30th Anniversary Seminar – Commonwealth Ombudsman  
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‘Investigating Corruption’

Corruption, Maladministration and the Ombudsman in 30 Years: Five Predictions

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Formerly, under the monarchy, the bureaucratic armies did not exist. Few in number, the clerks... directly served the king. ... [In modern times,] the clerks have become, in spite of our fine patriotic ideas, the employees of the government, and their superiors are buffeted by the winds of a power called a minister, who does not know from day to day whether he will be in office tomorrow. Since the routine of business must go on, a certain number of indispensable clerks survive; indispensable but at the mercy of the administration, they want to keep their positions. Bureaucracy, a gigantic power set in motion by dwarfs, is thus born.

Honore de Balzac, The Bureaucrats, 1838
(North Western University Press 1993, pp14-15)

Five predictions for the next 30 years

1. The Ombudsman won’t be alone as a pillar of the Commonwealth anti-corruption system;
2. AND/OR: The Ombudsman’s role will be enhanced as part of Commonwealth institutional strengthening in corruption prevention and investigation;
3. IN EITHER CASE: There will be less technical demarcation / fragmentation in integrity agency responses to (1) corruption versus maladministration, and (2) public interest complaints versus personnel matters;
4. There will also be greater coordination and streamlining between integrity agencies & line agencies;
5. Ombudsman recommendations will be effectively determinative.
1. The Ombudsman won’t be alone

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### Some Core Public Integrity Institutions in Australia (2007)

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Senator MASON — ... ACLEI applies to the AFP and the ACC. Is there a law enforcement gap with respect to other federal law enforcement agencies?...

Commissioner Keelty — ... There is a gap here … If we are serious about this, and if it is not just a quick fix, then the AFP could benefit in its investigations if the ACLEI had a wider remit than what is proposed in the Bill.

3.40 … [T]here are limits to the effective jurisdiction of the AFP in relation to broader corruption or integrity issues that fall short of criminal behaviour.

3.48 … [T]he committee considers that there is a strong rationale for ensuring that a wider group of law enforcement agencies are brought within [ACLEI's] jurisdiction, including Customs, the ATO and DIMA.

3.51 The committee also considers that a Commonwealth integrity commission of general jurisdiction is needed, and there is an accountability gap that would be closed by such a body. … [C]onsideration should also be given to developing such a commission in the longer term.

1. The Ombudsman won’t be alone as a pillar of the Commonwealth anti-corruption system – AND/OR

2. The Ombudsman’s role will be enhanced as part of Commonwealth institutional strengthening in corruption prevention and investigation

   • The Ombudsman currently is the primary integrity pillar… the Commonwealth’s only true ‘general purpose’ independent integrity agency;
   • This is even without expertise / resources to tackle corruption;
   • ‘Administrative action’:
     (i) contrary to law;
     (ii) unreasonable, unjust, oppressive…;… or
   • otherwise, in all the circumstances, wrong (s. 15(1)(a)).
   • Do we need to continue to bifurcate / duplicate institutions and approaches? ‘Superombudsman’ on a HREOC model / international model?
   • Public expectations, post-Cole Inquiry: elected officials (from ‘administrative action’ to ‘actions of a public official’).
3. Less technical demarcation / fragmentation in integrity agency responses

(1) corruption versus maladministration

- defective administration and corruption risk travel together;
- poor decisions / poor systems / poor culture / poor leadership / poor supervision / high corruption risk
- poor decisions / poor systems / poor culture / poor leadership / poor supervision / corruption risk
- specific instances: e.g. procurement
  - orchestrated permissions (by non-Aboriginal staff) to waive tender requirements in favour of particular (non-Aboriginal) consultants;
  - largest contract $221,000 - $987,000;
  - no recognition by management that procedures breached, or significance of the breaches.

- ATSIC v Ombudsman, Federal Court 1995, confirmed power to express adverse opinions about individuals, make recommendations re: disciplinary or criminal charges;
- all about acknowledging and addressing corruption risk.

2) public interest complaints versus personnel issues

- Outcomes and actions (e.g. discipline, prosecution, rotation, relocation) (New Burnt Bridge)
- Nature of complaints aired by officers – all just workplace grievances?
- Outcomes and actions (e.g. discipline, prosecution, rotation, relocation) (New Burnt Bridge)
- Nature of complaints aired by officers – workplace grievances?
- Dealing with the personnel and human resources implications of disclosures and investigations:
  e.g. reprisals, recriminations (whether against w'blowers, other internal witnesses, or other innocent parties);

  Ombudsman Act 1976, s. 5(2)(d) precludes investigation of ‘action taken by any body or person with respect to persons employed…being action taken in relation to that employment’;

  Proposed s. 5(4A), in Public Interest Disclosure Bill 2007, concurrent jurisdiction with APSC re: detrimental action.
4. Greater coordination and streamlining between integrity agencies, and with line agencies

- One stop shop (cf. Complaints NSW; Queensland);
- Revision of role of ‘out of jurisdiction’ discretions, to prevent matters falling through gaps;
- Mandatory reporting of corruption and serious maladministration cases by line agencies:
  - Queensland: All agencies to CJC, CMC
  - Commonwealth precedent: AFP > ACLEI.
- Clearinghouse role for public interest disclosures by Commonwealth officers (whistleblowers):
  - Victorian precedent, revised Public Interest Disclosure Bill 2007; especially risks of detrimental action;
  - Especially significant for corruption / corruption risk (‘victimless’ crime, lower likelihood that public will identify).

5. Ombudsman recommendations will be effectively determinative

- Old days: negotiation, persuasion, s.15 reports were rare.
- The Smith Era: section 35A public reports – in the public interest.
- Sunlight the best disinfectant… bypass ‘the club’ and ‘the govt’, report direct to the public even if recommendations accepted…
- A lesson from anti-corruption inquiries.

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