The integrity oversight network: titles, links and gaps

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The public law landscape is dotted with a large number of oversight agencies. They share a common purpose — to ensure that other bodies (usually those with a service delivery function) discharge their functions lawfully and fairly.

The oversight agencies are recognisable by their titles, though diversity abounds. Some are called 'Ombudsman', others 'commissioner', as well as 'inspector-general', 'inspector', 'monitor' and even 'complaints authority'.

Why do they have different titles? Does anything substantive turn on the use of a particular title? Does the title point to a unique or special character of the oversight agency that may influence both how it goes about its work and what the public expects of it? Should the use of titles be more systematic and better understood?

One answer to all those questions is that it is notoriously difficult — perhaps futile — to control the use of language, even in legislation. Language usage and fads are driven by many factors. Writers and speakers commonly insist on the freedom to choose their own words, or, in the oft-noted quip of Humpty Dumpty to Alice, to 'use a word [to] mean just what I choose it to mean'. Governments equally use legislative language to suit a political objective, as illustrated by evocative statutory titles that include such words as 'new', 'fair', 'strengthening' and 'my'.

There has, nevertheless, been some attempt in other areas of government to control how entities and units are described and grouped. Doing so can maintain a degree of consistency and structure in the framework of government.

Leading (Commonwealth) examples are the *Acts Interpretation Act 1901* (Cth) and the *Public Service Act 1999* (Cth). The Acts Interpretation Act supports consistency in statutory referencing by defining how terms such as 'magistrate', 'chair', 'minister', 'department' and 'officer' are to be ordinarily understood.[1] The Public Service Act creates structure by defining the term 'agency' to mean either a 'department', an 'Executive Agency' or a 'Statutory Agency'.[2] The head of a department is a 'secretary', and generic principles are set out on the responsibilities of the Head of an Executive Agency and the procedure for appointing and removing the Head.[3]

A related trend in government has been to lay down a coherent governance structure that applies across the board. Two leading (Commonwealth) examples are the *Public Governance*, *Performance and Accountability Act 2013*, which lays down general rules for the governance and accountability of corporate and non-corporate Commonwealth entities;

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1 *Acts Interpretation Act 1901* (Cth) ss 16C, 18B, 19, 19A, 21.

2 *Public Service Act 1999* (Cth) s 7.

3 Ibid s 67.

and the *Regulatory Powers (Standard Provisions) Act 2014*, which lays down a framework to encourage consistency and predictability in regulatory activity.

Two themes are addressed in this article. The first (and major theme) is whether there is or should be consistency in the titles given to oversight bodies. Interestingly, the lack of consistency is why we group these bodies by using other ill-defined descriptions such as 'oversight body', 'complaints agency' and 'watchdog'.

The second theme is the need to review and update how the diverse range of oversight bodies and mechanisms are interlinked. As the oversight system has grown sporadically, gaps and tension points have emerged as to how the various oversight bodies relate to each other and discharge their functions.

Ombudsman

A short history of the title

It is a familiar story that the institution of Ombudsman traces back to Sweden in 1809 and the establishment of the Justitie-ombudsman — 'representative of the people'. That initiative was followed in a couple of Scandinavian countries in the 1900s, New Zealand in 1962 and the Australian states and the Commonwealth in the 1970s. Two states (Western Australia and Queensland) initially opted for the tile 'Parliamentary Commissioner for Administrative Investigations', but all Australian jurisdictions now use the Ombudsman title.

As the importance of complaint handling spread, and the difference between government and private sector service delivery diminished, the Ombudsman model proliferated. An early example was the Telecommunications Industry Ombudsman, established in 1993 to build on the role the Commonwealth Ombudsman had formerly discharged when a government entity, Telecom Australia, delivered domestic telecommunications services. In like fashion, Ombudsman offices were established in relation to energy, water and transport, covering both public and private sector delivery of those services.

Ombudsman offices were also being established at the same time to receive complaints about services provided only by the private sector — such as the Australian Banking Industry Ombudsman, established in 1990. The rationale was that the community's interest in questioning whether key services were being delivered fairly and responsibly did not turn on whether the service delivery body was a government agency or a public corporation.

Two other developments contributed to the proliferation of Ombudsman offices. One was the emphasis that Ombudsmen had themselves given to the need for effective internal complaint handling to complement the Ombudsman's external complaint role. Many large bodies responded by establishing an 'internal Ombudsman office' — particularly local government, universities and finance and insurance companies.

The other development was that government itself applied the Ombudsman title to new bodies that did not fit the traditional mould and would likely have been described differently in earlier times. An early example was the creation in 2007 of the Workplace Ombudsman (now the Fair Work Ombudsman), which was adapted from the existing Office of Workplace Services.

Later examples of specialist Ombudsman offices established within the Commonwealth Government framework were the Private Health Insurance Ombudsman (now merged with the Commonwealth Ombudsman), the Aircraft Noise Ombudsman and the Australian Small Business and Family Enterprise Ombudsman.

A recent counter-trend is to rebadge an Ombudsman office with a new title. An example is the Australian Financial Complaints Authority (AFCA), established in 2018 as the latest chapter in the merger and extension of former Ombudsman bodies that oversighted banking, financial services and insurance. A direct link with that history has been maintained in naming the head of AFCA the Chief Ombudsman, who is supported by 26 senior officers who are each called an Ombudsman.

A similar proposal floated in a government consultation paper in 2018 but not ultimately adopted was to replace the Telecommunications Industry Ombudsman with a new External Dispute Resolution body.[4]

Concerns raised about use of the Ombudsman title

The use and proliferation of the Ombudsman title has stirred some controversy.

One arena in which this has played out is in the International Ombudsman Institute (IOI). The IOI was founded in 1978 and has a membership of 205 Ombudsman offices from more than 100 countries. Though the structure and jurisdiction of those offices is diverse, the IOI took a stance from the outset that membership was open only to offices that were independent of government, established by legislation and had a jurisdiction focused on public sector maladministration.

This restriction closed the IOI door on industry Ombudsman offices. The IOI later broadened its membership base, but retained a distinction between voting members who meet the traditional criteria, and other members who support IOI principles.

The IOI restriction that initially excluded industry Ombudsman membership caused acrimony and led to the formation of alternative Ombudsman associations. One example is the International Ombudsman Association, formed in the United States in 2005, that styles itself as a 'professional association committed to supporting organisational ombuds'.[5]

Another example was the Australian New Zealand Ombudsman Association (ANZOA), formed in 2010 and which — despite its inclusive name — initially confined its membership to industry Ombudsmen. ANZOA has since become one of many national and regional Ombudsman associations to sign a memorandum of understanding with the IOI to cooperate in promoting Ombudsman objectives. Interestingly, too, ANZOA has been the lead body

4 Consumer Safeguards Review, *Report to the Minister for Communication and the Arts, Part A: Complaints handling and consumer redress* (September 2018).

5 Ombudsman Association, 'About the International Ombudsman Association (IOA)' (online) <www.ombudsmanassociation.org>.

in Australia in campaigning to ensure proper use of the term 'Ombudsman' (as explained below).

Another arena in which concern about proper use of the Ombudsman title has played out has been in legislation. The South Australian *Ombudsman Act 1972* (SA), s 32, provides that a public sector agency 'must not use the word "Ombudsman" in describing a process or procedure by which the agency investigates and resolves complaints against the agency'. In effect, the Act preserves the principle that (at least in the public sector) an Ombudsman is an external and independent agency and not an internal grievance resolution procedure.

New Zealand went a step further in 1991, amending the *Ombudsman Act 1975* (NZ), s 28A, to prohibit use of the name generally without the written consent of the Chief Ombudsman. Consent was given twice — to the Banking Ombudsman Scheme in 1992 and the Insurance and Financial Ombudsman Scheme in 1995. In 2015 consent was refused to another industry-based financial complaints scheme. It successfully challenged the refusal decision in the New Zealand Court of Appeal, which ruled that the policy applied by the Ombudsman unduly restricted the discretion to grant approval.[6]

The Court's decision was effectively overturned by a subsequent amendment to the Ombudsman Act in 2020 that tightened the ground for approval to use the name. The discretion to grant approval no longer rests with the Chief Ombudsman but with the Minister for Justice, who can only grant approval to a public sector agency. The earlier two approvals to the banking and insurance Ombudsman schemes were preserved.

A third arena in which the concern has played out has been in Australian public policy debate. Two access to justice inquiries — by the Access to Justice Advisory Committee in 1994[7] and the Productivity Commission in 2014[8] — cautioned that the valuable association of the Ombudsman title with accessible, independent, impartial review would lose that credibility if associated with bodies that did not meet those standards.

Ombudsman offices have also taken up the case from time to time. The Commonwealth Ombudsman and the Banking Ombudsman published a draft code in 1994 setting out minimum essential criteria to be named an Ombudsman.[9] Individual offices have also raised concerns with government from time to time — but not always successfully, as illustrated by the use of the term by local councils and in the establishment of bodies such as the Workplace Ombudsman.

A related development has been the adoption by the Commonwealth in 1997 of benchmarks to be applied in accrediting industry customer dispute resolution schemes — accessibility, independence, fairness, accountability, efficiency and effectiveness.[10] They are similar to the principles that are emphasised in defining Ombudsman essentials. The benchmarks

6 *Financial Services Complaints Ltd v Chief Ombudsman* [2018] NZCA 27.
7 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994) 315.
8 Productivity Commission, *Access to Justice Arrangements* (Report No 72, 2014) Vol 1, 329.
9 The draft code was published in (1994) 39/40 *Admin Review* 60–1.
10 Australian Government Minister for Customs and Consumer Affairs, *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* (1997). These were reissued in 2015 by the Minister for Small Business.

have been picked up in legislation that requires licensed commercial entities to belong to an approved dispute resolution scheme.[11]

Using the Ombudsman title

That short history prompts several questions. Is it important to have an agreed understanding of what the term 'Ombudsman' means? Can a meaningful definition be reached? Can use of the term be regulated according to an authoritative definition?

One view is that the time for assigning any special meaning to the term 'Ombudsman' has passed. The institution eludes classification, as evidenced by the plethora of different Ombudsman offices and an equally diverse range of independent complaint and investigation arrangements. Picking up that theme, one writer has referred to 'the sprawling Ombudsman family' and 'rambling Ombudsman structures'.[12] Another writer observes that 'the dominant narrative of worldwide ombud-development is one of largely unimpeded expansion, diversification and successful adaptation'.[13]

A cynical critique is that 'brand recognition may be more important for those who work within the system … than for users … "Ombudsman" holds no magic meaning for those who need to hold state bodies and companies to account'.[14]

The opposing view is that the importance of the term 'Ombudsman' is demonstrated quite simply by the frequent attempts to use it. Why else would government rebrand an existing function as an Ombudsman office? Why else would a local council, university or corporation choose to apply the Ombudsman title to an internal office, when established alternatives are readily at hand? In a couple of years this author counted over 30 proposals in the media to create a specialised Ombudsman office, ranging over activities such as sports, gambling, franchising, the arts, auctions, funerals and drinking.[15]

As ANZOA explained in launching a campaign in 2010 to halt misuse of the term 'Ombudsman', increased adoption of the title has sprung from public respect for the independence, integrity and impartiality of Ombudsman offices.[16] While the adoption of the Ombudsman brand is an encouraging recognition of the importance attached to effective complaint handling and oversight, the trend poses a risk of tarnishing the stature of the Ombudsman role by inappropriate and unreliable use.

ANZOA's key concern was that a body should not be described as an Ombudsman office if it is not independent and impartial in a comprehensive way: the office must have a firm

11 Eg *Telecommunication (Consumer Protection and Service Standards) Act 1999* (Cth) s 128(10); *Corporations Act 2001* (Cth) ss 1050–1051A.

12 C Harlow, 'Ombudsmen: "Hunting Lions" or "Swatting Flies"' in M Hertogh and R Kirkham (eds), *Research Handbook on The Ombudsman* (Edward Elgar, 2018) Ch 5, 73.

13 N O'Brien, 'Ombudsmen and Public Authorities: A Modest Proposal' in Hertogh and Kirkham, ibid, Ch 3, 36.

14 V Bondy and M Doyle, 'What's In a Name? A Discussion Paper on Ombud Terminology' in Hertogh and Kirkham, ibid, Ch 26, 503.

15 J McMillan, 'What's In a Name? Use of the Term "Ombudsman"' (presentation, 2008), available on the Commonwealth Ombudsman website.

16 Australian New Zealand Ombudsman Association, 'Peak Body Seeks a Halt to Misuse of the Term Ombudsman' (media release, 18 May 2020).

statutory or other legal foundation, be independent of the organisations being investigated, and be headed by an Ombudsman who is appointed for a fixed term, is not subject to direction, has a threshold power to rule on whether complaints are within jurisdiction, and has an independent right to publish findings.

A related concern has to do with function. While Ombudsmen now discharge many roles, the core role is the investigation of complaints that can be made directly to the office by members of the public. In ANZOA's view it was inappropriate to use the title to describe an office that primarily has regulatory, disciplinary or prosecutorial functions.

Drawing from those concerns, ANZOA developed a statement of 'Essential Criteria for Describing a Body as an Ombudsman'. There are six criteria: independence, jurisdiction, powers, accessibility, procedural fairness and accountability.

The ANZOA statement largely accords with the description of the Ombudsman role by others. Descriptions vary nevertheless, as illustrated in the following contrasting definitions by the Productivity Commission (a narrower definition) and the IOI (a broader definition):

> Ombudsman are impartial organisations that receive and resolve complaints, and conduct inquiries into individual or systemic cases based on those complaints.[17]
>
> The role of Ombudsman institutions is to protect the people against the violation of rights, abuse of powers, unfair decisions and maladministration. They play an increasingly important role in improving public administration while making the government's actions more open and its administration more accountable to the public.[18]

Concluding observation

A lesson to be drawn from this analysis is — not surprisingly — that it is remarkably difficult to control how language is used and how it evolves and adapts to social trends. An analogous example is the now familiar institution described as the 'NRL Judiciary'.

The difficulty of controlling usage is all the harder in the Australian federal system, where each jurisdiction has control of its own terminology. And the jurisdiction with probably the loosest practice in using the Ombudsman title is the Commonwealth.

ANZOA's work in defining the term has nevertheless been valuable and possibly influential. It is a clear statement that captures essential Ombudsman features while also accepting that individual offices are structured and function differently. ANZOA applies the criteria in deciding whether to admit Ombudsmen to ANZOA membership.

Two features of the ANZOA definition that are particularly important — and that provide guidance for future usage — are that an Ombudsman's central role must be the investigation of complaints that are received from the public through an accessible procedure, and the office must be established in a way that safeguards its independence and impartiality.

17 Productivity Commission, above n 9, 312.
18 International Ombudsman Institute, 'About the IOI' (online) <www.theioi.org/the-i-o-i>.

Inspector-General

Another office with some traction in Australia is that of inspector-general. There is scant information on the public record to explain why this title was chosen for individual offices, and the explanation may largely be pragmatic. There is a stronger institutional foundation for the office in the United States, and it may be that this has been influential in Australia although not expressly mentioned when individual offices have been established.

The office of inspector-general in Australia

Inspectors-general in Australia tend to fall into three groups. The first group is that of executive agency head. There may be only one member of this group — the Inspector-General of Bankruptcy, who is the Chief Executive of the Australian Financial Security Authority that administers Australian bankruptcy and personal property security legislation.[19] The Inspector-General's role dates back to the first Commonwealth bankruptcy law enacted in 1924.[20]

A second group comprises statutory officers who are appointed (often in recent times) to discharge a specialist monitoring and oversight role in an area that can be controversial for government and where it welcomes independent assurance that the law is being administered correctly. Three Commonwealth examples are the Inspector-General of Biosecurity, which was given a statutory basis in 2015;[21] the Inspector-General of Live Animal Exports, established in 2019;[22] and the Inspector-General of Murray-Darling Basin Water Resources, established in 2019 and soon to be given a statutory basis in the *Water Act 2007* (Cth). Two comparable state example are the Queensland and Victorian Inspectors-General of Emergency Management, established respectively in 2013 and 2014.[23]

A third inspector-general group is statutory office holders that have a public law complaint-handling and investigation function, focused on a particular agency or group of agencies. The decision to confer an inspector-general title on each office was no doubt driven in part by a desire to distinguish them from the Commonwealth Ombudsman, who had similar or concurrent jurisdiction to the new inspector-general office:

- The Inspector-General of Intelligence and Security (IGIS) was established in 1987[24] to examine whether the six intelligence agencies (including the Australian Security Intelligence Organisation) are acting legally, with propriety and consistently with human rights principles. IGIS oversight can be triggered by a complaint, a ministerial referral or an own-motion investigation or compliance auditing review. The IGIS was established on the recommendation of the (second) Royal Commission on Australia's Security Intelligence Agencies in 1984. The Commissioner, Justice Hope, explained briefly that the administrative law review framework did not apply to the intelligence

19 *Bankruptcy Act 1966* (Cth) s 11.
20 *Bankruptcy Act 1924* (Cth) s 11. See Wenn and Lowe, 'History of Bankruptcy Administration in the 20th Century' (2001) 11(1) *New Directions in Bankruptcy* 10.
21 *Biosecurity Act 2015* (Cth) Ch 10, Pt 6.
22 *Inspector-General of Live Animal Exports Act 2019* (Cth).
23 *Disaster Management Act 2003* (Qld) Pt 1A; *Emergency Management Act 2013* (Vic) Pt 7.
24 *Inspector-General of Intelligence and Security Act 1986* (Cth).

agencies and that a new office with a different title would be preferable, commenting only: 'I believe the title "Inspector-General" is more descriptive of the intended role of the office and is less likely to connote executive responsibilities than the title "Security Commissioner"'.[25]

- The Inspector-General of Taxation (IGT) was established in 2003,[26] initially with a limited function of investigating systemic problems in taxation administration, and from 2015 with an additional function of handling complaints from the public. Both functions were formerly discharged by the Commonwealth Ombudsman, under the title Taxation Ombudsman, before those functions were relocated to the IGT.[27] The IGT commenced using the additional title of Taxation Ombudsman after 2015.

- The Inspector-General of the Australian Defence (IGADF) was initially established on an executive basis within the Department of Defence, and then as a statutory office in 2005.[28] The office oversights the operation of the Australian Defence Force military justice system, through complaints, own-motion inquiries and ministerial referrals. The Commonwealth Ombudsman has always had the concurrent title and functions of Defence Force Ombudsman. There are differences in the IGADF and Ombudsman roles, but some overlap.

As that summary indicates, the role of inspector-general in Australia is adaptable to prevailing policy choices within government. There has not been any move to spell out a definition or philosophy of the institutional role of an inspector-general as there has been for the office of Ombudsman.[29]

There are possibly three themes that can nevertheless be drawn from Australian developments. The first is that statutory independence from government is seen to be an important feature of an inspector-general, even though some offices were initially established by executive action. A statutory foundation is also essential for some of the powers that can be exercised by inspectors-general, such as coercive information-gathering powers.

Secondly, the offices have a jurisdiction that is limited to a particular aspect of government activity — such as taxation, intelligence or emergency management. These have generally been described as areas in which an external oversight body should have special insight or experience (though that claim could as easily be made about most areas of government activity).

Thirdly, government has been sparing in establishing offices of inspector-general. It is more common, by contrast, to see proposals for a new commissioner or Ombudsman function. This is probably a reflection of the apparent attitude in government that an office of inspector-general is a special role to be created only when there is a strong policy justification for doing so.

25 Royal Commission on Australia's Security Intelligence Agencies, *Report on the Australian Security Intelligence Organisation* (Australian Government, 1984) para 16.85.
26 *Inspector-General of Taxation Act 2003* (Cth).
27 *Ombudsman Act 1976* (Cth) s 4(3).
28 *Defence Act 1903* (Cth) Pt VIIIB.
29 *Ombudsman Act 1976* (Cth) ss 19B–19D.

The office of inspector general in the United States

The office of inspector general (IG) is a well-established feature of the federal administration in the United States.[30] In 2019 there were 74 statutory IGs established within departments and major agencies such as the Federal Trade Commission, US Postal Service, Central Intelligence Agency and the Library of Congress. The statutory foundation for most IGs (65) is the *Inspector General Act of 1978* (IG Act), while another nine were established by separate statutes. The largest IG office in the Department of Health and Human Services has 1,600 staff.

The role of the IG within each agency is to prevent and detect waste, fraud, abuse and mismanagement; and to promote program economy and efficiency. The IG does this through conducting audits, investigations, inspections and evaluations. The IG has broad access to agency records and the power to subpoena records and take evidence under oath. The larger offices include criminal investigators who have powers of arrest and search and seizure and are armed. The IG can receive anonymous complaints from agency employees, who are protected against retaliation.

Though located within an agency, the IG is regarded as an independent office. Most are appointed by the President of the United States (and the IG Act requires this be done on grounds of merit and not political affiliation); an IG can be removed only on stated grounds that must be reported to the Congress; there is a reporting power to the agency head and the Congress; they are subject only to 'general supervision' within the agency and not to direction; the IG appoints its own staff and legal counsel; and there are protections for budgetary independence. An added safeguard is that the IG Act establishes a Council of the Inspectors General on Integrity and Efficiency.

The independence of IGs has not been free of controversy. In a two-month period in 2020 President Trump removed five IGs appointed to the US intelligence community and the Departments of State, Defense, Transportation and Health and Human Services.[31]

Other titles

A few other titles that are commonly used in government are applied to officers who have a public law oversight and scrutiny role.[32] It is usual that the office holder has an identifiable public role, has specific functions and inquiry powers, is appointed for a fixed term, and has independence from government control or direction.

30 Two helpful papers relied on for this analysis were: Congressional Research Service, 'Statutory Inspectors General in the Federal Government: A Primer' (R45450, 3 January 2019); and Council of the Inspectors General on Integrity and Efficiency, 'The Inspectors General' (14 July 2014).

31 Wikipedia, '2020 Dismissal of Inspectors General' (Wikimedia Foundation, 3 September 2020) <https://en.wikipedia.org/wiki/2020_dismissal_of_inspectors_general>.

32 Another category of office is those with an advocacy function for disadvantaged or vulnerable groups — for example, the Victorian Office of the Public Advocate and the NSW Office of the Advocate for Children and Young People. These offices do not usually have a complaint-handling or investigation function.

Commissioner

The term 'commissioner' has a broad meaning. It commonly describes a person appointed to a statutory position to head a government agency, be a member of a commission or be responsible for a particular government activity, program or inquiry. Other usage is common, including in compound titles such as high commissioner, trade commissioner, royal commissioner, police commissioner, fire commissioner, electoral commissioner, chief commissioner and district commissioner.

A large number of Australian commissioners are appointed to regulatory roles to safeguard and promote interests and values as diverse as commercial integrity, consumer protection, fair trading, building safety, industrial harmony, workplace safety, small business, health advancement, public sector standards, law reform, legal services, liquor licensing, environmental sustainability, public housing availability, equal opportunity, Aboriginal engagement, mental health, victims' rights, youth safety and e-safety.

The 'commissioner' title is also commonly used for offices that have a public law complaint-handling, investigation, merit determination or standard-setting role. One commissioner group is those administering information laws — the information commissioners, privacy commissioners and, in the Commonwealth (though currently unfilled), the freedom of information commissioner.[33] Another commissioner group consists of those responsible for human rights protection, where again there are several human rights commissioners and specialist anti-discrimination and equal opportunity commissioners.[34] A third group consists of the commissioners responsible for the related areas of health and community services, disability services and aged care.[35] Among the most high-profile commissioners are those responsible for the prevention and investigation of public sector corruption and misconduct.[36]

Each commission is unique, although a prevailing theme is that the adoption of a commissioner model enables the office holder to bring a personal dimension to the role, perhaps more so than in many areas of public administration. That, in itself, contributes to the public perception that the commissioner has an independent scrutiny and integrity promotion role.

Inspector

The office of inspector is also widely used in Australia, both generally and for public law roles.

One distinguishing feature of the inspector model is that within an individual agency there may be many inspectors (or delegates), headed by a chief inspector. Some small offices may have only a single inspector.

A second feature is that the function of the inspector is usually to conduct an inspection to certify whether there is compliance with a particular law or standard. The inspection may be

33 Eg *Australian Information Commissioner Act 2010* (Cth).
34 Eg *Australian Human Rights Commission Act 1996* (Cth).
35 Eg *Health Care Complaints Act 1993* (NSW); *Disability Act 2006* (Vic); *Aged Care Quality and Safety Commission Act 2018* (Cth).
36 Eg *Crime and Corruption Act 2001* (Qld); *Law Enforcement Integrity Commissioner Act 2006* (Cth).

triggered when a person applies for a compliance certificate or licence or it may result from an own-motion (and unannounced) decision by the inspector to conduct an inspection.

Examples of inspectors that fit that model are those who examine compliance with laws relating to mines, factories, health, quarantine, education, building safety, pest control, transport security, motor vehicles, weights and measures, and lifts and scaffolding.

In the public law realm the inspector model is principally used in two areas. The first is the office of inspector of custodial/correctional/prison services.[37] This type of inspector conducts regular inspections and reviews of detention facilities, including critical incident investigations. The scope of the role has tended to expand in recent times in line with the expectation that detention facilities will comply with human rights standards as to how the facility is designed and managed and how custodial inmates are treated.

The office does not ordinarily have a separate complaint investigation role, which is more commonly discharged by the Ombudsman (which in some jurisdictions substitutes for the inspector). The inspector's office is established as an independent office with control over its own inspection program, the conduct of inspections and public reporting.

A second public law inspector role is that established in most Australian jurisdictions to oversee the operations and conduct of the anti-corruption/integrity commissions. Three examples are the Victorian Inspectorate,[38] the NSW Inspector of the Independent Commission Against Corruption[39] and the Parliamentary Inspector of the Crime Commission of Western Australia.[40] The Commonwealth and Tasmania do not have an equivalent position.

With one exception those inspectors have a narrow jurisdiction confined to oversighting only one agency — the anti-corruption/integrity commission in that jurisdiction. The exception is the Victorian Inspectorate (an office of 14 staff) that monitors most of the State integrity agencies, including the Independent Broad-based Anti-corruption Commission, Auditor-General, Ombudsman, Information Commissioner, Judicial Commission and Public Interest Monitor.

The inspector is an independent statutory office holder. In most instances the appointee is a former judge or senior counsel appointed on a part-time basis.

The common model is that the inspector can act on complaints or on an own-motion basis; investigate any aspect of the commission's operations or the conduct of its officers; conduct inquiries, inspections and audits; have full access to the commission's records; compel witnesses to give evidence; utilise covert surveillance powers; report publicly or to the Parliament; and recommend disciplinary or criminal action against a commission officer.

The commission inspectors are, in many ways, a unique office with extraordinary powers to ensure that anti-corruption and integrity commissions act with integrity and do not abuse

37 Eg *Inspector of Custodial Services Act 2012* (NSW); *Inspector of Correctional Services Act 2017* (ACT).
38 *Victorian Inspectorate Act 2011* (Vic).
39 *Independent Commissioner Against Corruption 1988* (NSW) Pt 5A.
40 *Corruption, Crime and Misconduct Act 2003* (WA) Pt 13.

the considerable powers vested in them.[41] They are an answer to the age-old riddle — *Quis custodiet Ipsos custodes* ('who will guard the guards themselves')? Generally, the inspectors have played a high-profile role from time to time, occasionally publishing reports that have been strongly critical of a commission's conduct.[42]

Public Interest Monitor

Two states — Queensland and Victoria — have established the statutory office of Public Interest Monitor.[43] The monitor — a senior legal practitioner — assesses and tests the validity of applications by law enforcement bodies for surveillance and covert search warrants.

As the title of the office suggests, the monitor's role is to ensure that the public interest is routinely considered in the warrant authorisation process in compliance with the detailed statutory criteria that must be considered in granting a warrant. The monitor's role stems from a concern that the public interest can be sidelined in an authorisation process that is routine, frequent and necessarily conducted in private. The monitor can appear at the hearing for a warrant application and examine witnesses and make submissions.

An analogous monitoring role that can be performed by a monitor or Ombudsman is to examine, after a warrant has been issued and executed, whether the conditions stated in the warrant and the legislation were observed.[44]

Another monitor position, though of a different kind, is the Commonwealth Independent National Security Legislation Monitor (NSLM).[45] The NSLM reviews (and publishes reports on) the operation, effectiveness and implications of national security and counter-terrorism laws, with a particular focus on the necessity for the laws and whether individual rights are protected. Unlike the state public interest monitors, the NSLM does not have an individual case monitoring role. (It is of passing interest too that the description 'Independent' is part of the statutory description of the office.)

Gaps in the integrity oversight network

The analysis to this point has looked at the titles and roles of Australian (particularly Commonwealth) oversight bodies. They have been created sporadically over many years, sometimes in response to a troubling incident or governmental trend. To that extent there are elements of difference in the history, setting and role of each oversight body.

41 See J Wood, 'Ensuring Integrity Agencies Have Integrity' (2007) 53 *AIAL Forum* 11.

42 Eg Office of the Inspector of the Independent Commission Against Corruption, *Report pursuant to sections 57B(5) and 77A of the Independent Commission Against Corruption Act 1988 concerning an audit under section 57B(l)(d) thereof into the Independent Commission Against Corruption's procedures for dealing with counsel assisting in investigations and inquiries under Part 4 of the Act* (Special Report 20/02, December 2019).

43 *Crime and Corruption Act 2001* (Qld) Pt 5; *Public Interest Monitor Act 2011* (Vic). The role of the Monitor is examined in NSW Ombudsman, *Operation Prospect* (2016) Vol 5, Ch 19, section 19.9.3.

44 Eg the Commonwealth Ombudsman has an inspection function under the *Telecommunications (Interception and Access) Act 1979* (Cth), the *Surveillance Devices Act 2004* (Cth) and the *Fair Work (Building Industry) Act 2012* (Cth).

45 *Independent National Security Legislation Monitor Act 2010* (Cth). See J Renwick, 'Monitoring Australia's National Security and Counter-terrorism Laws in the 21st Century' (2020) 99 *AIAL Forum* 49.

There is little on the public record to explain why each body was given its particular title or whether any broader thinking was undertaken about how a new oversight body would compare with and be linked to existing bodies. Australian developments aptly illustrate the observation made by Professor Harlow about British arrangements: 'The emphasis placed on grievance-handling in contemporary public administration has left us with a wide but uncoordinated assortment of mechanisms for dispute-resolution and the reception of complaints.'[46]

To the extent that we have a theory or philosophy to explain the integrity oversight network, it tends to be focused on particular segments. A lot has been written about the character and role of the Ombudsman but partly in response to a concern that the Ombudsman title has been used indiscriminately. A lot has equally been written about the anti-corruption and the human rights bodies, but the writing commonly focuses on the subject issues those bodies deal with and how the bodies have exercised their investigation and inquiry powers.

The most ambitious work undertaken so far to map the Australian integrity framework and to identify gaps and weaknesses has been the National Integrity Systems research project, led by the Griffith University Centre for Ethics, Law, Justice and Governance and supported by Transparency International Australia and several Commonwealth and state integrity bodies, with Australian Research Council funding.[47] The project has been highly influential in fostering the notion that accountability bodies, although they have discrete functions and objectives, should also be seen as elements of a larger oversight network that aims to assist the public and to promote integrity in government.

Viewed in that light, a range of specific and practical questions arise about whether and how integrity bodies are interlinked. Some questions would require a legislative response, others a revision of operating procedures and network arrangements. Following is a sample of the issues.

Titles

Should guidance be published on the appropriate or distinguishing use of titles such as Ombudsman, inspector-general, commissioner or monitor? At present, the relevant drafting direction from the Office of Parliamentary Counsel observes only that 'Different names are appropriate for different kinds of bodies … Authority, Commission, Council, Office is appropriate for advisory bodies, bodies engaged in administrative work or policy making, and representative bodies'.[48]

46 Harlow, above n 13, 86.

47 See AJ Brown et al, *Chaos or Coherence? Strengths, Challenges and Opportunities for Australia's Integrity Systems* (Griffith University and Transparency International Australia, 2005); and AJ Brown et al, *A National Integrity Commission — Options for Australia* (options paper, 2018). See also BW Head, AJ Brown and C Connors (eds), *Promoting Integrity: Evaluating and Improving Public Institutions* (Ashgate, 2008).

48 Office of Parliamentary Counsel, 'Commonwealth Bodies' (Drafting Direction No 3.6, May 2019) para 71.

Relationship to each other

There is informal contact between individual oversight agencies, and some enter into memoranda of understanding (MOU) with each other. Should this be more structured or formalised?

The Board of the Tasmanian Integrity Commission established in 2009 initially included the heads of the other main integrity oversight bodies, but this has since been discontinued. The five main integrity agencies in Western Australia (Ombudsman, Auditor-General, Information Commissioner, Corruption and Crime Commissioner and Public Service Commissioner) have established an Integrity Coordination Group that hosts a website and activities.[49] Similar, less formal arrangements have been adopted in other jurisdictions, but activity tends to wax and wane according to the interest of the individual office holders at a particular time. Another example of a network arrangement is the New South Wales Public Interest Disclosures Act 1994, s 6A, that constitutes a Public Interest Disclosures Steering Committee that includes several other office holders, as well as some senior government officers.

Jurisdiction over each other

A related issue is to define the jurisdiction that integrity bodies have over each other. At present they are largely treated as no different to any other agency — so, for example, the Ombudsman and the Human Rights Commission can each investigate complaints against each other and also against the Information Commissioner, who can likewise handle privacy and freedom of information (FOI) matters involving the others.

Not surprisingly, an unsuccessful complainant to one oversight agency will seek to keep the matter alive by treating that agency's conduct as the basis of a fresh complaint to another oversight agency. That is unavoidable to the extent that each agency is itself subject to administrative law requirements (see below). But there is equally a risk that the original complaint issue about the conduct of a government agency will expand to include the conduct of the oversight agency — a 'dispute about a dispute'. Public interest disclosure legislation adds to the options available to a dissatisfied complainant to inflate their dispute.

Reciprocal investigations by oversight agencies is an issue they sometimes addressed in MOUs with each other. Now, with so many oversight agencies and complaint options, it may be time to grapple with the issue in a more structured and comprehensive way.

Amenability to administrative law mechanisms

Little if any attention was paid to how administrative law mechanisms would apply to each oversight agency when they were being established, or at least to the implications of applying those mechanisms in a standard way.[50] For example, the Office of the Australian Information Commissioner (OAIC) is subject to the *Freedom of Information Act 1982* (Cth), which means

49 Western Australian Government, 'Integrity Coordinating Group' (online, 30 June 2020) <www.wa.gov.au/government/document-collections/integrity-coordinating-group>.

50 Attention was, by contrast, paid to that issue in relation to the Australian National Audit Office, which is an exempt agency under the *Freedom of Information Act 1982* (Cth) Sch 2: see *Brett Goyne and Australian National Audit Office* [2014] AICmr 9.

that it receives FOI requests for documents that have been received from other agencies for the purposes of the OAIC's merit review work. Equally, an FOI applicant to the OAIC whose request has been refused can seek both internal review of that refusal by the OAIC and independent external review of that decision by the OAIC.

The application of administrative law mechanisms to oversight agencies has, by contrast, been addressed directly in state legislation. In New South Wales, for example, an application cannot be made under the *Government Information (Public Access) Act 2009* (NSW) to either the Ombudsman or the Information Commissioner for information relating to their complaint-handling, investigative and reporting functions.[51] Nor are investigative agencies required to comply with most of the Information Protection Principles in the *Privacy and Personal Information Protection Act 1998* (NSW) when discharging their complaint-handling functions or in providing information to other investigative agencies.[52]

Another controversial immunity in New South Wales (and in most other states) is that judicial review proceedings cannot be instituted against the Ombudsman without the leave of the Supreme Court on the ground of bad faith.[53] In dismissing a constitutional challenge to the validity of that limitation, the NSW Court of Appeal observed that a rationale for the limitation was that the Ombudsman's powers 'do not extend to the making of decisions affecting the rights of individuals, but rather only to the making of recommendations which, if accepted by others, may affect such rights'.[54] Similar reasoning was adopted by the Full Court of the South Australian Supreme Court in relying on a privative clause to dismiss a judicial review challenge to an Ombudsman investigation.[55]

Relationship to the Parliament

The relationship between oversight agencies and the Parliament is an obvious issue that has not been properly grappled with, at least in the Commonwealth. This is surprising, given that the first two Ombudsmen in Australia were given the title of Parliamentary Commissioner; and the *Auditor-General Act 1997* (Cth) declares that 'The Auditor-General is an independent officer of the Parliament'.[56] The same status is given to the Ombudsman in the ACT, Queensland and Victoria.[57]

There are differing views on whether anything practical turns on the adoption of that course and whether it is desirable that all integrity agencies should have the status of officers of

51 *Government Information (Public Access) Act 2009* (NSW) Sch 2, Pt 2.
52 *Privacy and Personal Information Protection Act 1998* (NSW) s 24.
53 *Ombudsman Act 1974* (NSW) s 35A.
54 *Kaldas v Barbour* [2017] NSWCA 275 [156] (Bathurst CJ).
55 *King v Ombudsman* [2020] SASCFC 90.
56 *Auditor-General Act 1997* (Cth) s 8(1); subs 8(2) provides that 'no implied functions, powers, rights, immunities or obligations' arise from this status.
57 *Ombudsman Act 1989* (ACT) s 4A; *Ombudsman Act 2001* (Qld) s 11(2); *Constitution Act 1975* (Vic) s 94E(1).

the Parliament.[58] An alternative approach is to emphasise the relationship among oversight agencies as part of a national integrity system, or even as a 'fourth branch of government'.[59]

Whichever approach is taken, an important issue is whether oversight agencies should, individually or as a group, report to a special committee of the Parliament. The committee can, at the least, ensure that separate consideration is given to the annual reports of the agencies and to any proposed legislative changes that might affect them. A committee can also be given a consultative (or even veto) role in relation to the appointment of an office holder.

Three examples of special committee arrangements are the Joint Committee of Public Accounts and Audit, to which the Commonwealth Auditor-General reports;[60] the Joint Committee on the Australian Commission for Law Enforcement Integrity; and, in New South Wales, the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission.

Accessibility to the public

The threshold issue in access to justice is whether a person with a grievance knows where to go and can get there easily. A person may need to select not only from among a range of external oversight agencies but also between those agencies and internal review mechanisms. This raises several questions, including the adequacy of the guidance available to the public, the existence of effective consultation and transfer mechanisms among agencies, and whether impediments to agency cooperation are imposed by privacy laws or secrecy provisions.

The *Ombudsman Act 1976* (Cth) illustrates how these issues have generally been addressed in a piecemeal fashion. If the Ombudsman forms the view that a person should first have taken their complaint to the agency concerned, the Ombudsman can decline to investigate the complaint but has no general transfer power.[61] Specific transfer powers have been added from time to time as the complaint system has evolved — for example, to facilitate the transfer of complaints to an industry ombudsman, the Integrity Commissioner, Information Commissioner, the Inspector-General of Taxation or Small Business Ombudsman.[62]

Privacy impediments to effective investigation were similarly developed in a catch-up manner. The Ombudsman Act was amended in 2005 to override Privacy Act impediments to providing information to the Ombudsman after there was growing agency reluctance to provide 'the whole file'.[63] By contrast, there is a better framework in the New South Wales

58 Eg see D Pearce, 'The Commonwealth Ombudsman: The Right Office in the Wrong Place' in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law — At the Twenty-Five Year Mark* (CIPL, 1998); P Wilkins, 'Watchdogs as Satellites of Parliament' (2015) 74 *Australian Journal of Public Administration* 8–27.

59 See R Creyke, M Groves, J McMillan and M Smyth, *Control of Government Action* (Lexis Nexis, 5th ed, 2019) paras 1.4.5–10.

60 *Public Accounts and Audit Committee Act 1951* (Cth); see J McMillan and I Carnell, 'Administrative Law Evolution: Independent Complaint and Review Agencies' (2010) 59 *Admin Review* 42.

61 *Ombudsman Act 1976* (Cth) s 6.

62 Ibid ss 6(10), 6(13), 6B, 6C, 6D, 6E, 20ZQ.

63 Ibid s 7A(1D).

privacy statute, which provides an exception to the Information Privacy Principles for the disclosure of information between agencies in the course of complaint handling by an investigative agency, or to refer an inquiry from one public sector agency to another.[64]

Secrecy provisions in the statutes establishing oversight agencies can impede information exchange between oversight agencies. This is a regular topic for internal legal advice within oversight agencies and slows down investigations. The Australian Law Reform Commission (ALRC) drew attention in its report in 2009 to the inconsistent and antiquated range of secrecy provisions in Commonwealth legislation. Among the Commission's recommendations were that the general and specific secrecy offences recommended in the report should include an exception for disclosure in the course of a Commonwealth officer's functions or duties.[65] The report also recommended an enhanced role for the OAIC in reviewing information-handling and disclosure practices in Australian government.

A related issue is whether in an age of regular online communication between agencies, oversight agencies should have online access to agency databases for the purposes of investigation. The customary procedure of a summons or formal request to an agency to provide hardcopy documents reflects the design of a former age. It is not uncommon that police oversight agencies have online access to the police complaints database and there is a case for adopting that practice more widely.

Another pertinent issue in a digital age is whether there should be an integrated framework of complaint mechanisms and guidance, in line with the 'one stop shop / no wrong door' philosophy. New South Wales again leads the way following the joint development of a Complaint Handling Improvement Program by the NSW Ombudsman, Customer Service Commissioner and Department of Finance, Services and Innovation. One element of the program is a web-based portal, Feedback Assist, that is featured on the home page of all agencies so that customer complaints, suggestions or feedback can be lodged at numerous points and be redirected if necessary to the appropriate agency. The system is backed up by Six Commitments to Effective Complaint Handling that are subscribed to by all agencies and are monitored by the Ombudsman.

Inquiry powers

A missing element in the integrity oversight framework is an Inquiries Act that would enable government to establish ad hoc, independent inquiries. The inquiry options open to the Commonwealth government at the moment are to establish a royal commission, establish an executive inquiry that lacks the powers, protections and immunities that are thought to be essential for controversial or sensitive inquiries, or rely upon a statutory oversight agency to commence an own-motion investigation into a matter that falls within its jurisdiction.

64 *Privacy and Personal Information Protection Act 1998* (NSW) ss 24, 27A.

65 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report No 112, 2009), recommendations 7.1, 10.2.

The ALRC recommended in 2009 that the *Royal Commissions Act 1902* (Cth) be renamed the Inquiries Act and incorporate two types of inquiries — royal commissions and official inquiries.[66]

Updating the integrity oversight network

The variable and unexplained use of titles for integrity oversight bodies points to the need for a general review and updating of how those bodies link together as a vital element of the government accountability framework.

That has occurred in other areas of government, as noted at the beginning of this article. The *Public Service Act 1999* (Cth) is one example. Another is the *Public Governance, Performance and Accountability Act 2013* (Cth), which itself replaced two earlier laws designed to introduce coherence and consistency in the structure of government — the *Financial Management and Accountability Act 1997* (Cth) and the *Commonwealth Authorities and Companies Act 1997* (Cth). Those reforms were accompanied by major governance reviews, such as the *Review of the Corporate Governance of Statutory Authorities and Office Holders* (Uhrig review, 2003).

The Australian tribunal system also underwent a complete rethink and restructure with the creation of general-jurisdiction administrative appeals tribunals. The establishment of each tribunal followed an inquiry highlighting that the proliferation of individual tribunals had led to anomalies, gaps and inconsistencies in their jurisdiction, powers and procedure.

There is no obvious pathway for a general review of the range of issues raised in this article regarding oversight agencies. The most suitable body to undertake such a review would be the Administrative Review Council (ARC) — although it is a familiar lament that, while it still formally exists,[67] it has been inactive since 2012. Another option is always the ALRC, which has already addressed a few of the issues noted in this article and has undertaken past review work that has led to significant restructure of some administrative law elements. An example is the joint ALRC/ARC report on open government in 1995 that was picked up in reforms implemented in 2010.[68] It is possible too there will be a fresh focus on updating the integrity oversight framework after the Australian Government publishes proposed legislation for a Commonwealth Integrity Commission.[69]

While a comprehensive review is not presently on the horizon, the importance of a review should not be overlooked.

66 Australian Law Reform Commission, *Making Inquiries* (Report No 111, 2009).
67 *Administrative Appeals Tribunal Act 1975* (Cth) Pt V.
68 Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982* (ALRC Report No 77 / ARC Report No 40, 1995); see *Australian Information Commissioner Act 2010* (Cth) and *Freedom of Information (Reform) Act 2010*.
69 Attorney-General's Department, *A Commonwealth Integrity Commission — proposed reforms* (consultation paper, 2018).