

Administrative law evolution: independent complaint and review agencies

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The framework for Australian government accountability has developed and changed markedly in the past 30 years. Two changes stand out. One is the creation by statute of a large number of independent agencies (in addition to tribunals) that review and scrutinise executive government processes, including by complaint handling. These review agencies – watchdogs, as the media often describe them – have their roots in administrative law culture and its values of legality, rationality, fairness and transparency.

The second development is to do with the role of the oldest independent accountability agency at the Commonwealth level, the Auditor-General, which was established in 1901 under the fourth Act passed by the new Commonwealth Parliament.¹ Since the 1970s, through the broader mandate of performance auditing, the Auditor-General has analysed in detail selected administrative decision making in a manner that complements administrative law processes.

These two developments tell us a great deal about how government has changed over the period, both in structure and in its relationship with the public. The review agencies continue to flourish and to deal with new challenges in government accountability.

The emergence of independent review agencies since the 1970s

The first of the new independent review agencies to be created at the Commonwealth level was the office of the Commonwealth Ombudsman, established in 1976 following a lead set by Western Australia in 1971 and

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¹ *Audit Act 1901* (Cth).

quickly followed in other Australian states.² The primary function of the Ombudsman, then as now, is to investigate complaints received from members of the public about the administrative decisions and actions of government agencies, including departments. The number of approaches and complaints handled by the Commonwealth Ombudsman has steadily increased over the years, from 2656 complaints in 1977–78 to 45 719 approaches and complaints in 2008–09.

From an accountability perspective, a special feature of ombudsman offices is their statutory independence from parliament and the executive. The office is created by statute.³ The Commonwealth Ombudsman is appointed for a fixed term of up to seven years and can only be removed from office by both Houses of parliament. An investigation is to be conducted ‘as the Ombudsman thinks fit’.⁴ There is a broad discretion to begin or cease an investigation—including the authority to initiate an own-motion investigation. Extensive investigative powers, matching those of a royal commission, are conferred on the Ombudsman, among them the power to require documents, to take evidence on oath or affirmation, and to enter premises. A complainant to the Ombudsman is protected against civil proceedings (for example, defamation) and Ombudsman officers are not compellable to provide evidence in other legal proceedings. The Ombudsman can make a special report to parliament and has discretion to publish information in the public interest.

It has become commonplace for independent review agencies to be established along similar lines. Even so, the familiarity of this model of independent review should not detract from the profound nature of this change in government. It involved a marked departure from traditional means of accountability, which focused on the role of parliament. Before, accountability for government administrative action was primarily to the parliament in three ways—through the answerability of ministers for the administrative actions of government agencies, through the oversight role of parliamentary committees, and through the constituency grievance role of individual members of parliament.

The creation of ombudsman offices was a new and radically different way of requiring government agencies to justify their actions and expose their processes to independent external scrutiny. This change in the mechanisms

² The Western Australian office was called the Parliamentary Commissioner for Administrative Investigations. Ombudsman offices were established in South Australia in 1972, Victoria in 1973, Queensland in 1974, New South Wales in 1975 and Tasmania in 1978.

³ *Ombudsman Act 1976* (Cth).

⁴ *ibid.* s 8(2).

of accountability was a response to significant growth in the functions and activities of government.

Government had accepted greater responsibility for providing social welfare support, community grants and commercial incentive payments. As a consequence, more people, were affected by government decision making. Government regulation had also expanded, prompted by a host of new policy imperatives to combat injustice, safeguard the vulnerable, control development, regulate business, stimulate commerce, expand taxation, protect the environment, suppress criminal activity and respond to security threats. Other social changes – for example, in tertiary education and in entrepreneurial business activity and the rise in international travel – meant that people were more likely to require government permission or approval for social or business activities. The cumulative effect of all these changes was greater interaction between the community and government and government exercising more discretionary authority to control human affairs and business activity.

This greater interaction between the community and government was accompanied by other changes. People expected more of government agencies and officials: they expected them not only to act lawfully and in the public interest but also to be responsive, transparent and answerable. Allied to this change was the notion that people have a ‘right to complain’ against a failure by an agency or its staff to comply with the standards of good administration. This expectation is now well entrenched in community attitudes.

The creation of ombudsman offices was a response to this change in the role and functions of government and in government’s relationship with the public. There quickly followed the creation by statute of a number of other independent review agencies with a similar role of upholding the rule of law in government administration, protecting the public against wrongful agency action, and fostering good governance. Among these agencies were the following⁵:

⁵ An example of an oversight agency not included in this list is the Inspector General of the Australian Defence Force, which investigates complaints from defence personnel about military justice matters and conducts audits and performance monitoring of military justice arrangements. The inspector general is a statutory office (see the *Defence Act 1903* (Cth) Part VIIIB) that is independent of the normal chain of command but is located within the Department of Defence. Another example is the National Security Legislation Monitor, to be established in 2010 to review the operation of Australia’s counter-terrorism and national security legislation, although it will not have a complaint function – see the National Security Legislation Monitor Act 2010.

- The Australian Human Rights Commission, established in 1986 as the Human Rights and Equal Opportunity Commission, administers functions under laws relating to human rights, age discrimination, disability discrimination, sex discrimination, racial discrimination and equal employment opportunity.⁶ The functions of the commission are discharged by its president, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Disability Discrimination Commissioner, the Human Rights Commissioner, the Sex Discrimination Commissioner and the Race Discrimination Commissioner. These functions include investigating and conciliating complaints alleging discrimination and breaches of human rights, conducting public inquiries and consultations, raising public awareness about human rights, and intervening in legal proceedings to provide advice on human rights principles.
- The Inspector-General of Intelligence and Security, created in 1987, provides independent review of the six intelligence agencies – the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service, the Defence Signals Directorate, the Defence Imagery and Geospatial Organisation, the Defence Intelligence Organisation and the Office of National Assessments.⁷ The inspector-general can conduct investigations in response to a complaint from the public or a reference from a minister or on its own motion. Other activities include inspections (effectively compliance audits) of the legality and propriety of agency operations.
- Among other things, the Privacy Commissioner, created in 1988, monitors compliance by Australian government agencies with 11 Privacy Principles that control how personal information may be collected, stored, used and disclosed.⁸ The commissioner exercises diverse functions, among them investigating complaints, conducting own-motion investigations, auditing agency practices, providing advice and guidance on privacy matters, and raising awareness in government and the community about privacy rights and responsibilities.

⁶ *Australian Human Rights Commission Act 1986 (Cth), Racial Discrimination Act 1975 (Cth), Sex Discrimination Act 1984 (Cth), Disability Discrimination Act 1992 (Cth), Age Discrimination Act 2004 and Workplace Relations Act 1996 (Cth).*

⁷ *Inspector-General of Intelligence and Security Act 1986 (Cth).* See I Carnell & N Bryan 2006, 'Watching the watchers: how the Inspector-General of Intelligence and Security helps safeguard the rule of law', *Admin Review*, no. 57, ARC, Canberra, 33.

⁸ *Privacy Act 1988 (Cth).*

- The Inspector-General of Taxation, established in 2003, reviews the systems established to administer Australian taxation laws and makes recommendations for improvement.⁹ The inspector-general does not investigate individual taxation complaints but does conduct public inquiries to examine the need for systemic improvements in taxation administration with a view to reducing the administrative burden for taxpayers in meeting their taxation obligations.
- The Integrity Commissioner, supported by the Australian Commission for Law Enforcement Integrity, was established in 2006 to detect, investigate and prevent corruption in the Australian Crime Commission and the Australian Federal Police.¹⁰ A corruption investigation can begin as a result of a complaint to the Integrity Commissioner on the initiative of the commissioner or in response to a referral from the head of a law enforcement agency, the Minister for Justice or another agency such as the Commonwealth Ombudsman.
- The Aged Care Commissioner, established in 2007, reviews decisions made by the Complaint Investigation Scheme (located in the Department of Health and Ageing) concerning aged care services that are subsidised by the Australian Government and the conduct of the Aged Care Standards and Accreditation Agency.¹¹ In addition to receiving complaints, the commissioner can initiate an own-motion investigation into the scheme's processes for investigating aged care complaints or the conduct of the agency.
- Legislation was introduced into parliament in late 2009 to establish the Office of the Information Commissioner, to be constituted by three commissioners – the Information Commissioner, the Freedom of Information Commissioner and the Privacy Commissioner.¹² The functions of the new office will include monitoring agencies' compliance with the *Freedom of Information Act 1982* and the *Privacy Act 1988*, promoting the objects of both Acts, issuing guidelines on administration of the Acts, providing training to agency staff, investigating complaints received from the public, conducting own-motion investigations, advising government on information policy, and reviewing agency FOI decisions and making determinations that can substitute for those decisions.

Four features are common to these review bodies:

⁹ *Inspector-General of Taxation Act 2003* (Cth).

¹⁰ *Law Enforcement Integrity Commissioner Act 2006* (Cth).

¹¹ *Aged Care Act 1997* s 95A.1.

¹² *Information Commissioner Bill 2009*.

- They are established by statute as independent bodies that are not subject to government direction on how reviews should be conducted or other functions exercised.
- They can investigate the administrative actions of government agencies, including on receipt of complaints from members of the public.¹³
- Investigation reports are often published, either by the review body or through the minister or parliament.
- They have extensive statutory powers to conduct investigations, and there are associated protections for the investigation process, investigation staff, witnesses and complainants.

Many of the review bodies have functions additional to their investigative role. As noted, some have a record-inspection program or conduct audits in selected areas of government administration in order to gauge whether decisions are being lawfully and correctly made. That is the dominant activity of the Inspector-General of Intelligence and Security, who works in an area, national security, that is largely hidden from public view. Another example of a specialist function is the Ombudsman's role in preparing a report, tabled in parliament, on every person held in immigration detention for more than two years.¹⁴

Sometimes monitoring can be in 'real time'. The Inspector-General of Intelligence and Security can attend questioning conducted under warrant by ASIO; if the inspector-general expresses concern, the questioning is suspended until the concern is redressed.¹⁵

Some of the review bodies have additional powers that reflect their specialist functions. The Integrity Commissioner, for example, can investigate police corruption; this can be done by means of telephone interception, electronic surveillance, undercover and controlled operations, and passport confiscation.

Jurisdiction can be another area of difference. Three of the review bodies — the Ombudsman, the Privacy Commissioner and the Australian Human Rights Commission — have a jurisdiction that extends both to government agencies and, at least to some degree, to the private sector. The National Privacy Principles, administered by the Privacy Commissioner, apply to

¹³ The Inspector-General of Taxation does not have a complaint investigation function.

¹⁴ *Migration Act 1958* (Cth) s 486O.

¹⁵ *Australian Security Intelligence Organisation Act 1979* (Cth) s 34Q.

many private businesses, including health service providers, Commonwealth contractors, and businesses with an annual turnover exceeding \$3 million. The disability, race and sex discrimination standards administered by the Human Rights Commission similarly extend to most private businesses that provide goods and services to the public. The Ombudsman's jurisdiction extends to private businesses that provide government services under contract to the public and to some private postal operators that join the Postal Industry Ombudsman Scheme.

Another distinguishing feature is that some review bodies place strong emphasis on educational activities to promote better decision making and respect for human rights values and privacy principles, in and outside government.

Also notable is the fact that the Australian Commission for Law Enforcement Integrity reports to a parliamentary committee that is required by statute to monitor the commission's work. Additionally, the Inspector-General of Intelligence and Security must report to the Parliamentary Joint Committee on Intelligence and Security on certain matters.¹⁶

Widening of the Auditor-General's mandate

Before the mid-1970s the main task of the Auditor-General, supported by the Australian National Audit Office, was financial auditing to verify the information contained in the financial statements of Australian government agencies. A profound change in the 1970s was the widening of the Auditor-General's mandate to include performance auditing, which involves scrutinising the efficiency and effectiveness of program management by government agencies.¹⁷ A performance audit will typically examine both how an agency is performing its functions and whether it is achieving the objectives of the program in question.

There is overlap between performance auditing and administrative law, in terms of both the topics covered and the objectives. In the case of the topics, performance auditing and administrative law review cover all of government. Often the focus is on the areas of government that interact directly with the public, either through providing services to the public or through regulating individual and business conduct. In recent years, for

¹⁶ Respectively, the *Intelligence Services Act 2001* (Cth) s 28 and the *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 213.

¹⁷ J Wanna, C Ryan & C Ng 2001, *From Accounting to Accountability – a centenary history of the Australian National Audit Office*, Allen & Unwin, Sydney, chs 4 and 6.

example, the Auditor-General has carried out performance audits of payments made to individuals, such as age pension payments, Medicare claims and Youth Allowance¹⁸; government grants to regional and community projects¹⁹; registration of business activity for taxation and business purposes²⁰; administrative penalties²¹; and immigration and visa processing.²²

The Auditor-General has also carried out performance audits of components of the administrative law system. Among the topics examined have been the management of appeals by the Migration and Refugee Review Tribunals, Centrelink's review and appeals system, veterans' appeals against disability compensation decisions, the administration of freedom of information requests, confidentiality in government contracts, complaint handling, and customer service charters.²³

In the case of the objectives, performance auditing and administrative law are both concerned with ensuring that public administration is accountable and transparent. Both are also concerned with ensuring, at a more practical level, that administrative decision making and service delivery are lawfully and properly conducted. Tribunals and courts pursue that objective principally by the review of individual decisions that are the

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- ¹⁸ *Administration of Complex Age Pension Assessments*, ANAO report no. 26 of 2006/07; *Accuracy of Medicare Claims Processing*, ANAO report no. 20 of 2007/08; *Administration of Youth Allowance*, ANAO report no. 12 of 2009/10.
 - ¹⁹ *Performance Audit of the Regional Partnerships Programme*, ANAO report no. 14 of 2007/08; *Distribution of Funding for Community Grants Programmes*, ANAO report no. 39 of 2006/07; *Administration of Grants by the National Health and Medical Research Council*, ANAO report no. 7 of 2009/10.
 - ²⁰ *Administration of Australian Business Number Registrations Follow-up Audit*, ANAO report no. 15 of 2007/08; *Export Certification Australian Quarantine and Inspection Service*, ANAO report no. 2 of 2006/07.
 - ²¹ *Administration of Tax Penalties*, ANAO report no. 31 of 1999/2000.
 - ²² *Visa Management: working holiday makers*, ANAO report no. 7 of 2006/07; *Management of the Processing of Asylum Seekers*, ANAO report no. 56 of 2003/04; *Processing of Incoming International Air Passengers*, ANAO report no. 10 of 2009/10.
 - ²³ *Management of Tribunal Operations – Migration Review Tribunal and Refugee Review Tribunal*, ANAO report no. 44 of 2006/07; *Centrelink's Review and Appeals System Follow-up Audit*, ANAO report no. 40 of 2006/07; *Veterans' Appeals Against Disability Compensation Decisions Follow-up Audit*, ANAO report no. 58 of 2002/03; *Administration of Freedom of Information Requests*, ANAO report no. 57 of 2003/04; *Confidentiality in Government Contracts – Senate order for departmental and agency contracts (calendar year 2008 compliance)*, ANAO report no. 6 of 2009/10; *Centrelink's Complaints Handling System*, ANAO report no. 22 of 2008/09; *Centrelink's Customer Charter – follow-up audit*, ANAO report no. 33 of 2006/07; *Taxpayers' Charter – follow-up audit*, ANAO report no. 40 of 2007/08.

subject of an application for review by a tribunal or court. Review bodies such as the Ombudsman pursue not only individual cases but also systemic matters. Performance auditing achieves the same objective by examining a random selection of individual decisions to see if errors are occurring but also considers systemic or governance matters.

Both techniques can be effective in identifying flaws in decision making and service delivery. This can have a beneficial influence on public administration beyond the individual decisions that are reviewed or audited. The reports of the Auditor-General, along with the published decisions and findings of review agencies, tribunals and courts, provide a body of principle and case law that can guide officials when discharging their functions.

This message is the more influential because it comes from an external agency. The reality and potential of external review is that it provides a stimulus for officials to work more assiduously to improve the integrity and defensibility of decision making and service delivery. The underlying lesson is that it is more efficient and effective to get a decision right in the first instance than to have a flaw exposed publicly by an external agency at a later time. Public confidence in government programs and agencies can also be undermined if serious or frequent errors are detected by an external agency.²⁴

One other point of cross-over is that audit activity is increasingly being used by some review agencies as a means of promoting legality and propriety in government administration. From its inception the office of the Inspector-General of Intelligence and Security has devoted the larger part of its resources to regular examinations of intelligence agencies' use of their special powers and capabilities, such as entry and search or telecommunications interception warrants. Inspecting the records of law enforcement agencies to ensure compliance with laws controlling telecommunications interception, electronic surveillance, controlled operations and access to stored communications is now a routine function of the Ombudsman.²⁵ Similarly, the Privacy Commissioner audits agency practices in order to gauge compliance with the Information Privacy Principles.

²⁴ The importance of reputation has been emphasised by the Australian Public Service Commissioner – see L Briggs 2006, 'Building the reputation of the Australian Public Service', 31 August, www.apsc.gov.au/media/briggs310806.htm.

²⁵ *Telecommunications (Interception and Access) Act 1979* (Cth) s 152; *Surveillance Devices Act 2004* (Cth) s 55; *Crimes Act 1914* (Cth) s 15UA.

Taking stock: review bodies' contribution to the work of government

Individually and collectively, independent review agencies play an important, active and developing role in government. Government agencies take the work of the review agencies seriously, in responding to their investigations and reports and in implementing their recommendations. Routinely, in legislative and policy development, government agencies refer to the recommendations of review agencies as a catalyst for change. Most government agencies now have either a dedicated unit or specific procedures for liaising with the Auditor-General, the Ombudsman, the Privacy Commissioner and other review bodies.

Another dimension of review work is that individuals who are aggrieved by government administrative decisions and actions are given a genuine opportunity to express their concern and have it redressed. Again, it is routinely accepted in the community and in government that individuals have a right to complain, every complaint must be examined, a reasoned response must be given, and a remedy (including financial compensation²⁶) should be provided if there was defective administrative action.

One way government agencies have acknowledged this point is by establishing their own complaints units, which for the most part are well resourced and deal with a much higher number of direct inquiries and complaints than the external review agencies. Examples are ATO Complaints, the Centrelink Customer Service Centre, the Child Support Agency Complaints Service, the Department of Defence Fairness and Resolution Branch and the Department of Immigration Global Feedback Unit. This mechanism is supplemented by customer service charters adopted by government agencies; the charters outline the service standards the agency will meet and the complaint avenues available to a client who feels the agency has broken its commitments.

Government as a whole has also taken up this approach. A strong theme in the government reform agenda is the need for agencies to be 'customer focused' or 'citizen centered'. In an address in 2009 Prime Minister Rudd identified one of the five tasks facing the Australian Public Service as the need to 'deliver high-quality programs and services that put the citizen

²⁶ One scheme through which financial compensation can be provided is the scheme for Compensation for Detriment caused by Defective Administration – see Commonwealth Ombudsman 2009, *Putting Things Right: compensation for defective administration*, Report no. 11/2009. A Review of Government Compensation Payments, by the Senate Legal and Constitutional Affairs References Committee, began in February 2010.

first'.²⁷ This point was echoed in the government discussion paper *Reform of Australian Government Administration*, published in October 2009. The paper outlined the Government's commitment to a 'citizen centred philosophy':

Being truly citizen centered means placing the citizen at the centre of the entire public service endeavour. This requires a meaningful commitment to actively engaging and empowering people at all points along the service delivery chain – from high-level program and policy formulation all the way to the point of service delivery, and capturing feedback from the users of services. The public service also needs to be capable of effectively interacting with citizens with unique or special needs or whose circumstances do not fit what might be considered the norm.²⁸

The work of the review bodies also contributes to sustaining fundamental principles of Australian government and civil service. Foremost is accountability – a principle that is strengthened through the work of review bodies in handling tens of thousands of complaints each year against government agencies, investigating selected government activities and programs, auditing and monitoring government administration and publishing reports that are critical of government agencies, and through public appearances before and presentations to parliamentary committees, conferences and in the media. All this work also ensures a greater measure of transparency in the workings of executive government.

Another fundamental principle the review agencies safeguard is that government administration must be free of corruption, bias and conflict of interest. The work of the Auditor-General is significant in this regard, in its close scrutiny of government financial transactions followed by regular reporting to the parliament. Important, too, is the recent creation of the Australian Commission for Law Enforcement Integrity to combat

²⁷ Prime Minister Kevin Rudd, John Paterson Oration, Australia New Zealand School of Government Annual Conference, Canberra, 3 September 2009. Note also that the title of the Commonwealth Association for Public Administration and Management Conference held in Australia in October 2009 was 'Government – it's all about citizens'.

²⁸ Advisory Group on Reform of Australian Government Administration 2009, *Reform of Australian Government Administration: building the world's best public service*, October, 28. The report of the Advisory Group, *Ahead of the Game – Blueprint for the Reform of Australian Government Administration*, was released by the Government on 29 March 2010.

corruption in law enforcement agencies.²⁹ The work of the Ombudsman and some other complaint and investigation agencies also provides a means of deterring unacceptable conduct, in particular because these agencies are prepared to accept anonymous and whistleblower complaints and promise protection to those who allege misconduct.

The extensive jurisdiction and powers of standing independent review agencies have been an important element in Australia's consistently high ranking in the annual Transparency International Corruption Perception Index (Australia was ranked eighth in 2009).

Looking ahead: future challenges

Independent review agencies are now a permanent element of the government accountability framework. Their role in government is likely to grow, both in activity and in importance. One sign of this is the government decision in 2009 to establish three new officers – the National Security Legislation Monitor, the Information Commissioner and the Freedom of Information Commissioner.³⁰

Another sign is the increased functions of some of the existing review agencies. One point of note is a general movement beyond individual complaint handling: the agencies are now more active in conducting own-motion investigations, publishing reports, setting standards for good administration, and monitoring and auditing government administrative activity.³¹

Complaint and own-motion investigations by standing review agencies have a number of advantages over ad hoc reviews. There is no delay and establishment cost in launching an inquiry, staff with expertise are readily available, there is capacity to monitor responses to the report, and the review agency itself remains accountable for its work. The review agencies also have strong powers and protections available to them and are often flexible and inquisitorial in approach. These sorts of advantages led the Australian Law Reform Commission to conclude in 2010 that some public

²⁹ In May 2009 the Parliamentary Joint Standing Committee on the Australian Commission for Law Enforcement Integrity began an inquiry into whether ACLEI's jurisdiction to investigate corruption should be extended to other Australian government agencies – see Inquiry into the Operation of the *Law Enforcement Integrity Commissioner Act 2006*.

³⁰ See notes 5 and 12.

³¹ More generally, the role independent public inquiries play in government might increase following the proposals of the Australian Law Reform Commission in 2010 for a new Inquiries Act – see Australian Law Reform Commission 2010, *Making Inquiries: a new statutory framework*, ALRC, Sydney.

inquiries are best conducted by existing bodies such as the Ombudsman, the Inspector-General of Intelligence and Security and the Australian Commission for Law Enforcement Integrity.³²

The independence and expert knowledge of a review agency have a range of potential uses. An example is that the Inspector-General of Intelligence and Security – following on from the abolition of conclusive certificates as a means of denying access to documents under the freedom of information and archives legislation – has been given a role in the Administrative Appeals Tribunal as an expert witness on whether disclosure of documents would or could cause damage to Australia’s security, defence or international relations.³³ The Australian Law Reform Commission has built on that example by recommending that the inspector-general be allowed to provide expert advice or assistance to relevant royal commissions.³⁴

Looking ahead, another way of evaluating the future role of independent review agencies – the opportunities as well as the difficulties they face – is to examine their relationship to the parliament, to the executive branch of government, and to each other.

Independent review agencies and the Parliament

The Auditor-General has long been designated by statute ‘an independent officer of the Parliament’³⁵ and reports to the Joint Parliamentary Committee of Public Accounts and Audit. That Committee monitors the Auditor-General’s work and can play a role in approving or rejecting a recommendation for the appointment of the Auditor-General.³⁶ As noted, the Inspector-General of Intelligence and Security and the Integrity Commissioner are also required by statute to report to specialist joint parliamentary committees, at least on some matters.³⁷ Many of the review bodies can also make special reports to parliament.³⁸

A continuing debate concerns whether the role of ombudsman and similar offices should be tied specifically to parliament. Two of the early ombudsman offices, in Western Australian and Queensland, were named

³² *Making Inquiries: a new statutory framework*, paras 13.113–13.115.

³³ *Freedom of Information Act 1982* s 60A; *Archives Act 1983* s 50A.

³⁴ Australian Law Reform Commission 2010, *Making Inquiries: a new statutory framework*, Report no. 111, ALRC, Sydney, Rec 13-4.

³⁵ *Auditor-General Act 1997* s 8.

³⁶ *Public Accounts and Audit Committee Act 1951* ss 8, 8A.

³⁷ See note 16.

³⁸ For example, the *Ombudsman Act 1976* s 17.

the 'Parliamentary Commissioner for Administrative Investigations'³⁹, and specialist parliamentary committees exist in some states.⁴⁰ Internationally, the prevalent model for creating an ombudsman is to make it an officer of parliament.

It is not likely that there will be broad, sweeping change along these lines at the national level. Existing arrangements are settled, they rest on a mixture of formal and informal relationships between individual review bodies and parliamentary committees and parliamentarians, there is a high degree of cooperation and mutual respect, and the arrangements are generally effective. There is nevertheless scope within those arrangements for accentuating the relationship between review agencies and parliamentary committees.

The terms of reference of current committees could be sharpened to make more explicit their relationship with the review agencies in their area of activity. If a committee were to hold a hearing on the annual report of a review agency, this would also afford the review agency an important forum for discussing its work: at present many of the review agencies line up periodically for the parliamentary estimates hearings, sandwiched between central government departments and agencies, and are often not called because of political stoushes that can dominate the hearings.

From time to time there will also be scope for creating a new parliamentary committee to which review agencies can report. A welcome development in this regard was the Government's announcement in December 2008 that it would establish a Parliamentary Joint Committee on Law Enforcement to extend parliamentary oversight to include the Australian Federal Police.⁴¹

The dual advantage of these and similar reforms would be to strengthen the independent role of review agencies and enable them to provide more targeted assistance to the parliament in its compatible role of ensuring executive accountability.

³⁹ See the *Parliamentary Commissioner Act 1971* (WA). The Queensland Parliamentary Commissioner was renamed the Ombudsman in 2001. The Victorian Ombudsman has since been declared in the Constitution to be 'an independent officer of the Parliament' – *Constitution Act 1975* (Vic) s 94E(1).

⁴⁰ For further discussion see R Creyke & J McMillan 2009, *Control of Government Action: text, cases and commentary*, 2nd edn, LexisNexis, Sydney, 268–73.

⁴¹ Commonwealth Attorney-General, Media release, *Comprehensive Response to National Security Legislation Reviews*, 23 December 2008.

Independent review agencies and the executive branch

Review agencies' relationship to the executive branch is also well settled, yet could be refined. There are three main areas of contact.

First, review bodies can be more effective if government agencies cooperate in their investigations, readily provide information and assistance, and acknowledge and respect the bodies' independence. For the most part this occurs. There are occasional instances of resistance, which can usually be overcome by use of the review body's coercive investigative powers. The threat of adverse publicity is another valuable tool.

Second, a crucial performance measure for a review body is whether its recommendations and reports are accepted by government agencies. It is difficult to measure this precisely, since recommendations often require adaptation or implementation over time by an agency – for example, a recommendation that an agency provide more assistance or a better explanation to a member of the public, expedite the resolution of a person's application, revise its administrative procedures, or provide better training to agency decision makers. Nevertheless, the rate of acceptance is high. For example, for the last three years the Ombudsman has reported that between 80 and 92 per cent of the recommendations made in formal reports were accepted in whole or in part, with some others depending on further agency work.⁴²

This question of implementation and follow-up warrants consideration. The Auditor-General's practice is to monitor the implementation of audit recommendations and conduct follow-up audits when necessary. Similarly, the Inspector-General of Intelligence and Security monitors implementation closely and can initiate own-motion inquiries or report to ministers and ultimately the parliament if not satisfied. In 2009 the Ombudsman instituted a new system of asking each agency six months after publication of a report to explain the steps taken to implement the report's recommendations.

Government agencies are required to provide in annual reports information on the most important developments in external scrutiny of the agency, including judicial and tribunal decisions and reports of the Auditor-General and the Ombudsman.⁴³ The degree to which this is done

⁴² Commonwealth Ombudsman, *Annual Report 2008–09*, 12 (80 per cent); *Annual Report 2007–08*, 16 (84 per cent); *Annual Report 2006–07*, 14 (92 per cent).

⁴³ Department of the Prime Minister and Cabinet 2009, *Requirements for Annual Reports*, PM&C, Canberra. These guidelines are approved by the Joint Committee of Public Accounts and Audit under ss 63(2) and 70(2) of the *Public Service Act 1999* (Cth).

seems variable, particularly in relation to implementation of changes within the agency that flow from such decisions and reports.

More generally, there is no formal institutional means in the administrative law system for ensuring that review outcomes are ‘fed back’ into the administrative system in order to achieve systemic change.⁴⁴ Review agencies and tribunals are given all the powers necessary to conduct investigations and hearings, but less thought has been given to designing mechanisms for ensuring that the findings of those investigations and proceedings are heeded. This point was taken up in the *Access to Justice* report launched in 2009 by the Attorney-General.⁴⁵ The report recommended that all government agencies develop mechanisms for reporting to tribunals and the Ombudsman on the action taken in response to individual case decisions and recommendations, to help resolve systemic shortcomings and to communicate external review findings to staff of the agency. A similar recommendation was made in 2010 by the Henry review into the Australian system, that the Joint Committee of Public Accounts and Audit should monitor implementation by the Australian Taxation Office of recommendations of the Commonwealth Ombudsman and the Inspector-General of Taxation.⁴⁶

The third area of contact between review agencies and the executive branch is in relation to their budget. Put bluntly, the executive branch can undermine a review agency by starving it of finance. From time to time complaints are made that this occurs, but it has been less of a problem in recent years. For example, the staffing numbers of the Auditor-General, the Ombudsman and the Privacy Commissioner rose during the five years from 2004 to 2009 from 296 to 352 (Auditor-General), 89 to 152 (Ombudsman) and 36 to 64 (Privacy).⁴⁷ The experience of the present authors is that, on the whole, the executive branch will give sincere consideration to any submission about financial constraints or funding needed for a new or extended function.

The area of budgetary difficulty for review agencies is the efficiency dividend, introduced in 1987, whereby most government agencies receive a reduced budgetary allocation each year of 1.25 per cent, plus an additional one-off 2 per cent in 2008–09. Larger government agencies can usually absorb that reduction by phasing down an existing program or

⁴⁴ R Creyke & J McMillan 2002, ‘Executive perceptions of administrative law – an empirical study’, *Australian Journal of Administrative Law*, 163, 177–9, 184.

⁴⁵ Attorney-General’s Department 2009, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, AGD, Canberra, 135–7.

⁴⁶ *Australia’s Future Tax System*, Final Report, Recommendation 118.

⁴⁷ These figures are taken from the annual reports of the agencies. Each uses a different counting method, but the trend picture is accurate.

developing a new policy proposal that attracts new funding. It is not as easy for small agencies, including all the review bodies, to take the same action. As the Joint Committee of Public Accounts and Audit noted in a report in 2008:

The system favours larger agencies and agencies with a stronger policy focus over small agencies. This latter type of agency usually has a technical, precisely defined function that gives them reduced discretion over how they manage their operations. They have poorer economies of scale. Further, they have fewer opportunities to top up their funding through new policy proposals because they are rarely involved in new policy.⁴⁸

Among the difficulties some review agencies reported were recruitment and retention of quality staff in a competitive labour market, reduced training opportunities for staff, and difficulty with funding innovation.

The committee recommended a formula for exempting small agencies from the efficiency dividend and sufficient funding for the Australian National Audit Office to enable it to conduct each year the number of performance audits determined necessary by the Auditor-General and endorsed by the committee. The committee's set of recommendations has not apparently been accepted by the Government.⁴⁹

The relationship of independent review agencies to each other

The statutory independence of each review agency means that they are necessarily independent of each other. Indeed, many of them have jurisdiction to investigate complaints about the other. For example, the Ombudsman, the Human Rights Commissioner and the Privacy Commissioner can each investigate the administrative actions of the other. And, necessarily, the Auditor-General can scrutinise the accounts of all agencies.

Cooperation between the agencies occurs in numerous ways along the informality–formality spectrum. There is some statutory regulation; for example, the Inspector-General of Taxation is required to consult the Ombudsman and the Auditor-General at least annually⁵⁰, the Ombudsman

⁴⁸ Joint Committee of Public Accounts and Audit 2008, *The Efficiency Dividend and Small Agencies: size does matter*, Report 413, vii.

⁴⁹ The 2009 Budget did allocate additional four-year funding of \$20.1 million to the ANAO and \$3.3 million to the Ombudsman to continue oversight of the Northern Territory Emergency Response – see *Budget Measures: promoting integrity and accountability*, Media release 16/2009 by Senator Faulkner, Cabinet Secretary and Special Minister of State.

⁵⁰ *Inspector-General of Taxation Act 2003* s 9.

is required to transfer particular complaints to the Privacy Commissioner or the Integrity Commissioner⁵¹, and the Australian Human Rights Commission must refer complaints against the intelligence agencies to the Inspector-General of Intelligence and Security.⁵² Some review agencies have also signed memorandums of understanding with each other, to deal with cooperation, referral of complaints, and investigation of complaints about the other agency. In addition, there is a considerable amount of informal contact between the office holders and staff of the various agencies; for example the Auditor-General circulates (to all government agencies) a draft program of audits for the following year, and there can be cooperation with other review agencies in conducting those audits.

Another link between the review agencies is that many are now located within the portfolio of the Department of the Prime Minister and Cabinet – specifically, the Australian National Audit Office, the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security, the Privacy Commissioner and, when established, the Information and Freedom of Information Commissioners.⁵³ Together with the Australian Public Service Commissioner and the National Archives of Australia, these agencies are at times described as the ‘integrity group’ within government, and they occasionally meet under that rubric.

This grouping coincides with a broader emerging suggestion that the review agencies be viewed as a separate and fourth branch of government – the accountability or integrity branch.⁵⁴ It has been conventional to describe them as being located in the executive branch ‘because they fit in here better than anywhere else’.⁵⁵ Obviously, the review agencies are not part of the other two acknowledged and traditional branches of government – the legislative and judicial branches.

The suggestion is that we should update our constitutional thinking and recognise that independent review agencies have become a distinct group within government. In particular, they have statutory independence from the executive branch, their role is to ensure the integrity and accountability of the executive branch, and they do not implement government policies

⁵¹ *Ombudsman Act 1976* ss 6(4A), 6(17).

⁵² *Australian Human Rights Commission Act 1986* (Cth) s 11(3).

⁵³ The Attorney-General’s portfolio includes the Administrative Appeals Tribunal, the Australian Commission for Law Enforcement Integrity and the Australian Human Rights Commission.

⁵⁴ For example, see JJ Spigelman 2004, ‘Jurisdiction and integrity’, Australian Institute of Administrative Law National Lecture Series; and J McMillan 2005, ‘The Ombudsman and the rule of law’, *AIAL Forum*, no. 44, 1.

⁵⁵ C Saunders 1998, *It’s Your Constitution: governing Australia today*, Federation Press, Sydney, 99.

and programs in the traditional manner of the executive branch. Rather, review agencies are a new and effective means of enforcing the rule of law in government, checking the propriety of administrative decision making and controlling government action.