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Session 6: Beyond the Audit – inter-agency cooperation to maintain integrity.

'*A discussion of how anti-corruption agencies, Auditors-General and other integrity agencies work together*'

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Introduction

In the debate about the existence, and desirability, of a fourth, or 'integrity' arm of government, it has been argued that we should not seek to be wiser than an our ancestors, who saw fit, at least in this country, to divide power between three arms of government.

There are indications that it has been a concern of governments since ancient times that administration should be conducted with integrity.

Mary Beard writes in her recent work 'SQQR: A History of Ancient Rome' published by WW Norton and Company, at page 488,

> 'In most provinces too, a specialist financial officer, or *procurator*, appointed by the emperor looked after imperial estates and had a watching brief over tax collection. He and his staff of slaves and ex-slaves from the imperial household (the *familia Caesaris*) could also keep an eye on what the governor was up to and are known sometimes to have blown the whistle back in Rome'.

The word *procurator* is derived from the Latin verb procurare, which means 'to take care'. These caretakers were appointed to administer agricultural lands or large sums of money.

The reason for the dual administrative structure of governor and procurator was to prevent the concentration of power into the hands of the governor and avoid embezzlement and corruption by the governor, who was commonly posted several weeks ride away from Rome.

Another historical example is the censorial branch of government in Imperial China, introduced in the 13th Century CE with the role of maintaining integrity in systems of governance.[1] The Mongol Emperor, Kublai Khan said of his government, 'The Secretariat is my left hand, the Bureau of Military Affairs is my right hand, and the Censorate is the means for my keeping both hands healthy.'[2] The Republic of China divided power into five branches (or yuan) in the 1920's in accordance with Sun-Yat Sen's principles, including a 'control yuan' or 'audit branch'.

The idea of a tripartite separation of powers is comparatively recent, having its genesis in French philosopher Baron de Montesquieu's *Spirit of Laws* in 1748. While the Commonwealth Constitution appears to enshrine a strict separation of powers in Australia,

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[1] James Spigelman NPJ, *Institutional Integrity and Public Law*, Address to the Judges of Hong Kong, Hong Kong 30 October 2014, http://www.hkcfa.hk/filemanager/speech/en/upload/79/20141030%20Spigelman%20-%20Institutional%20Integrity%20and%20Public%20Law.pdf

[2] See Charles O Hucker, *The Censorial System of Ming China*, Stanford Uni P, Stanford, California (1966) 6.

the reality is that there is the legislative branch acts as a minimal check on the power of the executive, unless you count the State's House, or Senate. A stricter separation is observed in terms of the judiciary, although with significant practical difficulties adhering to the ability of that branch to check the power of the other two, which will be discussed in more detail later.

Here in Australia the earliest agency properly described as an 'integrity' agency was the office of the Auditor-General, established in NSW in 1824.[3] The next development took place in another 150 years, with the introduction of Ombudsmen. In more recent times, the number of integrity agencies has multiplied.

These agencies have begun, at least in some jurisdictions, to establish more or less formal arrangements for co-ordinating their activities, as outlined by Mr Goody from the CCC, whose presentation discussed the 'Queensland Integrity Committee', which is comprised of officers from the CCC, PSC, Integrity Commissioner, Queensland Audit Office, Ombudsman and Information Commissioner and meets on a quarterly basis.

For the purposes of this discussion, I will be adopting the definition of the integrity function of government set out by Professor AJ Brown in his chapter on the integrity branch, namely, 'to ensure that other governmental institutions and officials exercise the powers conferred on them for the purposes for which they were conferred.'[4]

Focus of my Research

In this paper I will explore the idea that a fourth arm of government has emerged in Australia, to provide an additional check and balance on the traditional three arms of government in this country.

My research involves examining structures for ensuring the accountability of anti-corruption agencies. My thesis is on the topic of how a federal ICAC, should such a body be created, would be made accountable to the Australian people.

This research has led me to examine the role of Parliamentary Committees in providing accountability for anti-corruption commissions. These mechanisms, along with Parliamentary Inspectors or Monitors have been developed in Australian State jurisdictions to address the tension between the level of independence necessary to ensure anti-corruption commissions can fearlessly investigate even the highest office in the land, while seeking to ensure the extraordinary powers wielded by such agencies are not misused.

My research has also introduced me to the inter-relationships of what could broadly be termed 'integrity agencies', which have proliferated over the past 25 years or so. The theoretical framework for my research is the introduction and growth of fourth, or integrity branch of government, providing a further separation of power, additional to the traditional tripartite division embodied in the Commonwealth Constitution.

This theory is relevant in the context of the discussion about the interaction between agencies which it is argued form part of the fourth arm of government, which can loosely be termed 'integrity agencies'.

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[3] David Solomon, 'What is the Integrity Branch?' 70 *AIAL Forum* 26, 27.
[4] AJ Brown, 'The Integrity Branch' in Matthew Groves (ed), *Modern Administrative Law in Australia: concepts and context* (Cambridge University Press, 2014) 313.

A Fourth Arm of Government?

The starting point for today's discussion of the emergence of a fourth arm of government is Topperwein's argument, in 1999, that while the Commonwealth Constitution appears to divide government into three arms, the Parliament and executive 'can create, and effectively have created, a fourth arm of government, independent of, but subject to oversight by, Parliament, the executive and the judiciary.'[5]

Topperwein argued that the fourth arm exercised all three forms of governmental power and was comprised of independent agencies not subject to Parliamentary or executive control.[6]

Under the heading of 'Two Modest Proposals', Professor Ackerman, in 2000, proposed that there should be an 'integrity branch' of government, saying the proposal is 'so obvious that it almost rises to the dignity of a truism: Bureaucracy cannot work if bureaucratic decisions are up for sale to the highest bidder'.[7]

Ackerman said American-style constitutional arrangements should not be exported, favouring the 'constrained parliamentarism' found in other countries, including Australia, where checks on power are found in independent institutions, including a Constitutional Court.[8]

Ackerman advocated for constitutional arrangements separating power into four branches, including an 'integrity branch' and provided the following blueprint for agencies in the integrity branch which stresses the importance of structural guarantees of independence:

> 'The credible construction of a separate "integrity branch" should be a top priority for drafters of modern constitutions. The new branch should be armed with powers and incentives to engage in ongoing oversight. Members of the integrity branch should be guaranteed very high salaries, protected against legislative reduction. They should be guaranteed career paths that permit them to avoid serving under officials whose probity they are charged with investigating. The constitution should also guarantee a minimum budget of *x* percent of the total government revenues because politicians may otherwise respond to the threat of exposure by reducing the agency to a token number of high paid help.'[9]

The defining feature of the fourth arm, for Ackerman, is the level of independence it, and the officers of the agencies within it, must enjoy from the other arms of government. This independence is designed to allow the integrity agencies to investigate corruption wherever it may occur, and ensure the integrity agencies do not become weapons in the hands of the executive, aimed at political opponents.

This independence though creates the problem of how these agencies, which wield considerable powers, are to made accountable, particularly how they can be accountable to the people, without compromising their independence.

Former NSW Chief Justice Spigelman has given a number of speeches developing the idea of an integrity arm of government in the Australian context. Spigelman said that once

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[5] Bruce Topperwein, 'Separation of Powers and the Status of Administrative Review' (1999) 20 *AIAL Forum* 33.
[6] Ibid.
[7] Bruce Ackerman, 'The New Separation of Powers' (2000) 113(3) *Harvard Law Review* 642 at 691.
[8] Ibid.
[9] Ibid 693.

integrity is 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.'[10]

Chief Justice Spigelman argued that recognising 'integrity' as a fundamental mechanism of governance, equivalent in significance to the legislative, executive or judicial branches, allowed a different basis for analysis of the individual components of those branches.[11]

The central theme developed by Chief Justice Spigelman was the extent to which the institutions comprising the three established branches of government perform integrity functions, citing parliamentary committees as an example.[12]

The Parliamentary committee system plays a particularly important role exercising these integrity functions in the Queensland unicameral system. Here in Queensland, the Parliamentary Committee of Public Accounts, forerunner of the Finance and Administration Committee, was established in 1988.

Chief Justice Spigelman concluded as follows:

> 'There is, I believe, utility in identifying the common function performed by the institutions to which I have referred: Parliament when not acting as a legislature, the head of state, the courts by judicial review, auditors general, corruption commissions, royal commissions etc. Whilst also performing other functions, from legislation in the case of a Parliament to resolving individual disputes in the case of the judiciary, it is possible to identify a distinctive function which can be categorised as maintaining the integrity of government in the manner I have identified: i.e. ensuring that powers are exercised for the purposes and in the manner envisaged.'[13]

Another significant contributor to the debate is Western Australian Chief Justice Martin, who has been a strong critic of the notion of a separate integrity branch. Chief Justice Martin has raised concerns about the lack of transparency of agencies 'which it has been suggested might collectively form a fourth branch of government'.[14]

Martin said that the emergence of a class of integrity agencies posed two relationship issues:

a) What is the nature of the relationships between the agencies forming a distinct branch of government?
b) What are the relationships between agencies in the integrity branch and the existing three branches of government, and 'do they disrupt the long-established systems of checks and balances between the existing branches of government?'[15]

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[10] Chief Justice James J Spigelman AC, 'Integrity and Privative Clauses' (1st 2004 National Lecture Series for the Australian Institute of Administrative Law presented in Sydney on 29 April 2004) 4.
[11] Ibid 5.
[12] Ibid 9.
[13] Ibid 41.
[14] Ibid 6-7.
[15] Ibid 18-19.

Inter-Agency Relationships

This discussion is concerned with the first of these issues.

Martin said it was disconcerting, if not alarming, that the 'Greek temple' or 'birds nest' representations of relationships between integrity agencies did not recognise the pre-eminence of the courts or legislature, to which 'integrity agencies' should properly be subordinate.[16]

Chief Justice Martin was concerned about the formation,[17] in Western Australia, of the 'Integrity Coordinating Group', an 'informal collaboration' of the CCC, the Public Sector Commissioner, Auditor-General, Ombudsman and Information Commissioner.[18] His concern centred on the fact that the agencies within the Group had 'banded together' to 'promulgate definitions of conduct and standards of behaviour which are separate and distinct from language used in the statutes creating the agencies, and which defines their separate jurisdictions'.[19]

Chief Justice Martin said that to see integrity agencies as composing a distinct branch of government creates the risk that the agencies will cease, at least in their own perception, to be 'islands of power' and see themselves as part of the overarching fabric of government, with the attendant risk that the system of checks and balances between the traditional arms of government may be undermined.[20] The Chief Justice argued that integrity agencies are and must remain firmly within the executive branch of government, subject to scrutiny by the Parliament and its laws as enforced by the courts.[21]

There appear to be significant problems with the placement of integrity agencies within the executive branch. The primary reason for the proliferation of integrity agencies is the exponential expansion of government regulation into manifold fields of human endeavour. It is the executive arm of government which the integrity arm primarily must be concerned with. Placing integrity agencies within the executive undermines the level of independence the integrity arm must have from the executive to perform effectively.

In 2014, the Deputy NSW Ombudsman, Chris Wheeler, authored a response, saying that the 2013 Whitmore Lecture has 'sparked considerable concern across purpose and value had been misunderstood and unfairly devalued'.[22]

Wheeler argued that Chief Justice Martin had proceeded from a false premise, namely that the historical 'arrangements or relationships' were still adequate to appropriate balance between the executive, legislative and judicial branches.[23] It was argued that integrity agencies had proliferated after 100 years of changes to the powers and functions of the executive branch, with a massive increase in regulation, along with increasing unaffordability

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[16] Chief Justice James J Spigelman AC, 'Integrity and Privative Clauses' (1st 2004 National Lecture Series for the Australian Institute of Administrative Law presented in Sydney on 29 April 2004) 20-21.
[17] Ibid 39.
[18] Ibid 36.
[19] Ibid 39.
[20] Ibid 40, referring to The Hon W M C Gummow AC, 'A Fourth Branch of Government?' (2012) 70 *AIAL Forum* 19, 24.
[21] Ibid.
[22] Chris Wheeler, 'Response to the 2013 Whitmore Lecture by the Hon Wayne Martin AC, Chief Justice of Western Australia' (2014) 88 ALJ 740, 741.
[23] Ibid.

of judicial mechanisms of review, which in any case were limited to issues of legality, rather than issues of propriety, reasonableness or fairness'.[24]

Wheeler stated that the creation of the member agencies of the Western Australian Integrity Coordinating Group ('ICG') has been an ad hoc process, with little attempt made to harmonise the legislation underpinning the agencies, to avoid overlaps between the jurisdictions and powers of the various agencies.[25] In those circumstances, it was argued that the intention of the ICG to promote 'policy coherence and operational coordination' was sensible and commendable.[26]

It is noted that the WA Integrity Coordinating Group has a website, where it publishes information from member agencies and useful guides for public officials designed to ensure complaints are brought to the correct agency.

The Queensland Integrity Committee is considerably less visible. As a matter of principle, a public presence for the Committee could help allay concerns such as those expressed by Chief Justice Martin about the transparency and provide useful information for public officials and members of the public, helping to avoid wastage of precious resources by ensuring complaints and information are directed toward the correct agency and address some of the allegations of inefficiency raised by the Callinan Aroney review of the CMC.[27]

Conclusion

I do not share the concerns expressed by Chief Justice Martin about integrity agencies seeking to co-ordinate their activities. There is considerable precedent for the coordination of activities by arms of government.

It is noted that the *Supreme Court of Queensland Act* 1991 (Qld) establishes a Rules Committee which may advise the relevant Minister about laws giving jurisdiction to the Supreme, District and Magistrates Courts.[28] The Rules Committee is composed of the Chief Justice of the Supreme Court, President of the Court of Appeal, Chief Judge of the District Court and Chief Magistrate, and their nominees.

The Governor in Council may only make Rules for the practice and procedure of the Courts, admission of legal practitioners and assessment of costs if the Rules Committee consents.

The idea of a fourth branch of government has reached a sufficient level of maturity that Professor AJ Brown has authored a chapter in an authoritative text on administrative law on the topic.[29] He says that in Queensland the most clearly defined candidates for membership of the integrity branch are the five integrity commissioners who 'over the past fifteen years or so have come to coordinate themselves as an Integrity Committee'.[30]

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[24] Chris Wheeler, 'Response to the 2013 Whitmore Lecture by the Hon Wayne Martin AC, Chief Justice of Western Australia' (2014) 88 ALJ 740, 742-3.
[25] Ibid 748.
[26] Ibid.
[27] See: I D F Callinan and N Aroney, *Review of the Crime and Misconduct Act 2001 and Related Matters: Report of the Independent Advisory Panel*, Queensland Government, Brisbane 28 March 2013.
[28] *Supreme Court of Queensland Act* 1991 (Qld) s 89.
[29] AJ Brown, 'The Integrity Branch' in Matthew Groves (ed), *Modern Administrative Law in Australia: concepts and context* (Cambridge University Press, 2014) 304-325.
[30] Ibid 311.

Professor Brown notes that similar arrangements exist in other jurisdictions[31] and refers to the 2005 National Integrity System Assessment in Australia which highlighted the need for 'an 'active strategy' to ensure effective policy coordination between the significant 'players' in the integrity field' and found there were questions about 'policy and operational coherence' in the field.[32]

Our ancestors saw the wisdom in dividing power between three arms of government in our Commonwealth Constitution. They also decided to divide power further between a lower and upper House, the latter being a State's House, and to give equal powers to each House, with a complex and expensive mechanism for resolving deadlocks.

Professor Ackerman notes the drawbacks of two Houses of equal power, found in Australia and Switzerland, which were most spectacularly displayed in the dismissal of the Whitlam government.

There are many who would argue that this anachronistic feature, amongst others, of the Commonwealth Constitution, should be altered to improve the quality of governance in Australia.

Setting aside the objection that Viscount Simond's formulation that 'it is even possible we are not wiser than our ancestors'[33] could be used as an argument against any innovation whatsoever, and for conservatism for conservatism's sake, there are more cogent criticisms to make.

Each and every step away from tyranny has involved some modification, or abandonment, of the received wisdom of the ancestors. The Parliamentary forces who defeated King Charles in 1648 rejected the proposition that the King should rule by divine right.

In more recent times, the proponents of a fourth arm of government have argued that the development of that arm has been caused by, on the one hand, the expansion of executive power and regulation over the past few decades, and the failure of traditional mechanisms, particularly the courts, for reviewing massively expended government administration.

It may be that we in Australia in 2017 have run up against the limits of the three-arm model of separating power, which our ancestors bequeathed to us. The challenges we face in efficiently providing redress or those aggrieved by administrative decision-making, and in ensuring that governments act for the good of the people, may require that another arm of government should be acknowledged.

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[31] AJ Brown, 'The Integrity Branch' in Matthew Groves (ed), *Modern Administrative Law in Australia: concepts and context* (Cambridge University Press, 2014) 304-325, 311.
[32] Ibid 312.
[33] *Chapman v Chapman* (1954) AC 429.