

# PUTTING ADMINISTRATIVE LAW BACK INTO INTEGRITY AND PUTTING THE INTEGRITY BACK INTO ADMINISTRATIVE LAW

*Dr A J Brown\**

## **1. Introduction**

What role does administrative law play in the pursuit of public integrity? And how confident can we be that it is currently performing its role?

The answer to the first of these questions might seem axiomatic – of course, administrative law is a fundamentally important field of societal regulation and professional practice, whose entire *raison d'être* is the proper regulation of relationships between government and the community. Indeed administrative law, just as much as if not more than constitutional law, could be better described as 'the law of public accountability'. If we restyled them thus, undergraduate administrative law courses might not even need to be compulsory to sustain student interest.

But is public 'accountability' the same as public 'integrity', especially when defined in legal terms; and even if the law of public accountability is vital to public integrity, how do we ensure that it is up-to-date and doing all that it should be doing?

This paper suggests some answers to these questions, reached as a result of recent research collaboration between several Australian universities and Transparency International Australia – the National Integrity System Assessment. This assessment took place over five years, with funding from the Australian Research Council and was released in draft form at the 4<sup>th</sup> National Investigation Symposium held by the NSW Ombudsman, the Independent Commission Against Corruption and the Institute of Public Administration in November 2004. The final report (Brown et al 2005) was launched by Professor John McMillan on UN Anti-Corruption Day, 9 December 2005. This paper draws heavily on that report and its underlying research.

The first part of the paper restates some of the reasons for seeking to describe and assess 'national integrity systems' and the approaches used in doing so. The second part then reviews some key practical recommendations of the assessment, particularly those relating to our administrative law frameworks. These confirm the centrality of administrative law to our nation's integrity systems, but also the need for those concerned with public integrity to think more broadly about how administrative law can, does and should interact with other elements of our integrity system.

The third part of the paper reinforces this by repeating some questions about the conceptual differences but also key relationships between ideas of 'accountability', 'responsibility' and 'integrity' in our society. These questions provide ongoing food for thought for lawyers, not

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*\* Senior Lecturer & Senior Research Fellow, Griffith Law School, Visiting Fellow, ANU College of Law, speaking at the AIAL 2006 Administrative Law Forum, Gold Coast, QLD, June 2006. # Refereed paper.*

just those interested in fine definitional distinctions, but particularly as a reminder to administrative lawyers to remain conscious of, and perhaps even assertive in promoting, the integrity-related dimensions of their role.

## **2. Integrity systems: what are they and why assess them?**

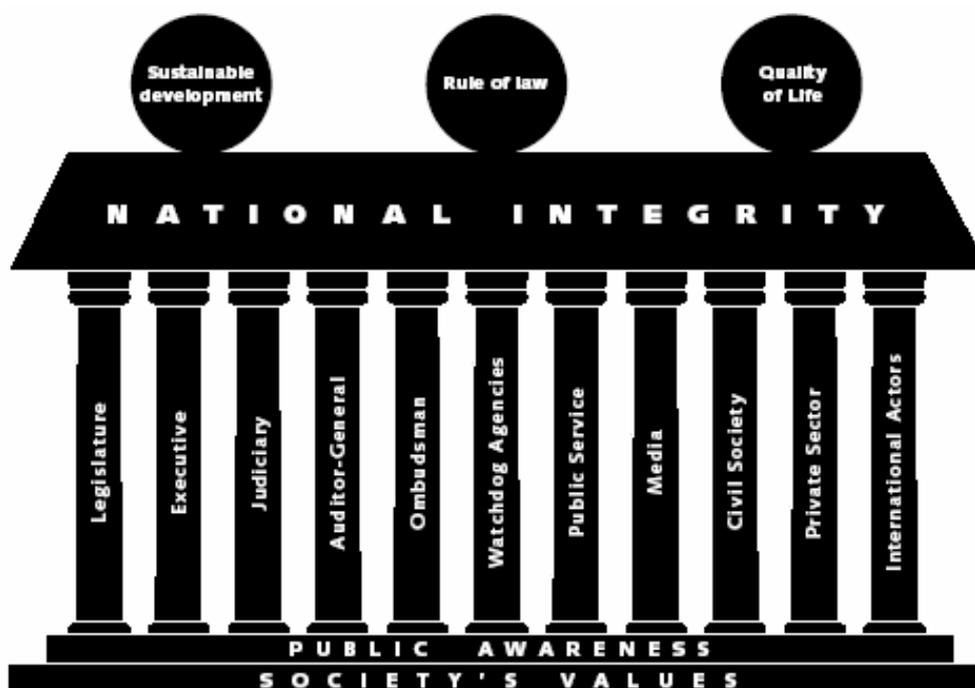
Australia's 'National Integrity Systems' are the sum total of institutions, laws, procedures, practices and attitudes that encourage and support integrity in the exercise of power in modern Australian society (Brown et al 2005: 1). Integrity systems function to ensure that power is exercised in a manner that is true to the values, purposes and duties for which that power is entrusted to, or held by, the institutions and individual office-holders concerned.

The sense of 'truth' that runs through this rather expansive definition relates back directly to the meanings we give to 'integrity' in our society – not just in relation to the personal integrity of individuals, but also the institutions through which most political and economic power is exercised. The word 'integrity' is derived from the Latin *integritas*, meaning 'unaffected, intact, upright, reliable'; the same root has given us 'integer', the mathematical term for a 'whole' number as opposed to a fraction (Preston in KCELJAG & TI 2001: 1; Uhr 2005: 194). 'Integrity' also operates as a conceptual opposite to 'corruption', which means decay, deterioration or perversion from an original or 'whole' state; in physical terms, corruption is 'the destruction or spoiling of anything, especially by *disintegration*...' (Oxford English Dictionary; Heidenheimer & Johnson 2002: 6-9).

When it comes to our society's major institutions, and the individuals that constitute them, how do we judge power as being exercised in an 'upright', 'whole', 'uncorrupted' manner? It is by reference to the values, purposes and duties for which that power is entrusted to, or held by, the institutions and individual office-holders concerned. Clearly, in modern societies such judgements are arrived at and acted upon in a myriad of ways – from institutions, laws, and procedures to social practices and attitudes. All these many and varied ingredients go to make up our integrity systems.

The definition of integrity and its relation with other key terms in other legal and policy lexicon will be further discussed at the end of this paper. The term 'National Integrity System' has an even more specific and recent origin, coined by the foundation managing director of Transparency International, Jeremy Pope, to describe a changing pattern in anti-corruption strategies in which it was recognised that the answer to corruption did not lie in a single institution, let alone a single law (Pope 1996; 2000; see also Langseth et al 1997; 1999). Pope's graphical metaphor for the national integrity system is an ancient 'Greek temple' (Fig 1).

Figure 1. Transparency International's NIS Greek Temple (Pope 2000)



This image of a 'typical' national integrity depicts the types of institutions commonly found in the integrity system of contemporary liberal democracies (the 'pillars'), but also captures how different elements of an integrity system interact in terms of 'horizontal' or 'mutual' accountability. As Pope (2000: 36) describes:

the pillars are interdependent but may be of differing strengths. If one pillar weakens, an increased load is thrown onto one or more of the others. If several pillars weaken, their load will ultimately tilt... crash to the ground and the whole edifice collapse into chaos.

The concept of 'mutual accountability' captured in this image is especially recognisable to lawyers, because its archetypal example remains the Anglo-European constitutional 'separation of powers' between legislative, executive and judicial branches of government (Schedler et al 1999; Pope 2000: 24-26). In the concept of a national integrity system, this principle extends through a wide variety of integrity institutions and processes used to hold each other accountable, in a network fashion as well as operating on agencies and individuals through traditional top-down supervision. In many newer constitutions, the recognition of an increasing range of integrity institutions such as auditors and ombudsmen exemplify the trend.

The same concept is evident in the suggestions of Spigelman CJ that a range of core public sector integrity institutions in Australia should be considered a new 'fourth branch' of all governmental structures and there is the fundamental necessity to ensure that corruption in government:

... there have been a number of candidates for a 'fourth branch' designation over the years. The number does not matter. The idea does. The primary basis for the recognition of an integrity branch as a distinct functional specialisation, required in a broad sense of that term, is eliminated from government. However, once recognised as a distinct function, for which distinct institutions are appropriate, at a level of significance which acknowledges its role as a fourth branch of government, then the idea has implications for our understanding of constitutional and legal issues of broader significance (Spigelman 2004).

Whether semi-constitutionalised in this fashion or left as a more diffuse network that is indeed broader than simply the government sector, the conception here is of systems in which vertical lines of accountability turn into ‘a circle, or criss-crossing pattern’ between multiple integrity guardians; and in which the associated problem of ‘how to guard the guardians’ is also solved by the fact that ‘every member is accountable to at least one other, or possibly several others’ (Mulgan 2003: 232). From a political science perspective, this network of accountability relationships has also been described as a ‘lattice of leadership’, which ‘implies that public trust in government is more reliably placed when the various institutions of government share the task of self-regulation’ (Uhr 2005: 155). Figures 2a&b apply these concepts graphically, drawing on the work of Australian regulatory specialist John Braithwaite (1998).

However a crucial feature of modern integrity systems in practice is that their relationships are defined by more than simply mutual accountability. In addition to this type of constitutional relationship, framed as a ‘separation’ of power, we rely on many key integrity institutions to collaborate and cooperate, and we expect them to act coherently in the overall task of helping ensure the appropriate exercise of power. Integrity systems are also not limited to the ‘core’ institutions we might most readily recognise as engaged in the task, but to a diversity of strategies, measures and requirements that are devolved or ‘distributed’ throughout *all* institutions. Consequently, a total picture of the interrelations and interdependencies that increasingly define our integrity systems would be incredibly intricate. Figure 3 suggests that if there is a suitable graphical metaphor for this, it is probably not a neat human-built structure metaphor, but the messier natural metaphor of a bird’s nest (see Sampford et al 2005).

**Figure 2a. Formal Models of Two Conceptions of Trust (Braithwaite 1998: 354)**

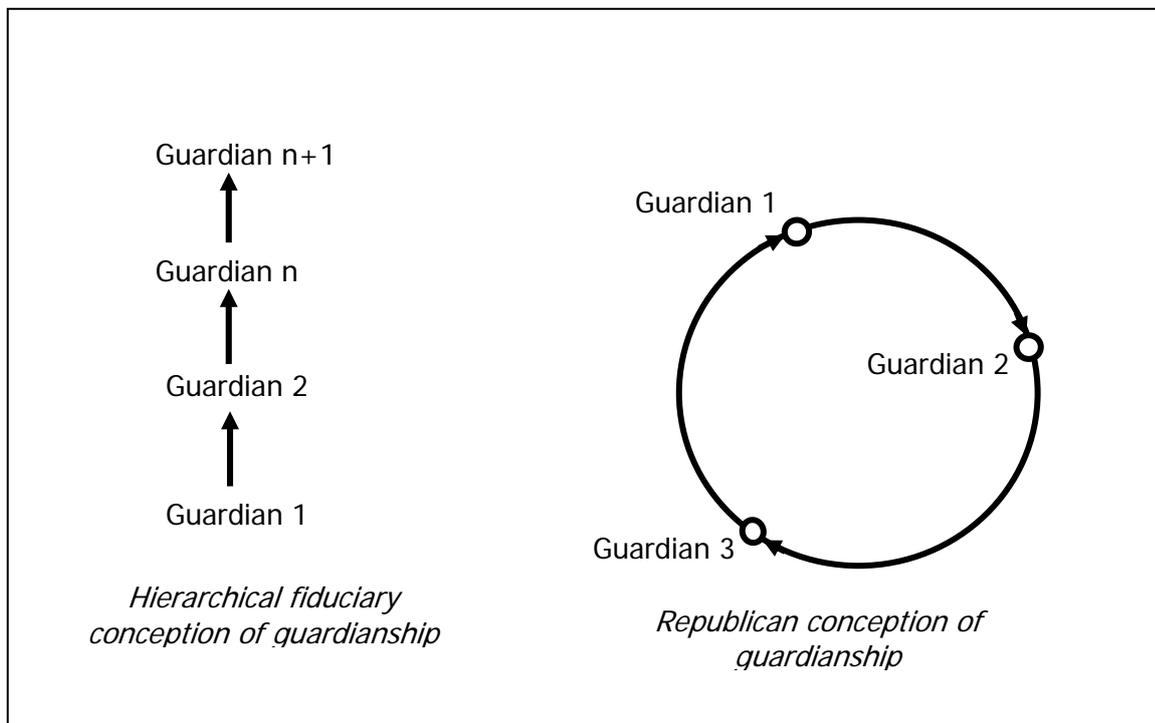


Figure 2b. A Model of Mutual Accountability (Brown et al 2005: 16)

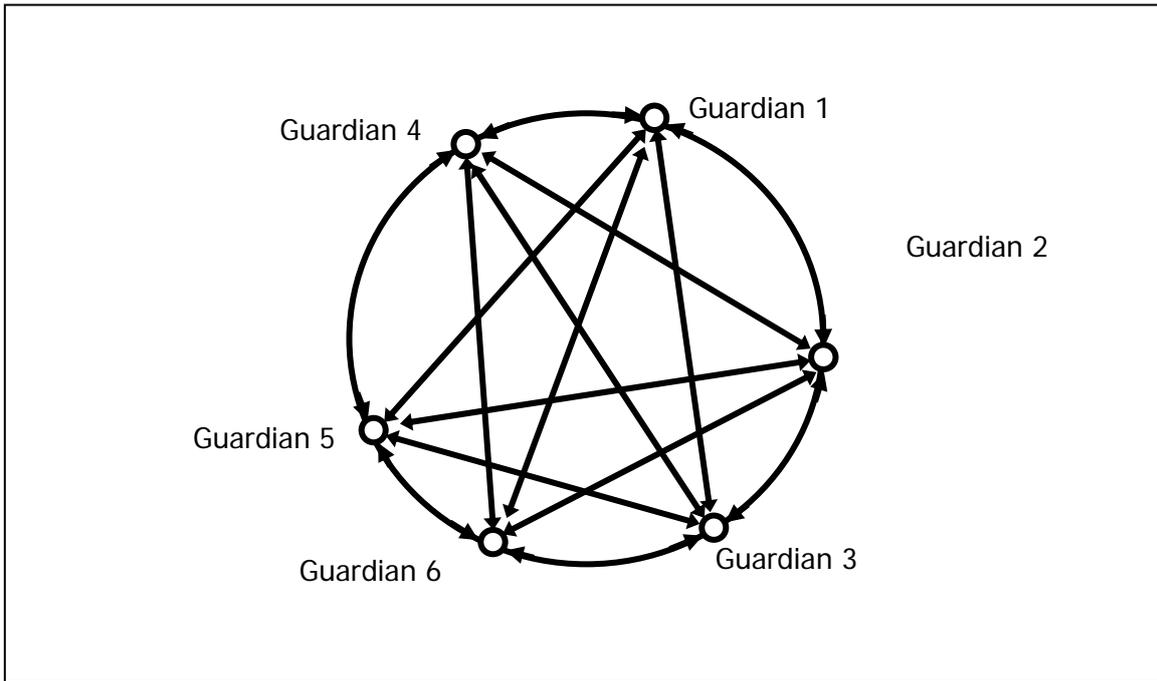
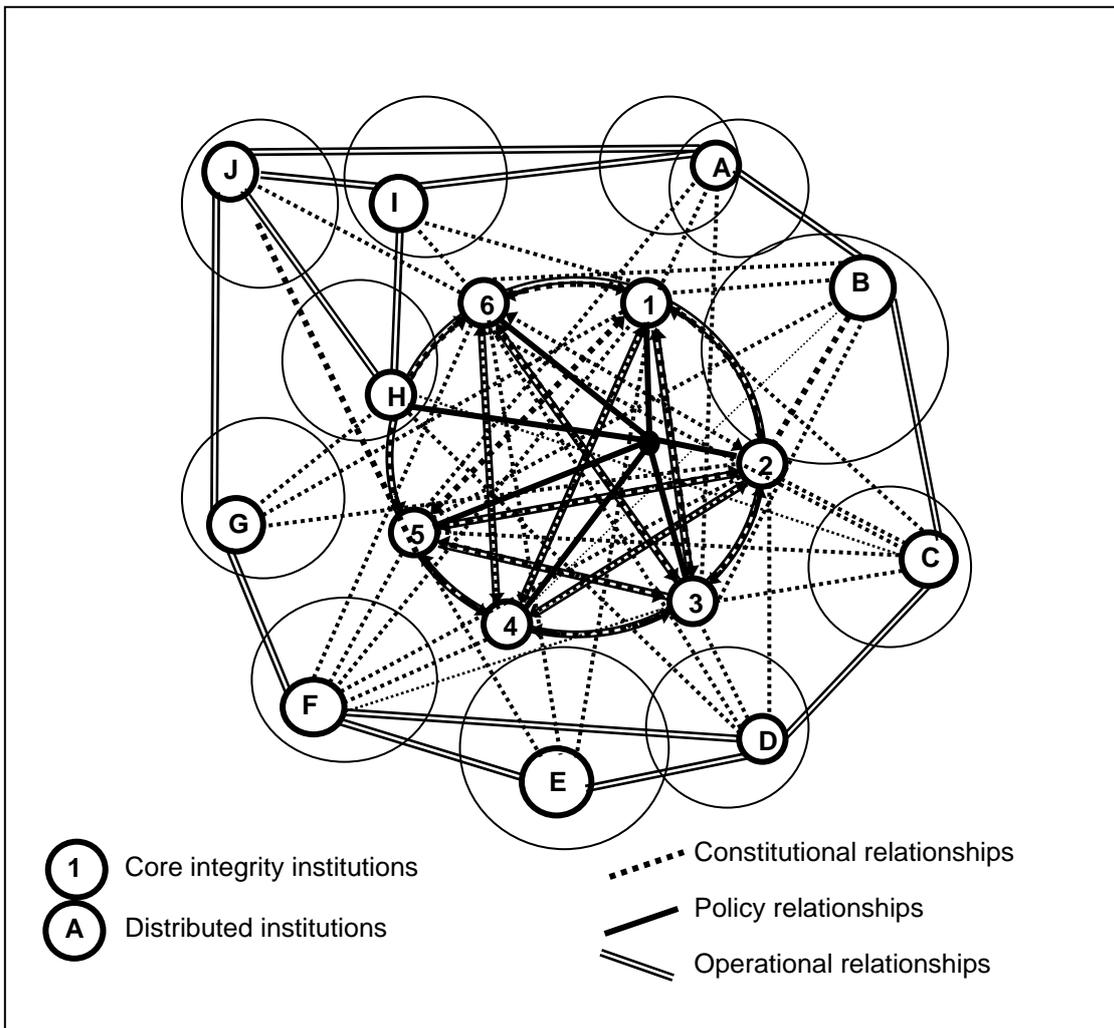


Figure 3. Integrity Systems 'Bird's Nest' (Sampford et al 2005: 105)



Turning from concepts to practice, the motivation for a more holistic appreciation of the dimensions of integrity systems lies with real-world problems – in particular, the struggle that many countries continue to have in ensuring that their integrity frameworks achieve their stated purposes. Australia’s National Integrity Systems Assessment (NISA) came about as part of an international effort to find more appropriate methodologies for reviewing the effectiveness of integrity reforms in particular and governance reforms generally, across a wide range of countries. This effort involves a diversity of international agencies, from government-sponsored efforts by the World Bank and OECD, to those of non-government organisations such as Transparency International.

Prior to the Australian NISA project, most of these focused on some means of analysing the performance of a similar range of institutional actors and practices (Table 1). Most were also quite limited, if not by a range of cultural and socio-political assumptions underpinning this form of comparative political analysis, then by their typically default to the identification of problem areas by contrasting the theory or intention of integrity systems, with their reality or practice. This approach can be unhelpful, because theory or intention may be based on ‘ideals’ which are inherently difficult to attain, and which do not themselves support definitive judgements as to when they have been compromised too much; nor indeed when the theory or intention may itself be wrong (Brown & Uhr 2004).

**Table 1. Common Elements of Western Integrity & Governance Assessments**

Assessment model/approach				
National Integrity Systems	OECD Anti-Corruption Mechanisms	OECD Ethics Infrastructure	Public Integrity Index	Governance Matters
Transparency International	OECD, Paris		Centre for Public Integrity (US)	World Bank
Pope 1996, 2000; Doig & McIvor 2003	OECD 1996	OECD 1999,2000	Camerer 2004	Kaufman 2003

**Key elements to be assessed**

Legislature	Oversight by legislature	Political will	Electoral & political processes	Political stability
Executive				
Judiciary	Specialised bodies to prosecute corruption	Effective legal framework	Branches of government	Rule of law
Auditor-General	Supreme financial audit authority	Efficient accountability mechanisms	Oversight and Regulatory Mechanisms	Control of corruption
Ombudsman	Ombudsman			
Watchdog Agencies	Anti-corruption regulation	Ethics coordinating body		
	Corruption investigation bodies			

Public Service	Human resource mgt procedures	Supportive public service conditions	Administration and Civil Service	Regulatory quality
	Financial mgt controls			
	Organisational mgt controls			
	Guidance & training for public officials	Workable codes of conduct Professional socialisation mechanisms		
Media	Transparency mechanisms		Civil Society, Public Information and Media	Voice & accountability
Civil Society		Active civil society		
Private Sector				
International Actors				

Figure 4. Global Integrity Report (Camerer 2004)

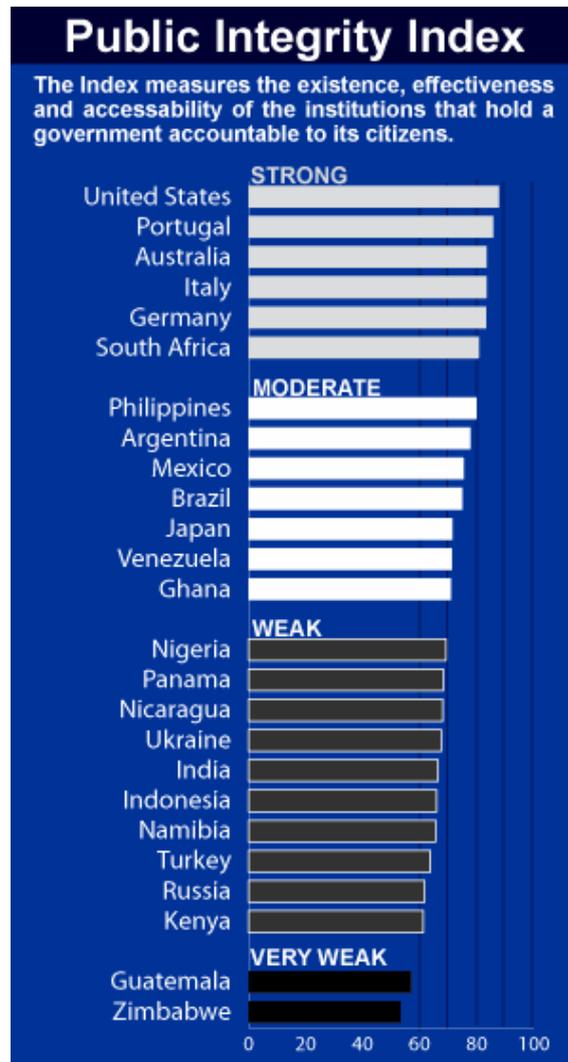


Figure 4 perhaps typifies the output of some previous international assessments, using a range of expert analyses to score a range of institutions and practices with a view to comparison in index form. In this case the sponsor was the Washington-based Centre for

Public Integrity. The meaning, accuracy and utility of this index is perhaps best left to the imagination – suffice to say that Italian public integrity advocates find it as amusing for their country to be ranked equally with Australia, as do Australian ones.

After considerable investigation and debate, the Australian NISA project decided to abandon any particular institutional template as the starting point for the assessment, and instead describe the institutional framework in the relevant jurisdictions from the ‘bottom-up’. As well, rather than by comparing reality with theory, the analysis was structured around three key themes arising from a number of sectoral studies and other similar evaluations: the **consequences**, **capacity** and **coherence** of the major systems involved. These three themes worked together as interrelated ‘lenses’ on the structure, operations and effectiveness of Australia’s integrity systems, providing a clearer platform for the identification of priority reforms. By analysing ‘consequences’ the assessment was able to review and pool existing efforts to directly measure the impacts or outputs of key integrity-related policies and institutions. By analysing ‘capacity’, the assessment tried to identify clear structural strengths and weaknesses in the ability of key policies and institutions to achieve their intended goals, as well as undertaking comparative analysis of certain obvious capacities (such as financial and human resources in like institutions) between different jurisdictions. By analysing, ‘coherence’, the assessment was able to focus on existing strategies and possible new options for achieving the type of mutual accountability, policy coordination and operational cooperation depicted in the graphical models above.

Perhaps the best compliment paid to this approach, was its adoption by the OECD Public Governance Committee in its report ‘Measures for Promoting Integrity and Preventing Corruption: How to Assess?’ compiled during the Australian assessment with direct input from the Australian team (OECD 2004). Table 2 below shows the basic framework and criteria around which the OECD now recommends countries could assess their public integrity systems, and correlates these criteria with the NISA assessment theme approach.

**Table 2. OECD Integrity System Assessment Criteria & NISA Assessment Themes**

<b>OECD Criteria Checklist (OECD 2004:10)</b>		<b>NISA Themes</b>
<b>QUESTIONS</b>	<b>CRITERIA</b>	
Are integrity policy instruments (e.g. legal provisions, code of conduct, institutions, procedures) in place?	Formal <b>existence</b> of components of policy instruments.	NISA Stage 1 – <b>Scoping</b>
Are integrity policy instruments capable of complete functioning (realistic expectations, resources and conditions)?	<b>Feasibility</b> of specific policy instruments.	NISA Stage 2 - <b>Capacity</b>
Did the integrity policy instrument achieve its specific initial objective(s)?	<b>Effectiveness</b> of specific policy instruments.	NISA Stage 2 - <b>Consequences</b>
How significantly have policy instruments contributed to meeting stakeholders’ overall expectations (e.g. actual impact on daily behaviour)?	<b>Relevance</b> , the contribution of specific policy instruments and actions to meet stakeholders’ overall expectations.	
Do the various elements of integrity policy coherently interact and enforce each other, and collectively support the overall aims of integrity policy?	<b>Coherence</b> of measures, relationship with other elements of the policy.	NISA Stage 2 - <b>Coherence</b>

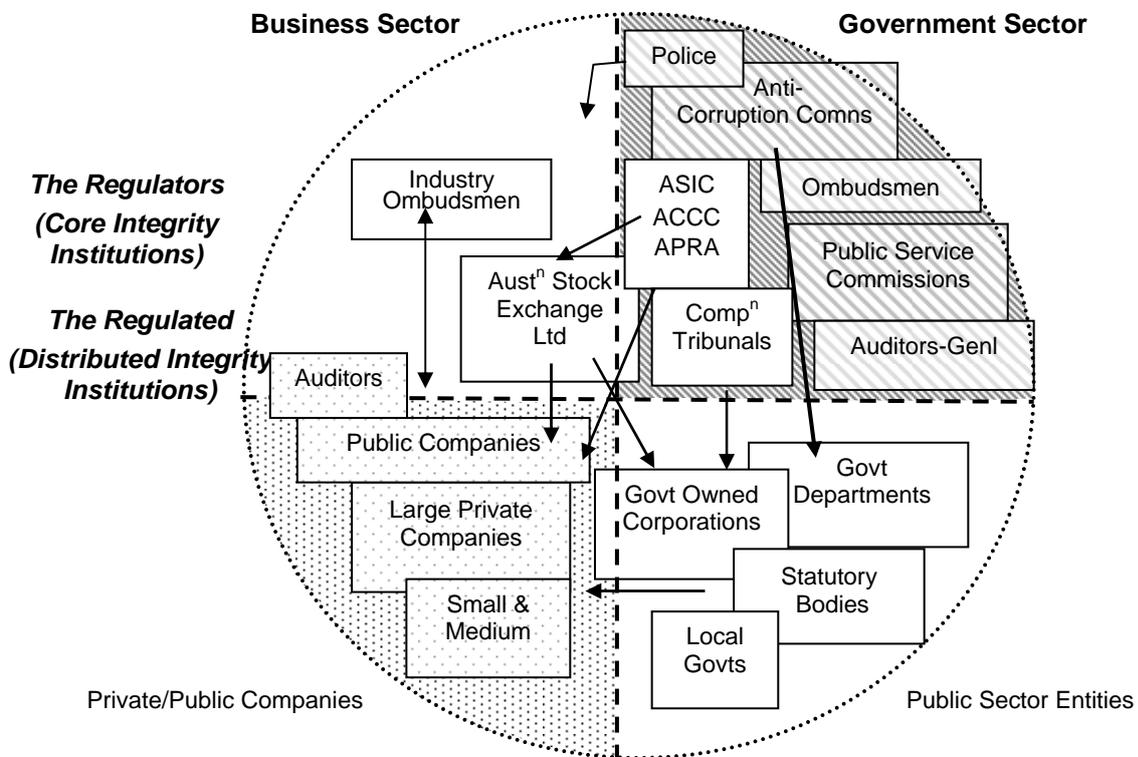
**3. Key recommendations from the National Integrity System Assessment (NISA)**

What specific conclusions emerged from this rather large canvas? These are set out in the report in the form of 21 recommendations, summarised in the box below.

It is important to note that these recommendations were not limited to the public sector and that the framework appeared to prove sound for also examining integrity systems in the business and civil society sectors in further depth, as well as inter-sectoral systems. Nevertheless the bulk of firm recommendations did relate primarily to the public sector. This is particularly the case for recommendations relating to ‘core’ integrity institutions, i.e. those making up the major public sector regulatory agencies, which formed the first group of recommendations. The second group of recommendations relate more to distributed integrity institutions, and include principles that are sometimes more sector-blind. Figure 5 below provides an indicative schema for where ‘core’ and ‘distributed’ integrity institutions are found in an Australian institutional context.

Many of the 21 recommendations relate directly or indirectly to the role of administrative law in our societal efforts to pursue public integrity. Indeed across the board, the assessment confirmed the need for legal strategies – and different forms of legal strategies, e.g. administrative, employment-related and criminal – to be more effectively coordinated with leadership and management strategies for maintaining ethical standards in the life and work of institutions. Nevertheless it is perhaps most useful to focus on those seven recommendations most directly relevant to the role and practice of administrative law, shaded in the box below.

**Figure 5. Key Integrity Institutions by Sector & Level (Brown et al 2005: 12)**



## Summary of recommendations – NISA

For full text see Brown et al 2005: 90-102 and supporting text as referenced on pp.90-91.

### ***Integrity from the top: core institutions***

#### *1. Commonwealth integrity and anti-corruption commission*

The Commonwealth Government's proposed new independent anti-corruption agency to be a comprehensive lead agency operating across the Commonwealth, not just a few agencies.

#### *2. Governance review councils*

Each Australian government to establish a governance review council to promote policy and operational coherence between core integrity institutions, and related functions.

#### *3. Standing parliamentary and public oversight mechanisms*

All core public integrity institutions to have a standing multi-party parliamentary committee, and direct public involvement in their operations or reviews.

#### *4. Jurisdiction over corporatised, contracted and grant-funded services*

Jurisdictions of public sector integrity institutions to extend to any decisions or services flowing from an allocation of public funds.

#### *5. Access to administrative justice*

National review of the availability of substantive administrative law remedies to citizens aggrieved by official decisions.

#### *6. Enforcement of parliamentary and ministerial standards*

All Australian parliaments to establish comprehensive regimes for the articulation and enforcement of parliamentary and ministerial standards.

#### *7. Independent parliamentary select committees*

New procedure for the initiation of inquiries by select parliamentary committee.

### ***Walking the talk: distributed integrity institutions***

#### *8. Statutory frameworks for organisational codes of conduct*

Comprehensive legislative basis for all integrity systems for any sector in any jurisdiction.

#### *9. Relationships between organisations and core integrity agencies*

All statutory frameworks to better reflect and ensure the mutually supporting functions of core and distributed integrity institutions.

#### *10. Effective disclosure of interests and influences*

New standards for systems for regulation and disclosure of material interests, including electoral contributions, based on continuous disclosure and the right of the public or affected persons to know of interests prior to relevant decisions.

*11. Whistleblower protection and management*

Revision of minimum legislative requirements to facilitate 'whistleblowing' by current and former employees, including better protection from reprisals.

*12. Minimum integrity education and training standards*

Training in integrity, accountability and ethics institutionalisation as a prerequisite for appointment to senior management.

*13. Professional development for integrity practitioners*

National program of advanced professional training for integrity practitioners in government and business sectors.

*14. Freedom of information*

Revision of FOI laws to better respect the principle of public 'right to know'.

*15. Regional integrity resource-sharing and capacity-building*

Comprehensive review of framework for building integrity system capacity at local and regional levels of government.

***Investing in integrity: education, evaluation and research***

*16. Civic education and community awareness*

Development of civic education to include a stronger direct focus on the theory and practice of the nation's integrity systems including nature of ethical decision-making.

*17. Public review of integrity resourcing and performance measurement*

National review of optimum resourcing levels and performance measurement arrangements for core and distributed integrity institutions.

*18. Parliamentary oversight review methodologies*

Joint comparative study of the methods used by standing parliamentary and public advisory committees in the oversighting of core integrity institutions.

*19. Evidence-based measures of organisational culture and public trust*

Joint long-term research by integrity agencies into optimum use of social science and evidence-based research for evaluation of integrity system performance.

*20. Core integrity institutions in the business sector*

Supplementary integrity system assessment of the consequences, capacity and coherence of core integrity institutions responsible for Australia's business sector.

*21. Civil society integrity systems*

Supplementary integrity system assessment of Australia's civil society sector.

**Recommendation 1 – Commonwealth integrity and anti-corruption commission**

*The Commonwealth Government’s proposed new independent anti-corruption agency to be a comprehensive lead agency operating across the Commonwealth, not just a few agencies.*

For some time, specialist anti-corruption investigatory and resistance-building capacities were regarded as interesting state government experiments in Australia. Now they are often accepted as *de rigueur*, both domestically and internationally – a significant piece of the integrity architecture, even though not providing a total response to corruption risks in their own right. We only need to remember the complete, as well as strictly legal meanings of concepts such as ‘improper purpose’ and ‘bad faith’ to know how intrinsically measures for detecting and remedying official corruption interrelate with the public accountability goals of administrative law.

This recommendation reflects not only the results of a number of analyses in the assessment itself, but the issues raised by a decision by the present federal government to strengthen capacity in this area by establishing a new ‘independent national anti-corruption body’, taken during the life of the project (Ruddock & Ellison 2004). This decision has now resulted in the Law Enforcement Integrity Commissioner Bill 2006 (Cth)<sup>1</sup>, introduced alongside the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 which is itself important for the new relationship it sets out between the Commonwealth Ombudsman and Australian Federal Police.

Both pieces of legislation were recently examined by the Senate Legal and Constitutional Legislation Committee (Senate 2006). The Committee noted and largely – in many cases, totally – endorsed the important questions of integrity system design that hang over the Commonwealth’s plans, set out in the NISA report (see also Brown & Head 2004, 2005; Brown 2005). While the creation of *any* new Commonwealth anti-corruption body is the most significant reform to the framework of the Commonwealth’s core integrity institutions in over 20 years, the current proposal is for the agency to have only the Australian Federal Police and Crime Commission within its jurisdiction. While consistent with earlier Australian Law Reform Commission recommendations (ALRC 1996), this is inconsistent with the rhetoric surrounding the relevant Ministers’ announcement, which presented the current frameworks in NSW, Queensland and Western Australia as the model to follow (on this, see table 3).

**Table 3. Some Core Public Integrity Institutions in Australia (based on Brown & Head 2004, 2005)**

	Auditor-General	Ombudsman	Police Complaints Authority	Police Integrity Com <sup>n</sup>	Anti-Corruption Com <sup>n</sup>	Crime Com <sup>n</sup>
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 (inc. Office of Police Integrity)				
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.

In the Senate Committee’s report, the Labor Opposition and Australian Democrats have now taken the position that the Law Enforcement Integrity Commission Bill should be expanded

beyond law enforcement so as to create an anti-corruption agency of general jurisdiction, rather than one limited to two agencies. Most importantly, the Committee was unanimous in its view that even if limited to law enforcement, the jurisdiction should be expanded to include a wider group of agencies including the Australian Customs Office, Australian Taxation Office, and Department of Immigration (Senate Committee 2006: 27-28). The Committee also expressed a unanimous view that:

A Commonwealth integrity commission of general jurisdiction is needed, and there is an accountability gap that would be closed by such a body. While the Committee considers that ACLEI – as currently proposed – needs to be created, consideration should be given to developing such a body in the longer term.

While there remain several possible paths to this result, and an obvious logic in dealing with these issues now rather than an indefinite point in the future, the overall conclusion remains the same and is one clearly supported by the assessment. For a variety of reasons set out more fully in the report, there are signs that such an injection of anti-corruption capacity is particularly overdue at the Commonwealth level, where enforcement capacity has suffered a lack of comprehensiveness. In particular, the Commonwealth's current and proposed regimes would continue to rely on the Australian Federal Police to oversight the handling of corruption in Commonwealth agencies, with agencies themselves left to handle 'non-corruption' issues. The Senate Committee disagreed with the Commonwealth Attorney-General's Department, and further agreed with the logic of the NISA recommendation, when it observed there are 'limits to the effective jurisdiction of the AFP in relation to broader corruption or integrity issues that fall short of criminal behaviour', a 'lacuna' which 'may not be adequately addressed by relying on agencies' internal investigations or the Ombudsman' (Senate Committee 2006: 26).

While this first recommendation was driven by considerations of institutional and legal capacity to deal effectively with corruption risks at the Commonwealth level, it has a consistency with other recommendations emphasising the importance of a comprehensive approach to integrity in public administration (e.g. recommendations 6 and 8). A comprehensive approach is one in which legal and non-legal strategies combine, and in which the different strategies of criminal law, the law of public sector employment and management, 'values-based' governance and administrative law all need to work in an integrated fashion. The type of 'lacunae' identified by NISA, as confirmed by the Senate Committee, confirm the need for such an approach, irrespective of the particular legal starting point – criminal, administrative or employment-based – from which one can approach the problem.

Any discussion about the creation or powers of executive 'watchdog' agencies prompts questions of their own accountability, as noted earlier. On this issue of mutual accountability, the report deals separately with current best practice in special parliamentary oversight arrangements for such agencies, with special mention of the need for these to also take in the Commonwealth Ombudsman (recommendation 3).

***Recommendation 2 – Governance review councils***

*Each Australian government to establish a governance review council to promote policy and operational coherence between core integrity institutions, and related functions.*

This recommendation goes to the crucial issue of the overall coherence of the modern public integrity systems of Australian governments, as the number and business of core institutions becomes increasingly complicated. Importantly, it is here that administrative law has both a lot to offer the task of effective policy and operational coordination, and perhaps something to learn.

When the assessment looked for concrete strategies for how modern integrity systems maintained or sought to maintain any coherence, it found a diversity of options. In Queensland, the modern system emerged from a comprehensive reform program in which development of many key institutions was linked through the principles articulated by the Fitzgerald Inquiry and developed in more detail by the Electoral & Administrative Review Commission (EARC). However, there was fragmentation between some reforms from the outset, while others crept in at implementation (see Preston et al 2002). The winding-up of the EARC pursuant to its 'sunset' provisions left no clear institutional coordination mechanism. More recently, the challenge of better policy and operational coordination has been met by an informal 'Integrity Committee' comprising the Ombudsman, Auditor-General, Chair of the Crime & Misconduct Commission, Public Service Commissioner, and Parliamentary Integrity Commissioner (Demack 2003; Parnell 2004).

In June 2005, in response to the NISA draft report, key Western Australian integrity agencies formed a similar but more formal 'Integrity Coordinating Group' (ICG), comprising the Ombudsman, Corruption and Crime Commission, Auditor-General and Public Sector Standards Commissioner, with terms of reference based on this recommendation, supported by an interagency working party.

New South Wales tells a particularly interesting story about the importance, and difficulty, of maintaining coherence in the operation of multiple integrity bodies. The NSW Government is alone among Australian governments in *not* possessing a comprehensive public sector ethics framework (recommendation 8). For possibly related reasons, one of the most significant efforts to coordinate the parallel operations of many agencies, through creation of a 'one stop shop' public interface called 'Complaints NSW' in 2001, foundered on technicalities which were also clearly indicative of a lack of central government support (Brown et al 2005: 87). The NSW public integrity system's story is more one of coordination *despite* any structural or institutional support, than because of it.

The Commonwealth integrity system suffers its own problems of fragmentation, including those noted above. At the same time, however, it provides the nation's strongest and most long-lasting mechanism for maintaining policy and operational coherence within at least *part* of the integrity system, in the form of the Administrative Review Council, established by Part V of the *Administrative Appeals Tribunal Act 1975* (Cth). So far only one state has followed suit, almost 30 years later, with the Tasmanian Administrative Review Advisory Council established in August 2004 (see [www.tarac.tas.gov.au](http://www.tarac.tas.gov.au)).

Administrative lawyers need little introduction to the Commonwealth body, which includes the President of the Administrative Appeals Tribunal (typically also a Judge of the Federal Court), Ombudsman, President of the Australian Law Reform Commission and up to 11 other members with extensive practice or knowledge in industry, commerce, public administration, industrial relations or administrative law. The purpose of the ARC was explicitly to maintain the coherence of the 'new administrative law' at a time when this itself was made up of a combination of mutually-supporting elements – namely the codification and liberalisation of judicial review of administrative action, general-purpose merits review tribunals, freedom of information, and the establishment of the Ombudsman. The presence of the president of the ALRC on the ARC provides a continuing reminder that maintaining the coherence and effectiveness of administrative law is an ongoing process. Indeed if we were to add the Auditor-General and the Public Service Commissioner to the ARC (in place of the senior agency head or heads currently appointed), we would quickly have a body which could help maintain our systems of public accountability not simply in their legal dimensions, but more broadly.

It may well be that key participants in the Commonwealth administrative law system would not want to risk diluting the current focus and frequent good works of the ARC. Nevertheless, this recommendation combines the lessons of the former Queensland EARC and the long-term success of the ARC – indeed, its strategic importance as a voice for coordinated approaches to public accountability – as a basic model for the type of recognised, statutory coordination mechanism now required to maintain an effective integrity system on a broader front. The roles of such a council would include research, performance measurement, capacity-building and capacity-sharing, as well as capacity to monitor longer-term integrity trends and ensure coherence in development of new integrity-related laws and institutions. Among the most important operational issues are the public's interest in more seamless and user-friendly complaint services, outreach and community education, shared information, research and intelligence, and better coordination of integrity policies at the 'coalface' of public sector management by better integrating and simplifying the diverse accountabilities imposed on individual public servants by the integrity regime.

The model provided by the Administrative Review Council also provokes some reflection on the extent to which developments in administrative law once played a more general lead role in the evolution of our integrity systems, than they might seem to play today. This is a question returned to below.

***Recommendation 4 – Jurisdiction over corporatised, contracted and grant-funded services***

*Jurisdictions of public sector integrity institutions to extend to any decisions or services flowing from an allocation of public funds.*

*That all governments review the traditional legislative methods for defining the jurisdictions of integrity institutions, away from characterisations of decision-makers or service-providers as 'public', 'private', 'commercial' or 'corporatised' and towards increased discretion for integrity bodies to investigate and/or hear any relevant matter involving any decisions or services flowing from an allocation of public funds.*

In an age of corporatisation and 'contracting out', this recommendation needs little explanation to the initiated. There is no question that whatever the benefits of the contracting out of public services, in terms of efficiency and responsiveness, the public expectation and need for integrity and accountability in the delivery of those services remains undiminished. Even in neo-classical economics, contracting-out poses alternative integrity challenges due to increased agency risks and lengthened supply chains. However, corporatised and out-sourced services since the late 1980s have been characterised by significant accountability 'gaps', with public integrity oversight – including the reach of administrative law remedies – halting at the point of contracting-out for no other reason than the traditional delineation of jurisdiction based on the legal character of the entity concerned, rather than the nature of the power and discretion being exercised, the services being delivered or the funds being expended. Even in the case of corporatised entities such as government-owned corporations (GOCs), in fact, there is no doubt that when it comes to the 'fundamental choice' needed on questions of governance, accountability and ethical behaviour 'we must treat GOCs as if they were public entities' (Bottomley 2003). Increasingly, there is little reason to differentiate between the basic integrity standards and strategies needing to be employed by public and private service providers (see e.g. Demack 2003: 12).

The solution adopted by some jurisdictions (e.g. NSW) has been to begin extending the jurisdictions of core public integrity institutions, such as the Ombudsman, to include discretion to investigate complaints into publicly-funded services regardless of provider. While other responses exist, including industry-specific integrity mechanisms (e.g. industry ombudsman's offices), these responses do not provide universal coverage of contracted

services and particularly where industry-controlled, can appear compromised. Such mechanisms also do not typically extend to programs funded by government grants, rather than contract. This recommendation identifies the need for a general reconsideration of the options for bringing our integrity systems up to date with the changing structure of modern governance.

***Recommendation 5 – Access to administrative justice***

*National review of the availability of substantive administrative law remedies to citizens aggrieved by official decisions.*

*That all governments join in a national review of the current availability of substantive administrative law remedies to citizens aggrieved by official decisions, recognising:*

- (i) Partial, and often complete lack of protection for basic civil and political rights in Australia's Constitutions and other fundamental laws, and the extent to which this continues to constrain the operation of administrative law;*
- (ii) Continuing increases in the cost of legal services and continuing comparative lack of legal aid support for administrative as against criminal and family matters;*
- (iii) Continued lack of availability of hearing-based merits review systems in some jurisdictions, either with comprehensive jurisdiction or at all;*
- (iv) The continuing, but unmonitored conferral of administrative merits review functions on some lower state courts as a substitute to establishment of a merits review tribunal with little evaluation of the value or equity of this approach;*
- (v) Current trends to a less equitable 'two-tiered' system of administrative review in which the only truly no-cost review mechanism (ombudsman) is only able to offer remedies based on negotiation and recommendation, and determinative remedies are available only to those in a position to pay; and*
- (vi) Widespread community concern regarding the need for effective legal protection of citizens against excessive use of official power by governments or individual officials in the name of border control and anti-terrorism.*

*That this review be overseen by the coordination body in recommendation 2, or otherwise by existing administrative review and/or law reform bodies or the national standing committee of Attorneys-General, with extensive public participation.*

This recommendation clearly has the most direct relevance to administrative law. Indeed, the title of this paper has as much to do with this recommendation as any other – based as it is on the concern that, when one stands back and takes a long look at apparent trends in the integrity system as a whole, administrative law itself appears to need to have some of its integrity restored and renewed.

The specific issues listed in the recommendation are fairly well known. Far from having been raised by the NISA research team for the first time, they have received the attention of a wide range of commentators, usually far more qualified to discuss them individually than any of the authors of the NISA report. The risk identified in the NISA assessment was that of only ever analysing the main challenges facing our systems of administrative review as if these challenges are separate and unrelated, when in fact they may have some common root causes. The title of the recommendation is indicative – 'access to justice' is of course most commonly discussed as an issue of cost, but scratch the surface and we find equally important issues to do with forum, jurisdiction, standing and citizens' awareness of their own rights and their capacity to assert them when it is not just in their own interest, but in the public interest that they do so.

If we take these challenges together, the question becomes whether we are not now travelling a road of gradual curtailment of the effective legal capacity of citizens to challenge government actions that affect them personally or conflict with valid conceptions of the public interest. This question is of course open to debate, but the conclusion reached by the NISA team was that we indeed appear to be on this road. As discussed earlier, the introduction of the 'new administrative law' brought significant liberalisation of the ability of citizens to challenge government actions, but despite the empirical evidence that judicial review of administrative action is effective (Creyke & McMillan 1998; 2004) broader political commitment to the philosophy of such review has somewhat lost its original impetus. Government attacks on administrative justice systems as a 'grievance industry' rather than an indispensable part of an integrity system are indicative of this trend (Mulgan & Uhr 2001: 162). Over several years, curtailments of the rights of non-citizens to equitable levels of administrative justice have now been found to have their corollary in systemic abuses of official powers by immigration authorities, including in respect of Australian citizens. Concerns also remain over the state of traditional principles of due process, independent oversight and review in relation to new laws regarding the monitoring, arrest, detention and control of those who may – or may not – be likely to conspire to engage in terrorism.

There is a clear constitutional dimension returning to the fundamental questions that confront administrative law. Our constitutional founders did not put anything in the Constitution by accident – one wonders if they had not elected to make explicit reference to at least some of the prerogative writs, whether administrative law remedies that we continue to take for granted would be quite as secure. For generations, basic citizens' rights, including what we now term human rights, have not been formed in the abstract but due to the circumstances that can befall individuals at the hands of the otherwise 'legitimate' power of governments, even governments acting with majority support. Administrative law provides one of our society's most tangible examples of an area where we could once look to the common law for deeply-rooted protections for citizens and do so with some pride, and all we had to do in the 1970s-1980s was systematise and codify. As our connections to the common law of old continue to weaken and the momentum for statutory and constitutional rights protection regains strength, we must see these as not simply constitutional questions but an opportunity to reconsider and reinvigorate the basis of our systems of administrative justice.

***Recommendation 10 – Effective disclosure of interests and influences***

*New standards for systems for regulation and disclosure of material interests, including electoral contributions, based on continuous disclosure and the right of the public or affected persons to know of interests prior to relevant decisions.*

For administrative lawyers, the 'rule against bias' provides the type of *grundnorm* or jural postulate that compared to so many areas of principle, can be delightfully simple and clear. This recommendation highlights the real lack of commitment we are showing today as a society, to effective transparency in the disclosure of interests that can be reasonably apprehended to affect official decision-making. We have become masters of procedure and form when it comes to disclosure. For examples, requirements for officeholders to disclose material personal interests via official registers are now standard for politicians and senior public officials, as these requirements are in corporate governance. But we have become quite unconcerned with the substance of disclosure, particularly in what has long been regarded as the most important area for such disclosure in any democracy – legislative regimes requiring the disclosure of electoral contributions by political parties and candidates, the 'invisible world of political donations' (see Ramsay et al 2001; Tham 2003; Tham & Orr 2004).

There is growing evidence that present electoral funding disclosure systems are fundamentally ineffective, requiring technical compliance with disclosure obligations

(lodgement of returns or completions of registers) in ways that may encourage officials to avoid conflicts of interest, but do little to inform citizens or affected persons of such a conflict at an opportune time. The classic example of this problem lies in disclosure of electoral contributions, which typically does not occur until after the election concerned, by which time electors have already cast their vote based on incomplete knowledge. These days, we have the technology to adopt much more substantively effective approaches. Unfortunately, passage of the 'Orwellian' Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth) as recently as last week, increasing the threshold on anonymous donations to political parties from \$1500 to \$10000, provides a chilling confirmation that as a democracy, we are now objectively going backwards (see Williams 2006). Anonymous to everyone, we might ask, or just those not already in the know, for whose very purpose the principle of disclosure exists?

This recommendation is not limited to electoral funding disclosures and has wider implications for how we conceptualise the disclosure obligations of all officeholders. However to the extent it does target the electoral sphere, this recommendation joins others (particularly recommendation 6) in highlighting the state of 'puzzling self-regulation' (Uhr 2005: 147) in which our elected political leaders maintain themselves. This is a state which contrasts with almost every other sphere of integrity-related regulation in our society, and the larger theory of mutual accountability. Beyond the province of administrative lawyers, one might ask? In some respects yes, but the question highlights that the law of elections and of politics is incredibly weak and neglected in Australia, when it should be far more robust. Administrative law provides the best and most likely source of principles and practitioners needed to close this gap.

### ***Recommendation 11 – Whistleblower protection and management***

*Revision of minimum legislative requirements to facilitate 'whistleblowing' by current and former employees, including better protection from reprisals.*

This recommendation highlights continuing weaknesses in one of the most complex, but important areas of the law of public accountability. In Australia's integrity systems, there is no question that one of the single most important assets remains the ethical standards and professionalism of those officers prepared to speak up about integrity breaches that would otherwise go uncorrected ('whistleblowers'). Public sector agencies' capacity to manage whistleblowers positively and encourage further reporting of wrongdoing by others is vital (McMillan 1994; Brown 2001; Brown, Magendanz & Leary 2004). However the performance of even the most comprehensive public sector whistleblower protection regimes is often questioned, primarily because the legislation hinges on an ability to transform organisational cultures in ways still not widely understood (Dempster 1997; Martin 1997; De Maria 1999).

Substantial differences between State and Territory regimes mean no single government has currently achieved what would constitute 'best practice'. The Commonwealth's scheme is positively inadequate. The extent of the confusion is such that when the Australian Democrats last introduced a Public Interest Disclosure Bill for the Commonwealth, in 2001-2002, they elected to model it on the ACT legislation which is perhaps the worst in the country. Regimes comparable to those in the public sector are now extending to the private sector, through the Australian Standard on Whistleblower Protection Programs for Entities (AS 8004-2003) and reforms such as Part 9.4AAA of the *Corporations Act 2001*, but are likely to suffer similar limitations in the absence of a more comprehensive approach.

The full text of the recommendation contains some key known principles of legislative best practice, and prioritises this as an area of reform. The more fundamental questions are currently the target of a \$1.3 million research collaboration led by Griffith University and a national consortium of 13 public integrity agencies and Transparency International Australia,

in which over 300 Federal and State agencies have already participated (see [www.griffith.edu.au/whistleblowing](http://www.griffith.edu.au/whistleblowing)).

#### **Recommendation 14 – Freedom of information**

*Revision of FOI laws to better respect the principle of public ‘right to know’.*

*That all Australian governments revise their Freedom of Information laws to better respect the general principle of a public ‘right to know’, by establishing:*

- (i) A clear principle that citizens are entitled to free and immediate access to such government records as they may request, without the need for a formal application, other than in circumstances in which it can be demonstrated that release would specifically damage or compromise someone’s rights or legitimate interests (other than public officials or agencies) or the public interest (other than as defined simply by the self-interest of public officials or agencies), or pose an unacceptable risk of such damage;*
- (ii) A reversed onus of proof so that where a public agency requires an applicant to submit a formal application for records due to its assessment of actual or unacceptable risk of damage, and then determines to reject that application for any reason other than privacy or personal (but not commercial) confidentiality, the agency must first make its own successful application for non-release of the records to the Information Commissioner, Ombudsman or other independent review agency — or release the records.*

This recommendation is of obvious interest to administrative lawyers, and builds on the critical analysis to which a range of more qualified commentators such as Rick Snell and Ron Fraser have been subjecting current FOI legislation and practices. While all Australian governments now have such laws, it is well-known that their operation in practice is frequently at odds with the principle of access (Willis 2002: 174; Fraser 2003). At a Commonwealth level, government has shown itself reluctant to review FOI requirements in ways which might help restore the principle of ‘right to know’, e.g. through implementation of the Administrative Review Council and Australian Law Reform Commission report, *Open Government* (1995). In a very revealing farewell speech that was probably difficult to hear outside Canberra, a recent Australian Public Service Commissioner strongly questioned whether Commonwealth practices and attitudes are consistent with the principle that FOI legislation be interpreted to extend, ‘as far as possible, the right of the Australian community to access information held by the Government’ (Podger 2005).

The major question that confronts us is the extent to which better outcomes can be achieved by tinkering with the detail, or whether it is time to explore the potential for a quantum shift. The conclusion reached in the NISA project is that it is time to seriously consider some quantum shifts, including abandonment of systems of exemptions based on ‘classes’ of records rather than actual contents and dealing differently with the inherently illogical situation in which the onus lies so heavily on applicants to challenge decisions for the non-release of records that they cannot see.

All seven of these recommendations are intended, like the remaining 14, as catalysts for further debate rather than pretending to provide a definitive last word on current dilemmas. The technical and political feasibility of some of the reforms implied are equally open to debate. The point of an assessment like the NISA project is to do something that is relatively rare, which is to attempt to form an overall, holistic picture of where current strengths and weaknesses lie on the very large canvas of regulation and administrative practice that makes up, in this case, our public integrity systems. The resulting ‘wish list’ of reforms can be no more than a guide to priority areas for action, but in this case, one that is already having impacts.

#### **4. In conclusion: is public accountability enough for public integrity?**

This paper opened by asking not only how ‘the law of public accountability’ currently features in issues in our integrity systems as a whole, but whether public ‘accountability’ is actually the same thing as public ‘integrity’, especially when defined in legal terms.

In closing, the answer is of course, ‘no’ – at least in theory. Integrity is a much more amorphous, complex and value-laden concept than simple accountability, which was once regarded as an ‘awful’ idea in its mission to render more objective the ‘counting’ of human performance against the rules and processes that bind us all in the modern world (Hoskin 1996). Public accountability is all about compliance with procedure; the law of public accountability often seems doubly so. The concept of integrity is all about substance, inextricably linked with ideas of truth, honesty and trustworthiness, whether applied to individuals or institutions. While truth and honesty are not synonyms for integrity, they provide its fundamental elements; as one Canadian integrity commissioner has said, ‘the virtue of integrity... includes honesty, together with worthiness, respect and an expectation that a promise made will be kept, absent some factor or circumstance beyond the control of the promiser’ (Evans 1996).

The reason for asking this final question is that in practice, our ‘integrity systems’ often have a very hard time being anything more than simply ‘accountability systems’. In both cases, we know these systems exist because the structure of modern society is now such that we simply cannot rely on normal, human, interpersonal trust to hold our institutions together and in place. Instead, in fact, we establish systems that institutionalise *distrust*, turning it around to play a positive role in the life of our institutions so as to ‘enculturate trust’ in business and government (Braithwaite 1998). We make our executive agencies subject to the scrutiny of an elected parliament, because as a populace, we cannot easily collectively exercise that scrutiny ourselves. We give watchdog agencies the power to monitor and investigate our officials, not because we distrust all of them all of the time, but because we need to know that our trust in them is not misplaced or being abused. We recognise the rights of individuals to take up their own legal causes against government in independent courts and tribunals, because we trust in the self-interest of individuals to identify when they have been wronged, knowing that otherwise, many wrongs would go undetected and unremedied.

Unfortunately, while our ‘accountability’ systems may hopefully increase the prospects of our officials acting with integrity, they cannot themselves guarantee it. We all know that officeholders can be perfectly accountable in legal and technical senses, and still breach standards of integrity. Similarly, their actions can be defended as highly responsive or responsible, in policy or political terms, even when quite corrupt in others (see Uhr 2005: 189). Importantly political scientists and public policy experts have for some years been noticing that although ‘accountability’ and ‘responsibility’ have different meanings in theory, in practice these terms tend to be used interchangeably, as if meaning one and the same thing. The more we talk about ‘public integrity’ in the same breath as ‘accountability’ and ‘responsibility’, the more we risk the same result.

**Table 4. Defining Accountability, Responsibility and Integrity (Brown & Uhr 2004; Brown et al 2005: 10)**

<b>Meaning (Dobel's model)</b>	<b>Technical</b> (Process-rational) (Institutional-Legal)	<b>Substantive</b> (Value-rational) (Implementation / Effectiveness)	<b>Personal</b> (Pre/post-rational) (Personal-Responsibility)
<b>'Accountability'</b>	Individual actions are, or can be held to account.	Individual actions invite, are open to accountability.	Accountability <i>makes</i> person trustworthy.
<b>'Responsibility'</b>	Individual actions are, or can be held responsible.	Individual actions are responsive, responsible.	Person <i>is</i> responsible, trustworthy.
<b>'Integrity'</b>	Actions accord with stated purposes/values; trust is honoured.	Actions are honest, honourable.	Person <i>is trusted</i> , has honour.

Source: Brown applying Weber (1954) and Hoskin (1996) to Thynne & Goldring (1987: 4-7), Davis et al (1993: 79), Uhr (1993, 1999), Schedler (1999), Dobel (1999) and Mulgan (2003: 7-22, 240).

Table 4 above is one attempt to unpack, and contrast the meanings we give these three terms in practice. Its reference points include some deep sociological theory as well as more recent discussions in public policy, including the work of the American political scientist Pat Dobel (1999) in identifying at least three distinct ways in which concepts of public integrity tend to be articulated – in ‘institutional-legal’ terms, in ‘effectiveness/implementation’ terms, and in ‘personal-responsibility’ terms.

Administrative law – the law of public accountability – functions primarily to help secure the ‘institutional-legal’ dimensions of public integrity. The final lesson for administrative lawyers, borne out by the breadth of issues identified by the National Integrity System Assessment as a whole, is to recognise this fact, but not allow themselves to be personally limited or blinded by it.

If we want public accountability, but nothing more, then we can go about our roles mechanically and take pride in our professional skill in doing so. If we want accountability to serve and support *integrity*, we also have to think more critically, form more judgements, debate higher principles and read the signs that it is time for some fundamental reinvigoration of the principles of administrative justice and reappraisal of the boundaries between administrative law and other areas of law. For many individual administrative lawyers, already perfectly cognisant of the difference between accountability and integrity, this is no lesson at all. However in an age where officeholders seem increasingly inclined to claim ‘we got away with it, therefore we must have acted rightly’, it is an important lesson for administrative law to help bring back to society as a whole.

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**Endnote**

1 This Bill was assented to and came into effect on 30 June 2006.