

Sixth Australian Public Sector Anti-Corruption Conference

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*The Commonwealth Ombudsman's Role in Australia's Integrity  
Framework: Michael Manthorpe PSM, Commonwealth Ombudsman*

Good afternoon delegates and thank you for the opportunity to speak today.

Before I begin, I'd like to acknowledge the Traditional Owners of the land on which we meet today, the Gadigal people of the Eora nation, and their continuing connection to land, culture and community. I would also like to pay my respects to Elders, past and present.

I'm very pleased to welcome two of my fellow Ombudsman partners to this conference:

- Professor Amzulian Rifai, Chief Ombudsman of the Ombudsman Republik of Indonesia; and
- Mr Michael Dick, Chief Ombudsman of the Ombudsman Commission of Papua New Guinea.

It's wonderful to have these two international guests with us and I'm sure they've gained some valuable insights over the past two days.

I know we're getting towards the end of what's been a very busy conference program.

However, I believe the theme of our discussions this afternoon — agency effectiveness to respond — is crucial to combating and preventing corruption in the Australian public sector.

As Samantha Gavel and Chris Wheeler have just highlighted in their very informative presentations — good public administration requires effective oversight and judicial review. My Office is in the oversight business. We are not a front-line anti-corruption body per se, but we do have a part to play in spotting corruption risks and mitigating those risks.

So today I'd like to cover:

**Firstly**, the role the Commonwealth Ombudsman plays in promoting, encouraging and supporting good public administration.

**Secondly**, several specific functions that the Commonwealth Ombudsman performs that are integral to Australia's Integrity Framework.

**Thirdly**, in detailing these two areas, demonstrating how the work of the Commonwealth Ombudsman underpins effective agency responses to corruption.

And **finally**, outlining some of the future challenges for my Office as our functions continue to evolve.

Before that, please allow me to briefly introduce myself. As some of you might already know, I'm relatively new to the role of Commonwealth Ombudsman. When I was appointed to the role by the Commonwealth Government in May some observers expressed surprise that a long-time public servant had been appointed to a role that has usually been the province of lawyers, academics or people from a consumer advocacy or similar background. Some people wondered publicly whether a generalist career public servant could effectively and independently fulfil the role of Ombudsman.

Personally, I think I can but I suppose time and others will be the judge.

But what I can tell you is this. I enjoyed a fascinating career in the Australian Public Service. I ran programs, wrote policy, resolved problems, engaged with Ministers, the Parliament and stakeholders and led people. It was sometimes hard and stressful and crazy. Most recently I worked in the Immigration and Border Protection Portfolio overseeing 8 million visa, refugee and citizenship decisions a year, a topic area of intense operational tempo and relentless political debate; and before that in Education, Employment and Workplace Relations where I worked on everything from the insolvency of ABC learning to waterfront reform.

The Office of the Commonwealth Ombudsman's slogan is "to influence systemic improvement in public administration"....and that's what I've been trying to do my whole public service life.

That's not to suggest that I think the public service is perfect. Far from it. So I am so honoured – having worked in the system for 33 years to now have an opportunity to work on the system.

And I must say, that my first six months in this position have been just as fascinating as anything I've experienced before. Coming from where I did I was immediately struck by the independence – the genuine independence – of the role. No Ministers, or Senators, or their enthusiastic young staffers, or officials seek to direct what I do. Many are rightly interested but they do not direct.

This means I have considerable discretion to determine where to direct my energies and, to some extent, the energies of my hard working staff.

The work is remarkably diverse and the role is unique.

As Commonwealth Ombudsman, I am also the Ombudsman for: Private Health Insurance, Overseas Students, VET Student Loans, the Defence Force, Immigration, Law Enforcement and the Postal Industry.

I am also the Australian Capital Territory Ombudsman, a role that provides me with a shared platform and insight into the work of other state and territory Ombudsmen.

However, there is one common factor that all the work that comes through my Office seems to have.

That is — it presents us with an opportunity to promote, encourage and support good public administration across the public sector, and indeed in certain private sector areas.

When most people think of the Commonwealth Ombudsman, it's generally our **complaint handling role** that first comes to mind.

And indeed we do consider and investigate thousands of complaints from people who believe they have been treated unfairly or unreasonably by an Australian Government department, agency or prescribed private sector organisation.

Our complaint handling function is generally reactive. It's reliant on members of the public complaining about issues as they arise.

In this role, our aim is to resolve complaints impartially, informally and quickly.

We cannot override the decisions of the agencies we deal with, nor issue directions to their staff. We are able to compel agencies to provide documents and answer our questions.

What we can do, is highlight our adverse findings by making formal recommendations in public reports and to the most senior levels of government. And what we can do is work quietly but influentially with agencies to help them help themselves. Indeed I have really been struck by the depth of the knowledge in the Office about the big entities we deal with daily: Defence, Immigration, Centrelink, the AFP, Australia Post, the big health insurers, and equally struck by how through thoughtful engagement and evidence, drawn from complaints, we are able to influence what they do.

We can and do highlight poor or deficient administrative systems which could sometimes be exploited by corruption and reduce integrity in the public sector.

While managing individual complaints may be regarded as the traditional ‘bread and butter’ work of the Office, it’s no quaint relic. It’s still an area that continues to grow.

In 2016-17, we received a total of 41,301 approaches compared to 37,753 the previous year – an increase of nine per cent. There was a further 17% spike in the first quarter of this FY, mainly as a result of complaints in our VSLO jurisdiction about allegedly unconscionable conduct by VET providers in relation to the now superseded VET Fee Help program.

And it’s not just a rise in the overall volume of complaints, but also an increase in the complexity of the complaints we’re handling.

This means we are spending much more time and energy investigating individual complaints and often they in turn highlight systemic problems that we can draw to the attention of Ministers, the Parliament or individual agencies.

These are areas of complaints that highlight trends or issues that need to be addressed at the program or policy design and implementation level.

Our own motion powers enable my Office to further investigate these systemic issues.

Some of the recent investigation reports my Office has released on systemic issues include:

- a report on Centrelink’s automated debt raising and recovery system (also known as the Robo-Debt Scheme); and

- an investigation into the administration of the character provisions of the Migration Act.

There are more reports in the works.

Not only do we produce reports but we make recommendations that, overwhelmingly, are accepted and acted on by the agencies that are subject to the recommendations. In 2016-17, 91% of our recommendations were agreed.

So through our complaint handling work we support, promote and encourage good public administration and influence enduring systemic improvement in public administration in Australia.

But in public administration, as in the rest of society, change is the only constant.

And as a consequence, the way in which we achieve our purpose has evolved over the years from pure complaint handling to encompass many different functions.

Several of these functions are integral to Australia's Integrity Framework and to limiting the space for corruption to flourish.

The first of these functions that I would like to discuss in some detail is our oversight of the **Commonwealth Public Interest Disclosure Scheme** (otherwise known as 'PID').

We administer the current Commonwealth PID scheme, which came into operation in January 2014. Now let me say at the outset that the whole area of how to protect whistleblowers and how to encourage disclosure of wrongdoing remains a work in progress. The intent is undoubtedly good, as have

been the efforts of my staff and those of many agencies to make the current scheme work. The legislative and administrative expression of that intent does, however, need further work.

The current legislative 'whistleblower' scheme, ie the PID Act, provides protection for public officials who make disclosures of wrongdoing in the Commonwealth public sector.

These can include allegations of corruption.

The scheme provides an avenue for investigation of these disclosures, enforces notification requirements on agencies and specifies that reports should be provided to disclosers outlining the matters considered.

The Explanatory Memorandum to the PID Act, states that the scheme is intended to promote the integrity and accountability of the Australian government public sector.

The strong protections and low threshold for making a public interest disclosure are designed in theory to encourage public officials to come forward and report any suspicions of wrongdoing.

The scheme should therefore be a useful mechanism to complement cultural change in the APS – to promote a pro-disclosure culture.

Staff are able to identify potential wrongdoing and agencies can use this as an integral part of risk management.

As part of our PID function, my Office supports and monitors the use of the scheme by around 176 Commonwealth departments and agencies, and I report on the operation of the scheme in my Annual Report to Parliament.

Agencies are encouraged to investigate public interest disclosures internally and, in doing so, when necessary, seek guidance and support from my Office.

We can also conduct our own investigations of public interest disclosures and investigate complaints made about the outcomes of an agency's internal investigation.

When a matter has been accepted as a PID by an agency and allocated for investigation, my Office is notified.

Some examples of the types of disclosures we see include:

- inappropriate use of agency credit cards to pay for personal expenditure;
- attempts to intimidate staff to prevent them cooperating in an external investigation;
- use of agency property to conduct a private business enterprise;
- systemic patronage and a culture of bullying; and
- falsified results presented as part of an evaluation of a management system.

The notifications we receive allow us to track the overall number of investigations each year and to observe any significant increases or decreases in PID reporting.

For example, we found that the number of PIDs across the Commonwealth public service was up from 612 in the previous year to 684 in 2016-17. This suggests that, over time, the PID mechanism is being used by more people to report potential wrong-doing.

Of these disclosures, the largest group concerned conduct that may result in disciplinary action (30 per cent of all PIDs), followed by a 'contravention of a

law of the Commonwealth, state or territory' (28 per cent), and then 'maladministration' (23 per cent).

Of interest, was that conduct alleged to have been engaged in for the purposes of corruption declined this financial year – from four per cent to one per cent, though I will come back to what this data means in a moment.

The Ombudsman is also responsible for promoting awareness and understanding of the PID Act across the Commonwealth public sector.

In this educative role we delivered 22 training presentations to agencies in 2016-17; met directly with over 80 agencies, and, in a number of cases, helped to review procedures and information on the PID scheme for staff and contractors.

Since arriving at the Office I have been struck by the importance of the PID scheme, and our role in it, as a means for giving whistleblowers the protection they need to bring to light serious wrong-doing in public administration.

In my judgement, the Office has done great work in assisting with the establishment of the scheme and its ongoing oversight.

However, an ongoing challenge in using the PID scheme as an integrity reporting mechanism lies in effective promotion and education.

Agencies continue to risk corrupt conduct when they fail to ensure that employees are empowered to disclose wrongdoing.

When PIDs are actioned, investigated and disclosers are recognised for their loyalty in coming forward, risk to the organisation and the individual are minimised.

In making a disclosure, the actions of an individual can benefit many others who may potentially be affected by the same issue or problem.

Agencies must therefore take an active role in educating their staff about how to identify and report suspected wrongdoings.

In 2016-17, we noticed a trend that the range of agencies receiving PIDs has been confined to some large agencies across the Commonwealth.

We found that in specialised agencies there is a greater reluctance to come forward to disclose wrongdoing – quite possibly due to a fear of being identified or because of a lack of knowledge about the PID Act in smaller agencies.

Among the complaints my Office receives about the management of PIDs, we have noticed an increase in those concerning reprisal action.

Contracted service providers are less aware of the applicability of the PID Act to their conduct when working with the Commonwealth government.

Thirty-two per cent of agencies conducted awareness training for their contractors and most contract service providers are unaware of their right to complain.

Considering the sheer volume of contractors within the APS, this finding is quite concerning.

And there are some other problems. A number of commentators have made the point that because the threshold for making a PID is deliberately low it encourages complaints about relatively low-level personnel or other issues that ought be dealt with in some other way. Others argue that the legislation is too complex, the well-intended confidentiality provisions too unwieldy, and that reprisals are on the rise.

Then there is the question of what the data about PID numbers and categories actually mean. I am sceptical as to whether all agencies classify the PIDs they receive in a consistent way. That isn't a criticism of the agencies because the headings we gather data under are in themselves overlapping – one person's "conduct that may lead to disciplinary action" might be another person's "maladministration". For this reason, over time I think we need to know more about the sort of conduct that agencies are finding, the degree to which it is serious or not, and gain more granular insights into whether alleged wrongdoing has been adequately investigated and, if so, whether adequate redress is being delivered.

I should emphasise that what I've just said reflects just a few months exposure to the PID scheme and its operation. The Government, through the Moss Review of the scheme, has also been considering its operation, and the Government has also been active in the preparation of legislation to strengthen whistle-blowing protections in the corporate sector. The Senate too, in the form of the recently published report about whistleblowing in the corporate and non-government sectors, which recommended among other things the creation of some kind of national whistle-blowing agency, has also been active recently.

With all this in mind I have asked one of my senior staff to work off-line for the next six months to explore how we can play the most constructive role possible with respect to our current PID responsibilities; as well as engaging with the other agencies who are considering the broader policy and legislative reform possibilities. The Whistling While They Work project – in which we are an active partner – also continues to be a good vehicle for thinking about what a really successful whistleblower scheme would look like.

So watch this space.

Another function of my Office that helps maintain Australia's Integrity Framework is our function as **Law Enforcement Ombudsman**.

This function involves assessing and investigating complaints about the AFP.

We also perform statutory reviews of the AFP's process for recording and dealing with issues where an AFP appointee has engaged in conduct that contravenes the AFP professional standards or has engaged in corrupt conduct.

As a result of these reviews we may make suggestions or recommendations to the AFP in relation to its administrative practices.

This function is critical to the way in which we, as an organisation, contribute to the maintenance of Australia's Integrity Framework.

We also play a critical integrity role through our **oversight of the use of covert, intrusive or coercive powers** by certain agencies.

This function provides assurance that agencies are using these powers as Parliament intended, and if not, hold the agencies accountable to the Government and the public.

We do this by conducting inspections. These inspections serve as an important community safeguard and assists agencies in applying sound administrative practices.

We currently conduct inspections concerning: telecommunications interceptions; the use and installation of surveillance devices; covert operations that may lead to the prosecution of a person for a serious offence; and the retention of metadata and stored communications.

In 2016-17, we performed more than 60 inspections on the use of these powers.

This is another area of our work that continues to grow.

The increase in the use of these powers in recent years means the sheer number of records to examine is greater now than ever before.

This has led to a shift in the way we conduct our inspections.

As we cannot inspect every record, we place more emphasis on gaining a thorough understanding of agencies' policies and processes.

We also invest heavily in building strong and productive working relationships with the agencies we oversee, so we can encourage compliance throughout the process, not just in our inspection reports.

This also reduces the likelihood of corrupt practices developing.

Our presence provides strong impetus for agencies to be accountable for their actions and gives us an opportunity to promote integrity and ethical practices.

And our inspections provide constant reminders to government employees, specifically law enforcement officers, of the need to act lawfully and with integrity.

When we conduct our inspections, we engage with agencies, audit relevant records, and test agencies' processes and systems.

In most cases the public will not (or at least, should not) be aware of the use of the powers that we are checking.

And of course you can't complain about something you're not aware of.

It's here that our oversight functions differ from our traditional complaint handling role.

As there is no complainant, it's up to us to stand in the shoes of the 'nominal complainant' and ask the questions a complainant might ask. We then report to Parliament about the performance of law enforcement agencies in this area, in a manner that doesn't reveal sensitive operational detail but in a manner that does highlight agency shortcomings where they exist.

Our oversight function has expanded considerably in recent years, which I think is a reflection of the leadership and consistency our work continues to demonstrate in this space.

For example, in 2016-17, we acquired a new oversight role with the passing of the Counter-terrorism Legislation Amendment Bill. This Bill provides both overt and covert powers to law enforcement agencies to monitor a person subject to a control order.

In gaining this new oversight function, we ensured an effective oversight model was provided in the Act through engaging in the public debate regarding the bill.

This will certainly be an area of sensitivity moving forward and a function that I'm sure our Office has the experience and expertise to manage.

Another function where we demonstrate our leadership as an integrity body is in our **international program**.

Broadly, our international program supports and strengthens other ombudsman and allied integrity bodies in the region, to promote transparency and accountability; deter corruption; and support public sector reform.

In doing this, my office provides technical assistance to help facilitate best practice integrity approaches within our international counterpart agencies.

For example, throughout 2016-17, we delivered a number of valuable outcomes for the Pacific Governance and Anti-Corruption program.

The program focused on strengthening engagement with senior integrity leaders and targeted training for addressing corruption and maladministration.

Partners included: ombudsmen and public audit and leadership code bodies in the Federated States of Micronesia, Papua New Guinea, the Republic of the Marshall Islands, Samoa, the Solomon Islands, Tonga and Vanuatu.

As part of our Pacific Integrity Network, we also recently launched a web platform where integrity bodies can access resources, share technical material and participate in online practitioner forums.

This year we also conducted regional training for 23 practitioners from 10 Pacific Integrity bodies on conflict of interest and procurement, both of which are key risk areas of corruption.

In performing this body of work, we can make a useful difference to governance and good public administration with carefully targeted activity in the Pacific and elsewhere.

Our Office also benefits from engaging with other ombudsmen offices, for example, by sharing and sharpening our skills and ideas and gaining valuable insight into how we might improve our own domestic anti-corruption framework.

Noting the difficulty in adequately defining ‘corruption’, over the past two days we’ve learnt that corruption commonly encompasses actions and behaviours that can be described as dishonest, unethical or seriously inappropriate.

So in order to combat corruption, we must minimise corruption risk factors, limit misconduct and strengthen good public administration.

My Office does this in the ways I’ve just outlined – through our complaint handling role and ability to highlight systemic issues in public administration; our oversight of the Commonwealth Public Interest Disclosure scheme; our role as Law Enforcement Ombudsman, our oversight of certain intrusive and covert powers and our international engagement.

This year, marked 40 years since the establishment of the Commonwealth Ombudsman’s Office.

The anniversary was a time of reflection on the Office and its place in the administrative landscape, but was also an opportunity to look forward towards the challenges that lie ahead for us as an organisation in the next 40 years.

At our celebratory conference earlier this year, we were lucky enough to have Former High Court Justice the Honourable Michael Kirby provide the concluding address.

In his address Justice Kirby observed that ‘the role of the Commonwealth Ombudsman effectively involves the function of auditing and improving public administration as a whole for the good governance of Australia. In this sense the Ombudsman is not just another part of the bureaucracy. The office stands over the general administration and plays a part in supervising the entirety.’

He picked up on the words of my predecessor, Colin Neave, who drew out the connection between maladministration, the hiding or non-disclosure of that maladministration and the development of corrupt practices.

And finally, something that has stuck with me throughout my first six months as Commonwealth Ombudsman, Justice Kirby observed that 'change and adaptation is essential to the role and function of the Ombudsman.' He spoke of the need for the Office to critically assess its own performance, just as it assesses the performance of others.

To me this is *so* true.

Looking forward I am optimistic about our future.

Irrespective of the institutional arrangements that exist to combat corruption I think the Commonwealth Ombudsman, and my counterparts in state and territory domains, have a critical contribution to make to public sector integrity.

However, to manage our many competing activities we need to be thinking about our business models, priorities and the effectiveness of what we do.

This involves five things:

Firstly, I want to ensure that the growing volumes of individual complainants to the Office receive a useful, respectful service which results, where possible, in a satisfactory outcome. In particular, I want to know more about how our clients feel about the service we provide – even if we can't change a decision that might impact on them – and I also want to know more about what happens when we refer clients somewhere else. I want us to do more to harness technology to serve growing numbers of clients, and engage with the

most vulnerable in a way that ensures that those who are least able or likely to complain still have a voice.

Secondly, we need to constantly assess the trends, themes and learnings from the volumes of complaints and use these to influence systemic improvement in public administration.

Thirdly, I want to ensure that the Office's new functions – such as our new role with respect to VET students, many of whom have been egregiously ripped off in the context of the VET Fee Help program - are delivered well.

Fourthly, we need to keep ensuring that the Office's statutory inspection functions in relation to law enforcement agencies are fulfilled, so as to build public confidence in the exercise of certain intrusive or covert functions in the interests of law enforcement.

And finally, we need to do all of the above within tight resource constraints, by constantly examining how we do things, and by ensuring that as individuals and an Office we continue to be as effective as we can be.

Thank you.