report of the ACT Ombudsman. A similar example is given by the Queensland Ombudsman in his *Annual Report 2003-04* at 17 of action taken by a local council at the Ombudsman's instigation to repay to residents more than \$53,000 in licensing fees that had been imposed without legal authority.

<sup>29</sup> Commonwealth Ombudsman, *Annual Report 2003-04* at 51.

<sup>30</sup> The role of Ombudsman offices in whistleblower protection legislation is discussed in NSW Ombudsman, *Adequacy of the Protected Disclosures Act to Achieve its Objectives*, Issues Paper (2004).

<sup>31</sup> See *Freedom of Information Act 1982* (Cth) s 57. The FOI Act as originally enacted conferred a larger role on the Ombudsman, which included an advocacy role in the Administrative Appeals Tribunal on behalf of FOI applicants (Pt VA). These provisions of the Act were later repealed at the Ombudsman's suggestion because the function was not separately resourced. In Queensland the function of Information Commissioner is conferred on the Ombudsman: *Freedom of Information Act 1992* (Qld) s 61(2). See also the annual audit of FOI reporting by agencies conducted by the NSW Ombudsman, eg, *Audit of FOI Annual Reporting 2002-2003*.

<sup>32</sup> Commonwealth Ombudsman, *Needs to Know: Own Motion Investigation into the Administration of the Freedom of Information Act 1982 in Commonwealth Agencies* (1999).

Another example of a special role discharged by the Commonwealth Ombudsman is under the new anti-terrorism legislation. That legislation confers powers that enable joint action by the Australian Security Intelligence Organisation and police to enter and search property and to detain people for questioning.<sup>33</sup> The legislation precludes judicial review of the exercise of those powers, while expressly preserving the role of the Ombudsman and the Inspector-General of Intelligence and Security in investigating complaints against (respectively) the police or ASIO.<sup>34</sup> My own office has developed protocols with other agencies to ensure that a detainee can contact the office's Law Enforcement Team 24 hours throughout the day.

One of the more significant but less known roles of the Ombudsman is to monitor compliance by the Australian Federal Police and the Australian Crimes Commission with legislation authorising telecommunications interception and controlled operations.<sup>35</sup> Police activity of that nature can only be undertaken in accordance with tightly-written statutory requirements that impose specific and demanding obligations upon police concerning authorisation of the interception or entrapment activity, the duration of the activity, preservation and destruction of records, and reporting to ministers and the parliament. The rigorous legislative code can be traced to concerns expressed by courts, royal commissions and members of the public generally about unlawful telephone interception and police entrapment.<sup>36</sup>

Judicial review of police compliance with these statutory requirements is still an option, but in practice will be intermittent and fractional. Instead, the legislation confers upon the Ombudsman a more systematic role of periodically inspecting the police records to ensure compliance with the legislation and to report the findings to the Minister and the Parliament. My own experience is that compliance auditing of this kind is a highly effective and low cost mechanism for ensuring strict compliance with statutory procedures that are grounded in the ideals of rule of law and rights protection. Importantly, too, I have seen how the systematic nature of this oversight has induced a culture of compliance within the law enforcement agencies; this is now anchored in the development of internal procedures for rigorous quality assurance and legal compliance, and in active support shown by senior law enforcement managers for the Ombudsman's oversight role.

Four other examples from the past year illustrate how the legal compliance and monitoring role of the Ombudsman is developing and poised for further expansion. First, on the recommendation of the Senate Standing Committee

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The office is currently conducting another own motion investigation, from which results should be published in early 2005.

<sup>33</sup> See *Australian Security Intelligence Organisation 1979* (Cth) Div 3.

<sup>34</sup> *Australian Security Intelligence Organisation 1979* (Cth) ss 34E, 34F (preserving Ombudsman's role), s 34X (excluding judicial review).

<sup>35</sup> See *Telecommunications (Interception) Act 1979* (Cth) s 84, *Crimes Act 1914* (Cth) Part 1AB. A 'controlled operation' is a covert police operation, to obtain evidence of criminal conduct, that involves police engaging in conduct that might itself be unlawful were it not authorised under a controlled operations certificate (eg, drug importation).

<sup>36</sup> Telephone interception legislation was enacted following incidents such as the 'Age tapes' and the Stewart Royal Commission into Unlawful Telephone Interception: see E Whitton, *Can of Worms* (1986, The Fairfax Library) at 158 ff. The controlled operations legislation followed the decision of the High Court in *Ridgeway v R* (1995) 184 CLR 19, in which the High Court condemned police entrapment activity undertaken without a statutory basis.



on Scrutiny of Bills, my office recently undertook a sample audit of the use by the Australian Taxation Office of its entry and search powers.<sup>37</sup> It is likely that this audit will be done periodically. Secondly, an own motion investigation of change of assessment decisions by the Child Support Agency looked *inter alia* at the criteria applied by decision-makers in calculating parental income.<sup>38</sup> An interesting (and disquieting) finding was that there are regional differences in the criteria being applied, meaning that on the same facts a parent's liability or entitlement under the child support legislation can potentially vary according to the State in which the parent lives. Thirdly, legislation enacted in 2004 requires annual inspection by the Ombudsman of the records of the Building Industry Taskforce, concerning its exercise of coercive powers to inspect building and industrial activity in Australia.<sup>39</sup> A recent decision of the Federal Court, warning that the notices issued by the Taskforce requiring the production of documents must not be 'foreign to the workplace relations of civilised societies, as distinct from undemocratic and authoritarian states', is a reminder of the need for effective oversight of the exercise of coercive powers.<sup>40</sup> Finally, the *Surveillance Devices Act 2004* (Cth) confers a new role on the Ombudsman of inspecting the records that law enforcement authorities are required to compile when using surveillance devices in criminal investigations and the location and safe recovery of children.<sup>41</sup>

### ***Adapting to change***

A perpetual challenge for all administrative law bodies is to adapt their function to cope with changes in the structure of government and the delivery of public services. The change that has attracted considerable attention and comment in recent years is the corporatisation, privatisation and contracting out of government functions and service delivery.<sup>42</sup> The statutory jurisdiction of administrative law bodies was mostly devised in an earlier age when there was a sharper distinction between the public and private sectors. The jurisdictional concepts embodied in legislation have not kept pace with changes in government, and in varying degrees constrain administrative law review bodies from reviewing administrative conduct that was formerly within jurisdiction. Many critics have complained that this has undermined accountability and the rule of law.

Administrative tribunals have probably had the least room to move in adjusting to this change. The decisions that are reviewable by tribunals are specified in legislation; outsourcing the function will sometimes remove the function from a tribunal's jurisdiction.

Judicial review has had mixed fortunes. On the one hand, courts exercising common law jurisdiction have been prepared on occasions to apply judicial review principles (notably natural justice) to decision-making by non-

<sup>37</sup> Commonwealth Ombudsman, *Use of Access Powers by the Australian Taxation Office* (2004).

<sup>38</sup> Commonwealth Ombudsman, *Child Support Agency Change of Assessment Decisions - Administration of Change of Assessment Decisions Made on the Basis of Parents' Income, Earning Capacity, Property and Financial Resources*, Report No 1 of 2004.

<sup>39</sup> *Workplace Relations Act 1996* (Cth) s 88AI.

<sup>40</sup> *Thorson v Pine* [2004] FCA 1316 at [40] per Marshall J.

<sup>41</sup> *Surveillance Devices Act 2004* (Cth) s 55.

<sup>42</sup> Eg, see two reports by the Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38 (1995), and *The Contracting Out of Government Services*, Report No 42 (1998).

government bodies.<sup>43</sup> There was, on the other hand, considerable caution displayed by the High Court in *Neat Domestic Trading Pty Ltd v AWB Ltd*<sup>44</sup> in holding that a public law remedy did not lie against a non-government body exercising a statutory veto on wheat export (in place, essentially, of a function formerly discharged within government). There has similarly been a reluctance by courts to sanction judicial review of government decision-making that is commercial in nature.<sup>45</sup>

The Ombudsman has often drawn critical attention to the impact that recent trends in the changing structure of government have on the limited jurisdiction conferred by the *Ombudsman Act 1976* (Cth) s 5 to investigate complaints against a 'department' or 'prescribed authority' (essentially, a body established by legislation for a public purpose).<sup>46</sup> The difficulties are real, and legislative amendment to close the growing gap in the Ombudsman's jurisdiction has been recommended by the Administrative Review Council and the Joint Committee of Public Accounts and Audit<sup>47</sup> and accepted by the Government.

Even so, there has been more adaptation of the Ombudsman's role than the public debate might suggest. This is significant in rule of law terms in showing that in some respects at least the Ombudsman has greater flexibility than other administrative law agencies to extend accountability principles to non-government activity. One example of this point is that a private company manages immigration detention facilities, but that does not absolve the Department of Immigration from its responsibility to respond to an Ombudsman complaint about the operation of a detention facility. Another example is the own motion investigation undertaken by my office in 2003 of complaint handling in the Job Network.<sup>48</sup> The jurisdictional focus of that investigation was the Department of Employment and Workplace Relations, but the purpose of the investigation was to ensure that the non-government contracted service providers – who essentially are discharging a public function – adhere to accepted public sector standards in complaint handling.

Another trend in government to which I drew attention in the annual report for 2003-04 is the use (seemingly, a growing use) of executive power rather than legislation to establish schemes of entitlement and assistance.<sup>49</sup> Two examples are the General Employee Entitlements and Redundancy Scheme

<sup>43</sup> Eg, *R v Panel on Take-overs and Mergers; ex parte Datafin plc* [1987] 1 QB 815. Cf *Forbes v New South Wales Trotting Club* (1979) 143 CLR 242 (per Gibbs & Murphy JJ), and *Dorf Industries Pty Ltd v Toose* (1994) 127 ALR 654, 666. Generally, see M Aronson, B Dyer & M Groves, *Judicial Review of Administrative Action* (3<sup>rd</sup> ed, 2004) Ch 3.

<sup>44</sup> (2003) 198 ALR 179. See A Buckland & J Higgison, 'Judicial Review of Decisions by Private Bodies' (2004) 42 *AIAL Forum* 37.

<sup>45</sup> Eg, *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164; *Australian National University v Burns* (1982) 43 ALR 25. Cf *MBA Land Holdings Pty Ltd v Gunghalin Development Authority* [2000] ACTSC 89.

<sup>46</sup> See A Stuhmcke, 'Privatisation and Corporatisation: What Now for the Commonwealth Ombudsman?' (2004) 11 *Aust Jnl of Admin Law* 101; and K Del Villar, 'Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsmen' (2003) 36 *AIAL Forum* 25.

<sup>47</sup> Administrative Review Council, *The Contracting out of Government Services*, Report No 42 (1998) Ch 4; Joint Committee of Public Accounts and Audit, *Contract Management in the Australian Public Service*, Report 379 (2000).

<sup>48</sup> Commonwealth Ombudsman, *Own Motion Investigation into Complaint Handling in the Job Network* (2003).

<sup>49</sup> Commonwealth Ombudsman, *Annual Report 2003-04* at 89.

(GEERS) administered by the Department of Employment and Workplace Relations, and an executive scheme for disaster assistance administered by Centrelink. Decisions made under an executive rather than statutory scheme are not subject to review by a tribunal or under the ADJR Act. Nor is there is a right to obtain a statement of reasons under the ADJR Act. And yet the executive decisions are indistinguishable, in nature and importance for those affected, from social support decisions made under legislation.

The only avenue of administrative law review still available to a person aggrieved by action taken under an executive scheme is a complaint to the Ombudsman. This right has proved important, including from a rule of law perspective. To take one example, in 2003-04 my office received roughly 120 complaints about decisions made under the GEERS scheme. Issues that we took up with the Department (with a favourable reception) were denials of natural justice in decision-making, inadequate statements of reasons, inadequate investigation upon internal review of decisions, and inadequate notification of the scheme to those eligible to apply under it.<sup>50</sup>

### ***Finding a remedy for governmental error***

A standard comment made about the Ombudsman, in legal literature in particular, is that its effectiveness is undermined by its absence of determinative powers. The description 'toothless tiger' is often applied.<sup>51</sup>

There is no denying that that restriction inhibits the ability of the Ombudsman to provide relief as easily or assuredly as a court or tribunal could. Recognising that point, the office will often suggest to a complainant that an issue in dispute can more appropriately be addressed in judicial or tribunal review; sometimes the office will decline to investigate on that basis.<sup>52</sup> Nevertheless, the significance of this restriction in evaluating the effectiveness of Ombudsman review is too easily overstated.

Examples given earlier in this paper illustrate that agencies are prepared to accept a reasoned argument that a decision or agency practice is contrary to law and should be altered. Indeed, nearly all formal recommendations made by the Ombudsman are accepted by agencies;<sup>53</sup> my experience is that there is a similarly high rate of acceptance of other suggestions and less formal recommendations. Even in urgent situations where a coercive judicial remedy might be thought more appropriate, there is a preparedness by agencies (as to some decisions at least) to accede to an Ombudsman request that implementation of a decision be deferred pending investigation of a complaint. For example, on a number of occasions the Defence Force has accepted an

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<sup>50</sup> Ibid at 65.

<sup>51</sup> To like effect is the distinction drawn by H Schoombee, 'Administrative Law: Choice of Remedies' (1995) 6 *AIAL Forum* 9: 'One of the first questions to be considered is whether recourse should be had to "sharp-edged remedies" such as review or appeal, or whether "softer" remedies such as the Ombudsman ... should be utilised'.

<sup>52</sup> See *Ombudsman Act 1976* (Cth) s 6(3).

<sup>53</sup> Eg, Commonwealth Ombudsman, *Annual Report 2003-04* at 15, noting that all but one of 31 formal recommendations in reports were accepted that year. Agency preparedness to change decisions after administrative law review was also confirmed in a study of judicial review cases undertaken jointly by the author, which found that close to 80% of favourable judicial review decisions were followed by a reversal of the original agency decision: Creyke & McMillan, above n 24 at 87.

Ombudsman request to suspend impending executive action to discharge a member of the Defence Force until completion of an investigation. Another recent example was a decision by a maritime authority to defer demolition of a structure that was the subject of a heritage dispute until a fuller investigation could be conducted.

A further point as to remedies is that the Ombudsman style of investigation, resting largely on inquisitorial method and consultation with agencies, is amenable to resourcefulness in deciding how best to resolve a problem. Not infrequently the difficulties that people encounter with government can be approached from different angles: the remedy that will satisfy a person is not necessarily the remedy they had in mind in lodging a complaint. A foremost example of this point is that compensation for administrative error is a remedy commonly adopted under the government-approved scheme for Compensation for Detriment Caused by Defective Administration (CDDA). The Ombudsman's office played a key role in the development of this scheme, which currently provides that a recommendation by the Ombudsman for payment of compensation is a sufficient basis for making a payment.<sup>54</sup>

A recent example of a payment made under the scheme illustrates the flexibility it offers for finding a fitting remedy for governmental error. An agency had declined on legal and administrative grounds to discharge a debt owed to the agency by a member of the public. Later, the agency accepted that an administrative lapse played a part in the debt being incurred, and the agency agreed to make a CDDA payment to the person of an equivalent amount, thus effectively extinguishing the debt.

The same flexibility can be used in other areas to circumvent legal obstacles. For example, a vexed administrative problem is whether a decision can be re-made if it appears there was a legal or factual error in the original decision. The law on this topic is not altogether clear or easy to apply, resting as it does on concepts such as whether the allegedly defective decision was a nullity, was infected by jurisdictional error, or was a decision without legal effect under the statute under which it was purportedly made.<sup>55</sup> Although the Ombudsman's office has to work within that doctrinal framework, we are often in a position to prompt an agency to approach the legal problem in a different way. I gave a couple of examples in my 2003-04 annual report of how we had persuaded an agency to take executive action to revise an obvious error or misnomer in a person's application, so as to validate the intent of the applicant and the legislation.<sup>56</sup> This effectively circumvented the problem initially raised by the agency, that it lacked statutory authority to revise its initial decision to reject the person's application.

It is important also to remember that the problems people have with government are more commonly about procedural justice than about the

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<sup>54</sup> Clause 21 of the CDDA guidelines, available on the website of the Department of Finance and Administration. See also the Ombudsman's own motion report, *To Compensate or Not to Compensate: Own Motion Investigation of Commonwealth Arrangements for Providing Financial Redress for Maladministration* (1999).

<sup>55</sup> Eg, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597. See also the Full Federal Court decisions in *Comptroller-General of Customs v Kawasaki* (1991) 103 ALR 661, and *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2004) 204 ALR 55.

<sup>56</sup> Commonwealth Ombudsman, *Annual Report 2003-04* at 87.

substantive correctness of decisions.<sup>57</sup> The prevalent issues raised in complaints to the Ombudsman are matters such as delay, misleading advice, inexplicable reasons, lost paperwork and discourtesy. Rarely will the remedy for such a grievance be the reversal of a decision by a determinative decree, or a declaratory, mandatory or injunctive order of the kind granted in judicial review. Oftentimes the more appropriate and accepted remedy is an explanation or an apology. Those remedies do not find a niche in rule of law theory, but nor should their importance be overlooked in evaluating how to civilise a system of government and make it attuned to its accountability and responsibility to the public.

### ***Other steps in legal compliance***

I have noted elsewhere that the effectiveness of judicial review of administrative decision-making rests in part on a blend of faith and assumption.<sup>58</sup> The reason is that we have scant empirical data or scientific understanding as to what happens after a court reaches a finding that a government decision is invalid. There is no published record to which one can turn to find the ultimate outcome; there is no procedure for reporting what occurs following a court decision; nor does any official have the function of monitoring the outcome of a court decision to ensure it is implemented as between the particular parties or that its principles are applied in other similar cases considered by the agency.

The situation is probably not as dire on the ground as that observation suggests. Two empirical studies undertaken jointly by the author with Prof Creyke revealed both a high level of support among executive officers for court and tribunal review of decision-making, and a high rate of implementation of court decisions both in individual cases and across the board.<sup>59</sup> However, the studies also showed that there is room for improvement in agency processes in implementing the lessons to be learnt from external review. One is left too with the fact that there is a lack of institutional mechanisms for ensuring that judicial review fulfils the rule of law benefits that are often claimed for it.

The Ombudsman model is more attuned to this issue. It is conventional for the office to define its role as one concerned as much with systemic problems in public administration as with transitory malfunctions in administrative decision-making. It is normal for the office to follow through and examine whether recommendations have been implemented and assurances have been honoured. Particularly through own motion investigations and publications on decision-making,<sup>60</sup> the office has both a functional and educative role in improving public administration, including legal compliance.

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<sup>57</sup> See J Howieson, 'The Justice of Court-Connected Mediation' *VCAT Mediation Newsletter*, No 6 (Nov 2002) 24: 'psycho-legal researchers have ... identified that it is *procedural justice* (the perception that the procedure is fair), rather than *distributive justice* (the perception that the outcome is fair), that is the most important factor in shaping disputants' overall perceptions of fairness, and in determining disputants' satisfaction with legal dispute resolution procedures'.

<sup>58</sup> Creyke & McMillan, above n 24 at 82. See also R Creyke & J McMillan, 'Executive Perceptions of Administrative Law – An Empirical Study' (2002) 9 *Aust Jnl of Admin Law* 163.

<sup>59</sup> Ibid.

<sup>60</sup> Eg, Commonwealth Ombudsman, *A Good Practice Guide for Effective Complaint Handling* (2<sup>nd</sup> ed, 1999). Manuals on effective decision-making published by State Ombudsmen include:

Of special importance has been the role of the office over three decades in stimulating the creation within agencies of internal complaint handling units.<sup>61</sup> Many of these units (such as ATO Complaints) are well-resourced and professional units that handle a substantially larger number of inquiries than the Ombudsman's office. This development is significant in rule of law terms. The integration of these units with the program work of the agencies, and the sponsorship and support the units often receive from agency management and the legal section, are influential in ensuring that within the agency there is a higher level of transparency, responsiveness, objectivity and legal compliance than might otherwise be the case.

A final point worth making has to do with the composition of Ombudsman offices. A criticism sometimes made of judicial review is that the sense of justice and community values that it imparts is at risk of being culturally specific. There is a high proportion of males holding judicial office, and a comparable narrowing in other qualifications for judicial appointment. The same narrowing trend has been occurring in appointments to some tribunals.<sup>62</sup> To my mind, a particular strength of Ombudsman offices is the diversity of qualifications, skills, experience and gender of the staff. The staffing profile of my office in June 2004 was 57 women and 35 men, including 22 men and 19 women in the executive level and SES band. Without labouring the point, my own experience is that the perspective the office brings to issues of legal compliance and government accountability reflects the diversity of the staff composition and is all the better for it.

## A NEW CONTEXT

An underlying premise of this paper is that legal scholarship too often presents a mistaken view of how accountability operates and the rule of law is upheld in the Australian legal system. The argument could stop there, with a call for a different presentation in legal writing. But deeper questions can be posed about how we define accountability and the rule of law in the contemporary setting of Australian government. Two issues taken up in the following discussion concern the mechanisms for human rights protection, and the constitutional placement of Ombudsman offices and other integrity institutions.

### ***Human rights protection in the Australian legal system***

There is a growing emphasis in Australia on improving the legal mechanisms for human rights protection. A common strain in academic legal discourse is that we need to develop a fresh approach to this challenge. Options often mentioned are the enactment of a bill of rights, incorporation of international human rights principles into Australian domestic law, and giving greater

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*Good Conduct and Administrative Practice* and *Effective Complaint Handling*, published by the NSW Ombudsman ([www.nswombudsman.gov.au](http://www.nswombudsman.gov.au)); *An Easy Guide to Good Administrative Decision-Making*, published by the Queensland Ombudsman ([www.ombudsman.qld.gov.au](http://www.ombudsman.qld.gov.au)); and *The Ombudsman's Guidelines for Conducting Administrative Investigations*, published by the WA Ombudsman ([www.ombudsman.gov.au](http://www.ombudsman.gov.au)).

<sup>61</sup> See also Administrative Review Council, *Internal Review of Agency Decision Making*, Report No 44 (2000).

<sup>62</sup> Eg, the annual reports of the Refugee Review Tribunal (RRT) and Migration Review Tribunal (MRT) for 2002-03 showed that 56% of RRT members and 72% of MRT members had a degree in law; 78% of the 18 new members appointed to the RRT in 2003 had a degree in law.

prominence to a human rights dimension in judicial review principles and constitutional doctrines. The argument for better human rights protection is often framed as an argument for enhancing respect for the rule of law.

Without entering that general debate about whether there is adequate protection of human rights in Australia, I would observe that the proponents for greater protection frequently overlook the established and effective human rights role currently played by Ombudsman offices and other elements of the administrative law system. The metres of books about human rights on law library shelves rarely mention the Ombudsman as a human rights agency. The focus overwhelmingly is upon bills of rights, courts and international instruments. Yet, an implicit theme in this paper is that complaint investigation by the Ombudsman is directly concerned with human rights issues, in areas as diverse as law enforcement, withdrawal of social security benefits, detention of immigrants, treatment of young children, imposition of taxation penalties, and the exercise of government coercive power. Furthermore, both symbolically and at a practical level, the Ombudsman's office captures what is arguably the most fundamental of all human rights, namely the right to complain against and to challenge the government in an independent forum.

Recent developments in the Australian Capital Territory on the human rights front illustrate my concern. In 2004 the Legislative Assembly of the ACT enacted the *Human Rights Act 2004*. It is doubtless true that the Act has an important potential to direct attention to human rights criteria in ACT law and government. Yet there is a discernible risk that the legal effect of the new statute will be overstated. For example, I disagree that the ACT is 'the first Australian jurisdiction to formally incorporate rights into its legislation'.<sup>63</sup> There are countless examples of statutes enacted decades earlier that formally protect the rights of members of the public in their dealings with government: an apt example is the large body of Commonwealth and State anti-discrimination and human rights legislation that establishes a procedure for complaint investigation and adjudication applying human rights criteria that are not dissimilar to those in the ACT Human Rights Act.<sup>64</sup> Most features of that Act – such as the obligation cast on legislative scrutiny bodies and executive agencies to have regard to the rights listed in the Act – have a parallel in established elements and doctrines of Australian public law. Perhaps the main innovation in the ACT statute is the jurisdiction it confers on the Supreme Court to make an advisory declaration that an ACT statute is inconsistent with one of the rights declared in the Act (s 32).

To overstate the change wrought by the Act is at the same time to understate the efficacy of the established mechanisms for human rights protection in the ACT. A deficiency of that kind preceded the enactment of the Human Rights Act, in the report in 2003 of the Bill of Rights Consultative Committee. In evaluating the existing mechanisms to protect human rights in the ACT, the Committee made no mention of the ACT Ombudsman or of administrative

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<sup>63</sup> C Evans, 'Responsibility for Rights: The ACT *Human Rights Act*' (2004) 32 *Federal Law Review* 291 at 309.

<sup>64</sup> For example, the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) confers a right to complain about breach of one of the standards in many of the leading international human rights conventions, that are contained in Schedules to the Act (such as the International Convention on Civil and Political Rights).

law.<sup>65</sup> There is a worry that that misrepresentation of the present public law system will be compounded. For example, a recent article on the ACT statute foreshadows that it will 'encourage a culture of respect for rights within [the] branches of government', but warns that '[t]he considerable effort which it takes to comprehensively change public service and executive government culture to one that is conscious and respectful of human rights should not be underestimated'.<sup>66</sup>

Assessments of that kind carry little weight unless there is solid empirical evidence to substantiate them. My own view is that the limited empirical evidence that is available suggests that institutions such as the Ombudsman, together with other innovations in administrative law and government, have had a marked impact over three decades in developing a new culture in public administration that is more attuned to the rights of members of the public.<sup>67</sup> If so, those innovations – which are now strongly rooted in Australian public law – deserve more attention in any discussion about enhancing respect for the rule of law in Australia.

### ***The integrity branch of government***

In a recent address Chief Justice Spigelman of the NSW Supreme Court proposed that we should recognise 'an integrity branch of government as a fourth branch, equivalent to the legislative, executive and judicial branches'.<sup>68</sup> The same argument has been made by an American constitutional scholar, Professor Ackerman, that 'a separate "integrity branch" should be a top priority for drafters of modern constitutions'.<sup>69</sup>

This idea may seem novel to anyone schooled in the trinitarian separation of powers, but the developments in Australian law and government over the past thirty years are sufficiently momentous to raise questions about the durability of constitutional models and thinking that date from a far earlier age.

There are now a great many independent statutory agencies that perform an important accountability and integrity function in the legal system. The list includes Auditors-General, ombudsmen, administrative tribunals, independent crime commissions, privacy commissioners, information commissioners, human rights and anti-discrimination commissions, public service standards commissioners, and inspectors-general of taxation, security intelligence and military discipline. The function they discharge embraces legal compliance, good decision-making and improved public administration. But the shared

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<sup>65</sup> ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003) 30-32.

<sup>66</sup> Evans, above n 63 at 300.

<sup>67</sup> That was the clear conclusion in two empirical studies I jointly undertook: see two articles by Creyke & McMillan, above n 24 and n 54. The annual reports of the Commonwealth Ombudsman also describe the steps taken by agencies to improve their systems in response to complaints from members of the public. Similarly, for an explanation of how the creation of an accountability and integrity framework within the executive branch of government transformed the Queensland Police Service (in the view of the Queensland Ombudsman) 'from a corrupt institution at the highest levels to a professional and respected organisation' see D Bevan, 'Queensland's Public Accountability Framework: Effective Regulation or Effectively Over-Regulated?' in M Barker (ed), *Appraising the Performance of Regulatory Agencies* (AIAL, 2004) 228.

<sup>68</sup> The Hon J J Spigelman, 'Jurisdiction and Integrity', Second Lecture in the 2004 National Lecture Series of the Australian Institute of Administrative Law.

<sup>69</sup> B Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633 at 694.



concern of these agencies goes further to embrace institutional integrity. Chief Justice Spigelman explains:

Institutional integrity goes beyond a narrow concept of illegality to encompass at least two additional considerations. First, the maintenance of fidelity to the public purposes for the pursuit of which an institution is created. Secondly, the application of the public values, including procedural values, which the institution was expected and/or required to obey.

This focus on fidelity to purpose and on applicable public values ... distinguish[es] the integrity function from other governmental functions, including most executive, legislative and judicial decision-making, which are concerned with the quality of outcomes.

The constitutional practice in Australia has been to classify these accountability or integrity agencies as being part of the executive branch of government. When the classification seems strained, unsatisfactory hybrid categories such as 'quasi-judicial' have been coined (more particularly for adjudicative tribunals). But is the tension now too great?

It is misleading to classify many of these agencies as 'executive'; both their independence and the watchdog role they play in government differentiate them from other agencies in the executive branch. The alternative, as Chief Justice Spigelman suggests, is to re-think their classification by taking stock of the enormous change that has occurred in the framework of government. It is premature to spell out a new constitutional philosophy of government, but a few pointers may help.

The conventional way of altering the structure of government is to embody the change in a constitutional document. That is not a promising option as regards the framework of national government, because of the difficulty of formal constitutional change under the referendum procedure in Constitution s 128. The difficulty is not so great at the State level. Already, for example, in Victoria, the Ombudsman, Auditor-General and Electoral Commissioner are recognised in the Constitution.<sup>70</sup>

Transformation of the structure or conventions of government can be achieved as well by non-constitutional means. In Queensland, the Ombudsman, Auditor-General and Crime and Misconduct Commission are grouped together as an integrity branch for the purposes of their appearance before parliamentary estimates committees.<sup>71</sup> Statutory requirements – on matters such as parliamentary oversight, annual reporting, and appointment and removal of statutory office holders – also play a role in characterising an agency within the structure of government. An example in point is the NSW *Ombudsman Act 1974* that establishes a joint committee of both houses of the legislature, called the Committee on the Office of the Ombudsman and the Police Integrity Commission. The functions of the Committee include the

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<sup>70</sup> *Constitution Act 1975* (Vic) ss 94A, 94E, 94F. A similar proposal was made in Queensland by the Queensland Constitutional Review Commission for constitutional recognition of certain statutory office holders, but this recommendation was not accepted by the Government: see Legal, Constitutional and Administrative Review Committee, *The Queensland Constitution: Specific Content Issues*, Report No 36 (2002) 48-53.

<sup>71</sup> Generally, see Bevan, above n 67.

exercise of a power of veto over the proposed appointment of a person as Ombudsman, the examination of the reports of the Ombudsman, and monitoring and keeping the legislature informed on the operations of the Ombudsman.<sup>72</sup>

The terminology and classifications that are used in describing a system of government are also an important element of that system. Here it is noteworthy that the concept of 'integrity' is increasingly being used both to describe and to evaluate the health of governmental systems. One example is the inaugural 'Global Integrity Report' prepared in 2004 by the Washington-based Centre for Public Integrity. Interestingly, the Ombudsman framework in Australia was an influential factor in Australia being ranked third among 25 democracies on the index.<sup>73</sup>

Another relevant Australian development was the publication in 2004 of a National Integrity System report by an Australian Research Council funded project conducted jointly over five years by Transparency International Australia and Griffith University's Key Centre for Ethics, Law, Justice and Governance.<sup>74</sup> The report was the first such attempt to 'map' a single country's integrity system. A large number of recommendations were made for improving Australia's integrity framework, including the creation of a national independent statutory authority to investigate and prevent corruption and misconduct, and also to promote integrity and accountability in government; the creation in each Australian jurisdiction of a governance review council, including representatives of agencies such as the Ombudsman, Auditor-General, public service head, parliamentary standards commissioner, and community representatives; the creation of a parliamentary committee to oversight the core integrity institutions; the imposition of a statutory duty on public sector agencies to prepare an organisational code of conduct; the creation of better consultative and other links between the core integrity institutions; and the development of accredited training on integrity, accountability and ethics requirements in public and private sector agencies.

Those proposals illustrate the fertile possibilities for conceiving of 'integrity' as a function or even a branch of government. As a concept it does not replace more traditional legal concepts such as the rule of law and separation of powers in defining the fundamentals of the system of law and government. On the other hand, the emergence of novel concepts and ways of looking at government are a reminder of the need for traditional concepts to be revisited from time to time to take account of other changes in government and society.

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<sup>72</sup> *Ombudsman Act 1974* (NSW) ss 6A, 31B, 31BA. See also in Queensland the *Ombudsman Act 2001* s 89, which confers an oversight role on a parliamentary committee; and the *Public Sector Ethics Act 1994*, which creates the position of Queensland Integrity Commissioner (s 26) and defines 'integrity' as one of the five 'ethics principles ... fundamental to good public administration' (s 4).

<sup>73</sup> See J Uhr, 'Australia: Integrity Assessment' in M Camerer (ed), *Global Integrity Report* (2004), Centre for Public Integrity ([www.publicintegrity.org](http://www.publicintegrity.org)).

<sup>74</sup> *Chaos or Coherence: Strengths, Challenges and Opportunities for Australia's National Integrity Systems*, draft report (Nov 2004) ([www.griffith.edu.au/centre/kceljag/nisa](http://www.griffith.edu.au/centre/kceljag/nisa)).