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# DEVELOPMENTS IN ADMINISTRATIVE LAW

***Peter Prince****

### *Withdrawal of access card legislation*

(See background in *AIAL (2006) 51 Forum*.)

A strongly critical report in March 2007 by the Senate Finance and Public Administration Committee led to the withdrawal of the Human Services (Enhanced Service Delivery) Bill 2007.[1] The Bill created a legal framework for the Health and Social Services Access Card to replace the Medicare card and other cards and vouchers used to access Australian Government health and social service benefits.[2]

Chaired by Liberal Senator Brett Mason, the Committee said that the Federal Government's decision to hold back for later legislation critical matters such as reviews and appeals, privacy protections and oversight and governance measures meant that it was 'being asked to approve the implementation of the access card on blind faith without full knowledge of the details or implications of the program'. The missing measures were 'essential for providing the checks and balances needed to address serious concerns about the bill'.[3] The Committee noted that two tenders for introduction of the card had already been issued 'creating the impression that passage of this legislation is preordained, rendering Senate oversight superfluous'.[4]

The Committee's central concern was the potential use of the access card as a national identification card. Together with the likelihood that almost every Australian would need the card to use services such as Medicare, the inclusion of a biometric photograph on the face of the card 'virtually guarantees its rapid evolution into a widely accepted national form of identification'.[5] The Committee recommended that the Bill be combined with the second tranche of legislation to allow proper consideration of the access card proposal.

The Federal Government continued to plan on the introduction of the access card in 2008, releasing a further discussion paper by the Consumer and Privacy Taskforce on the registration process for the card.[6]

### *High Court and control orders*

In February 2007 the High Court heard an appeal against the first 'control order' issued under Commonwealth anti-terrorism legislation.[7] The order was issued in August 2006 by the Federal Magistrates Court to Mr Jack Thomas under s 104.4 of the *Criminal Code* (Cth). Earlier that month, the conviction of Mr Thomas on a charge of receiving money from a terrorist organisation had been overturned by the Victorian Court of Appeal.[8] Under the control order, Mr Thomas must remain at his current place of residence between midnight

* *Canberra based government lawyer*

and 5 am each day, report to police three times per week, not use any mobile phone unless authorised by the Federal Police and not communicate with members of specified terrorist organisations.

At the heart of the challenge to the control order scheme is the principle that under the doctrine of separation of powers in the Commonwealth Constitution, federal courts can only exercise 'judicial power'. Lawyers for Mr Thomas argued that limiting the freedom of an individual not found guilty of a crime is not an exercise of 'judicial power', so the control order could not be validly issued by the Federal Magistrates Court.[9] In response, the Commonwealth noted that the rigid separation of functions into 'judicial' and 'non-judicial' had been replaced by the 'chameleon' doctrine. There are some powers which are exclusively judicial, such as punishment of criminal guilt, and others concerned purely with policy, which are incapable of being given to courts. But in between there is:

> …the great vast field of endeavour in which the power takes its character from the body to which it is given. It is executive if conferred on an administrative body. It is judicial if conferred on a court.[10]

In this case, the Commonwealth argued, the power to issue control orders was 'not necessarily judicial and not necessarily administrative' but was certainly 'capable of being judicially exercised'.[11]

### *AWB inquiry*

(For further background, see AIAL *(2006) Forum* 48 and 51.)

The Cole Royal Commission (*Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme*) delivered its final report on 24 November 2006.[12] Commissioner Terence Cole found that the conduct of AWB Limited (the former Australian Wheat Board) in paying some $290 million between 1999 and 2003 to a Jordanian trucking company, aware that the money would be passed to the Iraqi regime of Saddam Hussein, was due to a 'failure of corporate culture'. He said that officers of the company were told:

> Pay the money required by Iraq. It will cost AWB nothing because the extra costs will be added into the wheat price and recovered from the UN escrow account. But hide the making of those payments because they are in breach of sanctions.[13]

Commissioner Cole said there was a lack of openness and frankness in AWB's dealings with the Australian Government and the United Nations, noting that 'At no time did AWB tell the Australian Government or the United Nations of its true arrangements with Iraq'.[14] He recommended that proceedings against AWB and its key officers be considered under Commonwealth and State criminal legislation as well as the *Corporations Act 2001*.[15]

Criticism of the Cole Royal Commission focussed on its narrow terms of reference, which required it to look for breaches of the law but did not extend to examining governance and oversight arrangements. As one commentator said:

> The inquiry, to be useful, should have looked at the governance process to see how and why the AWB could get away with rorting the oil-for-food process so easily and quickly without being uncovered by checks and balances in the Department of Foreign Affairs and Trade, the responsible minister's office and cabinet.[16]

Such critics suggested that the failure of federal bureaucrats to properly investigate the activities of AWB, despite warnings as early as 2000 and 2001, indicated deeper problems with the system of accountable governance in Australia.[17] As an article in *The Age* said:

> To avoid more and more administrative scandals and cover-ups, Australia needs more open government and genuine accountability of executive government to the Parliament through effective FOI legislation, reintroduction of program budgeting and detailed appropriations and cash accounting.[18]

### *New Citizenship Act*

On 15 March 2007 the *Australian Citizenship Act 2007* received Royal Assent. The new Act replaces the 1948 statute which created the legal concept of Australian citizenship. The new Act:

- strengthens the residence requirement for citizenship (4 years including at least 12 months as a permanent resident)
- allows authorised persons to request 'personal identifiers' (including iris scans as well as fingerprints and photographs) to confirm the identity of a citizenship applicant, and
- prevents the Minister approving a citizenship application if a person has an adverse ASIO security assessment.

A Commonwealth Parliamentary Library research paper noted that the new Act does not address important nationality issues from recent High Court cases.[19] One issue involves people born overseas who have grown up in Australia, but have not formally become citizens. Legally regarded as 'aliens', they can be deported if, for example, they fail the 'character test' under the Migration Act (for further background, see *AIAL Forum* 48 and 51). Another issue is the constitutional position of dual nationals in Australia. In *Singh*[20] and *Ame's Case*[21] (2005), the High Court defined an 'alien' as a person who owes obligations (allegiance) to 'a sovereign power other than Australia'. As a Parliamentary Library paper stated:

> If this is the extent of the definition, then any dual national in Australia is an 'alien' and can be subject to the full extent of the Commonwealth's power over 'aliens' under the Constitution.[22]

### *Proposed citizenship test*

Despite continued opposition within its own ranks to the idea of a formal citizenship test, the Federal Government maintained its plans to introduce such a test.[23] The Government released a summary of responses to its September 2006 discussion paper on this issue (see 51 *AIAL Forum*).[24] Over 1600 responses were received, with some 60 per cent of respondents supporting a formal test. Over 90 per cent thought that it was important for effective participation as an Australian citizen to have knowledge of Australia and the English language and a demonstrated commitment to the country.[25]

## OTHER CASES

### *Apparent bias and the proper respondent*

In *Ho v Professional Services Review Committee* No. 295 [26] (March 2007), the Federal Court questioned whether the Committee was the proper respondent in proceedings challenging its decisions. This case concerned challenges by two doctors – Dr Ho and Dr Do – against findings by separate Review Committees that they had engaged in inappropriate provision of medical services under the *Health Insurance Act 1973 (Cth).*

Justice Rares of the Federal Court held that the Committees had made jurisdictional errors and that their findings should be overturned. However, because each Committee had been an active protagonist in proceedings before the court, there was a possibility of apprehension of bias if the matters were returned to the same committees to be reconsidered:

> …the fact that each committee has defended its own interpretation of the legislation and their dismissal of the doctors' cases would suggest to a fair-minded lay person that they will find it difficult entirely to put out of their mind the approach which the Court in proceedings such as this finds to be erroneous if they were to come to reapply themselves to the task.[27]

Justice Rares said that while each of the Committees was a proper and necessary party to the proceedings, they had chosen an unusual course by contesting the doctors' case with substantive arguments of their own. Instead, he suggested, the active respondent should have been either the Chief Executive Officer of Medicare Australia (who initiated the proceedings by the Committees) or the Minister responsible for the Health Insurance Act, i.e. the Minister for Health.[28] He proposed making orders, therefore, that the two matters be reconsidered, but by new Committees with a different membership to the original review bodies.[29]

### *The High Court and review of administrative action*

In *Bodruddaza v Minister for Immigration and Multicultural Affairs*[30] (April 2007), the High Court in an unanimous decision said that the Federal Government could not impose a time limit on applications for review of migration decisions if this would 'curtail or limit' the applicant's right to seek relief against the Commonwealth enshrined in s 75(v) of the Constitution.[31]

The case is the latest saga in the long history of Federal attempts, under governments of both persuasions, to reduce the use of the Australian court system by people refused the right to stay in this country.[32] Former Labor Immigration Minister Gerry Hand said that throughout his time as Minister he was concerned with the 'amount of public resources consumed in judicial review processes which ultimately did not alter the situation that the person was not entitled to remain in Australia'.[33]

The culmination of Federal efforts to restrict migration appeals was the insertion in 2001 by the Howard Government of a 'privative clause' (s 474) in the *Migration Act 1958* which prohibited review by the courts. In *Plaintiff S157* (2003),[34] the High Court rendered this mechanism largely ineffective. Callinan J also warned that a set time limit for migration appeals would make 'any constitutional right of recourse' under s 75(v) 'virtually illusory' and would be invalid.[35]

In *Bodruddaza* the High Court reiterated that:

> An essential characteristic of the judicature provided for in Ch III [of the Constitution] is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers. Section 75(v) furthers that end by controlling jurisdictional error as asserted in the present application by the plaintiff. In this way, s 75(v) introduced into the Constitution of the Commonwealth an entrenched minimum provision of judicial review.[36]

The *Migration Litigation Reform Act 2005* introduced (in s 486A) a maximum time limit of 84 days from actual notification for lodging an application for review of a migration decision. The Commonwealth argued that analogous to a limitation statute, s 486A regulated the right to institute proceedings and should not be seen as an attempted deprivation of the entrenched jurisdiction of the Court.[37] The High Court rejected this argument, stating:

> To say that because s 486A only denies entitlement to applicants to institute proceedings it therefore cannot trench upon the content of s 75(v) and upon the authority of this Court to determine applications thereunder is to look to form at the expense of substance.[38]

The Court noted that because s 486A limits the right to appeal based on the 'time of the actual notification of the decision in question', it did not allow for 'the range of vitiating circumstances which may affect administrative decision-making'. It made no provision for 'supervening events which…, without any shortcoming on the part of the applicant, lead to a failure to move within the stipulated time limit', noting as an example 'the present case where the plaintiff was one day late, apparently by reason of a failure on the part of his migration adviser'.[39] As the High Court said, imposing a set, non-extendable maximum period for appealing against migration decisions 'subverts the constitutional purpose of the remedy provided by s 75(v)'.[40]

**Endnotes**

1 Peter Martin, 'Inquiry kills off Access Card law', *The Canberra Times*, 16 March 2007, p.1.
2 http://www.aph.gov.au/parlinfo/billsnet/billslst.pdf.
3 Committee report at http://www.aph.gov.au/senate/committee/fapa_ctte/access_card/report/report.pdf, p.12.
4 Ibid, p.13.
5 Ibid, p.20
6 http://www.accesscard.gov.au/media/taskforce_discussion_paper_on_registration_process_released.htm.
7 See control order at http://www.aph.gov.au/library/intguide/law/terrorism.htm#court
8 ABC 7:30 Report, *Thomas, lawyers set to fight control order*, 29.08.06, www.abc.net.au.
9 ABC Radio National, Perspective, 27 February 2007, interview with Andrew Lynch, Director of the Terrorism and Law Project, Gilbert and Tobin Centre of Public Law, UNSW.
10 See transcript of proceedings 20 February 2007 pp 56-57 at http://www.austlii.edu.au/au/other/HCATrans/2007/76.html.
11 Ibid., p. 59.
12 See Report of the Oil-for-Food Inquiry at http://www.oilforfoodinquiry.gov.au/.
13 Ibid, p. xii.
14 Ibid.
15 Ibid, vol. 4 Findings, pp 109-324.
16 Kenneth Davidson, 'An indictment of politicised bureaucrats', *The Age*, 30 November 2006, p.15.
17 Shaun Carney, 'Politics of preservation', *The Age,* 30 November 2006, p.9.
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19 Parliamentary Library, Bills Digest Nos 72-73, 7 December 2005, p.21, at http://www.aph.gov.au/library/pubs/bd/2005-06/06bd072.pdf.
20 *Singh v Commonwealth of Australia* [2004] HCA 43, 9 September 2004
21 *Re Minister for Immigration & Multicultural and Indigenous Affairs; ex p Ame* [2005] HCA 36, 4 August 2005
22 Ibid. See also Peter Prince, 'Mate! Citizens, aliens and 'real Australians'—the High Court and the case of Amos Ame', Research Brief, no. 4, Parliamentary Library, Canberra, 2005–06.
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24 http://www.minister.immi.gov.au/media/responses/citizenship-test/index.htm.
25 http://www.minister.immi.gov.au/media/responses/citizenship-test/summary_report_citizen_test_paper.pdf
26 [2007] FCA 388
27 Ibid at [112]
28 Ibid at [111].
29 Ibid at [114].
30 [2007] HCA 14.
31 Ibid. at [53]
32 See Peter Prince, *Time limits on migration court appeals*, Research Note No. 58, Parliamentary Library, Canberra, 2003-04.
33 Ibid, p. 1.
34 (2003) 211 CLR 476.
35 Ibid., at 537–8.
36 [2007] HCA 14 at [46].
37 Ibid.at [49].
38 Ibid.at [54].
39 Ibid at [55], [57].
40 Ibid. at [58].

# DISCRIMINATION TOOLKIT LAUNCHED
# YOUR GUIDE TO MAKING A DISCRIMINATION COMPLAINT

*Attending the Discrimination Toolkit launch (left to right) Teena Balgi, Elizabeth Evatt AC, Meredith Osborne, Justice Margaret Beazley AO, Fiona Pace and Bill Grant OAM.*

**In a partnership of Community Legal Centres, Legal Aid NSW and AIAL, the Discrimination Toolkit was officially launched on 28 March 2007 by keynote speaker, the Honourable Elizabeth Evatt AC.**

The authors of the 150 page booklet are Meredith Osborne (Elizabeth Evatt Community Legal Centre), Teena Balgi (Kingsford Legal Centre) and Fiona Pace (Lismore Legal Aid) who identified the difficulty of finding resources to assist complainants who believed they had been discriminated against.

Describing this book as 'brave', Justice Evatt said it had taken on the difficult issue of assisting complainants who were representing themselves, in determining whether they should begin in the State or Federal jurisdiction. Often complainants were not eligible for legal assistance and therefore the booklet would be able to assist them in deciding whether they had been discriminated against, what legal or non-legal options were available to them and how their matter might progress if it went to court.

Community workers, advocates and legal practitioners will also find the book useful as it comprehensively outlines areas of discrimination, options for making complaints and procedures before the various tribunals and courts. Procedures relating to case conferences, mediations and conciliations are also outlined. In addition, useful resources such as contacts for tribunals and legal assistance are included.

Also speaking at the evening's proceedings were her Honour Justice Margaret Beazley AO and Chief Executive Officer of Legal Aid NSW, Bill Grant OAM.

***Justice Evatt's opening remarks -***

This week we remember the bicentenary of the abolition of the slave trade by the British in 1807. It was another 25 years before British slaves were actually freed and slavery persisted in the United States until 1865. Freedom, even when attained, did not bring equality. Former slaves and their descendants suffered gross racial discrimination in their struggle for equality in the US, and it was a further 90 years before the Supreme Court ruled that segregation was discriminatory.

The prejudiced attitudes of racial superiority, ethnic and religious hatred, which arise from an inability to accept people as they are and to tolerate the diversity of our world can, when unchecked, lead to violence and genocide.

***Freedom and equality: first principles of human rights***

Bearing in mind the evil effects of racial and religious prejudice, the history of slavery and segregation, the racism involved in colonialism, the holocaust and other genocides, it is no surprise that in 1948 the Universal Declaration of Human Rights took as its starting point the principle of the dignity, freedom and equality of all human beings (UDHR art 1).

Nor is it surprising that the first major UN human rights instrument to come into force was the Convention on the Elimination of All Forms of Racial Discrimination (1965, in force in 1969). Australia's ratification of that Convention opened the way for the enactment of the *Racial Discrimination Act 1975*, the first Commonwealth anti-discrimination law. It covers discrimination on grounds of race, colour, national or ethnic origin, etc. It was later extended to racial hatred.

This legislation was sorely needed in view of the malevolent effects of racial prejudice and discrimination on the indigenous people of this country. After enduring violent oppression, denial of equality in the law, they have still to win their long struggle against discrimination and prejudice, against the neglect that diminishes their life expectancies and opportunities The Racial Discrimination Act played a part in turning the tide for indigenous people. It paved the way for the *Mabo* decisions of the High Court, which struck down discriminatory Queensland legislation, which would have appropriated indigenous land and extinguished all rights of the traditional owners. This led to the later decision recognising native title and overruling the doctrine of *terra nullius*.

That is a good news story. But the overall picture in regard to the universal principle of equality is less satisfactory. Discrimination of all kinds adversely affects many in our community. The right to equality and non-discrimination applies regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. But it is not fully realised.

There are laws against discrimination. At federal level, we have, in addition to the Racial Discrimination Act, the Commonwealth *Sex Discrimination Act 1984* (which applies discrimination in certain fields on the ground of sex, marital status, pregnancy or potential pregnancy. It also covers dismissal on the ground of family responsibilities, and sexual harassment). Other legislation proscribes discrimination on the ground of disability, the *Disability Discrimination Act 1992* or age, the *Age Discrimination Act 2004*. All these Acts have their origins in international conventions, declarations and resolutions. There is extensive State anti-discrimination and vilification legislation, covering similar ground to the Commonwealth laws and adding (in NSW) discrimination on such further grounds as homosexuality, transgender and infectious disease.

All forms of discrimination violate the right to equality and diminish the enjoyment of rights by the targets of such discrimination. There should be recourse and remedies for all kinds of unfair discrimination.

### *Gaps in the protection against discrimination*

But despite the extent and complexity of the laws, there are gaps in our legal protection against discrimination. Anti-discrimination laws apply to specific fields and specific grounds. They are subject to exemptions and exclusions, which limit their application.

Australians have no general legal protection of the right to equality without any discrimination, such as can be found in the Constitutions of Canada and South Africa.

> The Constitution of the Republic of South Africa, 1996 provides that everyone is equal before the law and has the right to equal protection and benefit of the law. It also provides that neither the State nor any person may unfairly discriminate, directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (Article 9)

### *International equality standards not met*

The absence of any such provision in Australian law is regrettable, particularly as we are a party to the International Covenant on Civil and Political Rights which is built on the principle of equal enjoyment of rights. It calls for equality before the law, the equal protection of the law, the prohibition of discrimination and equal protection against discrimination on any ground (Article 26).

These principles are part of the Constitutions of Canada and South Africa. They are incorporated in the ACT *Human Rights Act 2004*, s 8, and the Victorian *Charter of Human Rights and Responsibilities Act 2006*, s 8, but they are lacking in Commonwealth law.

Australians do not have the general protection against discrimination of any kind that is called for by international standards. This is not an academic issue. People who experience certain kinds of discrimination fall through the cracks in the system of legal protection.

Some people may be able to take their case to an international body. But even if the case is won, this will not necessarily result in a good outcome here in Australia.

### *Sexual orientation*

A few years ago, an issue relating to the discriminatory treatment by the Commonwealth of parties to a same sex relationship was taken to the Human Rights Committee in Geneva. Though most States provide some degree of protection from discrimination in regard to sexual orientation, there is no enforceable legal protection in this regard under Commonwealth law.

The Committee found that the Commonwealth *had* discriminated by denying a dependant pension to the surviving partner of a war veteran, on the basis that the Act does not recognise same sex relationships. The Committee concluded that this was an unjustified distinction, violating Article 26 of International Covenant on Civil and Political Rights. Australia has since informed the Committee that it does not accept the finding of violation and does not consider that the author is entitled to a remedy.

The Human Rights and Equal Opportunity Commission is now conducting an Inquiry into discrimination against same-sex couples under Commonwealth and State law regarding access to financial and work-related entitlements and social security benefits. One can only

hope that the outcome of this inquiry will lead to new efforts to apply the equality and non-discrimination principle to same sex couples.

***Equality before the law, knowledge and resources***

Although there is the possibility of taking some discrimination cases to international bodies, the vast majority have to depend on Commonwealth or State legislation to counter the discrimination which has such an insidious effect on their lives. These laws operate concurrently, providing a complex package of overlapping anti-discrimination laws, administered by two different sets of institutions, courts and tribunals. So complex are they, that, even in cases where people have protection under anti-discrimination laws, that protection will be of little value if it is not known and understood by those entitled, or if those people lack the knowledge and resources to ensure that their rights are respected. The right to equality before the law and before courts and tribunals cannot be effective without the knowledge and means to proceed.

***The Discrimination Toolkit launched***

Enter the ***Discrimination Toolkit*** which will prove to be a valuable resource to everyone affected by discrimination and to those who are asked for advice and assistance.

It is a brave book, tackling those tricky areas of overlap between federal and state jurisdictions and those fine distinctions, which leave some protected and others outside the system. It steers a course through all this complexity to help people decide how to proceed in individual cases. It will help those who work directly in the anti-discrimination field, community services which may be asked about the issues and those who have the courage to take action on their own behalf.

It is the product of co-operation between several groups, all committed to improving community access to law. I would like to second the remarks of Bill Grant about the excellent work done by Community Legal Centres in providing legal information, advice and representation for so many people who otherwise would be left unable to insist that their rights be respected.

The ready accessibility of the Centres to people and their willingness to assist in a wide range of issues means that they are well placed to identify the legal needs of the community and to advocate for law reform and extension of legal services. Long may they continue to give a voice to those whose rights need to be represented.

I am especially proud that the Centre which bears my name has had a major role in the creation of this publication.

I congratulate that Centre, the Kingsford Legal Centre, the Legal Aid Commission of NSW and the Australian Institute of Administrative Law for their contributions to this project. I thank the funding bodies for their contributions to the project.

I congratulate especially the three authors:

> **Meredith Osborne**, the Education and Promotion Co-ordinator, Elizabeth Evatt Community Legal Centre
>
> **Fiona Pace**, Solicitor with the Legal Aid Commission of NSW, based in Lismore.
>
> **Teena Balgi**, Solicitor and Clinical Supervisor at Kingsford Legal Centre, based at the University of New South Wales.

The Toolkit is highly practical, it is free, and I believe that it will be available in electronic form. I have pleasure in launching the

***Discrimination Toolkit: Your Guide to Making a Discrimination Complaint***

A free copy of the ***Toolkit*** can be downloaded from the Legal Aid website www.legalaid.nsw.gov.au-publications or order a hard copy version directly from Legal Aid.

# ENSURING INTEGRITY AGENCIES HAVE INTEGRITY

***James Wood AO QC****

The question 'quis custodiet ipsos custodes' translated as 'who shall guard the guardians themselves?' was posed in a satire by Juvenal. It has remained a vexed problem for the many countries which have created anti corruption agencies, Offices of Ombudsman and special Commissions of Inquiry, tasked with responding to various forms of corruption and misconduct in public office.

In this paper I will canvas portion of the range of integrity agencies that exist in this country, the possibilities for their misuse or diversion from their proper function and explore whether there is a sufficient system to guard these guardians.

## Integrity agencies

In this country there are now a number of such agencies, including for example:

### *New South Wales*

- The Independent Commission Against Corruption (ICAC)
- The Police Integrity Commission (PIC)
- The Office of the Ombudsman.

### *Oueensland*

- The Crime and Misconduct Commission (CMC)
- The Oueensland Ombudsman

### *Western Australia*

- The Corruption and Crime Commission (CCC)
- The Ombudsman WA (also known as the Parliamentary Commissioner for Administrative Investigations).

### *Victoria*

- The 0ffice of Police Integrity (OPI)
- The Ombudsman - whose functions are effectively combined.

### *Commonwealth*

- The Australian Commission for Law Enforcement Integrity (ACLEI)
- The Commonwealth Ombudsman

** Inspector for the Police Integrity Commission of NSW, November 2006*

These agencies possess to a greater or lesser degree, far reaching intrusive and coercive powers which if abused, can significantly impinge on individual civil rights and occasion great personal harm to those caught up in their investigations.

The powers include those of

- Search and seizure under statutory warrants;
- Requiring the production of documents and things pursuant to notice;
- Requiring the production of statements of information pursuant to notice;
- Recording private conversations pursuant to listening device warrants;
- Intercepting telecommunications pursuant to warrants;
- Conducting physical surveillance;
- Using tracklng devices;
- Accessing information held by a wide variety of government agencies, such as Austrac, the Australian Tax Office, gaming and racing regulatory authorities and many other government bodies.
- Accessing police records inc!uding criminal records;
- Conducting covert searches;
- Entering public premises to inspect and take copies of documents;
- Conducting coercive interrogations under oath, in which the right of freedom from self incrimination is suspended;
- Conducting controlled operations and carrying out integrity tests.
- Conducting hearings either in public or in private which are not bound by the rules of practice or evidence;
- Obtaining injunctions restricting the conduct of persons under investigation;
- Initiating proceedings for the recovery of the proceeds of serious crime related activities and for the confiscation of the property of those who are engaged in such activities;
- Making assessments and forming opinions which may be published as to whether misconduct or corrupt conduct has occurred;
- Making recommendations as to whether consideration should be given to prosecution or disciplinary action in relation to affects persons;
- Prosecuting persons for contempt or for interference with the legitimate investigations and activities of these agencies or for disobedience to their lawful requirements;
- Disseminating information ot other law enforcement agencies and to bodies such as the Australian Taxation Office for potential investigation or prosecution or for the recovery of monies properly due to the State;
- Creating significant databanks of intelligence on individuals which are protected by secrecy obligations but which are available for future use;
- Arranging witness protection and the establishment of assumed identities;
- Effecting arrests;
- Reporting on potential promotions.

These powers extend well beyond the scope of legally acceptable criminal investigations and sometimes they are called upon in aid of joint task forces or of investigations conducted by other law enforcement agencies in a way which is potentially capable of abuse.

In addition the legislation creating these agencies usually creates a series of specific offences applicable to agency officers, for example in relation to abuse of their office, breaches of secrecy and so on, as well as a separate series of offences which might be committed by other persons, for example, involving bribery of agency officers, or interference with the agency's investigations or making vexations, false or frivolous complaints.

The width of potential interest of these agencies varies. For example, the jurisdiction of the Ombudsmen in general terms extends to responding to complaints in relation to the conduct of public officials, monitoring the police management of complaints or investigating such complaints, performing some audit and advisory functions in relation to a variety of public bodies and agencies, and responding to complaints in relation to those bodies and agencies:

That of the ICAC extends to investigating, exposing and preventing serious corruption involving or affecting public administration, promoting the integrity and accountability of public administration.

That of the Queensland and Western Australian Crime and Misconduct Commissions in broad terms embraces the combating of major crime as well as the investigation or coordination of investigations of police and other misconduct and the investigation of or monitoring the way in which the police investigate or deal with police misconduct. The Queensland Commission has a function of helping to prevent major crime and misconduct and of investigating major crime referred to it by the Crime Reference Committee. It also has a responsibility to improve the integrity of, and to reduce the incidence of misconduct in the public sector and in that regard, to build the capacity of units of public administration to prevent and deal with misconduct.

That of the NSW Police Integrity Commission and the Victorian Office of Police Integrity is essentially confined to the police service of those States, in relation to the investigation of serious misconduct and corruption by their members, in monitoring the investigation of complaints the management of which is left to Police, and in relation to Police practices and methodologies that may have an impact on Police integrity.

That of the Commonwealth Law Enforcement Integrity Commission will from the commencement of the enabling legislation on 30 December 2006 extend to the investigation and reporting of corruption within the Australian Federal Police, the former National Crime Authority, the Australian Crime Commission and any other Commonwealth law enforcement agencies that may be prescribed.

***Royal commissions***

To a lesser extent, there are the occasional Royal Commissions of Inquiry created for a finite term to investigate abuses of power and wrongdoing by public officials and others. In recent times we have seen significant Royal Commissions including:

- The Fitzgerald Commission of Inquiry into possible illegal activities and associated Police misconduct (OLD) which reported in 1989.
- The Royal Commission into NSW Police which reported in I997.
- The Kennedy Royal Commission into Police in Western Australia which reported in 2004.
- The Australia Wheat Board Inquiry of 2005/6.

In most instances, they share some of the powers of the agencies mentioned and similar considerations arise for ensuring their integrity and procedural fairness. They are amenable to administrative law review on procedural fairness grounds: *Mahon v Air New Zealand*[1].

***Self regulation***

The combination in the one agency of anti-corruption and major crime investigation functions as is the case with the Queensland and Western Australian Commissions is potentially problematic. It is in the area of investigations of major crime, particularly where the agency is part of a joint task force, or lends its assistance to another law enforcement body that has a

significant potential for corruption exists. An agency with those powers will have in act carefully and have proper controls, if it is to avoid any compromise of its operations or of its staff which would destroy its primary integrity enforcement role.

Each of these agencies has its own responsibility to act with integrity and fairness. For the most part that can be achieved through the adoption of specific guidelines and practice manuals to be applied in each aspect of their work, by the creation of internal audit and risk committees. But the adoption of a code of conduct; by the implementation of an IT system with suitable firewalls, controls as to permitted access and capacity for an audit trace and by an obligation on the part of staff to report breaches. They are obviously expected to apply high levels of ethical behaviours lest their reputation and capacity for setting an example to the bodies which they oversee is destroyed. They need to resist efforts by government or policing agencies to curtail their powers and capacity to operate effectively; they need to be scrupulously careful in their staff recruitment and training; and they need to be prepared to discipline, dismiss or prosecute any staff members who disobey their guidelines or commit relevant offences.

***External supervision and oversight***

The use by these agencies of listening devices and telecommunication intercepts is generally subject to statutory external audit, for example in NSW both by the Inspector and the Ombudsman in relation to listening devices and by the Ombudsman in relation to telecommunication interceptions. If the Surveillance Bill (NSW) is passed into law, the Ombudsman will have an even wider audit role for other aspects of surveillance.

Otherwise there are additional levels for the general oversight of these agencies via Inspectors or monitors and Parliamentary Committees.

a. Inspectors

In almost every instance it is recognised that the public interest in securing the independence of these integrity agencies and the need for confidentiality of their operations and intelligences means that direct parliamentary oversight is precluded. In the main, the solution has been to establish a structure which interposes an Inspector or Monitor between the agency and any relevant bipartisan Parliamentary Committee that may exist. Taking a selection of the agencies, such an office has been created in:

*New South Wales – in the form of*

- The Inspector of the Independent Commission Against Corruption
- The Inspector of the Police Integrity Commission

Notably there is no independent Inspector to oversee the activities of the NSW Ombudsman or the NSW Crime Commission. These Inspectors have similar functions which extend to auditing the operations of the relevant Commission so as to monitor compliance with the law, dealing with complaints of abuse of power and of misconduct by the Commission or its staff and to assess the effectiveness and appropriateness of its procedures. Each has wide powers to investigate, to have access to Commission records, to require officers to supply information and answer questions, to hold inquiries and to recommend disciplinary action or criminal prosecution against Commission officers.

*Western Australia - in the form of the:*

- Parliamentary Inspector of the Corruption and Crime Commission

With functions of auditing the operations of the CCC, dealing with misconduct on the part of the Commission or its staff, ensuring the effectiveness of the CCC's procedures, rnaking recommendations to the CCC and reporting to Parliament and the Statutory Committee. The powers given to the Inspector are extensive and are similar to those vested in the NSW Inspectors.

*Victoria – in the form of:*

The Special Investigations Monitor whose task it is to monitor compliance with the law by the OPI to assess the relevance of the Office's requirements for persons to produce documents or other things and to investigate complaints against the Office.

*Queensland – in the form of:*

The Public Interest Monitor who has a particular function in testing the appropriateness and validity of applications by the CMC for a surveillance warrant or covert search warrant.

The Queensland Parliamentary Commissioner has the function of auditing records and operational files of the CMC for the purpose, inter alia, of deciding whether it has exercised its powers in an appropriate way, whether matters under investigation are appropriate for investigation and whether there has been compliance with any necessary authorisation for the use of the powers and with policy or procedural guidelines.

The holder of that office also has a function on behalf of the Parliamentary Committee to investigate complaints made against or concerns expressed about the Commission or a Commission officer to exercise other functions in support of the integrity of the Commission including conducting an annual review of its intelligence holdings (a useful function in the light of the extensive and questionable holdings of the former Special Branch in NSW). A wide power is conferred to do all things necessary or convenient for the performance of those functions including a power to hold private hearings with the authority of the Parliamentary Committee.

*The Commonwealth* – has not made provision for the creation of any comparable Inspector or Monitor.

b. Parliamentary committees

In *New South Wales* at a Parliamentary level there are Committees to which the ICAC and PIC, the two Inspectors and the Ombudsman are accountable in the form of the Joint Committee on the Independent Commission against Corruption and the Committee on the Office of the Ombudsman and the Police Integrity Commission.

Similar Committees exist in other States. For example in *Western Australia* there is a Joint Statutory Committee on the Corruption and Crime Commission.

In *Queensland* there is the Parliamentary Crime and Misconduct Committee.

In *Victoria* there is no Parliamentary Committee although the OPI and the Special Investigations Monitor are required to report to Parliament on an annual basis.

At a *Federal* level, there is the

- Parliamentary Joint Committee on the Australian Crime Commission, and a
- Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity.

These Committees have a generally comparable role in being Committees to whom the Inspectors and Commissions report, which act on behalf of the government in ensuring, although without access to operational detail or involvement in investigative decision-making, the integrity of the system and in ensuring that appropriate persons are appointed to the offices of Inspector, Monitor and Commissioner.

The *Queensland* Parliamentary Committee has particularly extensive powers and functions in monitoring and reviewing the CMCs about the integrity functions, participating in the election or removal of the Commissioner and issuing guidelines and directions to the CMC including the giving of a direction to the CMC to investigate a matter involving misconduct.

Where it receives a complaint or has other concerns in relation to the conduct or activities of the CMC, it may ask the Parliamentary Commissioner In investigate the matter on its behalf.

Otherwise it appears to have a particularly extensive hands-on approach through its regular meetings with the CMC and the Parliamentary Commissioner in receiving information concerning any complaints that are made against the CMC and through the rolling audits which it asks the Parliamentary Commissioner to make as its agent.

***Concerns or complaints about the integrity of integrity agencies***

Several responses are available where there is a complaint in relation to the way in which one of the integrity agencies has dealt with a person affected by its inquiries or activities. They include:

- Complaint to an Inspector or Monitor where one exists, followed by investigation and report by that Inspector or Monitor;
- Complaint to any relevant Parliamentary Committee which may refer the matter back to the Inspector or Monitor;
- Complaint to the media with consequent exposure to public judgement;
- Challenge to any decision made, for example by a Commissioner of Police involving the dismissal or other disciplinary action taken against a serving Police officer consequent upon the Commission Report which, in New South Wales could be heard in the Industrial Relations Commission.

In *Queensland* a person who claims that a CMC investigation into official misconduct is being conducted unfairly may apply to a Supreme Court judge for an order in the nature o a mandatory or restrictive injunction addressed to the CMC. The Court may, if satisfied as to the applicant's claim, required the CMC o conduct the investigation in accordance with guidelines specified by it, or to stop or not proceed with the investigation.

In *Western Australia* there is a prohibition on judicial intervention by way of a prerogative writ, injunction or declaration in respect of the performance by the CCC of its functions (except with the consent of the Parliamentary Inspector) until after completion of the investigation.

In *NSW* while each of the ICAC and the PIC can make findings on the civil standard of proof of corrupt conduct (ICAC) or of misconduct (PIC) and can make recommendations that consideration be given to the bringing of a prosecution or disciplinary action, neither can make actual findings of guilt.

Merits review is not available. The Courts have, however, accepted that they have a jurisdiction to intervene in the event of such an agency acting in excess of its statutory powers to conduct an inquiry or to make findings or in the event of failing to carry out its

functions in accordance with the law: *Shaw v Police Integrity Commission* [2]overruled on other grounds in *Police Integrity Commission v Shaw*[3] and see also *Greiner v The Independent Commission against Corruption*[4]. The Courts also have a supervisory jurisdiction arising from the operation of the principles of procedural fairness for example in relation to the *audi alteram partem* rule or in relation to actual or apprehended bias: *Re Royal Commission on Thomas Case*[5], *Annetts v Mc Cann*[6].

The extent to which administrative law review might otherwise exist, in respect of the making of factual findings or recommendations by these agencies not amounting to determinations of liability or otherwise altering rights and falling short of extreme irrationality or illogicality is open to lively debate: cf *Australian Broadcast Tribunal v Bond*[7], *Hill v Green* [8] and note the discussion in Hall [9]and in Aronson, Dyer and Greves[10], as well as *Re Minister for Immigration and Multicultural Affairs, ex parte applicants S20/2002*[11].

This could potentially be regarded as a weakness in the integrity system as findings within a permitted area of jurisdiction, can have a very significant impact on an affected person particularly if criminal or disciplinary proceedings do not follow in which a further opportunity could be available, to meet the relevant concerns. It is true that an Inspector can recommend reconsideration by the relevant agency but it would not appear that such reconsideration could be directed or a merits review undertaken.

### *Conclusion*

Ultimately the integrity of these agencies and particularly that of the Inspector and Monitor appointed to act as their guardian depends upon the willingness and capacity of government to appoint as Commissioners and as Inspectors or Monitors, people who are competent, independent, experienced, ethical and free of any question as to their integrity. Clearly there is a capacity in government, if it so wishes and is able to nobble any Parliamentary Committee, which has power to approve or disapprove a particular appointment, to subvert the process by making an inappropriate appointment, or by limiting the powers of the relevant agency or Inspector, or by limiting the budget and resources of either.

However, the bipartisan nature of these Committees and their independence of executive government tend to provide an answer to any such concerns.

Moreover the responsibility has to end somewhere and it appears to me that the jurisdictions surveyed in this paper have adopted a suitable model. That model retains some general accountability to Parliament via the relevant Committee, without the need for it to be exposed to, or have access to, operational details.

The Inspector or Monitor have to be trusted with access to that level of detail. Whether the holder of that office is effective in detecting improper or corrupt conduct by the agency or its officers, however, depends entirely on the extent of the audit and access powers, on how thoroughly they are exercised, on the extent to which operations are vetted and on a readiness seriously to consider and investigate complaints against the Commission or its officers. It is a process that could also be frustrated by a corrupt or ineffective Commissioner in charge of those agencies who decided to withhold access or to conceal information.

It also depends upon the powers available to the holder of the relevant offices, which are cast in somewhat general terms in NSW and in more direct terms in other States which empower the Inspector to require the relevant Commission to take specific action. In NSW and in Victoria the power of the Inspectors and of the Monitor is confined to making recommendations to the relevant Commission and if necessary to report to Parliament if those recommendations are ignored. In these States the absence or determinative or directive powers means that the utility of the oversight agency is dependent on a mutual

relationship of trust and openness which seems to have worked well so far, and may, in fact, be more beneficial than systems which allow for confrontation and direction In the relevant Commission to do something or to refrain from doing something against its wishes.

Additionally of value is the extent to which inter jurisdictional cooperation and exchange of information, on intelligence and strategies, has been developed via the several National Conferences which have now been held.

In similar vein the existence in NSW of a Corruption Prevention Network, a semi official and voluntary body of public officials concerned in fraud and corruption prevention and investigation, has proved a useful model in building bridges, identifying emerging areas of corruption and risk management tools, improving the available level of skills and information and communication technologies as well as promoting the objectives of integrity and accountability. This is also an area where Transparency International has a potential role to play in enhancing an understanding and acceptance of the need for integrity and the avoidance of corruption.

All in all, I believe that Juvenal could be satisfied that the guardians in this country are capable of ensuring that the integrity agencies maintain their integrity and that, within the integrity agencies themselves, there are available mechanisms to secure the effective discharge of their functions.

**Relevant legislation**

***New South Wales:***
*The Ombudsman Act 1974*
*The Police Integrity Commission Act 1996*
*The Independent Commission Against Corruption Act 1988*

***Oueensland:***
*The Crime and Misconduct Act 2001*

***Western Australia:***
*The Corruption and Crime Commission Act 2004*

***Victoria:***
*The Police Regulation Act 1958*

***Commonwealth:***
*The Ombudsman Act 1974*
*The Australian Crime Commission Act 2002*
*The Law Enforcement Integrity Commissioner Act 2006*

**Endnotes**

1 (1984) IAC 808
[2] (2005) NSWSC 782
[3] (2006) NSWC 165
[4] (1992) 28 NSWLR 125
[5] (1982) 1 NZLR 252
[6] (1990) 170 CLR 596
[7] (1990) 170 CLR 321
[8] (1999) 48 NSWLR 161
[9] *Investigating Corruption and Misconduct in Public Office* at 712 to 716
[10] *Judicial Review of Administrative Action* 3rd ed 245-251
[11] (2003) 198 ALR 59

# THE PRINCIPLES THAT APPLY TO JUDICIAL REVIEW: ITS SCOPE AND PURPOSE

***Robert Lindsay****

There is controversy about the underlying principles that govern judicial review. On one view it is a common law creation. On the other it is a statutory and constitutional doctrine[1].

In *Cooper v Wandsworth Board of Works* Byles J said:

> …although there are no positive words in a statute requiring that the parties shall be heard, yet the justice of the common law will supply the omission of the legislature.

As Sir Anthony Mason said this can be construed as supporting either a construction that the doctrine is statutorily based or that it derives from the common law.

The common law proposition is expressed that:

> unless parliament clearly intends otherwise, the common law will require decision makers to apply the principles of good administration as developed by the judges in making their decisions.[2]

The alternative statutory doctrine may be expressed:

> unless parliament clearly indicates otherwise, it is presumed to intend that decision makers must apply the principles of good administration drawn from the common law as developed by the judges in making their decisions.

Brennan J said:

> the common law will usually imply a condition that a power be exercised with procedural fairness to parties whose interest might be adversely affected by the exercise of power. This is the foundation and scope of the principles of natural justice. The common law confers no jurisdiction to review an exercise of power by a repository when the power has been exercised or is to be exercised in conformity with a statute which creates and confers the power…. [3]

In *Re Refugee Tribunal: Ex Parte Aala*[4], Gaudron and Gummow JJ cited the above passage of Brennan J and this is also consistent with what Brennan CJ said in *Kruger v The Commonwealth Bank* [5] that:

> when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised[6].

Mason CJ who had favoured the common law approach, considered that the conflict between the theories as to whether the starting point is statutory or common law, can be seen as a reflection of the disagreement between those who wish to emphasise legislative supremacy and those who wish to protect fundamental individual rights[7].

He considered that the starting point may be important. If the statute is the starting point it may be easier to conclude that there is no intent to subject the decision maker to the

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common law principles. The broader view is that as expressed by Lord Steyn in *The Secretary of State for The Home Department: Ex parte Pierson*[8] who said*:*

> Parliament legislates for a European liberal democracy founded on the traditions and principles of the common law. The courts may approach legislation on this initial assumption. This assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.

Whatever the source, it is to be implied ordinarily that the rules of natural justice regulate the exercise of a power. In *Re Minister: Ex parte Miah*[9] Mc Hugh J said:

> It is now settled that, when a statute confers upon a public official the power to do something which affects a person's rights, interests or expectations, the rules of natural justice regulate the exercise of that power 'unless they are excluded by plain words of necessary intendment' (*Annetts v McCann* (1990) 170 CLR 596 at 598).

An intention on the part of the legislature to exclude the rules of natural justice is not to be assumed nor spelt out from 'indirect references, uncertain inferences or equivocal considerations' (*Annetts v McCann* citing *Commissioner of Police v Danos ((*1958) 98 CLR 583 at 396). Nor is such an intention to be inferred from the presence in the statute of rights which are commensurate with some of the rules for natural justice…the common law rules of natural justice are part of this background. They are taken to apply to the exercise of public power unless clearly excluded.

In *Ex parte Aala* a Tribunal made adverse credibility findings against an applicant. At the hearing the Tribunal stated that it had read all the papers from the previous applications and Federal Court proceedings in which the applicant had been involved. Relying upon this statement the applicant gave no further evidence. In fact, through an oversight, the Tribunal did not have certain unsworn statements by the applicant. It was held there had been a denial of procedural fairness and prohibition should issue under s 75(v) of the Constitution. In *Miah* an application for a protection visa on the basis that the applicant that the applicant was a refugee was refused on the grounds that the applicant's fear of prosecution in his country of origin was not well founded but a change in government in his country of origin had occurred after the application was lodged. The Minister's delegate did not tell the applicant of his intention to rely on new information respecting this governmental change or give him an opportunity to respond to it. By majority it was held that the Minister's delegate had failed to accord the applicant natural justice.

In *Miah's* case Gaudron J expressed procedural fairness in this way:

> the basic principle with respect to procedural fairness is that a person should have an opportunity to put his or her case and to meet the case that is put against him or her [99].

In many instances the law may define the scope of judicial review. For example under s 44(1) of the *Administrative Appeals Tribunal Act* 1975 an appeal may be made to the Federal Court 'on a question of law' from any decision of the Tribunal. Under the ADJR Act s 5 defines the grounds of review. These sections include breach of the rules of natural justice in connection with the making of the decision which itself entails examination of what the rules of natural justice require at common law.

### *The ultra vires doctrine*

The statutory theory as to the source of judicial review is unquestionably the *ultra vires* doctrine. This rests upon the concept of parliamentary supremacy. It has been said that the common law theory is not inconsistent with parliamentary supremacy but it does not concede as much to the statute as does the *ultra vires* doctrine[10] . The *ultra vires* principle provides no explanation for judicial review of prerogative power. In *Ex parte Aala,* Gaudron

and Gummow J J said that if an element of executive power incorporated a requirement for natural justice, prohibition would lie to enforce its observance of the Constitution itself[11]. Even more significantly the *ultra vires* doctrine does not provide a basis for a review in cases where the power exercised is not a statutory power. Indeed, the High Court in *Wu Yu Fang v The Minster,* on a special leave application, expressly queried the basis for an application for review which did not rest upon a specific statutory provision but upon a common law principle. The question then is whether the law will evolve in a similar way as it has in England, to allow judicial review because basic common law principles of administrative law respecting the exercise of discretionary powers have not been observed.[12]

Cases such as *R v Secretary of State for the Home Department: Ex parte Pierson*[13] in the House of Lords emphasise the importance of the principle of the rule of law in support of the availability of judicial review even where the decision-maker has not appeared to have acted pursuant to statutory authority.

### *Chapter III of the Federal Constitution as a constraint upon the scope of judicial review*

The decision of both the High Court and the Privy Council in the *Boilermakers*' case[14] draws a very broad line of demarcation between judicial power, exercised by Chapter III Courts and administrative power exercised by non judicial authorities. Because courts are not, under this doctrine, to be burdened with any administrative decision-making, it is not open to Chapter III Courts to carry out 'merits review'. That is to say, it is not for courts to substitute its view of the correct or preferable decision for those of the Tribunal.

The division between the role of the courts in judicially reviewing the decisions of administrative bodies and administrative bodies was highlighted in *Lam v MIMIA* where Gleeson CJ commented upon the Privy Council decision of *Attorney General* of *Hong Kong v Shui*[15]. The respondent had entered Hong Kong illegally, was caught up in a program to deport illegal immigrants and the government publicly announced the policy to be applied. People such as the respondent would be interviewed and each case would be treated on its merits. The respondent was made the subject of a deportation order without consideration of the individual merits of his case. The Privy Council quashed the removal order. Their Lordships based their decision on the ground that in the particular circumstances of the case, including the representation that each case would be considered on its individual merits, the respondent had a right to a hearing which he had been denied. Their Lordships said that it was unfair that the respondent had been denied an inquiry into the individual merits of his case. They also said it was inconsistent with good administration. Gleeson CJ, in commenting upon this said:

> if that were intended as a separate and independent ground for quashing the removal order, as distinct from a reason in legal policy for binding the authorities to the requirement of fairness, it would not relate easily to the exercise of this court of its jurisdiction under s 75(v) of the Constitution. The constitutional jurisdiction does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration. [32]

In the *Attorney General (New South Wales) v Quin,*[16]Mason CJ said:

> the prevailing view in this court has been, as Stephen J observed in *Salemi v MacKellar* (2) (1977) 177 CLR 396, that 'the rules of natural justice are in a broad sense a procedural matter' echoing the words of Dixon CJ and Webb J in *Commissioner of Police v Danos* (1958) 98 CLR 583.

### *Wednesbury unreasonableness*

Since the decision of the High Court in *Lam v MIMIA*[17] it may be accepted that while procedural unfairness constitutes jurisdictional error, substantive unfairness does not. Again

this is explained because of the restrictions placed in the Constitution upon judicial intervention in matters of an administrative nature. In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[18] the English Court of Appeal had held that the exercise of a discretion will be invalid if the result is 'so absurd that no sensible person could ever dream that it lay within the power'. In *Eshetu v MIMIA*[19] Gummow J commenting on *Wednesbury* said that a decision-making power might well be conditioned upon a basic element of reasonableness. This concept follows what was said in *Abebe v The Commonwealth*[20] by Gaudron J that an essential condition in the exercise of any decision- making power, in the absence of a statutory indication to the contrary, would be that it not be exercised in a manifestly unreasonable manner. In *Aala,* Gaudron and Gummow *JJ* returned to the question of reasonableness and approved what had been said earlier in *Kruger v The Commonwealth*[21]*:*

> moreover, when a discretion power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised.

In *Re MIMIA; Ex parte Applicant S120 of 2000*[22] McHugh and Gummow JJ appeared to accept that where a Tribunal makes findings which are 'illogical, irrational, or lacking a basis in findings or inferences of facts supported on logical grounds' this may ground jurisdictional error, though it would not be so where there was some evidence, albeit inadequate evidence, for the Tribunal to arrive at its adverse conclusion. In this way limited recognition is given to the duty upon decision-makers to determine matters reasonably.

***The use of privative clauses to prevent appeals***

The High Court decision in *Plaintiff S157/2002 v Commonwealth of Australia*[23] was of enormous significance and will rank along with cases such as the *Boilermaker' case*, the *Engineers'* case and the *Australian Communist Party* case as a significant development in the constitutional jurisprudence of Australia. The Howard government in recent times has attempted to eliminate meaningful judicial review in the area of migration decisions. This has taken the form of turning back boats which have entered Australian waters; excising Australian territorial areas so as to prevent onshore processing of asylum seekers and others; and by amendments to s 474 of the Migration Act in 2001 introducing a 'privative clause decision' as final and conclusive and not to be challenged or appealed against in any court; and said it was not to be subject to prerogative writs in any court on any account.

A 'privative clause decision' was defined as a decision 'made under the Act or under regulations of the Act granting, cancelling, and revoking an order or determination including a failure or a refusal to make a decision.' Although there were some decisions under the Migration Act that were not subject to the privative clause, these were of no significance compared with the major determinations to be made by the Minister in relation to visas which were subject to the privative clause.

There was a further amendment of s 486A of the Act, which provided that an application to the High Court for a constitutional writ or an injunction or declaration in respect of a privative clause decision, must be made within 35 days of the actual notification of the decision. The plaintiff had sought to invoke the jurisdiction of the High Court under s 75(v) of the Constitution to issue writs of prohibition and mandamus against officers of the Commonwealth and had brought the action outside the 35 day period from notification.

The plaintiff's argument was that s 474 was invalid as it attempted to oust the jurisdiction conferred on the High Court by s 75(v) of the Constitution. The Minister's argument conceded that s 474 cannot oust the jurisdiction conferred on the High Court by s 75(v) of the Constitution.

The Court said that there were two basic rules of construction which apply to the interpretation of privative clauses. The first is that if there is 'an opposition between the Constitution and any such provision, it should be resolved by adopting an interpretation consistent with the Constitution that is fairly open'. Secondly, it is presumed that parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies. Accordingly, privative clauses are strictly construed[24].

The Court said that a privative clause cannot operate so as to allow a non judicial tribunal to exercise the judicial power of the Commonwealth. Thus, it cannot confer on a non judicial body the power to determine conclusively the limits of its own jurisdiction[25]. The Court said that the Minister's argument which gave paramountcy to s 75 over other provisions of the Act and imposed limitations upon power was not to construe the Act fairly. Their Honours quoted Dixon J who first noted that parliament 'could neither give power to any judicial or other authority in excess of constitutional power nor impose limits upon the…authority of a body… with the intention that any excess of that authority means invalidity, and … at the same time deprive this court of authority to restrain the invalid action… by prohibition'[26].

In short, privative clauses need to be read together with the other provisions of the Act to which they relate to determine what force and effect they should have. It is presumed that Parliament does not intend to cut down the jurisdiction of the courts except to the extent that the legislation in question expressly states or necessarily implies.

The other aspect of s 474 upon which the Court concentrated was the wording in s 474(2) which stated that a 'privative clause' decision meant a decision of an administrative character, proposed, or required to be made 'under this Act or under a regulation or other instrument made under this Act'. In the joint judgment it is said 'decisions made under this Act' must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of jurisdiction conferred by the Act. Indeed so much is required as a matter of general principle. An administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all'. Thus, if there has been jurisdictional error because, for example, of a failure to discharge 'imperative duties' or to observe 'inviolable limitations or restraints', the decision in question can not properly be described in the terms used in s 474 (2) as 'a decision…made under this Act' and is, thus, not a 'privative clause decision' as defined in s 474(2) of the Act'[27].

The effect of a jurisdictional error means that the decision was a nullity and so no decision at all for the purposes of s 474(2). The contention of the plaintiff in S *157 of 2002* was that there had been a denial of natural justice in that the Tribunal had taken into account relevant material adverse to the plaintiff's claim for refugee status without giving him notice of the material and an opportunity to address it. Once this was accepted the decision was made in jurisdictional error and not a 'privative clause decision' and it would have to be regarded as a nullity. Consequently the Court found that the applicant could bring a constitutional writ against officers of the Commonwealth, not only by virtue of the powers vested in the High Court under s 75(v) of the Constitution, but because s 474(2) would have no application to him as the decision was not a 'privative clause decision' being a nullity. For the same reason the 35 day limitation under s 486A which only related to 'privative clause decisions' would have no application to the plaintiff.

The joint judgment concluded with this resounding paragraph -

> The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by

> privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s.75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.[28]

### *What is jurisdictional error?*

In *The Minister of Immigration and Multicultural Affairs v Yusof*[29]. McHugh, Gummow and Hayne JJ said:

> it is necessary, however, to understand what is meant by jurisdictional error under the general law and the consequences that follow from the decision maker making such an error. As was said *Craig v South Australia* (1995) 184 CLR 163 if an administrative tribunal (like the Tribunal) falls into an error of law which causes it to identify wrongly; to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the Tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the Tribunal which effects it.

'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. These different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying the wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further doing so, results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision maker did not have authority to make the decision that was made; he or she did have jurisdiction to make it. Nothing in the Act suggests the Tribunal was given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law."[30]

*Craig v South Australia* arose out of a ruling by a District Court judge that the prosecution could not proceed with a prosecution because the judge held that the principle of *Dietrich v The Queen*[31] applied, in which the High Court had held that persons facing serious criminal charges who through no fault of their own, cannot find legal representation, ought not to be compelled to stand trial. The DPP sought a writ of certiorari to quash the decision of the District Court judge on the grounds that he had made erroneous findings and the High Court reversed the Court of Appeals order to issue certiorari.

In a joint judgment the High Court cited Lord Reid's speech in an *Anisminic Ltd v Foreign Compensation Commission*[32]:

> …there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with a question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. It may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

The High Court said that Lord Reid's comments applied to an administrative tribunal but would not in Australia refer to a court of law. In the absence of a contrary intent in the statute an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law. In contrast, the jurisdiction of the court of law encompasses authority to decide questions of law as well as questions of fact. Accordingly, Lord Reid's comments were not to be accepted as an authoritative statement as to what constitutes constitutional error by an inferior court for the purposes of certiorari. This writ lies for jurisdictional error; procedural unfairness; fraud and error on the face of the record. However, it was said in *Craig* that the transcript of the reasons for decision did not form part of the 'record'. Certiorari would not lie to set aside the decision of the District Court judge even if it was assumed that the judge made an error in finding that the principle of *Dietrich* applied. It was an error within jurisdiction and was not an error on the face of the record.

**Endnotes**

1 The oft quoted statement of Byles J in *Cooper v Wandsworth's Board of Works* 1863 (14 CBNS 1280 at 1295) (143 ER 414 at 420)
2 See Forsyth *Heat and Light: A Plea for Reconciliation* (Hart Publishing, Oxford 2000 at 369) cited by Sir Anthony Mason Lecture 1: 31 *AIAL Forum* at 6 whose invaluable lecture highlights the importance of these issues.
3 *Annetts v McCann* 1990 170 CLR 596 at 604
4 (2000) 204 CLR 82
5 (1997) 190 CLR 136
6 204 CLR 82 at 100
7 *Foundations and Limitation of Judicial Review* 31 *AIAL Forum* at 12
8 (1998) AC 539 at 587
9 (2001) 206 CLR 57 at 93 [126]
10 *The Foundations and Limitations of Judicial Power*, supra p 12
11 (2002) CLR 82 at 101
12 *Enfield City Corporation* (2000) 199 CLR 135 at 153
13 (1998) AC 538 at 587-591
14 *R v Kirby; Ex Parte Boilermakers Society of Australia* (1956) 94 CLR 254
15 (1983) 2 AC 629
16 (1991) 70 CLR at 23
17 (1977) 137 CLR 461
18 (1948) 1 KB 223 per Lord Greene MR
19 (1998) 197 CLR 611 at paras 121 to 148
20 (1999) 197 CLR 510 at para 116
21 (1997) 190 CLR 1 at 36; see article 'Natural Justice, The High Court and Constitutional Writs' by John Basten QC *AIAL Forum* 30 at pp 21-87.
22 2003 198 ALAR 59 at (34)
23 2003 8 CA 2
24 *Plaintiff S 157- 2002* a joint judgment at [72]
25 ibid at [73
26 ibid at [58] citing *Hickman* (1945) 70 CLR 598 at 616
27 ibid at [76]
28 ibid [104]
29 2001 181 ALR 1
30 ibid at [82]
31 (1992) 77 CLR 292
32 (1969) 2 AC 147 at 171

# THE CHARTER AND THE GOVERNMENT: IMPLICATIONS FOR PRIVATE SECTOR CONTRACTS

***Udara Jayasinghe****

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) received royal assent on 25 July 2006. The Charter incorporates certain civil and political rights stipulated under the *International Covenant on Civil and Political Rights* 1966 (ICCPR). It recognises that public powers and functions must be exercised in a principled manner and aims to protect and promote the rights defined under it in the development of new and existing legislation and increase compatibility with those rights in government actions. This will be achieved by requiring:

(a) a statement to be prepared and submitted with all bills introduced into parliament, confirming the bill's compatibility with the Charter;
(b) the actions of public authorities to be compatible with the Charter; and
(c) Victorian Courts and Tribunals to interpret statutory instruments in a manner that is consistent with the rights set out in the Charter.

Victoria is a modern administrative state where public administration is governed by principles which promote consistent and fair decision making.

The legislative protection of rights under the Charter invokes a consideration of comparative and international law. It is now necessary to turn to comparative jurisprudence to ascertain and predict how the rights protected under the Charter will impact Victorians.

This article will discuss possible implications of the Charter for the Victorian government and its agencies when contracting with the private sector, using a comparative analysis of the development of jurisprudence in the United Kingdom. In the United Kingdom, there is a great deal of uncertainty about the application of the *Human Rights Act* 1998 (UK) (the UK Act), when the public sector contracts out its services to private sector service providers. There appears to be a considerable degree of confusion about where responsibility lies for actively securing and promoting the underlying standards of human rights when the public service enters into a contractual relationship with the private sector.

Considering the similarity between the relevant provisions of the Charter and the UK Act, it is likely that the Victorian public service will be presented with the same issues when contracting with the private sector. This article will discuss the implications of the Charter for the Victorian public sector, by drawing on developments in the United Kingdom in relation to public authorities that have contracted out functions of a public nature to the private sector.

### *Obligation for public authorities to act compatibly with the Charter*

The Charter requires a public authority to act in a way that is incompatible with or fails to give proper consideration to a right protected under the Charter. [1] In making a decision, public authorities are required to give proper consideration to relevant human rights.[2]

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A 'public authority' is defined under the Charter to include the Victorian Police, local councils and councillors, Ministers and members of parliamentary committees, as well as Courts when acting in an administrative capacity. The Charter is also directed at private sector organisations acting on behalf of the government or public authorities when performing functions of a public nature. The intention is that the obligation to act compatibly with human rights should apply broadly to government and to bodies exercising functions of a public nature.

Importantly, the obligation on public authorities to comply with the Charter extends only to situations where the authority is performing functions of a public nature.[3] Further, the Charter requires public authorities to give 'proper consideration' to relevant human rights. The requirement of 'proper consideration' is intended to encourage public authorities to give real and genuine consideration to human rights.

Importantly, s 7 of the Charter acknowledges that the rights contained in it are not absolute and that they need to be balanced against each other and other competing public interests. Questions of compatibility will turn on the facts of each individual case and it is therefore difficult to prescribe or predict situations in which incompatibility may be found under the Charter. This paper will however not canvass this aspect of the Charter.

The Charter sets out the following factors for determining whether a function is of a *public nature:*

> (d) whether the function is conferred on the entity by or under a statutory provision;
> (e) the function is connected to or generally identified with functions of government;
> (f) the function is of a regulatory nature;
> (g) the entity is publicly funded to perform the function; or
> (h) the entity that performs the function is a company (within the meaning of the Corporations Act) and all of its shares are held by or on behalf of the State. [4]
>
> It is anticipated that much of the judicial interpretation of the Charter will centre on what constitutes a function of a public nature when such a function is being exercised on behalf of the State or a public authority. Comparisons from case law developments under the UK Act will provide some useful guidance, in particular because the factors set out above appear to be a codification of the developments in the United Kingdom.[5]

### *Implications for government departments when contracting with the private sector*

The Charter has the potential to bind the private sector. Section 4(1)(c) of the Charter provides that the term 'public authority' can include *'*an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)'.

The rationale for the extension of the obligations under the Charter beyond so-called 'core public authorities' is explained in the Explanatory Memorandum to the Charter as follows:

> The obligation to comply with the Charter extends beyond these "core" government authorities, to cover other entities when they are performing functions of a public nature on behalf of the State (paragraph (c)). This reflects the reality that modern governments utilise diverse organisational arrangements to manage and deliver government services. The Charter applies to "downstream" entities, when they are performing functions of a public nature on behalf of another public authority. Guidance on the meaning of "functions of a public nature" and on the meaning of "on behalf of the State or a public authority" is provided in sub-clauses (2) and (4) respectively.

The Charter will impact on the private sector where a private sector company exercises a function of a 'public nature' or when a statutory provision affecting a private sector body is interpreted in accordance with the Charter.

This paper will only consider the implications for government departments when private sector bodies perform functions on their behalf under contract. Specific functions are expressly dealt with under the Charter. For example, private prisons may be public authorities if they exercise a function (such as managing a prison) that is connected to, or generally identified with the functions of government.

Although the factors enumerated under the Charter are not intended to be prescriptive, they provide valuable guidance on the type of considerations which will guide Courts and Tribunals when deciding whether a private body is exercising a 'public function' for the purposes of the Charter.

It is likely that Victorian Courts and Tribunals will have regard to case law from the United Kingdom when interpreting these provisions of the Charter. This paper will consider the position in the United Kingdom in respect of private entities exercising 'public functions' in accordance with their respective Human Rights legislation.[6] The UK Act does not provide any guidance as to how the public nature of a function is to be determined. As a result, English courts have applied a restrictive definition to private bodies, exercising a function of a public nature and many privatised service providers that would have been expected to fall within the ambit of the UK Act have been excluded from its application. Further, English decisions fail to conclusively resolve the issue of when a body will be held to exercise 'functions of a public nature'. Case law developments on this issue have been *ad hoc* and fragmented. Nevertheless, it is possible to distil a number of principles which have led English Courts to determine whether or not a body is performing functions of a public nature.

***Trends drawn from the jurisprudence in the United Kingdom***

In the United Kingdom, private or quasi-private bodies will only be considered public authorities (and therefore amenable to judicial review) for the purposes of the UK Act if they are underpinned by 'governmental' action or are at least recognised by the government. Until recently, the determining factor was the source of power.[7] In an administrative law context, the general trend is that Australian courts are moving towards an acceptance of the English test, asking whether the body is exercising 'public functions' or making decisions of a 'public character'.

According to the jurisprudence in the United Kingdom, a private body is likely to be considered a public authority performing public functions (a 'functional' public authority) under s 6(3)(b) of the UK Act if:

- its structures and work are closely linked with the delegating or contracting out State body; or
- it is exercising powers of a public nature directly assigned to it by statute; or
- it is exercising coercive powers devolved from the State.[8]

The following factors have also been considered in case law (and when applied cumulatively) have been considered to be indicative of functions of a 'public flavour'[9]:

- the fact of delegation from a State body;
- the fact of supervision by a State regulatory body;
- whether the body relies on public funding;
- the public interest in the functions being performed;

- motivation of serving the public interest (rather than for profit);
- historical role of the state in the activity;
- amenability to judicial review;
- whether its decisions are recognised by statute or parliament or have public consequences; or
- whether they are supported by sanction.

It is very clear that government departments and employees of the public service fall under the rubric of 'public authorities' or public bodies contemplated under the Charter and therefore will be subject to the operation of the Charter. What remains contentious is how widely the obligations will reach the 'private' contracted out bodies when they are performing a function on behalf of a public authority.

In the United Kingdom, cases such as *Poplar Housing and Regeneration Community Association v Donoghue*[10] and *R v Leonard Cheshire Foundation*[11] have found that a public authority which contracts out functions (which it would otherwise discharge itself), remains liable under the UK Act for any breach of the human rights. Accordingly, the public authority does not 'delegate' its functions, but rather, it exercises its functions by entering into contracts for the provision of services.

In *Poplar Housing* at [60], the Court of Appeal supported the retention of human rights liability by the public authority by stating that:

> the European Court made it clear that the State cannot absolve itself of its Convention obligations by delegating the fulfilment of such obligations to private bodies or individuals, including the head master of an independent school. However, if a local authority, in order to fulfil its duties, sent a child to a private school, the fact that it did this would not mean that the private school was performing public functions. The school would not be a hybrid body. It would remain a private body. The local authority would, however, not escape its duties by delegating the performance at the private school. If there were a breach of the Convention, then the responsibility would be that of the local authority and not that of the school.

This view was restated by the Court of Appeal in *Leonard Cheshire* at [33], when the Court added that:

> if the arrangements which the local authorities made with LCS had been made after the HRA came into force, then it would arguably be possible for a resident to require the local authority to enter into a contract with its providers which fully protected the residents' Article 8 Rights …

A contrary view was considered in *Aston Cantlow v Wilmore & Billesley Parochial Church Council v Warbank & Anor,*[12] the leading authority on the meaning of 'public authority' in the United Kingdom. In that case, the House of Lords decided that the correct test should focus on the nature of the function performed and not the nature of the institution. The House of Lords found that the relevant factors to be taken into account were the extent to which the body was carrying out the relevant function for which the body was publicly funded; whether or not it was exercising statutory powers or whether it was taking the place of central government (or local authorities) or was providing a public service.[13] Lord Hope was clear that the correct test should be 'functional' rather than 'institutional':

It is sensitive to the facts of each case. It is a function that the person is performing that is determinative of the question whether it is, for the purposes of that case, the hybrid public authority. The question whether section 6(5) applies to a particular act depends on the nature of the act which is in question in each case.[14]

The functional test endorsed in this case is significantly broader than the test set out in *Poplar Housing*, as it does not rely on 'institutional links'. However, the House of Lords failed

to refer to either *Poplar Housing* or *Leonard Cheshire* in their decision and therefore subsequent courts have side-stepped the decision and have determined the public nature of functions by reference to their amenability to judicial review[15] and by considering the institutional links of the organisation to the public authority.

As discussed in *Poplar Housing* and *Leonard Cheshire,* where a public authority contracts out functions which it would otherwise discharge itself, the public authority could remain liable under the UK Act for any breach of the human rights that results. However, a public authority can protect itself from potential human rights liability by considering possible human rights implications arising out of contractual relationships at the outset. Considering that some English Courts have found human rights liability to rest on the public authority when contracting out its services, it is prudent for Victorian government departments and agencies to consider possible human rights implications in their contractual relationships with the private sector. Express provisions in contractual relationships for human rights protection could provide evidence that the parties to the contract intended that the private contractor should have human rights responsibilities equivalent to those of a public authority.

In this manner, government departments and agencies could minimise breaches of human rights by service providers and ensure that the human rights of service users are protected. This will effectively bind service providers to the Charter. In doing so, government departments and agencies could ensure that subsidiary bodies comply by building human rights concerns into their risk management systems and adopting contract clauses with termination notices if a contractor defaults in human rights responsibilities. Further, it would demonstrate that 'proper consideration' has been given to Charter rights by the public authority.

### *Conclusion*

To instil a human rights culture, government departments may consider adopting Charter rights in their policies and risk management strategies. This will ensure that human rights implications are considered in contractual relationships with the private sector. To hold private sector bodies liable for any potential breach of human rights of service users, it is recommended that express terms of compliance with the Charter are incorporated into contractual relationships. Further, the public service may consider implementing policies which give priority to private sector clients with risk management strategies that positively outline compliance with human rights. This will not only protect the public authority from any human rights liability, but will also encourage the private sector contractors to take human rights seriously. As stressed in the report by the Victorian Consultative committee, human rights protection in Victoria is not only concerned with access to court and the enforcement of human rights standards through litigation. The Charter aims to achieve human rights protection through good practice and the development of an organisational culture of respect for human rights. Although the use of express contract clauses does not provide a complete answer, it will serve to promote good practice and instil a consciousness of human rights protection within the private sector.

**Endnotes**

1 Charter, s. 38(1)
2 Charter, s. 38(3)
3 Ibid
4 Charter, s.4(2)
5 Under s 6(3)(a) of the UK Act, 'pure' public authorities (such as government departments, local authorities, or the police) are required to comply with human rights in all their activities (both when discharging intrinsically public functions and also when performing functions which could be done by any private body).

Under s 6(3)(b), those who exercise some public functions, but are not 'pure' public authorities are required to comply with human rights when they are exercising a 'function of a public nature' but not when their actions are of a private nature (s 6(5) of the UK Act).

6 The recent New Zealand case of *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 demonstrates that New Zealand courts will be heavily influenced by current English authority on the topic.

7 Raymond Finkelstein, "Crossing the Intersection: how courts are navigating the 'public' and 'private' in Judicial Review" (2006) 48 *AIAL Forum* 1,6

8 Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act,* 7th Report 2003-04 Session (23 February 2004) HL Paper 39, HC 382, 16

9 Ibid.

10 (2001) EWCA CIV 595

11 (2002) EWCA Civ 366

12 (2004) 1 AC 546

13 *Aston Cantlow,* per Lord Nichols at [10] and [12]

14 *Aston Cantlow* , per Lord Hope at [41]

15 *R (Mullins) v The Appeal Board of the Jockey Club* (2005) EWHC 2197; *Hampshire CC v Graham Beer Hammer Trout Farm* (2003) EWCA Civ 1056; *R (Johnson and Others) v Havering London Borough Council* (2006) EWHC 1714

# PUTTING ADMINISTRATIVE LAW BACK INTO INTEGRITY AND PUTTING THE INTEGRITY BACK INTO ADMINISTRATIVE LAW

***Dr A J Brown****

## *1. Introduction*

What role does administrative law play in the pursuit of public integrity? And how confident can we be that it is currently performing its role?

The answer to the first of these questions might seem axiomatic – of course, administrative law is a fundamentally important field of societal regulation and professional practice, whose entire *raison d'etre* is the proper regulation of relationships between government and the community. Indeed administrative law, just as much as if not more than constitutional law, could be better described as 'the law of public accountability'. If we restyled them thus, undergraduate administrative law courses might not even need to be compulsory to sustain student interest.

But is public 'accountability' the same as public 'integrity', especially when defined in legal terms; and even if the law of public accountability is vital to public integrity, how do we ensure that it is up-to-date and doing all that it should be doing?

This paper suggests some answers to these questions, reached as a result of recent research collaboration between several Australian universities and Transparency International Australia – the National Integrity System Assessment. This assessment took place over five years, with funding from the Australian Research Council and was released in draft form at the 4th National Investigation Symposium held by the NSW Ombudsman, the Independent Commission Against Corruption and the Institute of Public Administration in November 2004. The final report (Brown et al 2005) was launched by Professor John McMillan on UN Anti-Corruption Day, 9 December 2005. This paper draws heavily on that report and its underlying research.

The first part of the paper restates some of the reasons for seeking to describe and assess 'national integrity systems' and the approaches used in doing so. The second part then reviews some key practical recommendations of the assessment, particularly those relating to our administrative law frameworks. These confirm the centrality of administrative law to our nation's integrity systems, but also the need for those concerned with public integrity to think more broadly about how administrative law can, does and should interact with other elements of our integrity system.

The third part of the paper reinforces this by repeating some questions about the conceptual differences but also key relationships between ideas of 'accountability', 'responsibility' and 'integrity' in our society. These questions provide ongoing food for thought for lawyers, not

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just those interested in fine definitional distinctions, but particularly as a reminder to administrative lawyers to remain conscious of, and perhaps even assertive in promoting, the integrity-related dimensions of their role.

### *2. Integrity systems: what are they and why assess them?*

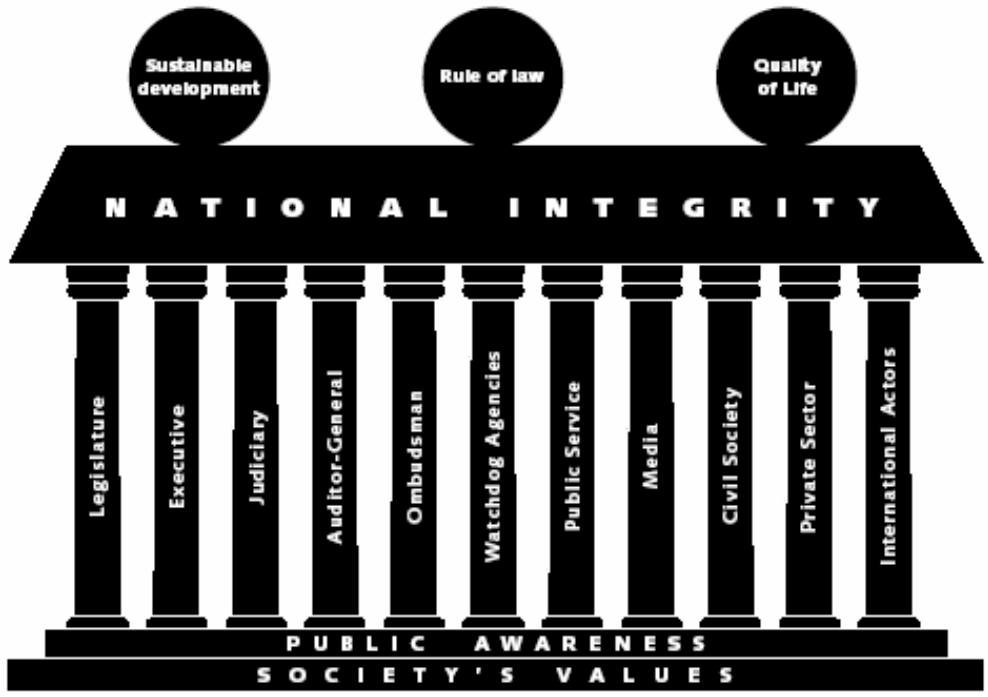
Australia's 'National Integrity Systems' are the sum total of institutions, laws, procedures, practices and attitudes that encourage and support integrity in the exercise of power in modern Australian society (Brown et al 2005: 1). Integrity systems function to ensure that power is exercised in a manner that is true to the values, purposes and duties for which that power is entrusted to, or held by, the institutions and individual office-holders concerned.

The sense of 'truth' that runs through this rather expansive definition relates back directly to the meanings we give to 'integrity' in our society – not just in relation to the personal integrity of individuals, but also the institutions through which most political and economic power is exercised. The word 'integrity' is derived from the Latin *integritas*, meaning 'unaffected, intact, upright, reliable'; the same root has given us 'integer', the mathematical term for a 'whole' number as opposed to a fraction (Preston in KCELJAG & TI 2001: 1; Uhr 2005: 194). 'Integrity' also operates as a conceptual opposite to 'corruption', which means decay, deterioration or perversion from an original or 'whole' state; in physical terms, corruption is 'the destruction or spoiling of anything, especially by *disintegration*…' (Oxford English Dictionary; Heidenheimer & Johnson 2002: 6-9).

When it comes to our society's major institutions, and the individuals that constitute them, how do we judge power as being exercised in an 'upright', 'whole', 'uncorrupted' manner? It is by reference to the values, purposes and duties for which that power is entrusted to, or held by, the institutions and individual office-holders concerned. Clearly, in modern societies such judgements are arrived at and acted upon in a myriad of ways – from institutions, laws, and procedures to social practices and attitudes. All these many and varied ingredients go to make up our integrity systems.

The definition of integrity and its relation with other key terms in other legal and policy lexicon will be further discussed at the end of this paper. The term 'National Integrity System' has an even more specific and recent origin, coined by the foundation managing director of Transparency International, Jeremy Pope, to describe a changing pattern in anti-corruption strategies in which it was recognised that the answer to corruption did not lie in a single institution, let alone a single law (Pope 1996; 2000; see also Langseth et al 1997; 1999). Pope's graphical metaphor for the national integrity system is an ancient 'Greek temple' (Fig 1).

***Figure 1. Transparency International's NIS Greek Temple (Pope 2000)***




This image of a 'typical' national integrity depicts the types of institutions commonly found in the integrity system of contemporary liberal democracies (the 'pillars'), but also captures how different elements of an integrity system interact in terms of 'horizontal' or 'mutual' accountability. As Pope (2000: 36) describes:

> the pillars are interdependent but may be of differing strengths. If one pillar weakens, an increased load is thrown onto one or more of the others. If several pillars weaken, their load will ultimately tilt… crash to the ground and the whole edifice collapse into chaos.

The concept of 'mutual accountability' captured in this image is especially recognisable to lawyers, because its archetypal example remains the Anglo-European constitutional 'separation of powers' between legislative, executive and judicial branches of government (Schedler et al 1999; Pope 2000: 24-26). In the concept of a national integrity system, this principle extends through a wide variety of integrity institutions and processes used to hold each other accountable, in a network fashion as well as operating on agencies and individuals through traditional top-down supervision. In many newer constitutions, the recognition of an increasing range of integrity institutions such as auditors and ombudsmen exemplify the trend.

The same concept is evident in the suggestions of Spigelman CJ that a range of core public sector integrity institutions in Australia should be considered a new 'fourth branch' of all governmental structures and there is the fundamental necessity to ensure that corruption in government:

> … there have been a number of candidates for a 'fourth branch' designation over the years. The number does not matter. The idea does. The primary basis for the recognition of an integrity branch as a distinct functional specialisation, required in a broad sense of that term, is eliminated from government. However, once recognised as a distinct function, for which distinct institutions are appropriate, at a level of significance which acknowledges its role as a fourth branch of government, then the idea has implications for our understanding of constitutional and legal issues of broader significance (Spigelman 2004).

Whether semi-constitutionalised in this fashion or left as a more diffuse network that is indeed broader than simply the government sector, the conception here is of systems in which vertical lines of accountability turn into 'a circle, or criss-crossing pattern' between multiple integrity guardians; and in which the associated problem of 'how to guard the guardians' is also solved by the fact that 'every member is accountable to at least one other, or possibly several others' (Mulgan 2003: 232). From a political science perspective, this network of accountability relationships has also been described as a 'lattice of leadership', which 'implies that public trust in government is more reliably placed when the various institutions of government share the task of self-regulation' (Uhr 2005: 155). Figures 2a&b apply these concepts graphically, drawing on the work of Australian regulatory specialist John Braithwaite (1998).

However a crucial feature of modern integrity systems in practice is that their relationships are defined by more than simply mutual accountability. In addition to this type of constitutional relationship, framed as a 'separation' of power, we rely on many key integrity institutions to collaborate and cooperate, and we expect them to act coherently in the overall task of helping ensure the appropriate exercise of power. Integrity systems are also not limited to the 'core' institutions we might most readily recognise as engaged in the task, but to a diversity of strategies, measures and requirements that are devolved or 'distributed' throughout *all* institutions. Consequently, a total picture of the interrelations and interdependencies that increasingly define our integrity systems would be incredibly intricate. Figure 3 suggests that if there is a suitable graphical metaphor for this, it is probably not a neat human-built structure metaphor, but the messier natural metaphor of a bird's nest (see Sampford et al 2005).

***Figure 2a. Formal Models of Two Conceptions of Trust (Braithwaite 1998: 354)***

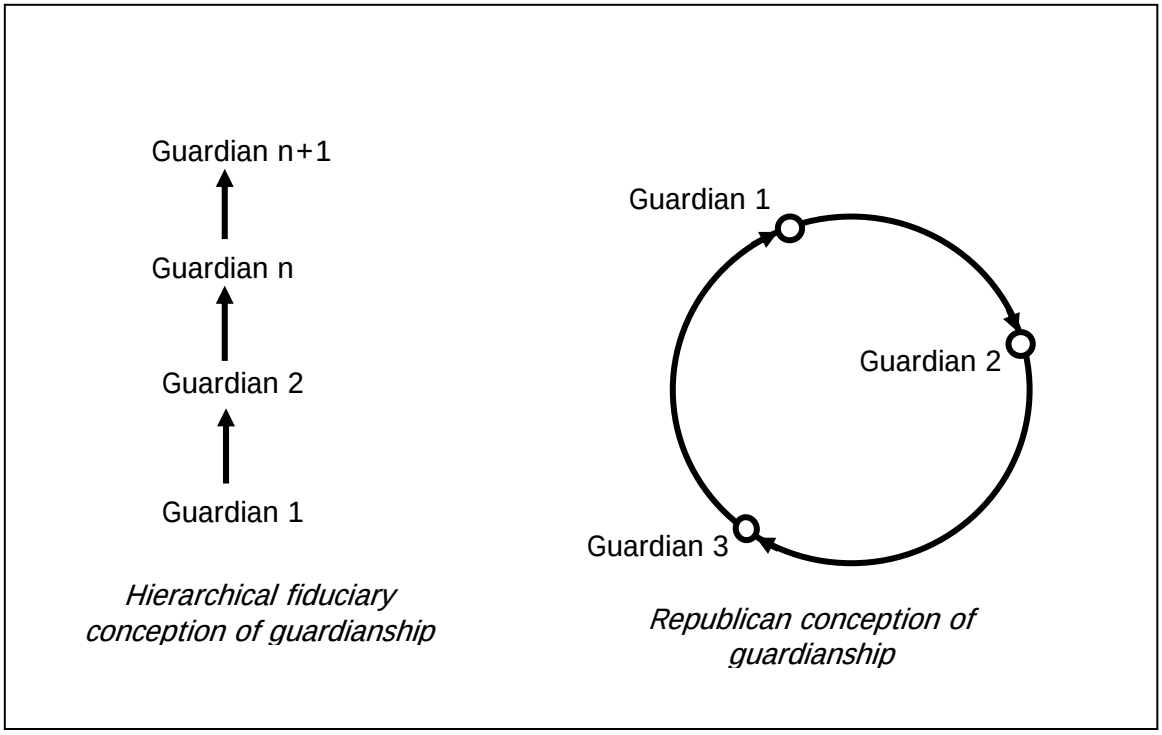


***Figure 2b. A Model of Mutual Accountability (Brown et al 2005: 16)***

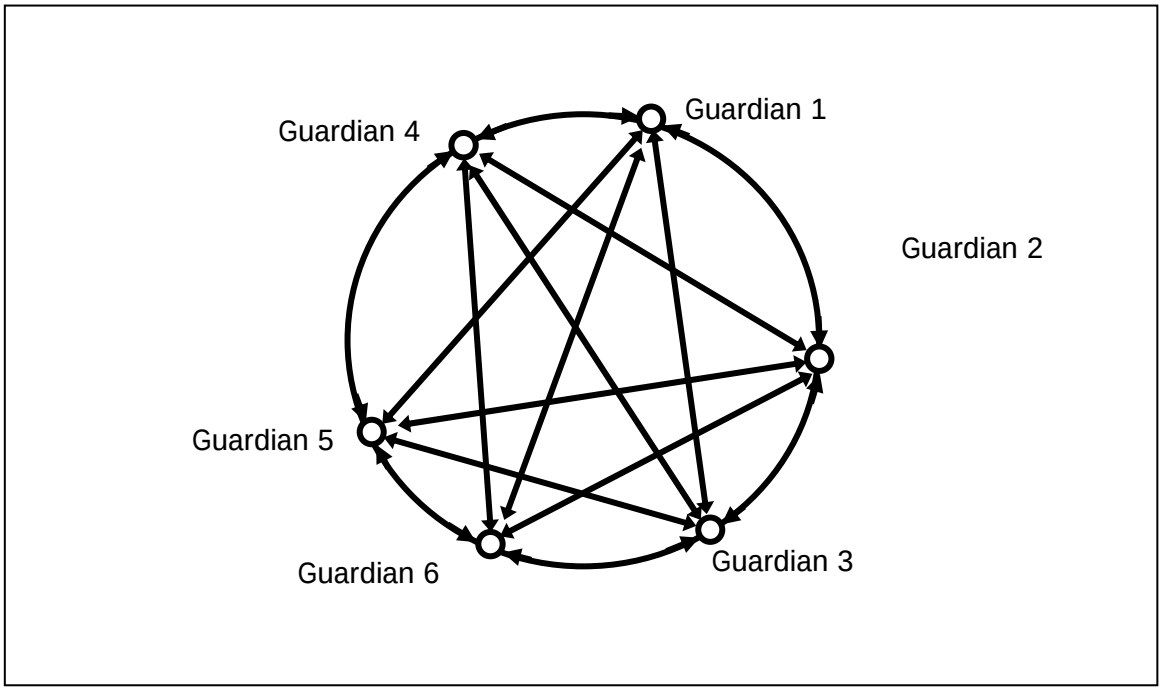
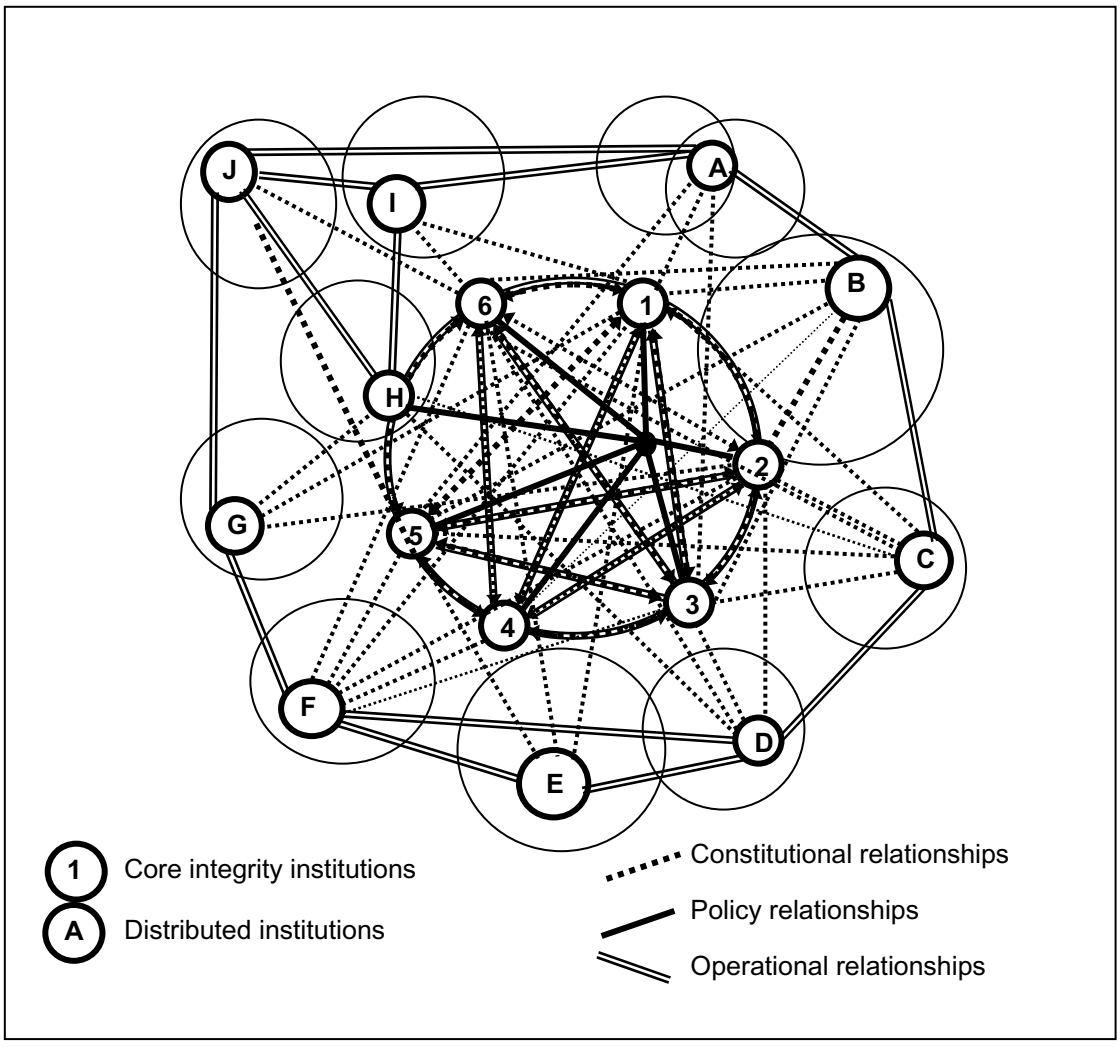



***Figure 3. Integrity Systems 'Bird's Nest' (Sampford et al 2005: 105)***



Turning from concepts to practice, the motivation for a more holistic appreciation of the dimensions of integrity systems lies with real-world problems – in particular, the struggle that many countries continue to have in ensuring that their integrity frameworks achieve their stated purposes. Australia's National Integrity Systems Assessment (NISA) came about as part of an international effort to find more appropriate methodologies for reviewing the effectiveness of integrity reforms in particular and governance reforms generally, across a wide range of countries. This effort involves a diversity of international agencies, from government-sponsored efforts by the World Bank and OECD, to those of non-government organisations such as Transparency International.

Prior to the Australian NISA project, most of these focused on some means of analysing the performance of a similar range of institutional actors and practices (Table 1). Most were also quite limited, if not by a range of cultural and socio-political assumptions underpinning this form of comparative political analysis, then by their typically default to the identification of problem areas by contrasting the theory or intention of integrity systems, with their reality or practice. This approach can be unhelpful, because theory or intention may be based on 'ideals' which are inherently difficult to attain, and which do not themselves support definitive judgements as to when they have been compromised too much; nor indeed when the theory or intention may itself be wrong (Brown & Uhr 2004).

***Table 1. Common Elements of Western Integrity & Governance Assessments***

**Assessment model/approach**

| **National Integrity Systems** | **OECD Anti-Corruption Mechanisms** | **OECD Ethics Infrastructure** | **Public Integrity Index** | **Governance Matters** |
|---|---|---|---|---|
| **Transparency International** | **OECD, Paris** | | **Centre for Public Integrity (US)** | **World Bank** |
| **Pope 1996, 2000; Doig & McIvor 2003** | **OECD 1996** | **OECD 1999,2000** | **Camerer 2004** | **Kaufman 2003** |

***Key elements to be assessed***

| | | | | |
|---|---|---|---|---|
| **Legislature** | **Oversight by legislature** | **Political will** | **Electoral & political processes** | **Political stability** |
| **Executive** | | | | |
| **Judiciary** | **Specialised bodies to prosecute corruption** | **Effective legal framework** | **Branches of government** | **Rule of law** |
| **Auditor-General** | **Supreme financial audit authority** | **Efficient accountability mechanisms** | **Oversight and Regulatory Mechanisms** | |
| **Ombudsman** | **Ombudsman** | | | |
| **Watchdog Agencies** | **Anti-corruption regulation** | | | **Control of corruption** |
| | **Corruption investigation bodies** | **Ethics coordinating body** | | |

| | | | | |
|---|---|---|---|---|
| **Public Service** | **Human resource mgt procedures** | **Supportive public service conditions** | **Administration and Civil Service** | |
| | **Financial mgt controls** | | | **Regulatory quality** |
| | **Organisational mgt controls** | | | |
| | **Guidance & training for public officials** | **Workable codes of conduct** | | |
| | | **Professional socialisation mechanisms** | | |
| **Media** | **Transparency mechanisms** | | **Civil Society, Public Information and Media** | **Voice & accountability** |
| **Civil Society** | | **Active civil society** | | |
| **Private Sector** | | | | |
| **International Actors** | | | | |

***Figure 4. Global Integrity Report (Camerer 2004)***

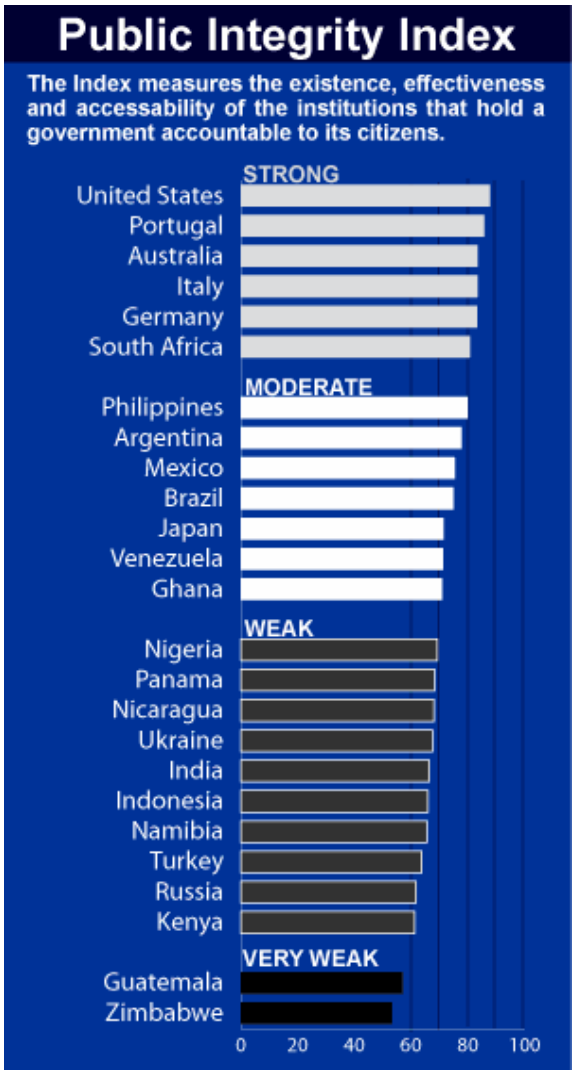



Figure 4 perhaps typifies the output of some previous international assessments, using a range of expert analyses to score a range of institutions and practices with a view to comparison in index form. In this case the sponsor was the Washington-based Centre for

Public Integrity. The meaning, accuracy and utility of this index is perhaps best left to the imagination – suffice to say that Italian public integrity advocates find it as amusing for their country to be ranked equally with Australia, as do Australian ones.

After considerable investigation and debate, the Australian NISA project decided to abandon any particular institutional template as the starting point for the assessment, and instead describe the institutional framework in the relevant jurisdictions from the 'bottom-up'. As well, rather than by comparing reality with theory, the analysis was structured around three key themes arising from a number of sectoral studies and other similar evaluations: the ***consequences, capacity*** and ***coherence*** of the major systems involved. These three themes worked together as interrelated 'lenses' on the structure, operations and effectiveness of Australia's integrity systems, providing a clearer platform for the identification of priority reforms. By analysing 'consequences' the assessment was able to review and pool existing efforts to directly measure the impacts or outputs of key integrity-related policies and institutions. By analysing 'capacity', the assessment tried to identify clear structural strengths and weaknesses in the ability of key policies and institutions to achieve their intended goals, as well as undertaking comparative analysis of certain obvious capacities (such as financial and human resources in like institutions) between different jurisdictions. By analysing, 'coherence', the assessment was able to focus on existing strategies and possible new options for achieving the type of mutual accountability, policy coordination and operational cooperation depicted in the graphical models above.

Perhaps the best compliment paid to this approach, was its adoption by the OECD Public Governance Committee in its report 'Measures for Promoting Integrity and Preventing Corruption: How to Assess?' compiled during the Australian assessment with direct input from the Australian team (OECD 2004). Table 2 below shows the basic framework and criteria around which the OECD now recommends countries could assess their public integrity systems, and correlates these criteria with the NISA assessment theme approach.

***Table 2. OECD Integrity System Assessment Criteria & NISA Assessment Themes***

| **OECD Criteria Checklist (OECD 2004:10)** | | **NISA Themes** |
|---|---|---|
| QUESTIONS | CRITERIA | |
| Are integrity policy instruments (e.g. legal provisions, code of conduct, institutions, procedures) in place? | Formal **existence** of components of policy instruments. | NISA Stage 1 – **Scoping** |
| Are integrity policy instruments capable of complete functioning (realistic expectations, resources and conditions)? | **Feasibility** of specific policy instruments. | NISA Stage 2 - **Capacity** |
| Did the integrity policy instrument achieve its specific initial objective(s)? | **Effectiveness** of specific policy instruments. | NISA Stage 2 - **Consequences** |
| How significantly have policy instruments contributed to meeting stakeholders' overall expectations (e.g. actual impact on daily behaviour)? | **Relevance**, the contribution of specific policy instruments and actions to meet stakeholders' overall expectations. | |
| Do the various elements of integrity policy coherently interact and enforce each other, and collectively support the overall aims of integrity policy? | **Coherence** of measures, relationship with other elements of the policy. | NISA Stage 2 - **Coherence** |

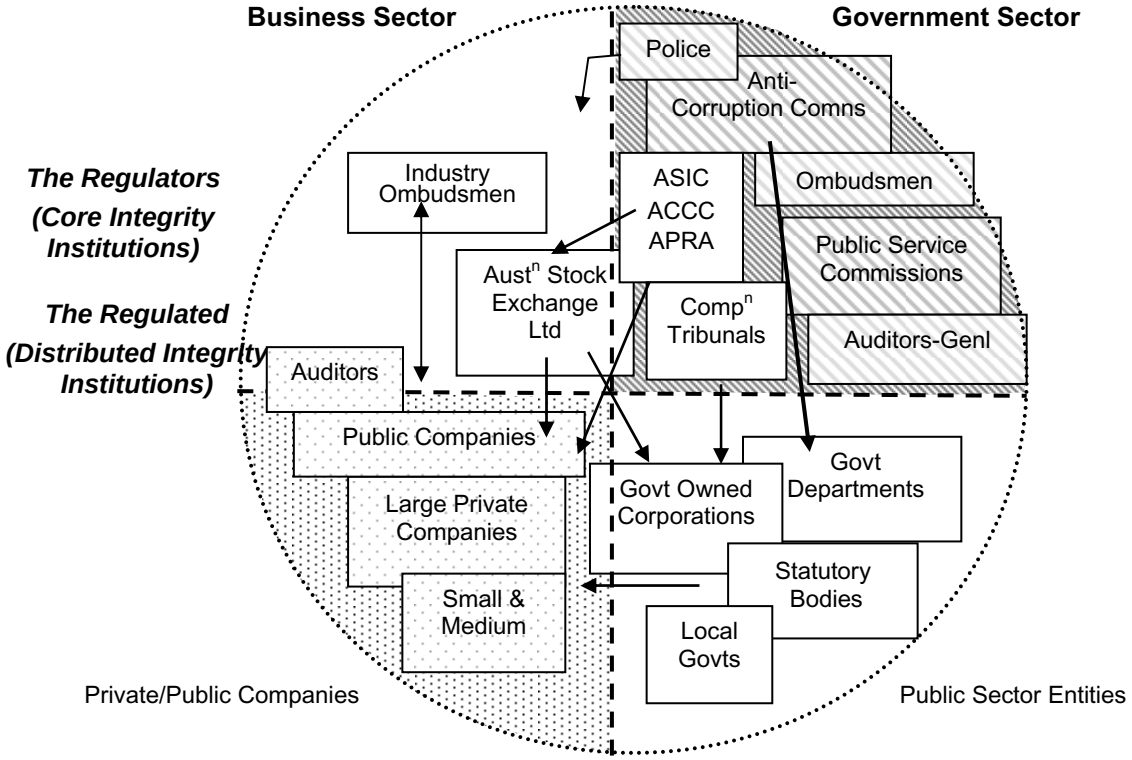
### *3. Key recommendations from the National Integrity System Assessment (NISA)*

What specific conclusions emerged from this rather large canvas? These are set out in the report in the form of 21 recommendations, summarised in the box below.

It is important to note that these recommendations were not limited to the public sector and that the framework appeared to prove sound for also examining integrity systems in the business and civil society sectors in further depth, as well as inter-sectoral systems. Nevertheless the bulk of firm recommendations did relate primarily to the public sector. This is particularly the case for recommendations relating to 'core' integrity institutions, i.e. those making up the major public sector regulatory agencies, which formed the first group of recommendations. The second group of recommendations relate more to distributed integrity institutions, and include principles that are sometimes more sector-blind. Figure 5 below provides an indicative schema for where 'core' and 'distributed' integrity institutions are found in an Australian institutional context.

Many of the 21 recommendations relate directly or indirectly to the role of administrative law in our societal efforts to pursue public integrity. Indeed across the board, the assessment confirmed the need for legal strategies – and different forms of legal strategies, e.g. administrative, employment-related and criminal – to be more effectively coordinated with leadership and management strategies for maintaining ethical standards in the life and work of institutions. Nevertheless it is perhaps most useful to focus on those seven recommendations most directly relevant to the role and practice of administrative law, shaded in the box below.

***Figure 5. Key Integrity Institutions by Sector & Level (Brown et al 2005: 12)***



**Summary of recommendations – NISA**

For full text see Brown et al 2005: 90-102 and supporting text as referenced on pp.90-91.

### *Integrity from the top: core institutions*

*1. Commonwealth integrity and anti-corruption commission*

The Commonwealth Government's proposed new independent anti-corruption agency to be a comprehensive lead agency operating across the Commonwealth, not just a few agencies.

*2. Governance review councils*

Each Australian government to establish a governance review council to promote policy and operational coherence between core integrity institutions, and related functions.

*3. Standing parliamentary and public oversight mechanisms*

All core public integrity institutions to have a standing multi-party parliamentary committee, and direct public involvement in their operations or reviews.

*4. Jurisdiction over corporatised, contracted and grant-funded services*

Jurisdictions of public sector integrity institutions to extend to any decisions or services flowing from an allocation of public funds.

*5. Access to administrative justice*

National review of the availability of substantive administrative law remedies to citizens aggrieved by official decisions.

*6. Enforcement of parliamentary and ministerial standards*

All Australian parliaments to establish comprehensive regimes for the articulation and enforcement of parliamentary and ministerial standards.

*7. Independent parliamentary select committees*

New procedure for the initiation of inquiries by select parliamentary committee.

### *Walking the talk: distributed integrity institutions*

*8. Statutory frameworks for organisational codes of conduct*

Comprehensive legislative basis for all integrity systems for any sector in any jurisdiction.

*9. Relationships between organisations and core integrity agencies*

All statutory frameworks to better reflect and ensure the mutually supporting functions of core and distributed integrity institutions.

*10. Effective disclosure of interests and influences*

New standards for systems for regulation and disclosure of material interests, including electoral contributions, based on continuous disclosure and the right of the public or affected persons to know of interests prior to relevant decisions.

*11. Whistleblower protection and management*

Revision of minimum legislative requirements to facilitate 'whistleblowing' by current and former employees, including better protection from reprisals.

*12. Minimum integrity education and training standards*

Training in integrity, accountability and ethics institutionalisation as a prerequisite for appointment to senior management.

*13. Professional development for integrity practitioners*

National program of advanced professional training for integrity practitioners in government and business sectors.

*14. Freedom of information*

Revision of FOI laws to better respect the principle of public 'right to know'.

*15. Regional integrity resource-sharing and capacity-building*

Comprehensive review of framework for building integrity system capacity at local and regional levels of government.

***Investing in integrity: education, evaluation and research***

*16. Civic education and community awareness*

Development of civic education to include a stronger direct focus on the theory and practice of the nation's integrity systems including nature of ethical decision-making.

*17. Public review of integrity resourcing and performance measurement*

National review of optimum resourcing levels and performance measurement arrangements for core and distributed integrity institutions.

*18. Parliamentary oversight review methodologies*

Joint comparative study of the methods used by standing parliamentary and public advisory committees in the oversighting of core integrity institutions.

*19. Evidence-based measures of organisational culture and public trust*

Joint long-term research by integrity agencies into optimum use of social science and evidence-based research for evaluation of integrity system performance.

*20. Core integrity institutions in the business sector*

Supplementary integrity system assessment of the consequences, capacity and coherence of core integrity institutions responsible for Australia's business sector.

*21. Civil society integrity systems*

Supplementary integrity system assessment of Australia's civil society sector.

**Recommendation 1 – Commonwealth integrity and anti-corruption commission**

*The Commonwealth Government's proposed new independent anti-corruption agency to be a comprehensive lead agency operating across the Commonwealth, not just a few agencies.*

For some time, specialist anti-corruption investigatory and resistance-building capacities were regarded as interesting state government experiments in Australia. Now they are often accepted as *de rigeur*, both domestically and internationally – a significant piece of the integrity architecture, even though not providing a total response to corruption risks in their own right. We only need to remember the complete, as well as strictly legal meanings of concepts such as 'improper purpose' and 'bad faith' to know how intrinsically measures for detecting and remedying official corruption interrelate with the public accountability goals of administrative law.

This recommendation reflects not only the results of a number of analyses in the assessment itself, but the issues raised by a decision by the present federal government to strengthen capacity in this area by establishing a new 'independent national anti-corruption body', taken during the life of the project (Ruddock & Ellison 2004). This decision has now resulted in the Law Enforcement Integrity Commissioner Bill 2006 (Cth)[1], introduced alongside the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 which is itself important for the new relationship it sets out between the Commonwealth Ombudsman and Australian Federal Police.

Both pieces of legislation were recently examined by the Senate Legal and Constitutional Legislation Committee (Senate 2006). The Committee noted and largely – in many cases, totally – endorsed the important questions of integrity system design that hang over the Commonwealth's plans, set out in the NISA report (see also Brown & Head 2004, 2005; Brown 2005). While the creation of *any* new Commonwealth anti-corruption body is the most significant reform to the framework of the Commonwealth's core integrity institutions in over 20 years, the current proposal is for the agency to have only the Australian Federal Police and Crime Commission within its jurisdiction. While consistent with earlier Australian Law Reform Commission recommendations (ALRC 1996), this is inconsistent with the rhetoric surrounding the relevant Ministers' announcement, which presented the current frameworks in NSW, Queensland and Western Australia as the model to follow (on this, see table 3).

***Table 3. Some Core Public Integrity Institutions in Australia (based on Brown & Head 2004, 2005)***

| | **Auditor-General** | **Ombuds-man** | **Police Complaints Authority** | **Police Integrity Com$^{n}$** | **Anti-Corruption Com$^{n}$** | **Crime Com$^{n}$** |
|---|---|---|---|---|---|---|
| NSW | **1** | **2** | **3** | | **4 (ICAC)** | **5** |
| Queensland | **1** | **2** | **3 (CMC)** | | | |
| WA | **1** | **2** | **3 (CCC)** | | | |
| South Australia | **1** | **2** | **3** | | | |
| Commonwealth | **1** | **2** | | | | **3** |
| Victoria | **1** | **2 (inc. Office of Police Integrity)** | | | | |
| Tasmania | **1** | **2** | | | | |

NB This table does not include Health Care Complaints Commissions and a range of other specialist independent integrity bodies, other than those dedicated to police.

In the Senate Committee's report, the Labor Opposition and Australian Democrats have now taken the position that the Law Enforcement Integrity Commission Bill should be expanded

beyond law enforcement so as to create an anti-corruption agency of general jurisdiction, rather than one limited to two agencies. Most importantly, the Committee was unanimous in its view that even if limited to law enforcement, the jurisdiction should be expanded to include a wider group of agencies including the Australian Customs Office, Australian Taxation Office, and Department of Immigration (Senate Committee 2006: 27-28). The Committee also expressed a unanimous view that:

A Commonwealth integrity commission of general jurisdiction is needed, and there is an accountability gap that would be closed by such a body. While the Committee considers that ACLEI – as currently proposed – needs to be created, consideration should be given to developing such a body in the longer term.

While there remain several possible paths to this result, and an obvious logic in dealing with these issues now rather than an indefinite point in the future, the overall conclusion remains the same and is one clearly supported by the assessment. For a variety of reasons set out more fully in the report, there are signs that such an injection of anti-corruption capacity is particularly overdue at the Commonwealth level, where enforcement capacity has suffered a lack of comprehensiveness. In particular, the Commonwealth's current and proposed regimes would continue to rely on the Australian Federal Police to oversight the handling of corruption in Commonwealth agencies, with agencies themselves left to handle 'non-corruption' issues. The Senate Committee disagreed with the Commonwealth Attorney-General's Department, and further agreed with the logic of the NISA recommendation, when it observed there are 'limits to the effective jurisdiction of the AFP in relation to broader corruption or integrity issues that fall short of criminal behaviour', a 'lacuna' which 'may not be adequately addressed by relying on agencies' internal investigations or the Ombudsman' (Senate Committee 2006: 26).

While this first recommendation was driven by considerations of institutional and legal capacity to deal effectively with corruption risks at the Commonwealth level, it has a consistency with other recommendations emphasising the importance of a comprehensive approach to integrity in public administration (e.g. recommendations 6 and 8). A comprehensive approach is one in which legal and non-legal strategies combine, and in which the different strategies of criminal law, the law of public sector employment and management, 'values-based' governance and administrative law all need to work in an integrated fashion. The type of 'lacunae' identified by NISA, as confirmed by the Senate Committee, confirm the need for such an approach, irrespective of the particular legal starting point – criminal, administrative or employment-based – from which one can approach the problem.

Any discussion about the creation or powers of executive 'watchdog' agencies prompts questions of their own accountability, as noted earlier. On this issue of mutual accountability, the report deals separately with current best practice in special parliamentary oversight arrangements for such agencies, with special mention of the need for these to also take in the Commonwealth Ombudsman (recommendation 3).

***Recommendation 2 – Governance review councils***

*Each Australian government to establish a governance review council to promote policy and operational coherence between core integrity institutions, and related functions.*

This recommendation goes to the crucial issue of the overall coherence of the modern public integrity systems of Australian governments, as the number and business of core institutions becomes increasingly complicated. Importantly, it is here that administrative law has both a lot to offer the task of effective policy and operational coordination, and perhaps something to learn.

When the assessment looked for concrete strategies for how modern integrity systems maintained or sought to maintain any coherence, it found a diversity of options. In Queensland, the modern system emerged from a comprehensive reform program in which development of many key institutions was linked through the principles articulated by the Fitzgerald Inquiry and developed in more detail by the Electoral & Administrative Review Commission (EARC). However, there was fragmentation between some reforms from the outset, while others crept in at implementation (see Preston et al 2002). The winding-up of the EARC pursuant to its 'sunset' provisions left no clear institutional coordination mechanism. More recently, the challenge of better policy and operational coordination has been met by an informal 'Integrity Committee' comprising the Ombudsman, Auditor-General, Chair of the Crime & Misconduct Commission, Public Service Commissioner, and Parliamentary Integrity Commissioner (Demack 2003; Parnell 2004).

In June 2005, in response to the NISA draft report, key Western Australian integrity agencies formed a similar but more formal 'Integrity Coordinating Group' (ICG), comprising the Ombudsman, Corruption and Crime Commission, Auditor-General and Public Sector Standards Commissioner, with terms of reference based on this recommendation, supported by an interagency working party.

New South Wales tells a particularly interesting story about the importance, and difficulty, of maintaining coherence in the operation of multiple integrity bodies. The NSW Government is alone among Australian governments in *not* possessing a comprehensive public sector ethics framework (recommendation 8). For possibly related reasons, one of the most significant efforts to coordinate the parallel operations of many agencies, through creation of a 'one stop shop' public interface called 'Complaints NSW' in 2001, foundered on technicalities which were also clearly indicative of a lack of central government support (Brown et al 2005: 87). The NSW public integrity system's story is more one of coordination *despite* any structural or institutional support, than because of it.

The Commonwealth integrity system suffers its own problems of fragmentation, including those noted above. At the same time, however, it provides the nation's strongest and most long-lasting mechanism for maintaining policy and operational coherence within at least *part* of the integrity system, in the form of the Administrative Review Council, established by Part V of the *Administrative Appeals Tribunal Act 1975* (Cth). So far only one state has followed suit, almost 30 years later, with the Tasmanian Administrative Review Advisory Council established in August 2004 (see www.tarac.tas.gov.au).

Administrative lawyers need little introduction to the Commonwealth body, which includes the President of the Administrative Appeals Tribunal (typically also a Judge of the Federal Court), Ombudsman, President of the Australian Law Reform Commission and up to 11 other members with extensive practice or knowledge in industry, commerce, public administration, industrial relations or administrative law. The purpose of the ARC was explicitly to maintain the coherence of the 'new administrative law' at a time when this itself was made up of a combination of mutually-supporting elements – namely the codification and liberalisation of judicial review of administrative action, general-purpose merits review tribunals, freedom of information, and the establishment of the Ombudsman. The presence of the president of the ALRC on the ARC provides a continuing reminder that maintaining the coherence and effectiveness of administrative law is an ongoing process. Indeed if we were to add the Auditor-General and the Public Service Commissioner to the ARC (in place of the senior agency head or heads currently appointed), we would quickly have a body which could help maintain our systems of public accountability not simply in their legal dimensions, but more broadly.

It may well be that key participants in the Commonwealth administrative law system would not want to risk diluting the current focus and frequent good works of the ARC. Nevertheless, this recommendation combines the lessons of the former Queensland EARC and the long-term success of the ARC – indeed, its strategic importance as a voice for coordinated approaches to public accountability – as a basic model for the type of recognised, statutory coordination mechanism now required to maintain an effective integrity system on a broader front. The roles of such a council would include research, performance measurement, capacity-building and capacity-sharing, as well as capacity to monitor longer-term integrity trends and ensure coherence in development of new integrity-related laws and institutions. Among the most important operational issues are the public's interest in more seamless and user-friendly complaint services, outreach and community education, shared information, research and intelligence, and better coordination of integrity policies at the 'coalface' of public sector management by better integrating and simplifying the diverse accountabilities imposed on individual public servants by the integrity regime.

The model provided by the Administrative Review Council also provokes some reflection on the extent to which developments in administrative law once played a more general lead role in the evolution of our integrity systems, than they might seem to play today. This is a question returned to below.

***Recommendation 4 – Jurisdiction over corporatised, contracted and grant-funded services***

*Jurisdictions of public sector integrity institutions to extend to any decisions or services flowing from an allocation of public funds.*

*That all governments review the traditional legislative methods for defining the jurisdictions of integrity institutions, away from characterisations of decision-makers or service-providers as 'public', 'private', 'commercial' or 'corporatised' and towards increased discretion for integrity bodies to investigate and/or hear any relevant matter involving any decisions or services flowing from an allocation of public funds.*

In an age of corporatisation and 'contracting out', this recommendation needs little explanation to the initiated. There is no question that whatever the benefits of the contracting out of public services, in terms of efficiency and responsiveness, the public expectation and need for integrity and accountability in the delivery of those services remains undiminished. Even in neo-classical economics, contracting-out poses alternative integrity challenges due to increased agency risks and lengthened supply chains. However, corporatised and out-sourced services since the late 1980s have been characterised by significant accountability 'gaps', with public integrity oversight – including the reach of administrative law remedies – halting at the point of contracting-out for no other reason than the traditional delineation of jurisdiction based on the legal character of the entity concerned, rather than the nature of the power and discretion being exercised, the services being delivered or the funds being expended. Even in the case of corporatised entities such as government-owned corporations (GOCs), in fact, there is no doubt that when it comes to the 'fundamental choice' needed on questions of governance, accountability and ethical behaviour 'we must treat GOCs as if they were public entities' (Bottomley 2003). Increasingly, there is little reason to differentiate between the basic integrity standards and strategies needing to be employed by public and private service providers (see e.g. Demack 2003: 12).

The solution adopted by some jurisdictions (e.g. NSW) has been to begin extending the jurisdictions of core public integrity institutions, such as the Ombudsman, to include discretion to investigate complaints into publicly-funded services regardless of provider. While other responses exist, including industry-specific integrity mechanisms (e.g. industry ombudsman's offices), these responses do not provide universal coverage of contracted

services and particularly where industry-controlled, can appear compromised. Such mechanisms also do not typically extend to programs funded by government grants, rather than contract. This recommendation identifies the need for a general reconsideration of the options for bringing our integrity systems up to date with the changing structure of modern governance.

***Recommendation 5 – Access to administrative justice***

*National review of the availability of substantive administrative law remedies to citizens aggrieved by official decisions.*

*That all governments join in a national review of the current availability of substantive administrative law remedies to citizens aggrieved by official decisions, recognising:*

*(i) Partial, and often complete lack of protection for basic civil and political rights in Australia's Constitutions and other fundamental laws, and the extent to which this continues to constrain the operation of administrative law;*
*(ii) Continuing increases in the cost of legal services and continuing comparative lack of legal aid support for administrative as against criminal and family matters;*
*(iii) Continued lack of availability of hearing-based merits review systems in some jurisdictions, either with comprehensive jurisdiction or at all;*
*(iv) The continuing, but unmonitored conferral of administrative merits review functions on some lower state courts as a substitute to establishment of a merits review tribunal with little evaluation of the value or equity of this approach;*
*(v) Current trends to a less equitable 'two-tiered' system of administrative review in which the only truly no-cost review mechanism (ombudsman) is only able to offer remedies based on negotiation and recommendation, and determinative remedies are available only to those in a position to pay; and*
*(vi) Widespread community concern regarding the need for effective legal protection of citizens against excessive use of official power by governments or individual officials in the name of border control and anti-terrorism.*

*That this review be overseen by the coordination body in recommendation 2, or otherwise by existing administrative review and/or law reform bodies or the national standing committee of Attorneys-General, with extensive public participation.*

This recommendation clearly has the most direct relevance to administrative law. Indeed, the title of this paper has as much to do with this recommendation as any other – based as it is on the concern that, when one stands back and takes a long look at apparent trends in the integrity system as a whole, administrative law itself appears to need to have some of its integrity restored and renewed.

The specific issues listed in the recommendation are fairly well known. Far from having been raised by the NISA research team for the first time, they have received the attention of a wide range of commentators, usually far more qualified to discuss them individually than any of the authors of the NISA report. The risk identified in the NISA assessment was that of only ever analysing the main challenges facing our systems of administrative review as if these challenges are separate and unrelated, when in fact they may have some common root causes. The title of the recommendation is indicative – 'access to justice' is of course most commonly discussed as an issue of cost, but scratch the surface and we find equally important issues to do with forum, jurisdiction, standing and citizens' awareness of their own rights and their capacity to assert them when it is not just in their own interest, but in the public interest that they do so.

If we take these challenges together, the question becomes whether we are not now travelling a road of gradual curtailment of the effective legal capacity of citizens to challenge government actions that affect them personally or conflict with valid conceptions of the public interest. This question is of course open to debate, but the conclusion reached by the NISA team was that we indeed appear to be on this road. As discussed earlier, the introduction of the 'new administrative law' brought significant liberalisation of the ability of citizens to challenge government actions, but despite the empirical evidence that judicial review of administrative action is effective (Creyke & McMillan 1998; 2004) broader political commitment to the philosophy of such review has somewhat lost its original impetus. Government attacks on administrative justice systems as a 'grievance industry' rather than an indispensable part of an integrity system are indicative of this trend (Mulgan & Uhr 2001: 162). Over several years, curtailments of the rights of non-citizens to equitable levels of administrative justice have now been found to have their corollary in systemic abuses of official powers by immigration authorities, including in respect of Australian citizens. Concerns also remain over the state of traditional principles of due process, independent oversight and review in relation to new laws regarding the monitoring, arrest, detention and control of those who may – or may not – be likely to conspire to engage in terrorism.

There is a clear constitutional dimension returning to the fundamental questions that confront administrative law. Our constitutional founders did not put anything in the Constitution by accident – one wonders if they had not elected to make explicit reference to at least some of the prerogative writs, whether administrative law remedies that we continue to take for granted would be quite as secure. For generations, basic citizens' rights, including what we now term human rights, have not been formed in the abstract but due to the circumstances that can befall individuals at the hands of the otherwise 'legitimate' power of governments, even governments acting with majority support. Administrative law provides one of our society's most tangible examples of an area where we could once look to the common law for deeply-rooted protections for citizens and do so with some pride, and all we had to do in the 1970s-1980s was systematise and codify. As our connections to the common law of old continue to weaken and the momentum for statutory and constitutional rights protection regains strength, we must see these as not simply constitutional questions but an opportunity to reconsider and reinvigorate the basis of our systems of administrative justice.

***Recommendation 10 – Effective disclosure of interests and influences***

*New standards for systems for regulation and disclosure of material interests, including electoral contributions, based on continuous disclosure and the right of the public or affected persons to know of interests prior to relevant decisions.*

For administrative lawyers, the 'rule against bias' provides the type of *grundnorm* or jural postulate that compared to so many areas of principle, can be delightfully simple and clear. This recommendation highlights the real lack of commitment we are showing today as a society, to effective transparency in the disclosure of interests that can be reasonably apprehended to affect official decision-making. We have become masters of procedure and form when it comes to disclosure. For examples, requirements for officeholders to disclose material personal interests via official registers are now standard for politicians and senior public officials, as these requirements are in corporate governance. But we have become quite unconcerned with the substance of disclosure, particularly in what has long been regarded as the most important area for such disclosure in any democracy – legislative regimes requiring the disclosure of electoral contributions by political parties and candidates, the 'invisible world of political donations' (see Ramsay et al 2001; Tham 2003; Tham & Orr 2004).

There is growing evidence that present electoral funding disclosure systems are fundamentally ineffective, requiring technical compliance with disclosure obligations

(lodgement of returns or completions of registers) in ways that may encourage officials to avoid conflicts of interest, but do little to inform citizens or affected persons of such a conflict at an opportune time. The classic example of this problem lies in disclosure of electoral contributions, which typically does not occur until after the election concerned, by which time electors have already cast their vote based on incomplete knowledge. These days, we have the technology to adopt much more substantively effective approaches. Unfortunately, passage of the 'Orwellian' Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth) as recently as last week, increasing the threshold on anonymous donations to political parties from $1500 to $10000, provides a chilling confirmation that as a democracy, we are now objectively going backwards (see Williams 2006). Anonymous to everyone, we might ask, or just those not already in the know, for whose very purpose the principle of disclosure exists?

This recommendation is not limited to electoral funding disclosures and has wider implications for how we conceptualise the disclosure obligations of all officeholders. However to the extent it does target the electoral sphere, this recommendation joins others (particularly recommendation 6) in highlighting the state of 'puzzling self-regulation' (Uhr 2005: 147) in which our elected political leaders maintain themselves. This is a state which contrasts with almost every other sphere of integrity-related regulation in our society, and the larger theory of mutual accountability. Beyond the province of administrative lawyers, one might ask? In some respects yes, but the question highlights that the law of elections and of politics is incredibly weak and neglected in Australia, when it should be far more robust. Administrative law provides the best and most likely source of principles and practitioners needed to close this gap.

***Recommendation 11 – Whistleblower protection and management***

*Revision of minimum legislative requirements to facilitate 'whistleblowing' by current and former employees, including better protection from reprisals.*

This recommendation highlights continuing weaknesses in one of the most complex, but important areas of the law of public accountability. In Australia's integrity systems, there is no question that one of the single most important assets remains the ethical standards and professionalism of those officers prepared to speak up about integrity breaches that would otherwise go uncorrected ('whistleblowers'). Public sector agencies' capacity to manage whistleblowers positively and encourage further reporting of wrongdoing by others is vital (McMillan 1994; Brown 2001; Brown, Magendanz & Leary 2004). However the performance of even the most comprehensive public sector whistleblower protection regimes is often questioned, primarily because the legislation hinges on an ability to transform organisational cultures in ways still not widely understood (Dempster 1997; Martin 1997; De Maria 1999).

Substantial differences between State and Territory regimes mean no single government has currently achieved what would constitute 'best practice'. The Commonwealth's scheme is positively inadequate. The extent of the confusion is such that when the Australian Democrats last introduced a Public Interest Disclosure Bill for the Commonwealth, in 2001-2002, they elected to model it on the ACT legislation which is perhaps the worst in the country. Regimes comparable to those in the public sector are now extending to the private sector, through the Australian Standard on Whistleblower Protection Programs for Entities (AS 8004-2003) and reforms such as Part 9.4AAA of the *Corporations Act 2001*, but are likely to suffer similar limitations in the absence of a more comprehensive approach.

The full text of the recommendation contains some key known principles of legislative best practice, and prioritises this as an area of reform. The more fundamental questions are currently the target of a $1.3 million research collaboration led by Griffith University and a national consortium of 13 public integrity agencies and Transparency International Australia,

in which over 300 Federal and State agencies have already participated (see www.griffith.edu.au/whistleblowing).

***Recommendation 14 – Freedom of information***

*Revision of FOI laws to better respect the principle of public 'right to know'.*

*That all Australian governments revise their Freedom of Information laws to better respect the general principle of a public 'right to know', by establishing:*

*(i) A clear principle that citizens are entitled to free and immediate access to such government records as they may request, without the need for a formal application, other than in circumstances in which it can be demonstrated that release would specifically damage or compromise someone's rights or legitimate interests (other than public officials or agencies) or the public interest (other than as defined simply by the self-interest of public officials or agencies), or pose an unacceptable risk of such damage;*

*(ii) A reversed onus of proof so that where a public agency requires an applicant to submit a formal application for records due to its assessment of actual or unacceptable risk of damage, and then determines to reject that application for any reason other than privacy or personal (but not commercial) confidentiality, the agency must first make its own successful application for non-release of the records to the Information Commissioner, Ombudsman or other independent review agency — or release the records.*

This recommendation is of obvious interest to administrative lawyers, and builds on the critical analysis to which a range of more qualified commentators such as Rick Snell and Ron Fraser have been subjecting current FOI legislation and practices. While all Australian governments now have such laws, it is well-known that their operation in practice is frequently at odds with the principle of access (Willis 2002: 174; Fraser 2003). At a Commonwealth level, government has shown itself reluctant to review FOI requirements in ways which might help restore the principle of 'right to know', e.g. through implementation of the Administrative Review Council and Australian Law Reform Commission report, Open Government (1995). In a very revealing farewell speech that was probably difficult to hear outside Canberra, a recent Australian Public Service Commissioner strongly questioned whether Commonwealth practices and attitudes are consistent with the principle that FOI legislation be interpreted to extend, 'as far as possible, the right of the Australian community to access information held by the Government' (Podger 2005).

The major question that confronts us is the extent to which better outcomes can be achieved by tinkering with the detail, or whether it is time to explore the potential for a quantum shift. The conclusion reached in the NISA project is that it is time to seriously consider some quantum shifts, including abandonment of systems of exemptions based on 'classes' of records rather than actual contents and dealing differently with the inherently illogical situation in which the onus lies so heavily on applicants to challenge decisions for the non-release of records that they cannot see.

All seven of these recommendations are intended, like the remaining 14, as catalysts for further debate rather than pretending to provide a definitive last word on current dilemmas. The technical and political feasibility of some of the reforms implied are equally open to debate. The point of an assessment like the NISA project is to do something that is relatively rare, which is to attempt to form an overall, holistic picture of where current strengths and weaknesses lie on the very large canvas of regulation and administrative practice that makes up, in this case, our public integrity systems. The resulting 'wish list' of reforms can be no more than a guide to priority areas for action, but in this case, one that is already having impacts.

### *4. In conclusion: is public accountability enough for public integrity?*

This paper opened by asking not only how 'the law of public accountability' currently features in issues in our integrity systems as a whole, but whether public 'accountability' is actually the same thing as public 'integrity', especially when defined in legal terms.

In closing, the answer is of course, 'no' – at least in theory. Integrity is a much more amorphous, complex and value-laden concept than simple accountability, which was once regarded as an 'awful' idea in its mission to render more objective the 'counting' of human performance against the rules and processes that bind us all in the modern world (Hoskin 1996). Public accountability is all about compliance with procedure; the law of public accountability often seems doubly so. The concept of integrity is all about substance, inextricably linked with ideas of truth, honesty and trustworthiness, whether applied to individuals or institutions. While truth and honesty are not synonyms for integrity, they provide its fundamental elements; as one Canadian integrity commissioner has said, 'the virtue of integrity… includes honesty, together with worthiness, respect and an expectation that a promise made will be kept, absent some factor or circumstance beyond the control of the promiser' (Evans 1996).

The reason for asking this final question is that in practice, our 'integrity systems' often have a very hard time being anything more than simply 'accountability systems'. In both cases, we know these systems exist because the structure of modern society is now such that we simply cannot rely on normal, human, interpersonal trust to hold our institutions together and in place. Instead, in fact, we establish systems that institutionalise *distrust*, turning it around to play a positive role in the life of our institutions so as to 'enculturate trust' in business and government (Braithwaite 1998). We make our executive agencies subject to the scrutiny of an elected parliament, because as a populace, we cannot easily collectively exercise that scrutiny ourselves. We give watchdog agencies the power to monitor and investigate our officials, not because we distrust all of them all of the time, but because we need to know that our trust in them is not misplaced or being abused. We recognise the rights of individuals to take up their own legal causes against government in independent courts and tribunals, because we trust in the self-interest of individuals to identify when they have been wronged, knowing that otherwise, many wrongs would go undetected and unremedied.

Unfortunately, while our 'accountability' systems may hopefully increase the prospects of our officials acting with integrity, they cannot themselves guarantee it. We all know that officeholders can be perfectly accountable in legal and technical senses, and still breach standards of integrity. Similarly, their actions can be defended as highly responsive or responsible, in policy or political terms, even when quite corrupt in others (see Uhr 2005: 189). Importantly political scientists and public policy experts have for some years been noticing that although 'accountability' and 'responsibility' have different meanings in theory, in practice these terms tend to be used interchangeably, as if meaning one and the same thing. The more we talk about 'public integrity' in the same breath as 'accountability' and 'responsibility', the more we risk the same result.

***Table 4. Defining Accountability, Responsibility and Integrity (Brown & Uhr 2004; Brown et al 2005: 10)***

| **Meaning**<br><br>**(Dobel's model)** | **Technical**<br>(*Process-rational*)<br>(Institutional-Legal) | **Substantive**<br>*(Value-rational)*<br>(Implementation / Effectiveness) | **Personal**<br>*(Pre/post-rational)*<br>(Personal-Responsibility) |
|---|---|---|---|
| **'Accountability'** | Individual actions are, or can be held to account. | Individual actions invite, are open to accountability. | Accountability *makes* person trustworthy. |
| **'Responsibility'** | Individual actions are, or can be held responsible. | Individual actions are responsive, responsible. | Person *is* responsible, trustworthy. |
| **'Integrity'** | Actions accord with stated purposes/ values; trust is honoured. | Actions are honest, honourable. | Person *is trusted*, has honour. |

Source: Brown applying Weber (1954) and Hoskin (1996) to Thynne & Goldring (1987: 4-7), Davis et al (1993: 79), Uhr (1993, 1999), Schedler (1999), Dobel (1999) and Mulgan (2003: 7-22, 240).

Table 4 above is one attempt to unpack, and contrast the meanings we give these three terms in practice. Its reference points include some deep sociological theory as well as more recent discussions in public policy, including the work of the American political scientist Pat Dobel (1999) in identifying at least three distinct ways in which concepts of public integrity tend to be articulated – in 'institutional-legal' terms, in 'effectiveness/implementation' terms, and in 'personal-responsibility' terms.

Administrative law – the law of public accountability – functions primarily to help secure the 'institutional-legal' dimensions of public integrity. The final lesson for administrative lawyers, borne out by the breadth of issues identified by the National Integrity System Assessment as a whole, is to recognise this fact, but not allow themselves to be personally limited or blinded by it.

If we want public accountability, but nothing more, then we can go about our roles mechanically and take pride in our professional skill in doing so. If we want accountability to serve and support *integrity*, we also have to think more critically, form more judgements, debate higher principles and read the signs that it is time for some fundamental reinvigoration of the principles of administrative justice and reappraisal of the boundaries between administrative law and other areas of law. For many individual administrative lawyers, already perfectly cognisant of the difference between accountability and integrity, this is no lesson at all. However in an age where officeholders seem increasingly inclined to claim 'we got away with it, therefore we must have acted rightly', it is an important lesson for administrative law to help bring back to society as a whole.

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**Endnote**

1 This Bill was assented to and came into effect on 30 June 2006.