

# Presentation to the 25<sup>th</sup> Australasian and Pacific Ombudsman Regional Conference

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## The Ombudsman in the Integrity Framework

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### 1. Introduction

Before I start my presentation, can I say what a pleasure it is to attend my first APOR meeting and have the opportunity to spend time with APOR colleagues. This session is titled 'Ombudsman in the Integrity Framework' and it is a topic I think of great, and growing, interest.

In the short time that I have I want to touch upon four issues that hopefully will help provoke some further discussion during the session. The first is what do we mean by the term 'integrity framework'? The second is how does the Ombudsman fit within that framework? The third is why has the Ombudsman become a central pillar of the integrity framework? The fourth is what are the benefits and costs of the framework?

### 2. What do we mean by the term 'integrity framework'?

Well what do we mean by the integrity framework? I think it is fair to say that there is not one accepted definition of the integrity framework – it is a framework that is reasonably recent in its inception and evolving at a rapid pace.

Using Australia as an example, what seems reasonably clear is that over the last few decades, despite considerable deregulation and privatisation, there has nonetheless been growth in government, including increasing complexity in government services. Indeed, even in those areas of deregulation and privatisation that may have removed jurisdiction from classical Ombudsmen, this jurisdiction has often been taken up by industry-based Ombudsmen.<sup>1</sup> University of Chicago academic, Professor Richard Epstein, has noted that "...each new extension of government power should be examined under a presumption of error".<sup>2</sup> While this view is unlikely to be shared completely, a growing recognition of the likelihood of error occurring with new government powers has no doubt supported the development of accountability and oversight agencies. Indeed, with this rise in government activity there has been, for the most part, a concomitant rise in the number (and scope) of accountability agencies, so much so that John McMillan, Commonwealth Ombudsman, has spoken, compellingly I

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<sup>1</sup> Micro-economic reform throughout the 1980s and 1990s, greater emphasis of self-regulation and market models and the rise of the organised consumer movement (who were active protagonists for these schemes) all partly explain the growth of industry-based Ombudsmen.

<sup>2</sup> Richard Epstein, 'Why the Obama stimulus plan must fail', *Forbes*, 21 July 2009, viewed as at 2 August 2009 on the Cato Institute website at [http://www.cato.org/pub\\_display.php?pub\\_id=10372](http://www.cato.org/pub_display.php?pub_id=10372)

think, about a fourth branch of government, the integrity branch, to sit alongside the executive, legislature and judiciary.<sup>3</sup> It is suggested that this integrity branch of government has been vested with the responsibility to oversight, investigate and educate the public sector in relation to corruption, misconduct, good decision making, avoiding conflicts of interest and the like.

### **3. How does the Ombudsman fit within the integrity framework?**

In my view we can now confidently say that the office of the Ombudsman is not only a permanent fixture on the administrative law landscape, but a fundamentally important part of the network of accountability agencies that play a vital role in maintaining and promoting the integrity of Australian public service – the Ombudsman has become recognised as a central pillar in this integrity framework.

In my home state of Western Australia, for example, we have established an initiative that the Western Australian Ombudsman is involved in that I think is of significant value in terms of inculcating a culture of integrity across the Western Australian public sector - the Integrity Co-ordinating Group. The Group consists of the Auditor-General, Ombudsman, Crime and Corruption Commission and the Office of Public Sector Standards. Each of these agencies has a clear role in ensuring integrity in public administration and are often referred to as 'integrity agencies'.

Once again using Western Australia as an example, taking the Integrity Coordinating Group members to be at the core of the Integrity Framework, we could also list agencies such as the Information Commissioner, Office of the Inspector of Custodial Services, Office of Health Review, Equal Opportunity Commissioner and Parliamentary Inspector of the Crime and Corruption Commission as part of a larger 'integrity framework'. How many agencies should be considered part of this framework is an interesting question. Do, for example, offices of regulatory review, economic regulators and offices such as the Productivity Commission and Departments of Treasury, concerned in part as they are with the integrity of expenditure of public money, constitute part of the framework?

The truth is probably that there is no one set of values, ethical imperative, mechanism, action, regulation, framework or insight that will, by itself, create a culture of integrity across the public sector. Creating a culture of integrity requires a range of different approaches – governance frameworks, audits, oversight, investigation and prosecution, cultural awareness, incentives, disincentives, regulation and education are a few that come to mind. Indeed, seen in its fullest extent, the scope of our accountability mechanisms designed to enhance public sector integrity can be considered to be very wide, including the parliament, the opposition and minor parties, the judicial and executive branches of government, independent regulators, watchdog agencies, whistleblowers, the media, academia and non-government organisations. All have a role to play in creating and maintaining integrity within the public sector. There will also be a range of ways of implementing these mechanisms – one size is unlikely to fit all, in the same way that one intervention at a given point of time will not create an enduring culture. These mechanisms will also not be immutable – they will evolve and need to be tailored to new learning and challenges.

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<sup>3</sup> John McMillan, 'The Ombudsman and the rule of law' (2005) 44 *AIAL Forum* 1 at 4 and John McMillan, 'Chaos or coherence? Strengths, opportunities and challenges for Australia's integrity systems', available at [www.ombudsman.gov.au](http://www.ombudsman.gov.au)

#### **4. Why has the Ombudsman been recognised as a central pillar in the ‘integrity framework’?**

So why has the Ombudsman been recognised as a central pillar of the integrity framework? I think there are numerous reasons why this is the case and they are largely the same reasons that explain the growth in both the scale of scope of the Ombudsman concept worldwide.

First, the term Ombudsman has become a unique and trusted brand name – a name that connotes impartiality, independence, fairness and integrity. Importantly too the Ombudsman is not seen as some passing fad or recent invention and is respected as politically bipartisan. Indeed, the success of the Ombudsman brand name is starting to also become somewhat of a curse – it seems that barely a week now goes by without the call for the establishment of a new Ombudsman, many of which bear very little resemblance to what we would think of as Ombudsman.

Second, the Ombudsman is first and foremost a complaint resolver and the capacity to complain about government services has been, correctly I think, seen as an integral part of ensuring integrity in government.

Third, while the Ombudsman’s principal role is to receive and resolve complaints the Ombudsman has always possessed, and I think is increasingly exercising, a very significant proactive jurisdiction that fundamentally relates to integrity in government.

Fourth, the office of the Ombudsman has expanded to undertake a range of new functions that sit within the broad concept of integrity oversight. To use my office as an example, in addition to the “classical” Ombudsman functions, we undertake inspections of telecommunication’s intercepts, investigation of whistleblowers’ complaints, investigation of complaints from overseas students and, most recently, reviews of certain child deaths.

Fifth, the Ombudsman has become recognised as an important contributor to the maintenance of the rule of law – perhaps the bedrock upon which all integrity in government services is built.<sup>4</sup> The Ombudsman is a contributor to the rule of law because we help to ensure that those who administer government’s laws play by the rules.

And whilst we are, quite rightly, focussing on the role of parliamentary Ombudsmen in the integrity framework we should not completely overlook the role of industry-Ombudsmen such as the Financial Services Ombudsman and Telecommunications Ombudsman for the role that they play in the integrity of the delivery of public services.

#### **5. The benefits and costs of our integrity frameworks**

The benefits of creating and maintaining integrity frameworks, and the Ombudsman’s central role in this framework, have been commented on many times before and are numerous. Using Australia as an example we regularly appear at the very head of

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<sup>4</sup> See, generally, John McMillan, note 14 above.

international tables that measure national prosperity as well as national integrity (that is an absence of corruption and the promotion of transparency and accountability). It seems to me that there is little doubt that the two are highly correlated.

We must also be aware however that our integrity frameworks both cost money and can impose costs. Integrity frameworks, be they through the encouraging of different organisational cultures, ethics and values education, regulatory controls, incentives or disincentives to change behavioural patterns, can impose regulatory costs on public sector agencies, and by implication, on taxpayers. They may also act undesirably to have a stultifying effect on welcome innovative behaviour, to appear to encourage total risk adversity, where some risk taking is actually desirable, or simply burden efficient, timely decision making with excessive red-tape. In short, although it is not always typical to think of them as such, integrity frameworks impose regulatory costs and we should be able to clearly demonstrate that the costs are outweighed by the benefits of our actions.

As a final comment on this point, when we design and implement governance frameworks for the public sector we will almost invariably have very good intentions in mind. We must be aware, however, that some of our intended outcomes may not be realised and some unintended outcomes may be achieved. An oft referenced regulatory failure is American prohibition.<sup>5</sup> Prohibition was a perfectly well-intentioned regulation with, unfortunately, spectacularly bad results. A regulation designed to stop alcohol consumption created, among other things, a whole new market for criminals and fraudsters and distorted market forces that led to a proliferation of shoddy and dangerous products. In fact the only thing prohibition most certainly did not achieve was to stop the consumption of alcohol!

The key here is to exercise caution and care in our approach – seeking to define what we do by rigorous evidence-based analysis and consideration of all of the possible consequences of the approach we propose.

## **6. Conclusion**

In conclusion, Governments hallmarked by integrity retain the confidence of the public and contribute significantly to stable and successful societies. Conversely, governments hallmarked by a lack of integrity, a lack of an ethical underpinning, corruption, conflict, secrecy, undue favours and unaccountable to its citizens, risk losing their confidence and threatening those societies. Further still, there is clear correlative evidence linking economically underperforming nations with lack of integrity and corruption in government. In short, integrity in the public sector is essential for our ongoing economic prosperity, to protect individuals from overbearing governmental activity and to optimise the way they exercise their powers.

Within this integrity framework the Ombudsman has rightly become a central figure. Whether it is as a protector of the human right to complain about government services, an inspector of government powers, or an investigator of its own motion of alleged public sector failure, the Ombudsman protects and promotes integrity.

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<sup>5</sup> Milton Friedman and Rose Friedman, *Free to Choose*, Harcourt 1980 at 226-7.

The highly developed integrity framework that is now a feature of so many countries around the world, with the Ombudsman as an indispensable part of that framework is neither perfect, nor costless. But to paraphrase Winston Churchill – governments, hallmarked by robust frameworks to protect and promote public sector integrity, are the worst form of government, apart from every other form of government that has ever been tried!<sup>6</sup>

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<sup>6</sup> I have adapted this view from that expressed by Stanley Fischer in his paper 'Globalisation and its challenges', *Ely Lecture*, 2003, at 33. The lecture is available at <http://www.iie.com/fischer/pdf/fischer011903.pdf>