

# **Ombudsman, Corruption Commission or Police Integrity Authority? Choices for Institutional Capacity in Australia's Integrity Systems**

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## Introduction<sup>1</sup>

Australian public life is generally seen as relatively 'clean' in terms of global league tables on corruption and integrity. Australia received a 'top 8' rating in Transparency International's most recent Global Corruption Report (TI 2004: 155), and ranks third out of 25 democracies on the Public Integrity Index compiled by the Centre for Public Integrity (Camerer 2004; see Brown & Uhr 2004). Nevertheless, even in relatively advanced countries like Australia there are regular outbreaks of dishonesty, leading to crises and scandals that demand political attention. As Frank Costigan QC noted towards the end of 2003:

For a country that is perceived not to be corrupt, a lot has happened in the last 20 years. Let me recall a few highlights, in no particular order:

- the institutional corruption in Queensland under the Bjelke-Petersen government as shown by the Fitzgerald Inquiry;
- the institutional corruption in the New South Wales Police Force as shown by the Wood Royal Commission;
- allegations of institutional corruption in the Western Australian Police Force resulting in the Kennedy Inquiry;
- serious problems in the drug squad in Victoria (and that police force is widely regarded as the cleanest in the country with high standards and leadership of integrity);
- massive corporate scandals of which HIH and One-Tel are current and striking examples.

All these incidents reveal a common thread of greed, whether for power or money or both, lies and secrecy (Costigan 2004). Corruption, integrity and accountability issues have been a constant theme in the media and in parliaments around the country. Numerous incidents have been front-page news. In recent months, a leading public sector issue has been corruption in the Victorian Police, and debates on how the state government should respond, which have in turn spilled over into federal politics and national institutional choices.

In this paper we analyse these debates for insights into how basic issues of capacity are currently perceived and resolved within Australia's integrity systems. Capacity is fundamental to assessing the nation's integrity systems, because as discussed in the opening paper to this series (Brown & Uhr 2004), nations and governments can sometimes *appear* to have all the necessary institutions and processes in place to pursue integrity and control corruption, but their actual capacity to do so may be limited or non-existent. Further, while we may assume that the cornerstones of integrity systems might be particular institutions or laws, some key integrity capacities may reside elsewhere – such as in social structures, cultural values and education systems. This paper uses questions of basic institutional choice as an entry into these larger questions.

The first part of the paper recognises that institutional choices, while not the whole story, are crucial to the functioning of integrity systems in Australia. It provides some background on recent debates in the Victorian and Commonwealth

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<sup>1</sup>

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governments, and helps identify some of the key issues dominating current assessments of capacity. The second part of the paper considers those issues against historical trends in the resourcing of 'independent' public integrity institutions, presenting a comparative analysis of Australian governments' record on fundamental indicators of capacity: staffing and funding. The results provide some clearer confirmation as to why Victoria may have recently faced such colourful problems, because even with recent major expansion in its independent integrity resources, there is evidence that it may still have the weakest formal anti-corruption infrastructure in Australia, on a simple staffing and financial basis.

The third part of the paper highlights, however, that other, different elements of institutional choice are also to be found in current debates. Assessing whether integrity systems have the necessary capacity involves not only considering their financial resources, but how those resources are configured, whether the charters of the key organizations are properly targeted, and whether they have the necessary skills and powers. Here choices become more complex, with recent debate revealing that apparently simple calls for particular institutional paths require careful consideration of no less than eight intersecting questions:

1. Public versus less public approaches;
2. Internal versus external review;
3. Reactive versus proactive inquiries;
4. Agency-specific versus sectorwide review;
5. Limited versus expansive jurisdictions;
6. Misconduct versus maladministration;
7. Investigation versus research and policy; and
8. Who guards the guards?

Having attempted to distinguish between these different issues of institutional choice, the paper concludes by asking more generally how integrity system might be best assessed in light of these debates. We argue that in the long-term, more sophisticated policy analysis is needed than has been evident in recent Australian debates, on basic questions of institutional choice and design. Once this is achieved, it may also be possible to develop improved methods of assessing integrity system capacity more broadly, sensitive to the mix of resources, staffing, powers, skills and political will needed to tackle public accountability problems through continuing innovation and reform.

## **Institutional Choice: Background and Current Dilemmas**

### *The Diversity of Australian Institutional Arrangements*

Since the 1970s, independent or 'watchdog' agencies have become one of the major repositories of institutional capacity, as well as major political symbols, in Australian governments' efforts to promote integrity and fight corruption. Like many aspects of the Australian federal system, their tale is one of significant diversity within a similar pattern. These agencies typically take two or more of four institutional types, which together add up to a complex system of anti-corruption bodies:

- Governments have long relied on a relatively independent **Auditor-General** to provide assurances of regularity and propriety in public financial affairs, often since the 19<sup>th</sup> century colonial period. In addition to regular financial auditing roles, auditors have often carried out investigations into major allegations of waste, fraud and corruption, and since the 1970s have only continued to grow in importance in the integrity infrastructure of Australian governments (Coghill 2004).
- From the 1970s, the enlarged size and complexity of the liberal welfare state provoked the introduction of the Scandinavian tradition of **Ombudsmen** to investigate citizen grievances against appointed officials. These 'watchdogs' were not generally scandal-driven, and are usually related to developments to make administrative law simpler for 'aggrieved persons' to challenge government actions in the courts (Douglas 2002: 188-288). The idea of the ombudsman has been copied in many areas of commercial service delivery, both public and private, including banking and communications. Following inquiries by the Australian Law Reform Commission in 1978 and 1981, ombudsmen took on special roles in relation to complaints against police, exercising more supervision over internal complaint-handling than for other agencies. In many states, ombudsmen have also been set up for specific portfolio areas, such as Health Care Complaints Commissions. In the 1980s, Victoria and South Australia chose to apply this specialist model to their police forces, establishing separate Police Complaints Authorities.
- From the late 1980s, the complexity of dealing with *intentional* wrongdoing or misconduct by public officeholders (appointed and elected) led to introduction of additional **anti-corruption commissions** in three states. In NSW, the Independent Commission Against Corruption was created in 1988, followed by the Police Integrity Commission in 1997; Western Australia's Official Corruption Commission (then Anti-Corruption Commission, now Corruption & Crime Commission) commenced in 1989; and Queensland's Criminal Justice Commission was created in 1990 (now Crime & Misconduct Commission).
- Since the 1970s, several governments have established separate **crime commissions** to investigate organised crime, undertake crime research, and track and recover criminal proceeds. Importantly, these are not accountability 'watchdogs' but rather have expanded criminal investigation roles (a form of 'super-police'). However wherever they exist, crime commissions tend to play a fundamental role in anti-corruption work due to natural links between official corruption and organised crime, and their evidence-gathering capacities. Queensland's CJC/CMC was always established as *both* an anti-corruption and crime commission (briefly separate in 1997-2000), and Western Australia converted to this model in 2004.

The different combinations of core 'watchdog' agencies make for a complex institutional matrix. As Table 1 shows, among Australia's seven major governments, only Queensland and Western Australia have now come to have directly similar arrangements.

**Table 1. No. of Independent Integrity Watchdogs by Australian Government**

	Auditor-General	Ombudsman	Police Complaints Authority	Police Integrity Comm	Anti-Corruption Comm	Crime Comm
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				
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.

Indeed the reality is significantly more complex even than shown, because even like bodies vary significantly in their jurisdictions and functions between states. For example, even though the development of anti-corruption commissions in NSW and Queensland paid close attention to the precedent set by the Hong Kong ICAC, established in 1974 (Fitzgerald 1989: 300-303; Sturgess 1994), the permanent bodies that emerged in NSW, Queensland and Western Australia all differed from the Hong Kong model, and equally still differ from each other (Finn 1994; Irwin 1994; Niland & Satkunandan 1999; Rayner 2003; Maor 2004). Similarly ombudsman offices vary in size and nature of jurisdiction, sometimes losing jurisdiction to specialist offices, and sometimes regaining or expanding it, as demonstrated by the recent amalgamation of the NSW Children's Services Commission into the office of the NSW Ombudsman. There is not necessarily anything wrong with this kind of institutional diversity – indeed it may be an asset. Diversity is often celebrated in federal systems (Moon & Sharman 2003), and makes sense given evidence that differences of political culture continue to mean differences in the nature and timing of accountability issues giving rise to different institutional responses (see e.g. Perry 2001). In the US federal system, similarly, a review of mandates and approaches followed by around 36 different State Ethics Commissions shows that even if the diffusion and adaptation of ideas were undesirable, it would probably be unavoidable (Smith 2003). There are plausible arguments in Australia both for consolidation and for pluralist dispersion of accountability mechanisms/bodies, depending on the nature of the problems being addressed (Brennan 1999). However it is also clear that multiple mechanisms and bodies are only likely to help reduce the risk of corruption if their mandates are clear, and their powers and resources adequate to the tasks. The first issue involves questions of coordination and coherence, forming a separate major theme of this project (see KCELJAG & TI 2001; Smith 2004). The focus here is on the second question, that of raw capacity:

- How do these configurations compare, when it comes to the mix of staffing, resources, skills, legal powers and organisational objectives needed to fulfil the different roles of independent watchdogs?
- Is there any evidence that one model is better than another, in terms of basic capacity to promote accountability and control corruption?

These questions are brought into sharp relief by current debate over solutions preferred by the Victorian and Commonwealth governments.

### *The Victorian Corruption Crisis*

In Australia, as elsewhere, law enforcement is recognised as an area of particular corruption risk, and particular importance given the social and political consequences of breakdowns in the integrity of justice processes. Victoria Police is no different to other law enforcement agencies in these respects, and from about 2001 – when a new commissioner was appointed – the Victoria Police strengthened efforts to deal with corruption problems in high-risk areas including the Major Drug Investigation Division. Like other major complaints and investigations, these investigations received independent oversight from the Victorian Ombudsman, with whom the short-lived Victorian Police Complaints Authority had been amalgamated in 1987-1988.

Public confidence in this process was progressively shaken from late 2003, when a major war between Melbourne organised crime groups broke out which appeared to go unaddressed by police. Several killings, including that of a confidential police informer, became linked with possible police corruption. While sometimes colourful, no other recent Australian police corruption problems had ever approached this level of seriousness, provoking unprecedented comparisons with societies with much better-known corruption problems. For example, despite ranking consistently higher in Transparency International's Corruption Perception Index than Italy (8<sup>th</sup> versus 35<sup>th</sup> in 2003, and 11<sup>th</sup> versus 31<sup>st</sup> in 2002), Australia was ranked equally with Italy in the Centre for Public Integrity's first Public Integrity Index (Camerer 2004). Where normally close comparisons with Italy's corruption problems would be seen as highly questionable in Australia, the comparison was made much more plausible by the distinctly Sicilian undertones of Victorian underworld and police behaviour. From early 2004, the Victorian Government came under strong pressure from integrity groups, sections of the media, some serving and former police and, eventually, the Victorian Opposition parties to undertake three institutional responses, similar to those undertaken in response to similar crises in Queensland, NSW and Western Australia:

- To appoint an independent, one-off royal commission into existing and new police corruption allegations;
- To establish a permanent independent anti-corruption commission to supervise police integrity in the future, as well as integrity and corruption matters across the Victorian Government more generally; and
- To also establish a crime commission, either as a stand-alone body dealing with organised crime or combined with the anti-corruption commission (though the separation between the two roles was rarely clear in public advocacy: see Bottom & Medew 2004).

To date the government's responses have instead taken different directions. The first response was to resist calls for a royal commission, identifying this as an expensive "wigfest" which would slow down internal police prosecutions and reforms already underway, and be unlikely to identify any new or different

institutional responses. The argument against a royal commission was also made by the police commissioner, Christine Nixon, in an article in the *Melbourne Age*, stressing that recent police royal commissions in NSW and WA had produced few criminal convictions, but cost \$80 million and \$28 million respectively (Nixon 2004). A less explicit factor was government concern about the difficulty of controlling the outcomes of any royal commission, a recognised problem in light of the Fitzgerald, Kennedy and Wood royal commissions undertaken in Queensland, WA and NSW (see Weller 1994; Ransley 2001). As the crisis worsened, however, the government became more vocal in explaining that the Victorian Ombudsman already had most of the powers of a royal commission; then augmented those powers; then announced that the Hon Tony Fitzgerald QC had himself been commissioned by the Ombudsman to investigate the worst of the most recent corruption allegations (see Gilchrist & Bachelard 2004; Skelton & Shiel 2004; Lewis 2004).

The government's second, related response was to insist that the existing system of Ombudsman-supervised complaint investigation also rendered unnecessary any new permanent anti-corruption commission. As with the first call, it was supported by a variety of public figures and the Victorian Opposition – until the crisis worsened. The government nevertheless held to its basic position, but progressively strengthened its responses. In March 2004, the Premier announced that George Brouwer, a former head of the Victorian Premiers Department, would become the new Ombudsman; in April that the Ombudsman's budget would be boosted by \$1 million per annum (from \$3.5 to \$4.5 million) with enhanced powers; in May that his powers would be enhanced yet further still; and in June, in tandem with Tony Fitzgerald's retainer, that the Ombudsman's resource boost would be \$10 million rather than \$1 million (taking the office from around 30 to a total of around 100 staff) (see Bracks 2004; Victorian Parliament 2004a&b). Despite criticism, the necessary measures were passed unanimously by the Victorian Parliament in May and June 2004.

Calls for additional institutional reform remain strong. At the height of the crisis, media opinion polling reported 81% of Victorians as supportive of a royal commission or similar independent body, and only 16% against. However 67% also agreed that police corruption was limited to "a few bad apples" and 73% rated Victorian police corruption as comparable to the problem in other states (Gray et al. 2004). Victorian Police also finally moved to arrest major protagonists in the gangland war, and the Victorian Ombudsman promptly completed its report on the major police corruption investigation already in progress – Operation CEJA – with a forceful endorsement of the government's approach:

Current calls for some form of standing anti-corruption body in Victoria often overlook or ignore the fact that the Ombudsman's office under its legislation has demonstrated over many years its capacity to perform this function. Much of the current debate reflects a poor understanding of the nature of the Victorian Ombudsman's office and its record. The Victorian Ombudsman has for many years been inextricably involved in the uncovering and investigation of police corruption in Victoria. The current system, which harnesses the investigative resources of police via the police Ethical Standards Department and special task forces like CEJA, has achieved as much – and probably more – than any Royal Commission or standing anti-corruption commission in Australia. ... A properly funded and empowered Ombudsman performs precisely the role of an anti-corruption commission (Ombudsman Victoria 2004: 1-2).

At time of writing, the Victorian Government appears to have weathered the crisis. However the debate tended to leave unresolved, in the minds of many, what the relative longer-term strengths and weaknesses might be of the very different institutional arrangements being consolidated by different states. This broad question was also explicitly elevated to a national scale by a related federal decision in June 2004.

### *Integrity and the Commonwealth*

Tensions over the Victorian Government's institutional decisions were made a national issue on 16 June 2004, when the Commonwealth Attorney-General and Minister for Justice jointly announced that the federal government would establish an independent anti-corruption commission to oversee the Australian Federal Police, Crime Commission and Customs Service. This would be "an independent national anti-corruption body... with telephone intercept powers which, if required, would be able to address corruption amongst law enforcement officers at a national level" (Ruddock & Ellison 2004). Little further detail was announced, but the federal Opposition confirmed it would support the decision or, if elected, do the same.

The federal announcement followed on two events. First, the Victorian Government had applied to the federal government to grant federally-regulated telephone interception (phone tapping) powers to the Victorian Ombudsman, in line with his enhanced powers to investigate corruption in the same manner as other states' anti-corruption commissions. However members of the federal government from Victoria had lobbied the government to support the Victorian Opposition's call for a royal commission and/or anti-corruption commission, in preference to the Victorian Government's response of strengthening the Ombudsman. In line with the political fact that the Liberal Party was in government federally, but in opposition in Victoria, the federal government took the opportunity to reject the Victorian Government's request and endorse the principle that Victoria should instead establish an anti-corruption commission. The stated reason was that the Victorian Ombudsman was responsible for monitoring how the Victoria Police used such phone tap powers, creating a conflict of interest if the Ombudsman's office itself also had such powers. However the political message could not have been clearer:

...if Victoria was to raise a properly-formulated independent Commission - similar to those in WA, New South Wales and Queensland - the [federal] Government would move quickly to confer telephone intercept powers on this body (Ruddock & Ellison 2004).

The Victorian Government rejected this federal encouragement – or blackmail, depending on one's perspective – as party-political interference. However, the second aspect of the federal decision also further reinforced the general principle that every government should possess such a body, in addition to or irrespective of its Ombudsman, not least because this was what the federal government was announcing itself. Two days earlier, a national television current affairs program (ABC Four Corners) had aired that the Commonwealth Ombudsman was oversighting a review by the Australian Crime Commission (ACC) of alleged corruption by two state police officers while seconded to the federal government. In



other words, media reports were highlighting that the federal government's anti-corruption institutions were the same as those of the Victorian Government, which the federal government was now trying to criticise. Therefore the policy solution clearly hit upon by the federal government was to change its institutions to more closely match those in NSW, Queensland and Western Australia, and differentiate itself from Victoria (and Tasmania, and to a lesser extent South Australia).

The knee-jerk nature of this federal political response is emphasised by the fact that the federal government itself had previously considered exactly the same question some years earlier, but had determined to leave the institutions as they were. As far back as 1991, a review of the Commonwealth Ombudsman's office by the Senate Standing Committee on Finance and Public Administration had recommended a higher profile and increased resources for major investigations, so as to increase the Ombudsman's capacity to contain corruption and oversight the Australian Federal Police (AFP). These resources were provided in 1992-1993 and then further enhanced in 1994-1995, in a manner not dissimilar to the strengthening of the Victorian Ombudsman. Then, in a prelude to the 2004 events, corruption allegations about the AFP were aired in the NSW Wood Police Royal Commission in 1995-1996, leading the federal government to commission its own smaller inquiry into AFP corruption by Mr Ian Harrison QC; and to ask the Australian Law Reform Commission to recommend whether institutional changes were needed.

These 1996 reviews resulted in a divergent opinions. The Australian Law Reform Commission recommended that a new national anti-corruption body was needed to oversight the AFP and National Crime Authority (predecessor to the ACC), to be called the National Integrity & Investigations Commission (ALRC 1996). However the Harrison inquiry generally endorsed the existing system of investigation oversight by the Ombudsman, and the Ombudsman (and others) argued strongly that with more resources to conduct a higher number of independent investigations, the existing system would be adequately strengthened. The federal government chose not to implement the Law Reform report, and left these functions with the Ombudsman, despite also providing no new resources (indeed under budget cuts in 1996-1997, resources were withdrawn).

In 2004, when announcing a reversal of this position, the federal government made no reference to the earlier decision nor to the Australian Law Reform Commission report, though this would have supported its case. The varying opinions in 1996 had left unresolved some of the major questions about the best federal institutional framework, but so too the June 2004 decision – like the Victorian situation – tended to raise as many questions as it answered. No substantial case or justification for the new body was in evidence, other than the political imperatives described above. Indeed the new body seemed to be needed only as a 'contingency', since, like the Victorian Ombudsman, the Commonwealth Ombudsman promptly completed its independent review of the corruption allegations without problem (Commonwealth Ombudsman 2004).

There is thus ongoing uncertainty about the basic need for such a body, especially if limited to law enforcement. Moreover there is evidence of uncertainty elsewhere in the country. For example, unlike its Victorian and federal colleagues, the Queensland Opposition continues to see the Crime and Misconduct Commission as a "multimillion-dollar joke... that couldn't track an elephant through snow" (May 2003; see also Preston et al 2002: 177-8), an attack duly quoted by members of the Victorian

Government in the recent crisis (Victorian Parliament 2004b: 12). Similarly, in May 2004 the NSW Parliamentary Standing Committee on the ICAC recommended an independent review of that Commission, concerned it had lost its way (see Smith 2004). While the federal government stated as an apparently uncontested principle that only “a properly-formulated independent Commission” should undertake corruption investigations and not an Ombudsman, it is not clear that such a principle has really been established.

How, then, might the institutional choices created by strengthened integrity demands be more reliably considered and resolved? The remainder of the paper attempts a way forward by separating out the two main questions running through these debates, both fundamental to assessing the relative capacities of different options. First, we more closely examine the level of basic financial resources available to the bodies in question, to see what light this might throw on the capacities of current models, irrespective of other considerations. Second, we identify the key issues of focus, skills and powers that need to be worked through for more sensible decision-making about integrity institutions.

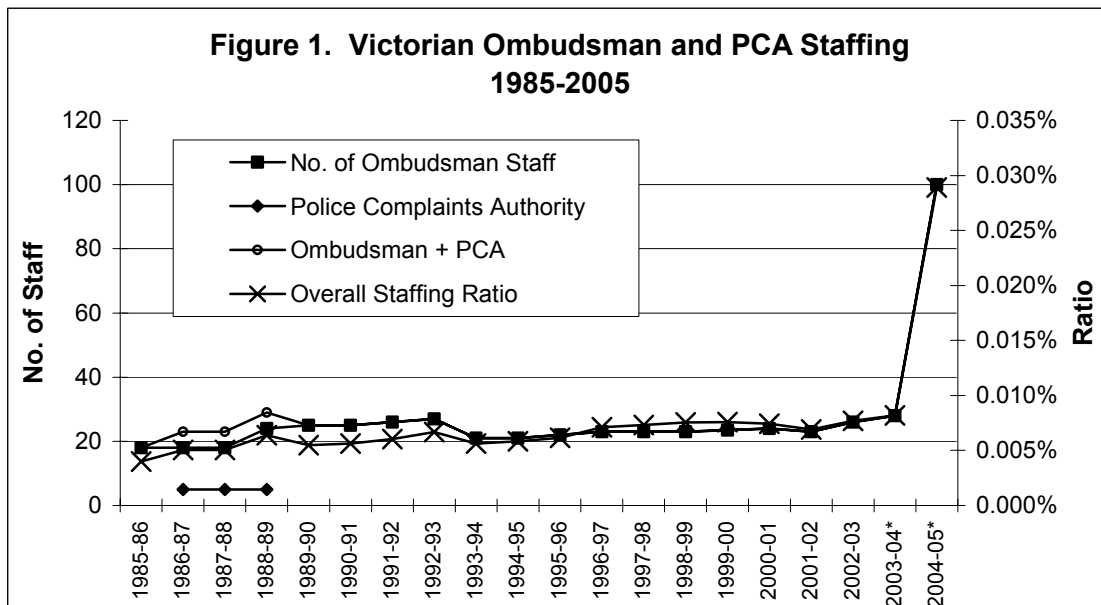
### **The Basics of Capacity: Comparing the Resourcing of Key Integrity Agencies**

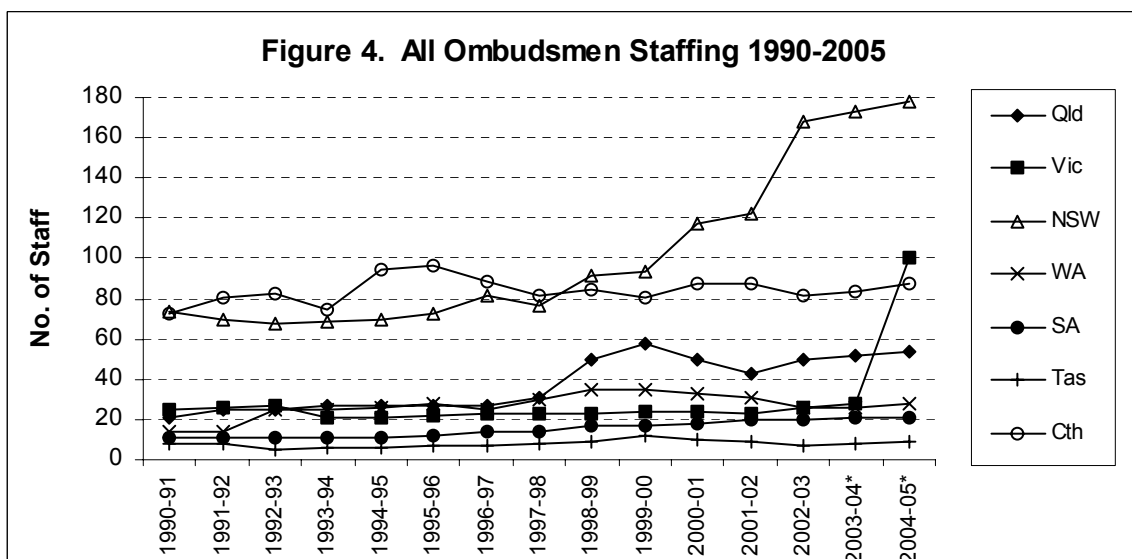
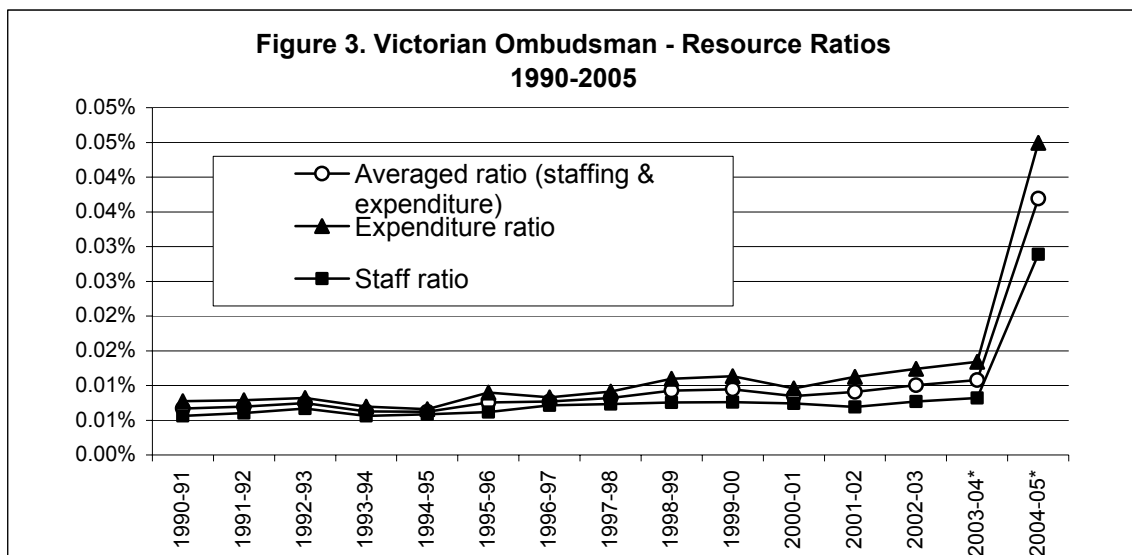
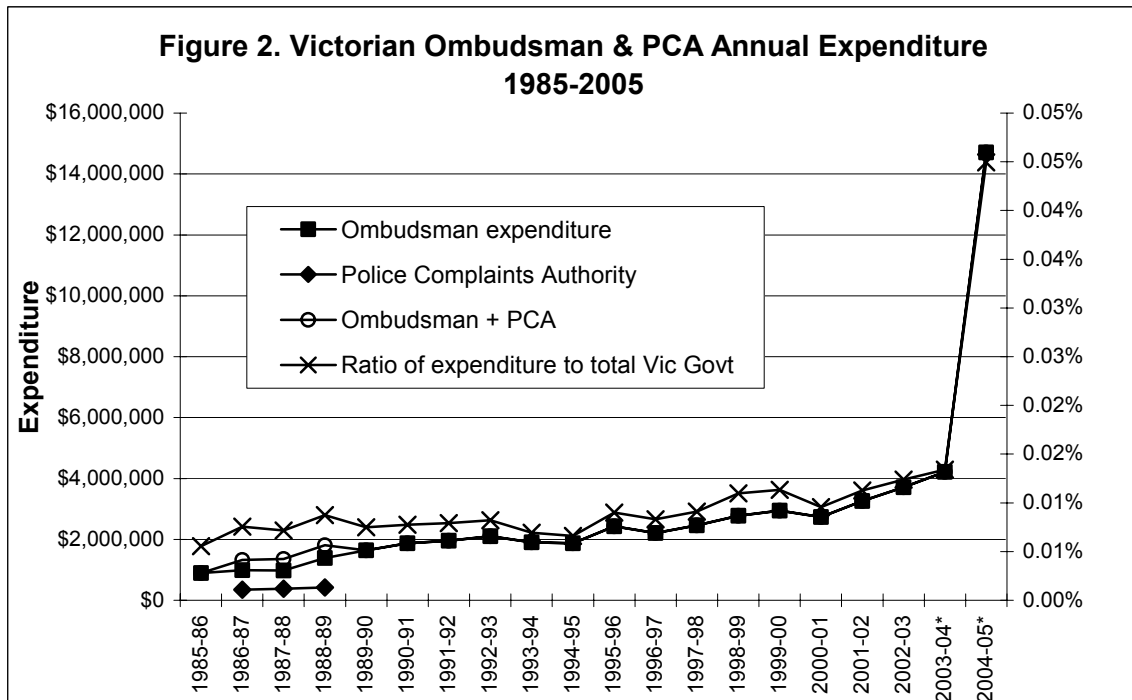
Throughout public administration, a fundamental measure of institutional capacity is the number of staff and level of financial resources commanded by a given agency. As much is obvious from the above, with increases of resources commonly targeted – and even granted – as the first solution to alleged deficiencies in capacity. To date, however, public debate over the optimum level of resources has been limited to fairly crude comparative analysis of the current raw budget and staffing figures of different agencies from within different governments (e.g. Bottom & Medew 2004). Since no two jurisdictions are alike in the terms of financial or staffing size, and already possess different institutions, this raw comparison provides few helpful insights. Nor does a current snapshot provide much information about how institutional capacity might be faring over time. For example, it might be currently high but in rapid decline, or currently low but on a rapid rise.

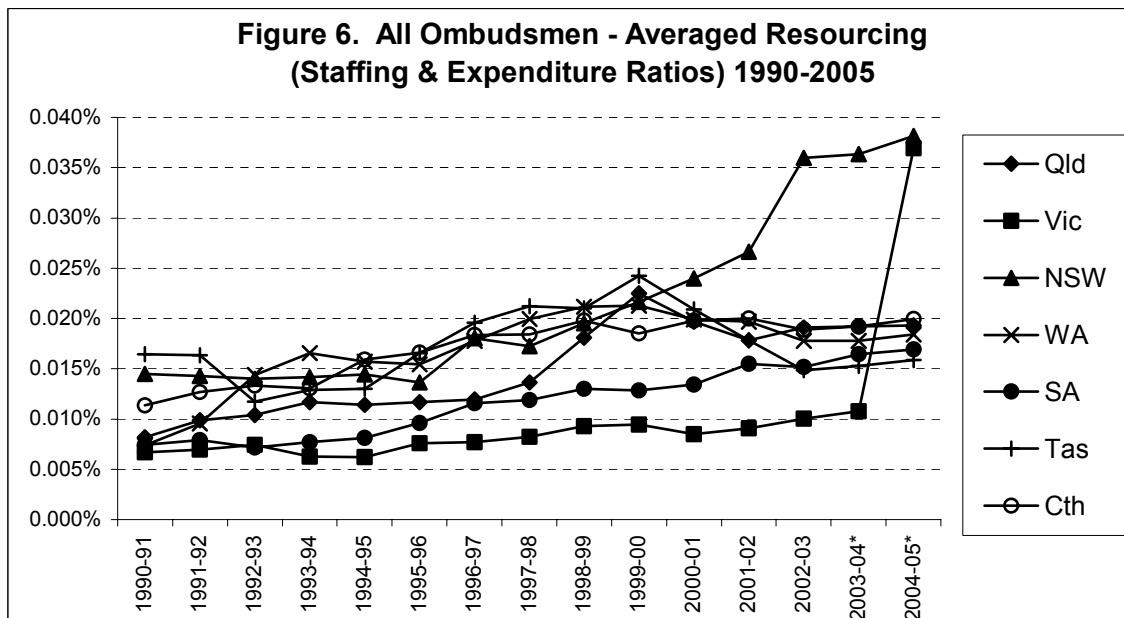
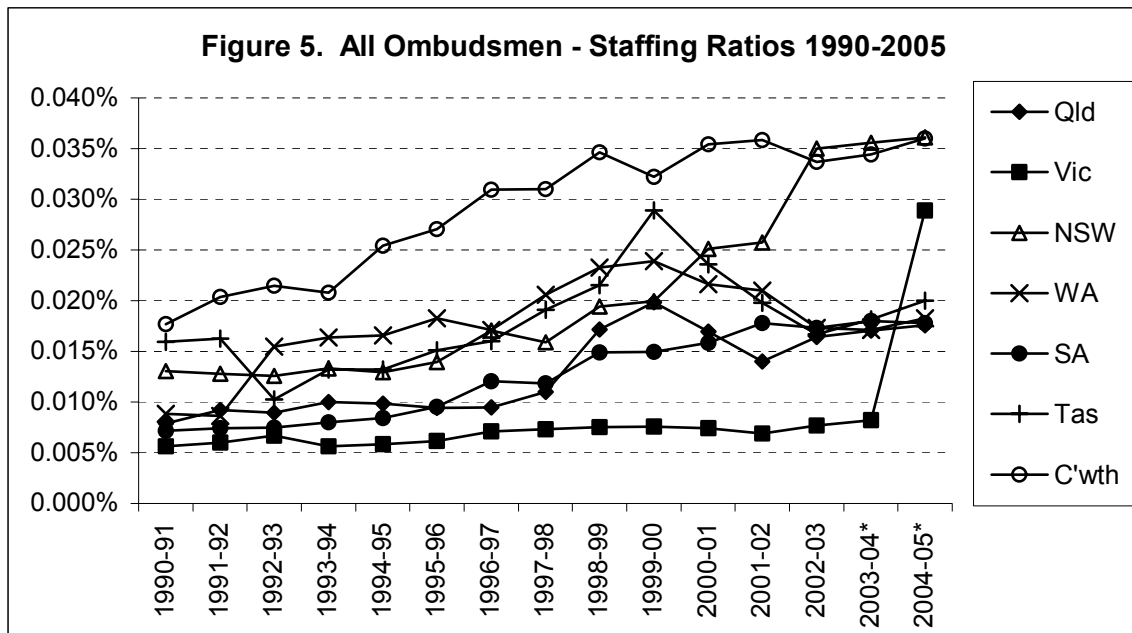
For more useful insights, we determined to compare only like bodies, or roughly comparable groupings of bodies; to seek information on their resourcing over time; and to compare their resourcing as a proportion of the size of the relevant jurisdiction as a whole, rather than as raw figures. Resources are usually measured in terms of either staff numbers or total financial resources. While these usually correlate (i.e. most resources are usually spent directly on staff), this is not necessarily guaranteed; for example, an agency might theoretically have few staff, but substantial financial capacity that allows it to cost-effectively outsource investigation activity to forensic accountants. To cater for this theoretical possibility, we compiled information on both staffing and total financial resources, as well as presenting these separately, to also present an aggregate picture based on a simple averaging of the two ratios (staffing and finances). In each case, the level of comparability is still only approximate because total staffing or budget figures for the entire jurisdiction do not necessarily correlate to the exact jurisdiction of each particular agency. Nevertheless comparing these ratios is a clear improvement on comparing raw figures. Detail on the data used is at Appendix 1.

Figures 1-3 demonstrate this approach using the Victorian Ombudsman's office. *Figure 1* shows Victorian Ombudsman staffing from 1985-2005, also showing the staffing of the short-lived Police Complaints Authority in the 1980s. The left axis shows raw staff numbers, while the right axis presents the overall staffing ratio (the number of Ombudsman staff as a proportion of total number of Victorian Government staff for that year). *Figure 2* shows the same data for financial expenditure. *Figure 3* simply repeats the two overall ratios from Figures 1 and 2, and demonstrates the averaged ratio as a combined indicator of relative staffing and finances together.

Figures 1-3 show clearly the relatively static situation of the Victorian Ombudsman, until the recent dramatic expansion. Given the amount of public sector change and accountability challenges confronting all Australian governments, this picture seems consistent with a degree of stagnation followed by the major shock of recent debates. Figures 4-6 show similar results, but for all state and federal ombudsmen's offices. *Figure 4* shows the raw numbers of staff in each office over the period 1990-2005. The recent expansion of the Victorian Ombudsman shows clearly, jumping from a very small office to the nation's second largest, overtaking the Commonwealth Ombudsman.





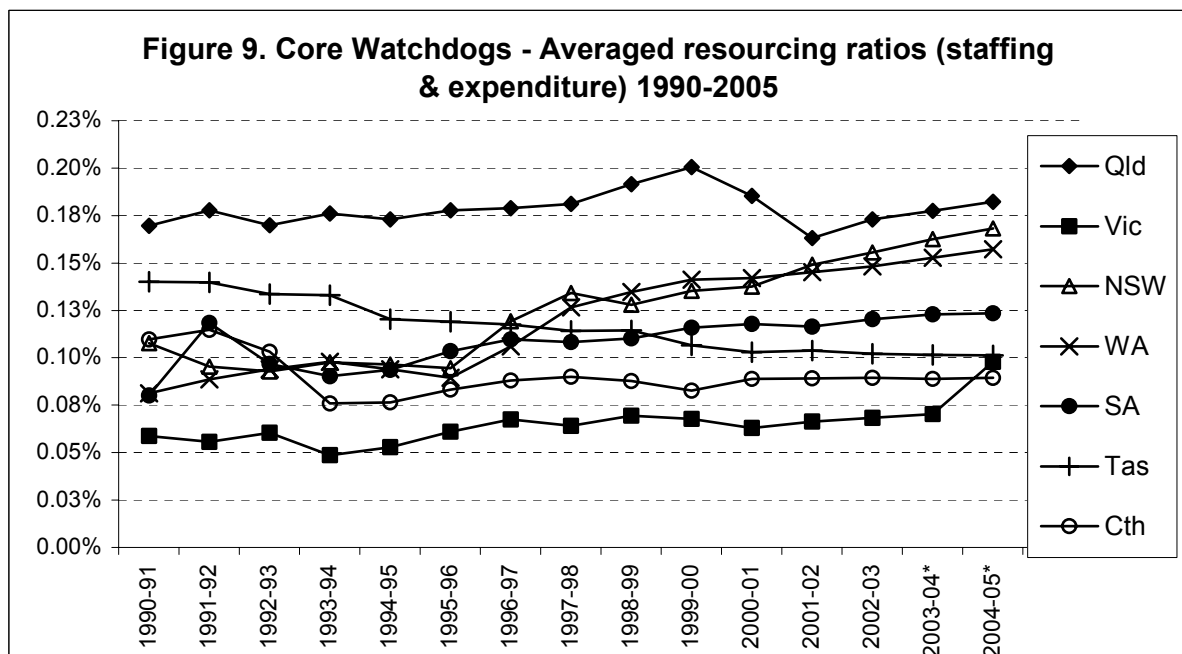
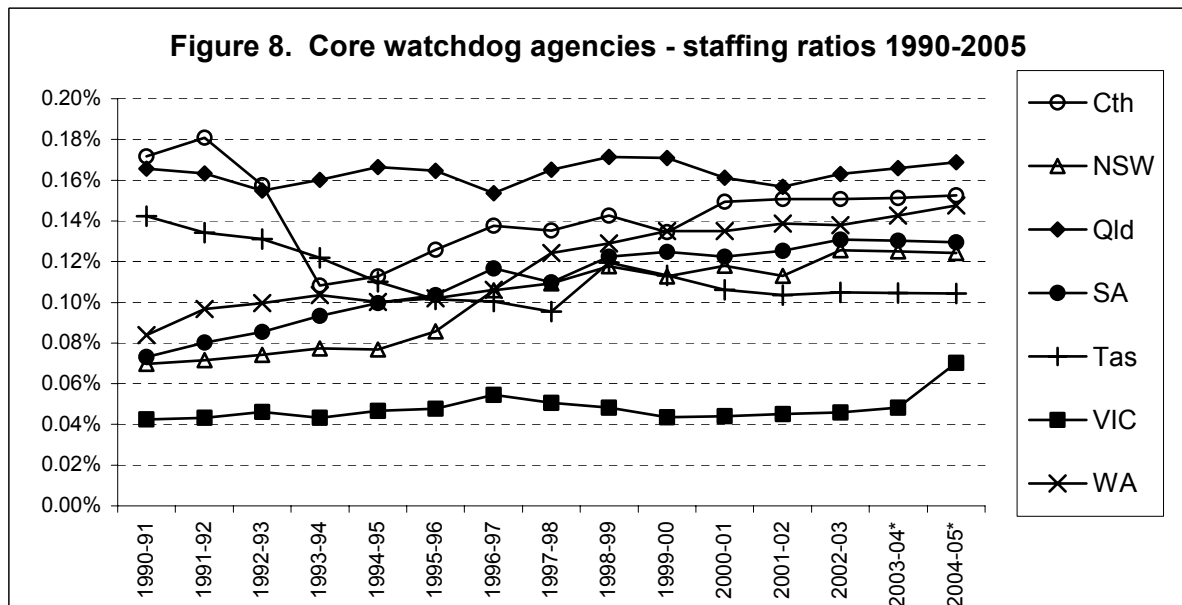
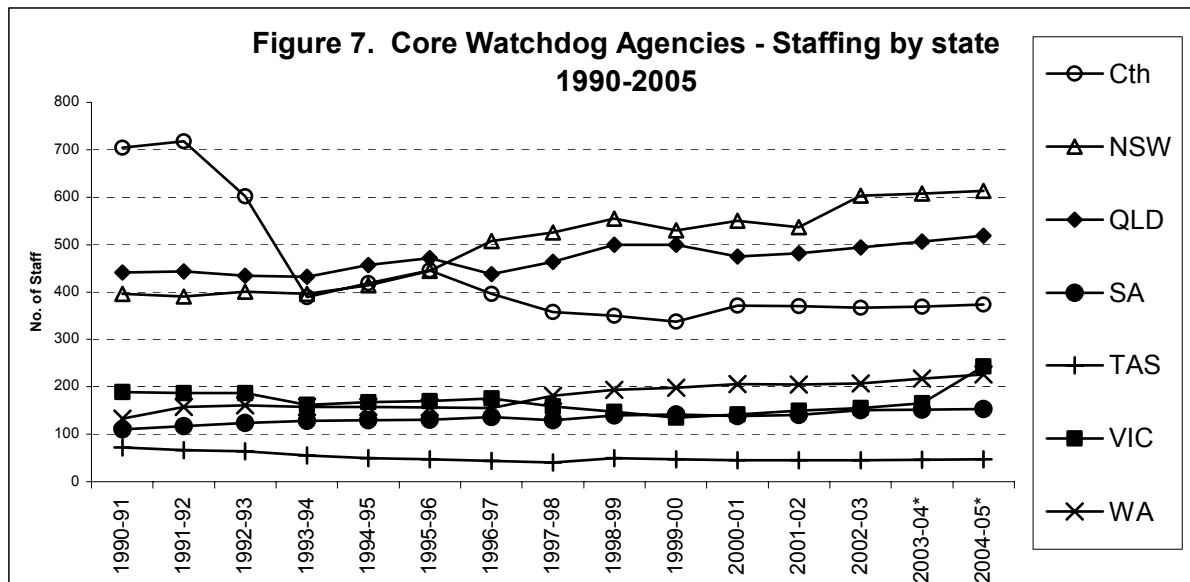


However one of the immediately striking features is the degree of change in some other ombudsmen's offices, especially the growth of the NSW and Queensland Ombudsmen, and apparent fluctuation of the Commonwealth Ombudsman, as against static resourcing for the remainder. *Figure 5* shows more precisely how these staffing levels compare, taking each as a ratio of total public sector staff for that jurisdiction. This confirms that the Victorian Ombudsman's office was definitely languishing relative to its equivalents until its recent injection; while NSW has caught up with the Commonwealth Ombudsmen as the traditionally best staffed office. South Australia, Western Australia, Tasmania and Queensland are all staffed at a similar level, but on a pro rata basis less than half that of the larger offices. *Figure 6* reflects the averaged resource ratios based on both staffing and expenditure. It highlights that the Victorian Ombudsman is now also predicted to be fairly cash-rich, bringing its average up to that of NSW; but that despite its strong staffing, the

Commonwealth Ombudsman's office appears relatively cash-poor, taking its average down to that of less populous states. These contrasts clearly deserve further study.

While these figures enable us to compare ombudsmen, we established earlier that such a comparison does not provide conclusive insights into the relative capacity of different governments independent integrity agencies overall. This is because in some jurisdictions the Ombudsman must also fulfil tasks that in others are performed by one or more additional agencies. Figures 7-9 attempt some insights into a larger comparison – how jurisdictions fare in a comparison of all the resources put behind all their core 'watchdog' bodies together. These graphs show staffing and expenditure results for all the bodies in Table 1, not including crime commissions or, in the case of Queensland and WA, our best estimates of the crime commission components of their corruption commissions. Table 2 details the agencies included.

Here the results are again dramatic. *Figure 7* shows the raw numbers of staff held by all these bodies. The significant drop in Commonwealth integrity staffing is owed to major downsizing of the Australian National Audit Office in the early 1990s; while Queensland overtakes the Commonwealth as the nation's second largest integrity sector, and Victoria's enlarged Ombudsman's office begins to look less dramatic. This is clearly borne out by *figure 8* which shows the same staffing numbers as more directly comparable ratios; and *figure 9* as an averaged ratio of both staffing and expenditure. NSW may have the largest number of independent bodies, and the best staffed Ombudsman, but ranks only mid-field for total resources. For the Commonwealth, the combination of a fairly strong Ombudsman and strong Audit Office means a strong ranking even with just two main bodies, and no anti-corruption commission such as possessed by its nearest colleagues, Queensland and WA. Most significantly, Victoria stands out as clearly still possessing the nation's weakest independent integrity resources, notwithstanding the boost to its Ombudsman's office which looked so promising in figures 5 and 6. However as the comparisons with Tasmania and the Commonwealth show, this is not necessarily because Victoria has no anti-corruption body, but because its Auditor-General is also comparatively weak. *Figure 9* does begin to suggest, however, a common feature of those jurisdictions without anti-corruption bodies – the averaged resourcing ratios incorporating expenditure, as well as staffing, again pull the Commonwealth down even lower than Victoria. Despite having strong staffing, therefore, these particular integrity systems appear to spend less than their colleagues on a pro rata basis, possibly indicating their lower proportion of independent and proactive investigations.



**Table 2. Agencies included in Figures 7-9**

<b>Jurisdiction</b>	<b>Agency</b>	<b>Years</b>
Commonwealth	Ombudsman	Whole period
	Australian National Audit Office	Whole period
NSW	Ombudsman	Whole period
	Audit office	Whole period
	ICAC	Whole period
	Police Integrity Commission	From 1996/97
Qld	Ombudsman	Whole period
	Audit office	Whole period
	CJC/CMC	Whole period
SA	Ombudsman	Whole period
	Audit office	Whole period
	Police Complaints Authority	Whole period
Tasmania	Ombudsman	Whole period
	Audit office	Whole period
Victoria	Ombudsman	Whole period
	Audit office	Whole period
WA	Ombudsman	Whole period
	Audit office	Whole period
	OCC/ACC/CCC	Whole period

Overall, resourcing appears to be a legitimate measure of the state and worth of the different integrity institutions of different governments. It confirms that the Victorian Government may still have a problem persuading its electors that their integrity bodies are on par with other jurisdictions, even with recent expansion of the Ombudsman's office, because overall the resourcing of the sector appears still comparatively low. However these comparisons also show that the answer is not necessarily to create more integrity bodies, because the jurisdiction with the most watchdogs – NSW – still has a lower proportion of staff dedicated to these functions overall than some jurisdictions with only three or two organisations. One of the reasons why the Commonwealth may continue to fare fairly well on the integrity front, is that its core institutions remain comparatively well resourced, at least in staffing terms, even though they have a relatively simple and traditional configuration. In other words, the capacity of integrity institutions may hinge more on commitment to appropriate levels of resourcing overall, in the long-term, than creation of a new institution every time a problem appears.

### **Broader Institutional Choices: Roles, Powers, Skills and Relationships**

The second main question running through current debate, fundamental to assessing the relative capacities of different institutional options, is whether or when these options should hinge on issues of focus, skills and power. The Victorian Government's decision to boost the Ombudsman's resources appears clearly justified, in comparative terms; and indeed some further expansion may well be justified, along with expansion of the Victorian audit office. But what of claims that no ombudsman, no matter how well resourced, has the right power or organisational focus to investigate corruption? Conversely, there may be good reasons for the



Commonwealth Government to build its integrity capacities by creating a new federal anti-corruption commission; but what then do we make of the lack of evidence that, particularly if better resourced, the Ombudsman does not already have the necessary skills and legal powers to do the job?

These questions demonstrate that if particular institutions provide the key vehicles or cornerstones of public integrity systems, we must also be clear about the questions and issues they are intended to address, along with the powers to do so. Rather than attempting a definitive answer to current institutional choices, we want to briefly highlight the range of institutional design issues caught up in current debate. Once broken down, these issues show not only that the choices are more complex than recent media reporting or political announcements tend to suggest, but that through careful deliberation, it may be possible to identify new or different institutional options, rather than presuming that the answer lies simply in copying a particular institution from another jurisdiction. In all, eight different further questions intersect in the present debate.

### *Public versus less public approaches*

As discussed, one of the major institutional choices in response to any scandal is the establishment of a royal commission or one-off special inquiry. Royal commissions have been very useful in identifying systemic problems, changing the political agenda, and clearing the decks for major institutional reforms. This option is always likely to remain valid wherever public confidence in responses to integrity scandal is dependent on a comprehensive public cleansing process, or there is substantial lack of public confidence in existing institutions. Public outrage and concern, assisted by media interest, will always have a valid role to play in forcing change (cf Tiffen 1999). By contrast the traditional methods of Australian ombudsmen have been informal and often low profile, despite having a quite good performance record (see e.g. Mulgan & Uhr 2001: 159).

However it is important to note an increasing area of 'middle ground' in the integrity system. Recent royal commissions have tended to recommend similar reforms, giving governments an increased idea of what such an inquiry might recommend were it established, and thus giving some validity to the option of jumping straight to the solutions. More importantly, standing commissions such as the Queensland Crime & Misconduct Commission have power and capacity to conduct public hearings and act as royal commissions, as demonstrated by both the recent Shepherdson electoral fraud inquiry and Childrens' services inquiry. Once established, therefore, such bodies should be able to reduce the need for one-off commissions. Finally, ombudsman legislation also typically empowers ombudsmen to investigate as they see fit. This has already enabled ombudsman to conduct a higher proportion of independent investigations, interviewing witnesses on oath, compelling the production of evidence, and issuing public reports. It should not be assumed that ombudsmen could not also hold public hearings if required. While the demand for a major public inquiry might be valid, therefore, it should not be assumed that royal commissions are the only appropriate vehicle for conducting them.

### *Internal versus external review*

No matter how powerful the investigative capacity of 'independent' integrity bodies, public integrity systems will always rely heavily on good internal investigation capacities within public agencies. This reality is both unavoidable, from a workload perspective, and desirable given the need for agency management to take as much responsibility as possible for its own ethical climate and responses. As emphasized by the 1996 Australian Law Reform Commission inquiry and 2000 review of the Queensland CMC, the key issue is the relationship between these functions, hinging on when line agencies are required to notify central agencies of complaints or problems, when line agencies' procedures and capacity can be recognized as sufficient to handle some or all complex matters, and when central agencies have capacity and procedures in place to become promptly and directly involved, including conducting a fully independent inquiry.

Here again, therefore, the institutional answer is not 'black or white' – not a question of *all* internal complaint-handling or *all* external scrutiny – but an appropriate balance. It is important to note that some anti-corruption commissions were established as entirely independent, but have since spent years building relationships and capacity within agencies in order to pass back responsibility for much investigation work, reserving their own powers and resources for serious matters. On the other hand, ombudsmen tended traditionally to rely heavily on agencies' internal capacity, but in recent years have tended to develop their own independent capacity (while still preserving relationships). There is an obvious point of convergence in these trends, which again points to similarities in the capacities that are needed in such bodies, not stark differences.

### *Reactive versus proactive inquiries*

A major recognized need is the ability of independent integrity bodies to be proactive, in identifying issues that require investigation, and then formally in their ability to initiate investigations. In serious integrity matters, this now extends to the ability to conduct clandestine operations and 'integrity testing'. On the other hand, integrity bodies also need to rely on referrals from external sources, including complaints from the public, to identify matters for investigation. Citizens' rights to have their complaints heard by an independent reviewer or arbiter has been particularly fundamental to the traditional role of ombudsmen, and thus forms the main basis for some of the strongest criticism:

Ombudsmen's offices are complaint bureaux for dissatisfied citizens. They are incapable of dealing with organised corruption. Corruption is a consensual crime. Both parties to the arrangement are unlikely to complain -- illegal gain flows to the police officer while criminals are unhindered in their pursuits. By the time, if ever, the matter is manifest as a complaint, the problem has usually assumed serious proportions (Le Grand 2004).

However, in our view this criticism is based on an inappropriately 'black and white' approach to institutional design. Ombudsmen have usually long possessed power to initiate investigations of their 'own motion', and thus are legally empowered to act proactively as well as reactively. This capacity was recently added to the Victorian Ombudsman's police powers (Victorian Parliament 2004a). Ombudsmen also

increasingly monitor complaint trends and public debate to identify systemic issues that call for investigations or recommendations going beyond individual complaints. Similarly, contrary to Le Grand's suggestions above, anti-corruption bodies themselves rely heavily on official complaints from a wide range of sources, even if this is also married with a range of other intelligence. Corrupt practices *do* often come to light through external complainants, particularly whistleblowers and informants.

The real question, therefore, is whether the organization has access to the information necessary to trigger inquiries, and the ability to assess that information correctly, as well as the available resources and skills to proceed with an investigation. These issues remain just as valid for any anti-corruption commission, as demonstrated by the recent call for review of the NSW ICAC. Moreover, in circumstances where line agencies are already taking an appropriately proactive approach to integrity issues themselves – as in the case of the integrity testing now conducted by all Australian police services (see e.g. Homel 2002) – there is a valid question as to whether independent agencies need to replicate such efforts, or simply monitor those already occurring. Certainly integrity bodies need to have the power, ability and responsibility to undertake proactive inquiries, but assumptions that ombudsmen's offices necessarily lack these – or than an independent commission by its nature automatically possesses them – may be false ones.

#### *Horizontal jurisdiction: agency-specific versus sectorwide review*

A fourth design issue, fundamental to agency capacity, is when oversight bodies should be charged with ensuring integrity only in certain sectors of government, rather than having a mandate to uncover maladministration or corruption wherever found. In NSW, for example, the Police Integrity Commission was established with a clearly agency-specific focus, and similarly, the Commonwealth proposal for a national anti-corruption commission remains limited to law enforcement agencies (police, crime commission and customs). Even institutional responses to maladministration or other complaints must confront this question: for example, when a separate Health Care Complaints Commission is needed as well as an Ombudsman. In Victoria, will the recent focus on police accountability see the bulk of new resources devoted to police oversight, possibly at the expense of the need for increased anti-corruption capacity in other sectors? At a Commonwealth level, wouldn't the creation of a law-enforcement watchdog mean a need for the Commonwealth Ombudsman to continue to build anti-corruption capacity for dealing with other sectors, otherwise left unattended? These questions point to the need for a more general, ongoing assessment of where the volume of corruption risks lie and how resources can be most efficiently configured to deal with them.

#### *Vertical jurisdiction: limited versus expansive jurisdictions*

A related question to that of agency-specific or sectorwide jurisdiction, is the question of jurisdiction defined by political seniority or constitutional hierarchy. Here Australian ombudsmen's offices indeed have a major formal limitation by comparison with subsequent anti-corruption bodies. Ombudsmen's jurisdictions are defined by their ability to investigate 'matters of administration' involving

government officials from agency-heads down, therefore not including ministers, ministerial staff, politicians, or judicial figures. Even after the recent amendments, this remains the case for the Victorian Ombudsman (see section 13, *Ombudsman Act 1973* (Vic)). Anti-corruption bodies are usually empowered to investigate any public official along with any related persons (e.g. those suspected of corrupting public officials).

The fact that ombudsmen are constituted only to investigate 'matters of administration' is not necessarily a barrier to them taking on a comprehensive role. For example, it is now clear that suspected corruption or misconduct by public servants in the course of their official duties can be 'matters of administration', the Federal Court having upheld the Commonwealth Ombudsman's powers to publicly recommend disciplinary or, presumably, criminal charges as a result of an investigation (see *ATSIC v Ombudsman* 1995). The question is one of inappropriate limitation on which public officers or related private individuals might be included within investigations. This formal jurisdictional constraint, as opposed to rhetoric about the investigative incapacity of ombudsmen, may be a genuine barrier to the necessary legal capacity. However again, it may have a technical legislative solution rather than requiring the creation of another body.

### *Misconduct versus maladministration*

While ombudsmen may have the *power and skills* to investigate corruption or other misconduct, as well as more mundane matters of defective administration, there is a valid question as to whether it is in the public interest to dilute their capacity to investigate the latter by also giving them responsibility for the former. Some of the statistical analysis presented earlier, is consistent with the fact that while anti-corruption commissions may not have more staff than ombudsmen, their operations may be much more expensive. This may be a sign of the understandable complexity and resource-intensiveness of conducting the types of investigations designed to flush out corrupt officials and prepare evidence to support formally disciplinary or criminal prosecution, as against the simpler administrative remedies usually pursued by ombudsmen.

A valid reason for creating an entirely new institution, therefore, may be the need to not overload existing institutions with new responsibilities, nor distract them from an existing mandate. However this is only true if the new workload and staffing truly justifies a body of sufficient size to warrant legal autonomy, and one in which a 'critical mass' of skills and experience can be built up. If this is not the case, then the new agency may be small, weak in its own identity and culture, and prone to its own maladministration or corruption risks. This is one risk now facing the Commonwealth Government, if it proceeds to create a small anti-corruption agency whose need is not clearly established. A new option, suggested by the combination of crime and anti-corruption functions in a single body in Queensland and Western Australian, may be to combine different integrity investigation roles within one organisation, subject to a legislative charter that differentiates between the roles and maintains an institutional recognition of the need for such roles to be maintained and properly resourced. One suggestion publicly aired is that of a National Integrity Commission made up of two divisions, the major one being the existing Ombudsman's Office, and the new division being an anti-corruption division with

the necessary higher level of resources and legal skills needed to deal with corruption (Brown 2004). Such an option – not yet tried in Australia – could maximise synergies, efficiencies and ‘critical mass’ in Commonwealth investigative capacity while recognising the need for continuing differentiation between different functions.

### *Investigation versus research and policy*

Identifying and removing the ‘rotten apples’, whether in private firms, the police force, or public offices, is always a fundamental part of the required solution. This bringing of individuals to account for their actions has an important symbolic or demonstration effect, not to mention its place in the populist politics of moral hygiene. But beyond the removal of rotten apples, the enduring solutions are generally seen as centred on *institutional* arrangements to improve integrity *systems* and thus reduce the opportunities for corrupt behaviour in both the public and private sectors. A major institutional development in recognition of this broader reality has been the establishment of substantial research and policy functions within more recently established integrity bodies, including the CMC, ICAC and now the WACCC. These functions are customarily tied to integrity capacity-building and corruption prevention functions, which involve quite different capacities than those involved in basic investigation:

One of the risks inherent in any complaints system is that the processing of large volumes of complaints becomes the sole function. A concern with prevention, on the other hand, will lead to the integration of findings from investigations within a larger research-based risk management approach to integrity (Prenzler 2004: 109).

Unless the need for such capacity is recognised, current trends suggest that research and policymaking on workplace ethical standards tends to remain dominated by human resource management considerations, which tend to be more internal to the public service and less concerned with objective legal or external community standards across the broader field of integrity issues. Ombudsman’s offices can develop research and policy capacity, as demonstrated by the NSW Ombudsman’s office, but the pressure of high complaint loads can work against the type of institutional support that research, policy and resistance-building functions require. This suggests that these functions need to be built into the statutory objectives and structures of the integrity regime. The need for effective integrity research and policy-making capacity in some governments – including Victoria and the Commonwealth – has been a largely missing element in recent debate.

### *Who guards the guards?*

A final institutional design question relates to the accountability of integrity bodies themselves, or ‘who guards the guards’. The theory and practice of ‘horizontal accountability’ as a defining feature of modern integrity systems will be dealt with in another NISA paper. In recent debate, the question was made directly relevant by the Commonwealth Government’s decision not to approve phone tapping powers for the Victorian Ombudsman on the ostensible ground that the Ombudsman had statutory responsibilities to review the Victorian Police’s use of the same powers.

Similarly, the Commonwealth Ombudsman has responsibility for auditing the use of such powers federally, and this appears to have been a further reason why the Commonwealth announced creation of a new federal anti-corruption body, to have phone tapping powers of its own, presumably subject to audit by the Ombudsman.

Some of the confusion underlying the federal position, as announced, typifies the currently untheorised state of the answer to the question of who guards the guards. If the ultimate custodian remains the Ombudsman, who may need to investigate any complaint of corruption in the new body's use of its phone tapping powers, then presumably the Ombudsman should be entitled to access such powers itself if necessary. The question 'who guards the ombudsman' should presumably be answered, as it is in Queensland and NSW, by a special purpose parliamentary committee constituted for that purpose – but this is a missing feature at the Commonwealth level. Moreover, there are other unresolved similar questions in the Queensland and WA combinations of crime and anti-corruption commissions. In NSW, should the crime commission become corrupted by organised criminals, then separate independent bodies would investigate it – but in Queensland and WA, these bodies must be ready to investigate themselves. These issues highlight that there is some lack of logic to the current Commonwealth position, but that this is not untypical, again reinforcing the need for broader and more careful deliberation over the available institutional design options.

## **Conclusions: Assessing Integrity System Capacity**

This article has used recent debate over core or 'independent' integrity institutions in Victorian and Commonwealth governments to highlight some of the need, and the potential, for more thorough and careful deliberation over the institutional options on which much of the capacity of modern integrity systems depends. The first part of the analysis compared and contrasted overall resourcing of these institutions by Australian governments over the past 15 years. It confirms that basic staffing and financial resources are a legitimate basic measure of capacity, helping lift attention away from a 'knee-jerk' assumption that the creation of new bodies necessarily lifts capacity overall. However it also highlights that some jurisdictions – particularly still Victoria – may yet have some way to go if they wish to match the resources of other governments.

The second part of the analysis breaks down some of the institutional design issues currently lumped together in public debate, into eight intersecting but nevertheless differentiable considerations. Our conclusion is that by working through such issues in a more deliberate fashion, it may be possible for governments to identify new or different institutional options for configuring their independent integrity resources, in circumstances where the alternative may be to unnecessarily create a new body, overload an existing one, or import an institutional framework that does not necessarily 'fit'.

This analysis by no means covers all, or even most issues of capacity that confront Australia's integrity systems. It has focused only on public sector integrity institutions, whereas as noted at the outset, corruption and lack of accountability have also featured highly in the private sector in recent years. The collapse of major corporations has provoked debates on raising the standards for financial reporting,

public disclosure of full and accurate information, and the duties of directors in ensuring accountability. Further work needs to be done on comparative analysis of similar issues of institutional capacity in business and civil society integrity systems. Furthermore, institutional design is only part of the story of the capacity of integrity systems. Leadership, organisational culture and climate, and coherent relations between institutions are also important. Any full assessment of capacity must take these into account right across the board of public institutions, and not just in central agencies. As we have seen, issues of legislative power and political will to fight corruption are as important dimensions of system capacity as the staffing, finances and technical capacity of specialist integrity bodies.

As then-commissioner Tony Fitzgerald asserted with vigour, “there is no purpose in piecemeal solutions, which only serve to conceal rather than cure the defects in the existing system” (Fitzgerald 1989). The present need for Victoria and the Commonwealth, as it was then for Queensland, is a framework for more carefully assessing whether proposed solutions are piecemeal or will grow the overall capacity of the public integrity system in healthy directions. In the long-term, more sophisticated policy analysis is needed than has been evident in recent debate, on basic questions of institutional choice and design. Once this is achieved, it may also be possible to develop improved, broader methods of assessing integrity system capacity, sensitive to the continuing innovation and reform needed to tackle modern accountability problems.

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## Appendix 1

### Notes Accompanying Figures 1-9

#### Data Sources

Unless otherwise stated, raw staffing and financial expenditure data is as published in the relevant annual reports of the agencies. Total public sector staffing for each government for each year, and total expenditure for each government each year was compiled for Griffith University by the Australian Bureau of Statistics.

\*All 2003-2004 and 2004-2005 figures are estimates based on reported changes in budget (e.g. for Victoria and Western Australia), or standard extrapolation on current trends.

#### *Figures 1 & 3*

PCA: Figures for 1987-88 and 1988-89 are estimates only due to unavailability of PCA annual reports (not ordered for print in Victorian Parliamentary papers).

Ombudsman: In 2004-2005 it is projected that the Victoria Ombudsman's Office will increase its staffing level to approximately 100 staff. Figures include this projection. Staffing figures from 1993-94 and 1994-95 were obtained through telephone conversation with Mr. Peter O'Grady (senior investigator Victorian Ombudsman).

#### *Figures 2 & 3*

Ombudsman: In 2004-2005 it is projected that Victoria will receive \$10M additional funding for the Ombudsman's Office. Figures include this projection. 2002-2003 expenditure includes resources given free of charge, p104. All other years it was not specified if this applies.

### **Figures 4-6**

**Queensland:** 1999-2000 and 2000 and 2001 staffing figures were manually counted from the Queensland Ombudsman organisational chart. 1990-97/98 staffing figures were obtained from 1998/1999 annual report page 9. 2001-2002 and 2002-2003 staffing figures were given in terms of 'permanent staff' as opposed to full time employees.

**Tasmania:** 1997-98, 1998-99 and 2000 and 2001 staffing levels are estimates due to unavailability of annual reports. The figures are estimates on surrounding trends. 1995-1996, 1997-1998 and 1998-1999 expenditure are estimates due to the unavailability of annual reports. The figures are estimates on surrounding trends.

### **Figures 7-9**

**Victoria:** Audit office staffing. All figures include both 'audit office' staff and 'audit Victoria' staff, even though they were officially separate bodies until 1998-1999.

**Queensland:** Audit office staffing: 1994-1995 staffing level was taken from a manual count of the organisational chart for that year. CJC/CMC: Figures are based on 'established positions'; 1999-2000 staffing level was taken from a manual count of the organisational chart for that year; figures treat CJC/CMC as a continuous body, but staffing is minus the *Crime Division staffing* for reasons given in the text. The separate staffing figures were obtained from the 2004 *Three Yearly Review of the Crime and Misconduct Division*,

[www.parliament.qld.gov.au/comitees/Comdocs/Pcjc/PCMC64.pdf](http://www.parliament.qld.gov.au/comitees/Comdocs/Pcjc/PCMC64.pdf)

**New South Wales:** Audit office staffing: Staffing figures prior to 1993-1994 were taken from 30 November, after this date 30 June was the recording date.

**South Australia:** Police Complaints Authority: Staffing figures were appropriated directly from the office of the Police Complaints Authority.

**Western Australia:** ACC/OCC staffing: 1998-1999 staffing level was an estimate based on current trends. Staffing levels for 2003-2004 and 2004-2005 for the Crime & Corruption Commission were extrapolated using original figures of the ACC, rather than total envisaged budget of the CCC (division 29 of page 490 of the public reports) for reasons given in the text, i.e. the need for figures not to include crime as opposed to corruption functions. This is therefore a hypothetical representation.

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