

# **Transparency and Accountability – the role of the fourth branch of government**

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# Overview of presentation

- The importance of accountability and transparency in government
- The role of the Ombudsman and other key agencies in the accountability and transparency framework
- The wider network of accountability

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- The benefits, costs and unintended consequences of accountability activity
- Principles for good practice accountability
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# The importance of accountability and transparency in government

- There are many reasons why accountability and transparency in government is important and also many reasons to be thankful that we largely take that importance, certainly in Australia, as a near universal truth.

# The importance of accountability and transparency in government

- Beyond its obvious virtues, accountable and transparent government is, in my view, an integral step on the path to creating the most prosperous, productive economies - economies that allow individuals, businesses and governments to create the highest possible standard of living for the highest possible number of people.

# The importance of accountability and transparency in government

- In its recent 2009 Prosperity Index, the Legatum Institute assessed 104 countries, representing approximately 90% of the world's population, in terms of a series of measures, such as:
- whether a country possesses “an honest and effective government that preserves order and encourages productive citizenship” or whether it features “transparent and accountable governing institutions that promote economic growth”.

# The importance of accountability and transparency in government

- In the 2009 index, Australia finished sixth and only a marginal amount separated us and the number one placed country, Finland. What becomes apparent very quickly about those countries at the top of the prosperity index is that they are countries that are not just prosperous, but enjoy high levels of economic and personal freedom, respect for the rule of law and high levels of accountable and transparent governance.

# The importance of accountability and transparency in government

- Of course, there could be some genuine debate about causation here. Does prosperity precede integrity and systems of accountability and become something that prosperous countries can afford, or do prosperous countries become so in part because of their commitment to the integrity mechanisms of its government and governance institutions?

# The importance of accountability and transparency in government

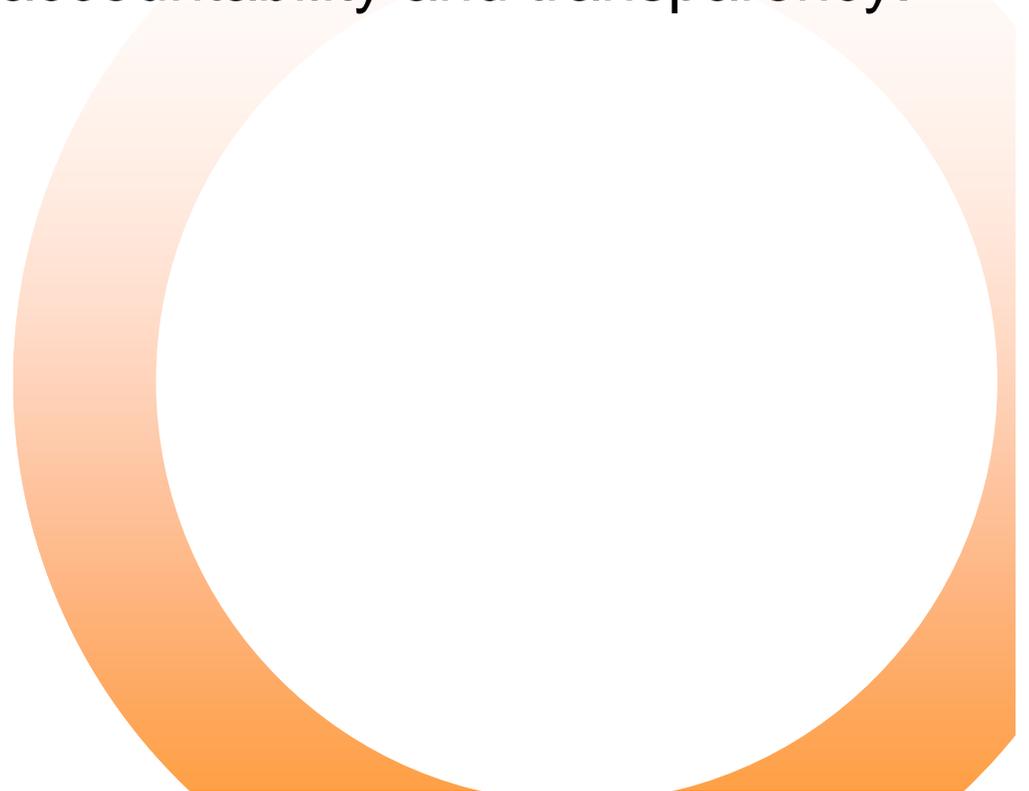
- The Legatum Institute observes that “the foundations of prosperity reinforce each other” and goes on to say that “countries in which sound governance creates satisfied citizens are also the most likely to have the healthiest economic fundamentals and the most entrepreneurial societies”.

# The importance of accountability and transparency in government

- Using Australia as an example, on one hand, we regularly appear at, or very near, the head of every international table that measures national prosperity, and on the other hand, at, or very near, the head of every international table that measures government integrity. It seems to me that the correlation and co-dependency of the two are irresistible.

# The importance of accountability and transparency in government

- In short, there is, in my view, a very strong correlation between prosperity, the rule of law, democratic institutions, respect for economic and personal freedoms and good governance hallmarked by accountability and transparency.



# The role of the Ombudsman and other key agencies in the accountability and transparency framework

- There are a range of agencies that have been created to oversight government action that have considerable histories – the office of the Auditor-General and the Ombudsman immediately come to mind.



# The role of the Ombudsman and other key agencies in the accountability and transparency framework

- We can also observe that over the last few decades, despite considerable deregulation and privatisation, there has nonetheless been growth in government, including increasing complexity in government services. University of Chicago academic, Professor Richard Epstein, has noted that “...each new extension of government power should be examined under a presumption of error”.

# The role of the Ombudsman and other key agencies in the accountability and transparency framework

- While there are many reasons that we might identify to explain our well developed accountability framework, there seems little doubt that the acceptance of the possibility of error occurring with new government powers has supported the development of accountability agencies.

# The role of the Ombudsman and other key agencies in the accountability and transparency framework

- This CSA Annual Public Sector Update is titled ‘Life in the spotlight – The implications of increased accountability’.
- I think this title is accurate - with the rise in government activity there has been, for the most part, a concomitant rise in public interest and expectations of government and an increasing number (and scope) of accountability agencies, so much so that commentators even now talk of a fourth branch of government, the integrity branch, to sit alongside the executive, legislature and judiciary.

# The role of the Ombudsman and other key agencies in the accountability and transparency framework

- Although I personally do not subscribe to the notion of a fourth branch of government, the mere fact that it is now seriously suggested indicates the growth of accountability agencies and their increasingly institutionalised nature.
- It is suggested that this integrity branch of government has been vested with the responsibility to oversight, investigate and educate the public sector in relation to corruption, misconduct, poor decision making, avoiding conflicts of interest and the like.

# The role of the Ombudsman and other key agencies in the accountability and transparency framework

- The accountability and transparency framework is wider than the office of the Ombudsman and, in Western Australia, includes the Auditor-General, the Corruption and Crime Commission and the Office of the Public Sector Standards Commissioner.
- These three agencies, with the Ombudsman, form the Western Australian Integrity Co-ordinating Group and each clearly works to protect and promote integrity in government and enhance the quality of public sector decision-making.

# The wider network of accountability

- But the framework of accountability and transparency agencies can be seen as much wider again and would include such agencies as the Information Commissioner, Office of the Inspector of Custodial Services, Office of Health Review, Mental Health Commissioner, Office of the Public Advocate, Equal Opportunity Commissioner, Director of Public Prosecutions and Office of the Inspector of the Corruption and Crime Commission.

# The wider network of accountability

- Having identified that there is an accountability and transparency framework that operates within and around government, the truth is that there is no one set of values, ethical imperative, mechanism, action, regulation, framework or insight that will, by itself, create a culture of integrity across the public sector.

# The wider network of accountability

- Creating a culture of integrity requires a range of different approaches – governance, risk, quality assurance and performance frameworks, audits, oversight, investigation and prosecution, cultural awareness and education, incentives, disincentives and regulation are a few that come to mind (and no doubt there will be many more discussed today).

# The wider network of accountability

- Indeed, seen in its fullest extent, the scope of our accountability mechanisms designed to enhance public sector integrity can be considered to be very wide, including the Parliament, the government, the opposition, minor parties, the judicial and executive branches of government, independent regulators, watchdog agencies, whistleblowers, the media, academia and non-government organisations.

# The wider network of accountability

- All have a role to play in creating and maintaining integrity within the public sector. There will also be a range of ways of implementing these mechanisms – one size is unlikely to fit all, in the same way that one intervention at a given point of time will not create an enduring culture. These mechanisms will also not be immutable – they will evolve and need to be tailored to new learning and challenges.

# The role of the Ombudsman

- So what is the role of the Ombudsman in the accountability and transparency framework? I think the Ombudsman plays four principal roles in this framework.
- First and foremost, the role of the Ombudsman is to receive, investigate and resolve complaints from citizens about the administration of government, or perhaps more accurately, alleged maladministration.

# The role of the Ombudsman

- A mechanism to have the administration of government services independently investigated through the resolution of complaints is both a feature of government systems hallmarked by integrity but also those that are seen to respect the rights of citizens.

# The role of the Ombudsman

- As immediate former Commonwealth Ombudsman Professor John McMillan, has observed “the right to complain, when securely embedded in a legal system, is surely one of the most significant human rights achievements that we can strive for”.
- Last year my office dealt with more than 2000 complaints that represent a ready evidence base of areas for potential improvement in the delivery of government services.

# The role of the Ombudsman

- Second, the Ombudsman exercises a very significant proactive jurisdiction - particularly the undertaking of inspections regarding the exercise of coercive powers and the ability, of its own motion, to undertake investigations into how government services are administered.

# The role of the Ombudsman

- My office is presently undertaking three projects of our own motion, although they are strongly informed by the complaints that we have received. In June we released a major administrative improvement report into how government and local government agencies are handling complaints.

# The role of the Ombudsman

- Importantly, the lessons that are learned from these investigations, combined with the knowledge gained from resolving individual complaints, represent a powerful tool to work collaboratively with agencies to improve over time the quality of public sector decision-making.

# The role of the Ombudsman

- Third, the office of the Ombudsman has expanded to undertake a range of new functions that sit within the broad concept of integrity oversight.
- Ombudsmen now undertake a much wider range of activities than was the case traditionally. To use my office as an example, in addition to the “classical” Ombudsman functions, we undertake:

# The role of the Ombudsman

- Inspections of telecommunications intercepts, investigation of public interest disclosures (more popularly referred to as whistleblowers' complaints), investigation of complaints from overseas students and, most recently, reviews of certain child deaths.

# The role of the Ombudsman

- Fourth, the Ombudsman has become an important contributor to the maintenance of the rule of law, which itself underpins accountable and transparent government.
- An Ombudsman model can easily fit with a more protective, interventionist welfare state approach (indeed, much of the growth of the Ombudsman institution this century parallels the growth of the welfare state).

# The role of the Ombudsman

- But at the same time the Ombudsman can fit successfully with a political approach that favours more limited government, but places a central focus on the role of the state to maintain the rule of law. Famous economist Friedrich Hayek has said of the rule of law:

# The role of the Ombudsman

“Nothing distinguishes more clearly conditions in a free country than those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all its technicalities this means that government in all its actions is bound by fixed rules and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.”

# The role of the Ombudsman

- Converting a rather complex topic to a simple, single sentence - the Ombudsman is a contributor to the rule of law because we help to ensure that accountable, transparent laws are accountably and transparently administered.

# The benefits and costs of accountability review

- In short, accountability agencies, such as the Ombudsman, create very significant public value from their existence, their work and their recommended improvements to public administration.
- It is surprising how often, however when people consider changes to a currently less than optimal system, that great emphasis is given to the benefits of the changes, but less so to the costs.
- Resources are limited and therefore costs, are important. Accountability review must be undertaken in this context.

# The benefits and costs of accountability review

- These costs might be one-off implementation costs or ongoing compliance costs.
- Similarly, in considering cost, we do need to consider the value that the community places on the various choices that can be made with limited resources.
- It might be not particularly costly to fix a problem but if the expenditure of money in this area will be an opportunity cost to expenditure in an area more valued by the community, it still may not be desirable.

# The law of unintended consequences

- A very large amount of the activity of governments, regulators and accountability agencies alike occurs for the right reasons – it is conceived, considered and implemented with unquestionably good intentions.
- Unfortunately, not all of that which is designed with good intentions actually achieves good outcomes.

# The law of unintended consequences

- In an episode of the ABC television program the Hollowmen, the Prime Minister has announced a “National Carbon Challenge”. The Prime Minister’s office responds by introducing initiatives to reduce their carbon emissions. After a week of the initiatives being in place, Holly, the Office Unit Manager, hands the results of their work on the “carbon challenge” to Tony, the Principal Private Secretary:

# The law of unintended consequences

- Tony: That can't be right?
- Holly: It is, our energy consumption has actually gone up.
- Tony: Up? What happened to low-watt fluoros? What happened to freezing for the last week?
- Holly: Well it turns out that to get the temperature down to 18 degrees the air conditioning was kicking in ... Which chewed up twice as much power as the heater.
- Tony: So for all of our efforts we've actually managed to increase emissions. Imagine if we ran the country like that.

# The law of unintended consequences

- Most accountability review occurs for the right reasons – it is conceived, considered and implemented with unquestionably good intentions.
- But whether you are inclined to the Hollowmen or Hayek, not all that is done with good intent actually achieves good outcomes.

# The law of unintended consequences

- We must be aware that no matter how well-intentioned are our plans, these plans may either (1) not necessarily achieve their desired outcome or (2) have unintended consequences. Sometimes these unintended consequences can in fact be desirable.
- Unfortunately, these unintended consequences can also be highly undesirable, indeed in the worst cases, they can be quite perverse, leading to the exact opposite outcome of what was intended.

# The law of unintended consequences

- American Prohibition was a perfectly well-intentioned regulation with, unfortunately, spectacularly bad results. As famous American economist Milton Friedman stated:

“Prohibition was imposed for our own good. Alcohol *is* a dangerous substance. More lives are lost each year from alcohol than from all the dangerous substances the FDA controls put together. But where did Prohibition lead?

# The law of unintended consequences

New prisons and jails had to be built to house the criminals spawned by converting the drinking of spirits into a crime against the state. Al Capone, Bugs Moran became notorious for their exploits – murder, extortion, hijacking, bootlegging. Who were their customers? Who bought the liquor they purveyed illegally? Respectable citizens who would never themselves have approved, or engaged in, the activities that Al Capone and his fellow gangsters made infamous. They simply wanted a drink. Prohibition didn't stop drinking.

# The law of unintended consequences

It did convert a lot of otherwise law-obedient citizens into law breakers. It did confer an aura of glamour and excitement to drinking that attracted many young persons. It did suppress many of the disciplinary forces of the market that ordinarily protect the customer from shoddy, adulterated and dangerous products. It did corrupt the minions of the law and create a decadent moral climate. It did *not* stop the consumption of alcohol.”

# Principles for good practice accountability

- We should also remember that accountability agencies exist to identify and suggest the remediation of mistakes in public administration. But if public administrators can make mistakes so can accountability agencies, including mistakes in the suggestions we make to improve public administration.

# Principles for good practice accountability

- The answer is not that we will never make a mistake, nor that we should not undertake accountability review because it may lead to a mistaken outcome, but to be cognisant of the fact that mistaken judgments occur and to have a series of principles in place to reduce the likelihood of error.
- The principles that I suggest utilising in accountability review and any proposed improvements that flow from that review are as follows:

# Principles for good practice accountability

- Work is undertaken on a ‘no surprises’ basis, addresses material problems, is well-targetted and proportionate to the problem identified. Some problems are wide-ranging, whole of government problems with serious implications and deserve similarly wide-ranging solutions. Other problems may be limited or not so serious and the remedy similarly limited;

# Principles for good practice accountability

- That there is always an evidence base that establishes the need for our work and our suggested changes. We should also be able to demonstrate that our proposed remedies will actually address the problem at hand;
- Our proposed improvements are the least costly solution to an identified problem;
- Our approach to our work preserves as much as possible positive public sector decision-making;

# Principles for good practice accountability

- The costs imposed by our work are outweighed by the benefits of our work; and
- That we have considered the unintended consequences of the recommendations we make.

# Principles for good practice accountability

- We must also remember that accountability agencies do not just investigate, report on, and make recommendations about, problems in public administration, they also undertake a range of activities from education, standard-setting, and creating new regulatory mechanisms designed to limit the likelihood of these problems occurring in the first place. These types of measures will mostly be highly desirable.

# Principles for good practice accountability

- Integrity frameworks, be they through the encouraging of different organisational cultures, ethics and values education, regulatory controls, incentives or disincentives to change behavioural patterns, can, however, impose regulatory costs on public sector agencies, and by implication, on taxpayers.

# Principles for good practice accountability

- They may also act undesirably to have a stultifying effect on welcome innovative behaviour creating an undesirable inertia in government administration and dampen positive innovation through excessive risk aversion where some risk taking is actually desirable, or simply burden efficient, timely decision making with excessive red-tape.

# Principles for good practice accountability

- Finally, it should also be said that it not the role of accountability agencies alone to take responsibility for any administrative imposts created by their work. Clearly agencies themselves must consider the need, alternatives, costs and benefits and unintended consequences of any improvement recommended to them.

# Closing Comments

- A lack of integrity in the public sector damages us all.
- Governments hallmarked by integrity retain the confidence of the public and contribute significantly to stable societies.
- Conversely, governments hallmarked by a lack of integrity, a lack of an ethical underpinning, or characterised by corruption, conflict, secrecy, undue favours and unaccountability to its citizens, risk losing their confidence and threatening the very stability of those societies.

# Closing Comments

- Further still, there is clear correlative evidence linking economically underperforming nations with a lack of integrity and corruption in government. In short, integrity in the public sector is essential for our ongoing economic prosperity, to protect individuals from inappropriate governmental activity and to optimise the way that the public sector exercises its powers.
- At its most simple, the best quality decision making in the public sector is accountable and transparent decision making.

# Closing Comments

- We can take great solace from the fact that we largely take for granted the fundamental importance of a robust accountability and transparency framework.
- Although we should not, I think, take it for granted, we can also take great comfort in the fact that Western Australia's public service is largely so free of corruption and maladministration and is, in my experience as the Western Australian Ombudsman for the past three years, comprised of so many dedicated public servants committed to the public interest and serving the public well.

# Closing Comments

- Of course, the highly developed integrity framework that is now a feature of so many countries around the world is neither perfect, nor costless.
- But to paraphrase Winston Churchill – governments, hallmarked by robust frameworks to protect and promote public sector integrity, are the worst form of government, apart from every other form of government that has ever been tried!

# Questions





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