

**AUSTRALIAN AND NEW ZEALAND SCHOOL OF GOVERNMENT  
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**DELIVERING UNDER PRESSURE - IMPROVING PUBLIC SECTOR  
PRODUCTIVITY**

*Reflections on statutory oversighting of Government agencies*

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**Background**

The Victorian Ombudsman has been dealing with complaints about government agencies for 40 years. During that time we have dealt with over 200,000 complaints; conducted 110,000 investigations and enquiries; and provided over 100 reports to the Victorian Parliament.

In recent years there has been a change in public administration in Victoria, both as governments have changed and as public finances have tightened. Gone are the days when budget overruns were not questioned and staffing numbers were not a problem.

There has also been acknowledgement of the effectiveness of the independent role of the Ombudsman to improve public administration in Victoria. This has been illustrated by the high level of acceptance of the Ombudsman's recommendations and the requests from government to conduct investigations into a range of issues. See for example:

- Brookland Greens investigation<sup>1</sup>

In September 2008 the Acting Premier brought to the Ombudsman's attention the problems at Brookland Greens housing estate where methane gas was leaking from a closed tip into houses in the estate. Many residents had to evacuate their homes as a result.

We conducted an own motion investigation into the circumstances surrounding the presence of methane gas in the estate. Our investigation led to major rehabilitation

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<sup>1</sup> Victorian Ombudsman - Brookland Greens Estate – Investigation into methane gas leaks – October 2009

works being carried out by the council concerned and the settlement of a Supreme Court class action taken by hundreds of householders.

- The Hotel Windsor development<sup>2</sup>

In June 2010 the Legislative Council Standing Committee on Finance and Public Administration requested that the Ombudsman investigate the probity of The Hotel Windsor development, following a Committee enquiry in which the then Victorian Government had refused to allow ministerial advisers to give evidence before the Committee.

Our investigation identified inadequate accountability and transparency in the planning and heritage application processes for the hotel as well as poor management of conflicts of interest. The investigation was a focus of media attention due to a media plan prepared by the Minister's office containing inappropriate and speculative language.

- Foodbowl Modernisation Project enquiry<sup>3</sup>

In February 2011 the Minister for Water wrote to the Ombudsman expressing concern about Goulburn-Murray Water (GMW) and the Northern Riverina Irrigation Renewal Project (NVIRP) in relation to the modernisation of water irrigation infrastructure in Victoria's Goulburn-Murray region.

The subsequent investigation identified areas where NVIRP had not implemented the project transparently and equitably and had failed to manage its contractors' conflicts between their public duties and private business interests. As a result of our investigation, NVIRP and its Board were abolished and its functions subsumed into GMW.

- Geoff Shaw MP<sup>4</sup>

In June 2012 the Speaker of the Legislative Assembly referred to the Ombudsman complaints he had received from whistleblowers about the conduct of Mr Geoff Shaw MP, the Member for Frankston. After determining that the complaints met the requirements for a public interest disclosure, we commenced an investigation.

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<sup>2</sup> Ombudsman investigation into the probity of the Hotel Windsor redevelopment – February 2011

<sup>3</sup> Victorian Ombudsman - Investigation into the Foodbowl Modernisation Project and related matters – November 2011

<sup>4</sup> Victorian Ombudsman - Whistleblowers Protection Act – Investigation into allegations against Mr Geoff Shaw MP – October 2012

We found that Mr Shaw had improperly allowed employees of his business to use his government vehicle for commercial use; used his parliamentary fuel card for his private vehicle; and had used his government vehicle for commercial use. The Ombudsman recommended that these matters be referred to the Privileges Committee.

While these investigations have had significant resource implications for a small office, they have delivered significant outcomes for government. For example the Foodbowl enquiry led to \$1 billion federal funding being made available to Victoria for upgrading the Shepparton irrigation region.

### **Politicisation of the public sector**

I have also observed a shift in the relationship between the Executive and Government, with political advisors taking a much greater role in the running of government. This was graphically illustrated recently by the publicity about the former Premier's Chief of Staff and the revelations of his controlling the legislation to set up the new Independent Broadbased Anti-corruption Commission (IBAC).

The tape recording of his conversation with the former adviser to the Police Minister<sup>5</sup> revealed the Chief of Staff saying:

..you would have noticed that with IBAC we've put in all sorts of constraints and controls to ensure that the kind of generalised allegation and automatic destruction of people's good name has been much more severely constrained under the future anti-corruption commission and we're going to have all sorts of supervising mechanisms so that they're not unchecked and rampaging around the place doing pretty much what they want to anyone.

During the Windsor Hotel investigation the emails of ministerial staff were particularly instructive. They revealed an unhealthy culture which had developed, largely because of the closed, exclusive environment in which they worked. While Ministerial staff are not in the Ombudsman's jurisdiction, they are compellable witnesses.

In some of our investigations, we identified that senior public servants were informing the Minister what they thought he should hear, rather than the truth.

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<sup>5</sup> Herald Sun 8.3.13

## Misleading advice to Ministers

One real risk in a constantly changing political environment is for public servants to believe that they run the show, to the exclusion of their Minister. This is particularly a risk for a new government and new Ministers.

Our investigations identified instances where misleading advice was provided to Ministers, including:

- The Melbourne Underground Rail Loop<sup>6</sup>

During our investigation into the condition of the safety infrastructure of the Melbourne Underground Rail Loop (MURL) in 2012, we identified a 12 page briefing provided to the Minister for Public Transport, following an article in the media about the safety of the MURL. Our investigation identified that the briefing did not inform the Minister about the degraded condition of the emergency walkways and incorrectly advised him that, after disembarkation, the escape route for passengers is along the rail track. This contrary to established evacuation procedures and dangerous, as there are gaps between the rail sleepers with a 90cm drop to the drain below.

The briefing also incorrectly advised that work on the corroded fire services pipes had been completed. The briefing also failed to inform the Minister that tests of the smoke exhaust fans had revealed deficiencies in the effectiveness of the smoke exhaust system in the event of an emergency.

The Ombudsman observed that one could reasonably expect that, on matters of such importance as the security and safety of rail commuters and staff, senior Transport officials would ensure that a briefing to the Minister would be accurate and not omit important information. This was not the case.

- Foodbowl Modernisation Project<sup>7</sup>

During this investigation, we identified a briefing to the former Minister for Water by the Department of Sustainability and Environment was misleading because it did not advise the Minister of the following:

- An agreement existed between the Northern Victoria Irrigation Renewal Project and a farm designer to assist a private investment project

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<sup>6</sup> Victorian Ombudsman – Investigation into allegations concerning rail safety in the Melbourne Underground Rail Loop – October 2012

<sup>7</sup> Ibid

- The project had received confidential information regarding incentive payments to landowners
- NVIRP officers had been present when the decision was made for a farm designer to deliver a letter on behalf of the private investor to a landowner.

The information on which the Department based its briefing to the Minister was provided by NVIRP.

- Department of Human Services

In another instance, a briefing provided by the Department of Human Services to its former Minister failed to state that a former registered carer had been rejected by one agency to become an approved carer as they had concerns about him. This was an important and material fact that was overlooked.

### **Failure of leadership**

Many of the investigations we have undertaken over the past few years identified improper conduct and maladministration that occurred as a result of a failure of leadership and management.

Despite progress made by some agencies, we continue to identify agencies that fail to learn from their mistakes and fail to fully implement revised policies and procedures that our enquiries and investigations have identified.

Good leadership enables an agency to foster an environment where its staff are best able to perform their roles and by extension the agency will adequately perform its statutory and public responsibilities. Good leadership requires key qualities such as:

- Responsibility
- Decisiveness
- Courage
- Communication
- Openness.

Many investigations have revealed a lack of strong leadership. Too often senior public officials have pleaded ignorance of the problems our investigations have identified in their agency because they were unaware of the issues and did not have in place processes that would have ensured that they were informed of such matters.

Increasingly however, we have identified that such shortcomings are due to self-interest, as opposed to poor management. For example:

- Greyhound Racing Victoria<sup>8</sup>

This investigation is a good example of how an inappropriate culture existed in the agency responsible for monitoring and overseeing greyhound racing in Victoria because of poor leadership.

The investigation was conducted as a result of information received about a culture within the organisation of staff betting on greyhound racing. It identified that the CEO bet on greyhound races; another manager placed over 4,000 bets totalling over \$500,000 during work hours; staff, including stewards, were betting on races that they officiated at. A number of staff were dismissed and the CEO resigned during the investigation.

- CenITex<sup>9</sup>

CenITex is a Victorian State Owned Enterprise, established by government in 2008, with the purpose of providing information, communication and technology services to government. Our investigation identified numerous breaches of government procurement policies and guidelines, including:

- Companies and their contractors being awarded significant contracts totalling up to \$4 million without competitive processes. In one instance the process was in fact a sham.
- In some instances, nepotism and favouritism influenced procurement and recruitment practices.
- Some appointments were made on the basis of fabricated or false documentation.
- One CenITex officer misused his position to engage and approve invoices for a company in which he had a financial interest.
- The then CEO approved an exemption from procurement guidelines which provided notional approval to engage unspecified contractors up to the value of \$995,000 without any competitive process and without adequate justification.

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<sup>8</sup> Victorian Ombudsman – Own motion investigation into Greyhound Racing Victoria – June 2012

<sup>9</sup> Victorian Ombudsman – Investigation into allegations of improper conduct by CenITex officers – October 2012

This latter conduct set a poor example for CenITex staff and contractors in relation to the need to comply with Victorian Government Purchasing Board guidelines. The Ombudsman observed that ‘when such conduct occurs at the top of an organisation, there is a risk that poor practices will occur down the line’<sup>10</sup>. The CEO had resigned after some of these issues being made public, before our investigation commenced.

- Williams murder<sup>11</sup>

On 19 April 2010 Carl Williams, a notorious gangland identity, was killed while in custody at the Barwon maximum security prison. His killer was subsequently convicted of murder and in September 2011 was sentenced to 32 years in prison.

Mr Williams’ death raised important questions as to how was possible for a high profile prisoner in Victoria’s highest security prison unit to be killed with an unsecured metal pipe from an exercise bike.

The decision to place William’s subsequent murderer in the same cell was a major focus of our investigation. We identified that more than a year before his death, the Acting Corrections Commissioner raised concerns about Williams’ safety with the Secretary of the Department of Justice. Notwithstanding these concerns, both officials supported the placement. However because of the murderer’s background (which was known to Corrections) we found that the Acting Commissioner should have exercised caution and not recommended that they be placed together. In doing so, Corrections Victoria failed in its statutory duty to ensure Mr Williams’ safety.

### **Losing sight of objectives**

At times we encounter agencies which have lost sight of their statutory role and objectives. This can lead to poor decision-making; an inappropriate culture; and misdirected actions.

Where this occurs, governments need to step in and take positive action to limit the risks to the agency’s funding and reputation. The Foodbowl investigation is a good example as it led to the Board being dismissed and NVIRP being abolished, with its functions subsumed into Goulburn-Murray Water.

Poor decision making at a senior level can at times have unintended consequences. Take for example our investigation into Victoria Police crime statistics in 2011<sup>12</sup>. The

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<sup>10</sup> Ibid p.4

<sup>11</sup> Victorian Ombudsman – The death of Mr Carl Williams at HM Barwon Prison – Investigation into Corrections Victoria – April 2012

complaint, made by a whistleblower, was that crime statistics released by a Deputy Commissioner in October 2010 had been manipulated for political purposes and that the data was misleading.

Our investigation identified that, while the Deputy Commissioner was the spokesperson, he took no part in either the preparation of the data or the commentary used in the press release. It was the decision of the then Chief Commissioner of Police to release the data, despite being warned by staff that the data was not settled. The statistics, which were flawed, were released just before the caretaker period leading up to the last State election.

On the day the Ombudsman tabled his report in the Parliament, the Chief Commissioner resigned.

Prior to its abolition in February this year, the Office of Police Integrity (OPI) was also the subject of several Ombudsman investigation reports to Parliament. It was clear that the OPI had lost its objectivity. In one of those reports, the Ombudsman raised concerns about OPI's lack of accountability and external scrutiny<sup>13</sup>.

In another instance, an approach by a senior OPI officer making what could only be described as a threatening message to a whistleblower was reported<sup>14</sup> on by the Ombudsman.

## **Whistleblowers**

Whistleblower legislation was introduced in Victoria in 2001<sup>15</sup>. It has been important in identifying serious issues in the public sector, including corrupt conduct; waste of public monies; and risks to the environment. Many of our investigations have led to reports to Parliament, with substantial recommendations for change. Individuals, including CEOs, have either resigned or had action taken against them as a result of an insider blowing the whistle. In my view it has been an important tool for effecting positive change in the public sector.

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<sup>12</sup> Victorian Ombudsman – Investigation into an allegation about Victoria Police crime statistics – June 2011

<sup>13</sup> Victorian Ombudsman – Investigation into the Office of Police Integrity's handling of a complaint – October 2011

<sup>14</sup> Ibid – crime statistics report

<sup>15</sup> Whistleblowers Protection Act 2001

- Recent changes to legislation in Victoria

In February 2013 the government introduced a suite of legislation for a new integrity regime. This including abolishing the Office of Police Integrity (OPI); establishing the Independent Broadbased Anti-corruption Commission (IBAC); amending the Ombudsman Act; and introducing new whistleblower legislation<sup>16</sup>.

While the changes have had an impact on the role of the Ombudsman, in practice, many of the whistleblower complaints are being referred by IBAC back to the Ombudsman for investigation.

- Blowing the whistle

Blowing the whistle can be risky. In a recent article<sup>17</sup> in the Age it was stated that:

In the US, the law is geared to protect and reward informants, but in Australia, they end up jobless and traumatised.

This can occur. Even if you are suspected of being a whistleblower there are risks. Take for example the former Deputy Commissioner of Victoria Police, Sir Ken Jones. He was suspected of being a whistleblower and, as it was reported in the media, was put under surveillance; his phone calls were monitored; and his reputation subsequently trashed despite several investigations by the Victorian Ombudsman not identifying any evidence that Mr Jones had leaked to anyone. Nor has it ever been confirmed that he was the whistleblower.

In many of our investigations, whistleblowers have been vindicated, for example:

- Victoria Police Forensic Services Centre<sup>18</sup>

In 2008 a whistleblower complained about the manner in which drug exhibits were being managed at the Victoria Police Forensic Services Centre. He had previously complained to the Ethical Standards department of Victoria Police which had taken no action.

This investigation led to significant changes in the management and destruction of drug exhibits; the structure and leadership of the Centre; and the overall security of drug exhibits. The whistleblower was vindicated and remains in the police service.

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<sup>16</sup> Protected Disclosure Act 2012

<sup>17</sup> The Age 15 June 2013 - Warning: blowing the whistle could mess up your life – Ruth Williams

<sup>18</sup> Victorian Ombudsman – Whistleblowers Protection Act – Investigation into the handling of drug exhibits at the Victoria Police Forensic Services Centre – December 2009

- Child Protection

We have conducted a number of investigations as a result of whistleblowers coming forward with concerns about child protection<sup>19</sup>. The allegations were substantiated leading to significant changes in how the department manages the safety of young children.

Perhaps the most graphic example of an investigation leading to significant improvement is the investigation into the Parkville Juvenile Justice Detention Centre. When we investigated this whistleblower complaint we found a poorly run facility used to detain young offenders; dirty and unhygienic conditions; mismanagement and mistreatment of detainees; and little or no education provided to the young high school age children held there.

As a result of the investigation significant improvements have been made, not only to the premises but also to the management of the Centre and the education of the detainees. It is a much better place as a result.

- Victorian Institute of Forensic Medicine (VIFM)<sup>20</sup>

A whistleblower disclosed that an employee of VIFM had been emailing photographs and details of autopsy cases to friends. Our investigation substantiated the allegation. The employee was employed as a Forensic Technician at the Institute. His work involved assisting with autopsies on deceased persons. When interviewed he admitted to email photographs and other information to a group of friends for 'four or five years'. Also, a large amount of documents and photographs of deaths were found in his possession at his home. Many depicted graphic deaths. The employee resigned during our investigation.

The investigation led to physical and information technology security and auditing arrangements at the Institute being reviewed and improved.

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<sup>19</sup> Victorian Ombudsman – Own motion investigation into the Department of Human Services – Child Protection Program – November 2009

Victorian Ombudsman – Whistleblowers Protection Act 2001 – Investigation into conditions at the Melbourne Youth Justice Precinct – October 2010

Victorian Ombudsman – Investigation regarding the Department of Human Services Child Protection Program (Loddon Mallee Region) – Whistleblowers Protection Act 2001 – October 2010

<sup>20</sup> Victorian Ombudsman – Investigation into the improper release of autopsy information by a Victorian Institute of Forensic Medicine employee – May 2011

## **Detrimental action against whistleblowers**

Protecting whistleblowers against detrimental action is essential. We have investigated instances of detrimental action being taken against public servants because of their blowing the whistle<sup>21</sup>. In several cases allegations of detrimental action have been substantiated and compensation payed to the whistleblowers.

Another example is our investigation into the allegation that detrimental action was taken against former Deputy Commissioner Sir Ken Jones by the former Chief Commissioner of Police Mr Simon Overland because it was believed that Mr Jones was the whistleblower in the crime statistics investigation. The complaint was substantiated to the extent that the allegation that Mr Overland's action in sending Mr Jones on gardening leave was at least significantly detrimental to Mr Jones<sup>22</sup>. Mr Overland denied that his actions amounted to a detriment. However, the Ombudsman found that:

... the stigma associated with a senior officer being directed to take leave from work and exit the building by close of business, including having their building and email access withdrawn on the same day, could reasonably be perceived as detrimental to their reputation and professional standing.

### **How do you get your good name back?**

What if you have been falsely accused? Perhaps this is by way of a complaint to your employer, a 'leak' to the media or even mentioned under the privilege of Parliament. Leaks and personal attacks are often used to discredit someone who is seen as challenging an organisation or its leadership.

How do you redress this wrong? How do you get your good name back? Do you remain silent hoping that it will all go away, or do you seek redress? It may be more than just damaging your reputation. What if it destroys your future job prospects?

This dilemma is common enough, as is the use of leaks to damage peoples' reputations. As the Ombudsman stated in his report into the investigation into the

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<sup>21</sup> See for example Ombudsman Victoria Annual Report 2008 p66

<sup>22</sup> Victorian Ombudsman – Investigation into allegations of detrimental action involving Victoria Police – June 2012

release of crime statistics by Victoria Police<sup>23</sup>, sometimes leaks occur ‘for personal reasons including payback and for others it may be for altruistic reasons’.

In a similar vein the former Director of the OPI, Judge Michael Strong said in relation to attacks on his agency, that ‘detractors know that the best way to undermine public confidence in [an] anti-corruption agency is to insinuate that the agency itself is corrupt. Such insinuations – like all slander – gain credence by constant repetition’<sup>24</sup>.

Attacking a person’s reputation may be a blunt edged way of undermining not only the person, but the truth of what that person is saying. This can occur with whistleblowers, for example. As Judge Strong said in another report, ‘the mere recitation of what allegedly occurred may be seen by some to reflect adversely’ on the person, even if the allegation is untrue<sup>25</sup>.

The media’s role in damaging a person’s reputation can also be significant. Much of the Victoria Police crime statistics investigation was subsequently played out in the media, with leaks from a number of agencies contributing to speculation about the departure of both the Deputy Commissioner and Chief Commissioner.

How can such wrongs be righted? I don’t think that there is a quick fix. In my view the best strategy to combat baseless allegations is to encourage ethical behaviour in organisations so that leaking information is not only discouraged, but abhorred. To be successful such a strategy needs to be led from the top. You might think that such a concept would be obvious. In my experience this is not always the case.

### **Positive changes**

Ombudsman enquiries and investigations inevitably focus on error and wrongdoing. This is the nature of our work. However there are times when our investigations lead to positive change. Take for example:

- Transport Accident Commission (TAC)

The TAC has been the subject of several adverse reports, identifying significant concerns with its dealing with state revenue<sup>26</sup>. As a result of internal changes

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<sup>23</sup> Victorian Ombudsman – investigation into an allegation about Victoria Police crime statistics – June 2011 page 15

<sup>24</sup> Office of Police Integrity Annual Report 2010-2011 page 14

<sup>25</sup> Office of Police Integrity – Crossing the Line – October 2011

<sup>26</sup> Victorian Ombudsman – Report of an investigation into issues at Bayside Health – October 2008

Victorian Ombudsman – An investigation into the Transport Accident Commission’s and the Victorian WorkCover Authority’s administrative processes for medical practitioner billing – July 2009

following these reports, including a new CEO, there have been positive improvements to the TAC's processes, resulting in fewer complaints to the Ombudsman.

- Ballarat University

We have a longstanding interest in how universities in Victoria deal with complaints. In 2010 we conducted an own motion investigation into how four Victorian universities dealt with international students<sup>27</sup>. International education has become a key focus for universities. In 2009, there were 67,000 overseas students studying at Victorian universities, and \$1.16 billion was earned from fee-paying international students.

Of the four universities reviewed (Deakin, RMIT, Swinburne and Ballarat), overall Ballarat stood out as setting the best example of good practice in relation to its handling of international students.

- Legal Services Commissioner

The role of the Legal Services Commissioner (LSC) is to protect both consumers of legal services and the public interest in the proper administration of justice. As a result of a large number of complaints received about the LSC, the Ombudsman conducted an own motion investigation into the LSC and its decision making processes<sup>28</sup>.

The investigation identified a lack of understanding by staff of the LSC's statutory powers and a restricted skill-set to conduct investigations. Following this investigation the Commissioner resigned.

In December 2009 a new Commissioner was appointed. We have worked with him to assist in the improvement of the office by: assisting with training of staff; seconding a senior officer to the LSC for a period of time; and liaising on a regular basis on individual complaints. As a result we have seen a marked improvement in the timeliness and quality of work coming out of the LSC.

## **Conclusions**

Firstly, the role of the Ombudsman is to improve public administration. This can be achieved in a variety of ways. While our public reports attract a lot of media attention, it is only in about 20-25% of formal investigations that the Ombudsman

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<sup>27</sup> Victorian Ombudsman – Investigation into how universities deal with international students – October 2011

<sup>28</sup> Victorian Ombudsman Annual Report 2009 p.23

decides that it is in the public interest to report to Parliament on an investigation. The remaining are dealt with direct with the agencies concerned.

Strong and ethical leadership is the key factor in the effective management of government agencies. While I have given many examples of agencies where leadership broke down, or was ineffective, there are large sections of the public sector which are effective and well run. These agencies and their staff generally do not attract complaints.

Finally, I mentioned courage as a key quality of leadership. More often than not, demonstrating courage is simply doing what you are paid to do. This is most important in a leader. Too often I have seen organisations with a toxic culture because of poor leadership, lacking courage to do their job.

It is only because of the courage of the Surveyor Robert Hoddle, who stood up to the Governor of the day in 1837, that Melbourne's main streets are so wide, tree lined and attractive. Having been ordered by Governor Sir Richard Bourke to reduce the width of the streets from 99 feet to 66 feet, Hoddle said that "upon my urging the Governor, and convincing him that wide streets were advantageous on the score of health, and convenience to the future city of Victoria, he consented to me having my will".

John R Taylor  
Deputy Ombudsman