WHAT IS THE INTEGRITY BRANCH?

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According to the former NSW Chief Justice, James Spigelman, 'the integrity branch or function of government is concerned to ensure that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose.'[1] He says it is not a separate, distinct branch, because many of the three recognised branches of government, including the Parliament, the head of state, various executive agencies and the superior courts, collectively constitute the integrity branch of government.

I acknowledge that not all commentators take the Spigelman approach. Professor Bruce Ackerman, in a long article, 'The New Separation of Powers' in the Harvard Law Review, wrote this:

> 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 later under officials whose probity they are charged with investigating. The constitution should also guarantee the branch a minimum budget of *x* per cent of 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.[2]

Ackerman appears to be concerned primarily with systems of government that, like the United States, have a formal separation of power of governmental institutions.

Most of the Chief Justice's paper was concerned with the role of the courts and their performance of integrity functions, including the role of the High Court through judicial review – 'Constitutional law is a clear case of an integrity function directed towards the legislature'[3] – and the role of administrative law as an integrity function of the superior courts generally.

Before discussing the integrity role of the courts he noted that, in recent decades, concern with the personal integrity of public officials had taken an institutional form, with the adoption of such documents as codes of ethics and the creation of separate institutions – such as my own office. Additionally, he said:

> The integrity function of government has been the basis of the creation of new statutory rights designed, in part, to enable the function to be better performed, including by involvement of individual members of the public, non-governmental organisations and the media. Freedom of information legislation is of that character. So is whistleblower legislation.[4]

While the name, integrity branch, may be new, the function described by the former Chief Justice – of ensuring that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do and for the purposes for which those powers were conferred, and for no other purpose – can be traced back a long way in the Westminster system of representative government.

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Spigelman says the oldest such institution in Australia is that referred to as the Auditor-General. In England the office can be traced back to the 1860s; in Australia the office has an even longer history, the NSW Governor having appointed the first Auditor-General in 1824. Tasmania had its first Auditor-General two years later and Western Australia three years after that in 1829. Subsequent colonial governments made early appointments of Auditors-General to monitor spending by government officials.

In recent decades the audit role has been expanded, as Spigelman noted, into performance auditing, designed to cover the three Es, economy, efficiency and effectiveness of governmental programs. He considers that this goes beyond the integrity function, in that it is concerned with merits rather than probity.[5]

The next institutional development in the integrity branch did not take place for another 150 years, until the creation of the office of Ombudsman. The Ombudsman is an independent officer who can investigate complaints made by people about decisions or actions of government departments or agencies. In Australia the office has usually been created through legislation. If an investigation finds that the complaint is justified, the Ombudsman normally can only recommend that the agency change the decision and does not have the power to override or change it. The Ombudsman, like the Auditor-General, has expanded its roles in recent years, in particular in carrying out systemic investigations. The Ombudsman also may offer to help agencies improve their decision-making and administrative practice by providing training. This should enhance integrity but is probably better considered as an executive function.

My focus is on the integrity agencies that have been created in Queensland. Most have counterparts in other States and some at the Commonwealth level. But I think Queensland has more than any other single jurisdiction. That no doubt is a consequence of the Fitzgerald inquiry in the late 1980s into police and other corruption, and the change of government that followed.

I should note in passing that Tony Fitzgerald was appointed to carry out his investigation under Queensland's *Commissions of Inquiry Act 1950* –the equivalent of a Royal Commission in other Australian jurisdictions. That Act provided the executive government with an important integrity tool. But while investigations under the Act have no doubt been carried out independently, it was the executive government that decided on their scope and who would conduct them.

One of the first integrity outcomes of the Fitzgerald report was the creation of the Criminal Justice Commission (CJC), modelled to a considerable extent on the NSW Independent Commission Against Corruption. A decade later, the CJC had become the Crime and Misconduct Commission, after being merged with a Crime Commission created by a later government. The CMC's functions still include investigation of complaints against public sector misconduct by police, politicians, public sector officers and public officials, and working with public sector agencies, including the Queensland Police Service (QPS), to fight misconduct, including corruption.

A second result of the Fitzgerald report was the creation, in 1989, of the Electoral and Administrative Review Commission (EARC). This body was mainly concerned with making recommendations to government about reforms but was also empowered to carry out a redistribution of electoral boundaries. Many of the reforms recommended by EARC and adopted by the Government were concerned with integrity issues and resulted in additions being made to the integrity branch in Queensland, or changes to existing institutions to increase their independence, scope or effectiveness. For example, one of the early EARC reports was on Public Sector Auditing, and resulted in changes that increased the independence of the Auditor-General and expanded the Auditor-General's oversight of the

public sector to include, for example, Government Business Enterprises, as they were then called.

The first EARC report, in 1990, recommended guidelines for the declaration of registrable interests of elected representatives of the Parliament of Queensland. Parliament's register of Members' interests actually dates from the previous year. Since 2009, the register has been available to the public and can be viewed on the Parliamentary website, thus making it available to anyone concerned with this aspect of the integrity of Members of Parliament, including Ministers.

In 1991 the EARC produced a report on Codes of Conduct for public officials. This resulted in the passage of the *Public Sector Ethics Act 1994* which provided for the introduction of formal codes of conduct by public service agencies. A sector-wide code was introduced following amendments to the Act in 2010.

An important EARC report on judicial review of administrative decisions and actions resulted in the Supreme Court being given a specific judicial review jurisdiction.

This was followed by one which recommended that Queensland adopt a Freedom of Information (FOI) law. That legislation was duly passed and was similar to laws already in force in the Commonwealth and some other States. However it became less effective as changes were made by subsequent governments. The Act was replaced by the *Right to Information Act 2009* (Qld). As with similar developments in Tasmania and New South Wales, and to a lesser extent the Commonwealth, it ceased to be correct to characterise the laws as constituting freedom **from** information

The Information Commissioner, the Right to Information Commissioner and the Privacy Commissioner are all independent officers who hold statutory appointments: to oversee the working of the *Right to Information Act 2009* (*RTI*) and the *Information Privacy Act 2009*; to hear and investigate complaints; and to determine various appeals. The Information Commissioner is responsible for advancing the *RTI's* pro-disclosure of information agenda.

Also in 1991, the EARC produced a report on the protection of whistleblowers. This also resulted in new legislation, the *Whistleblowers Protection Act 1994*. Once again that legislation has recently been reviewed in Queensland and it has been replaced by a *Public Interest Disclosure Act 2010*, which should be more effective.

The following year the EARC conducted a review of archives legislation. The legislation that resulted from this review gave the Queensland State Archivist relative autonomy, though not complete independence from the government. Importantly, the new Act made it a legal requirement that 'A public authority must — (a) make and keep full and accurate records of its activities'[6]. That provision greatly assists other agencies and people concerned with and/or involved in the integrity process.

Not all EARC reports were adopted relatively quickly – a rewrite of the Queensland Constitution (8 years), the development of a single administrative review tribunal (18 years), or a review of the Parliamentary Committee system (about 17 years) – some were rejected, including human rights legislation. The EARC was disbanded less than four years after it was created.

Another integrity agency now known as the Public Service Commission (PSC) is essentially a management tool for the executive government, but it does have an integrity function, in overseeing the probity of appointments and discipline. The PSC also provides ethics advice to public servants at their request as well as coordination across the public sector on ethics

matters through the Queensland Public Sector Ethics Network, which holds regular (mostly monthly) meetings of relevant officers from agencies.

In 1998, the Government amended the *Public Sector Ethics Act 1994* to create the position of Queensland Integrity Commissioner. This was prompted by recognition by both sides of politics at the time that popular opinion of politicians was, as my predecessor put it, 'at an abysmally low level'.[7] It was apparently thought that if politicians had a confidential sounding board available to them, advice given would contribute to their image and prevent possible blunders. The Act provided that the 'designated persons' who could seek advice were not restricted to politicians. Ministers and their staff could ask for advice, as could government MPs (Opposition MPs were later added to the list), statutory officers, the heads of government departments, and senior executives and other senior officers (but only with the consent of their chief executive), and some others who could be added by Ministers. In total, more than 5,000 people met the description of a designated person. A limitation was that these people could only ask for advice about conflicts of interest – it was not until 2010, when provisions in the *Public Sector Ethics Act 1994* affecting the Integrity Commissioner were transferred to a new Integrity Act, that the advice that could be sought was broadened to include any ethics or integrity issue.

Those who created the new position had no expectation that the Integrity Commissioner would be very busy. The first two Integrity Commissioners were appointed as 40 per cent of full time equivalent; neither lived in Brisbane and both were required to be in the office only two days a month. They were supported by one staff member. During the first 10 years of the office, an annual average of about 28 formal requests for advice were made. During my first year this leapt to 57; it then dropped to 40 but in this last financial year it has risen to the mid 60s.

In 2010 the Integrity Act added an additional integrity function to the role of the Commissioner – running the Register of Lobbyists and having responsibility for writing or rewriting a Lobbyists Code of Conduct. This is supposed to provide for more accountability and openness in the interaction between lobbyists and government representatives. In this it only partly succeeds, not least because only professional third party lobbyists need to register and abide by the Code of Conduct. I estimate that this represents only 20 per cent or so of actual lobbyists. As a consequence of this additional function, I have two additional staff and my official working hours have increased to 80 per cent of a full time equivalent.

Other bodies/organisations that perform some integrity functions are:

- the Anti-Discrimination Commission;
- the Commission for Children and Young People and the Child Guardian;
- the Health Quality and Complaints Commission; and
- the Energy and Water Ombudsman.

In Queensland we appear to have recognised the development of an integrity or fourth branch even before Chief Justice Spigelman drew it to general attention. More than 10 years ago the heads of some of the integrity agencies decided they should have regular meetings. They called their informal grouping the Integrity Committee. Meetings are held three or four times a year to discuss matters of mutual interest - that is, matters of interest to at least two of those present. The committee consists presently of the Chairman of the Crime and Misconduct Commission, the Auditor-General, the Ombudsman, the Integrity Commissioner, the Information Commissioner and the Chief Executive of the Public Service Commission. They are attended only by the heads of those bodies - deputies are not permitted – and, of course, all discussions are confidential. A page on the Ombudsman's website which lists all complaints agencies was one outcome of discussions of the

committee. These, then, are the governmental responses to the apparently growing need to create an official integrity branch, performing the functions described by Spigelman.

Has the fourth branch been outsourced by whistleblowing reform or FOI?

The recent developments in FOI/RTI referred to earlier have increased the openness and accountability of government. The 'push' model adopted in Queensland and elsewhere has encouraged departments and agencies to voluntarily make more information publicly available. At the same time, some governments have decided to increase the information they release on decisions by cabinet and more mundane matters such as contracts that agencies have entered into. For example, Queensland now publishes basic information about any contract worth $10,000 or more and more detailed information about contracts for $10 million or more. There is not much evidence of who accesses this information, other than those who made unsuccessful bids wanting to know why and how their competitors won their contracts.

While these developments are welcome, one has to look primarily to the way the media has used FOI/RTI to see whether there has been any significant contribution to integrity processes. Undoubtedly much interesting information has emerged that was not previously available such as, for example, large extracts from the blue or red briefing books that departments prepare for incoming governments at election time. FOI/RTI is also used for private purposes, by lawyers and their clients, and by corporations. It does not seem to have been taken up to the degree that has occurred in the United States, by lobby groups and activist non-profit organisations (such as environmental groups).

My impression is that these developments have not encouraged the development of non-government groups pursuing an integrity agenda, other than to a limited extent, the media.

Whistleblowing, in so far as it is provided for by legislation, is essentially an internal government integrity process. Disclosure of aberrant behaviour by officials is intended to be made to more senior officials or to agencies tasked with investigating complaints. In Queensland, it is only if a complaint has not been dealt with adequately that the whistleblower may make the problem public, while retaining the safeguards that the law provides. In most jurisdictions going public leaves the whistleblower without further protection. Of course, there are occasionally whistleblowers who put themselves completely outside the whistleblower laws by leaking directly to the media. They don't merely put themselves outside the protection that the law might offer – they expose themselves to prosecution under secrecy laws that are meant to protect what happens within government, including behaviour by public servants or ministers that might be improper or even illegal.

In my view whistleblowing legislation does not contribute to external integrity processes but can assist the internal integrity processes of the executive government.

Is the media part of the fourth branch?

The media is an obvious candidate for inclusion in the fourth branch. Most media would like to believe that some of their activities are specifically directed towards this end.

The press has long been referred to as the fourth estate and the media in general have tried to assume this designation. But being the fourth estate is not quite the same as being the fourth branch.

The term, fourth estate, was apparently applied to the press when journalists were formally admitted to report in the House of Commons. The other three estates were the Lords Spiritual, the Lords Temporal and the Commons. The name was meant to convey the

importance of the press in the political life of the nation. The press was part of the polity and exercised power, though not always beneficially, in the public interest. Its significance and influence has probably increased. As Professor Rodney Tiffin wrote in *The Oxford Companion to Australian Politics:*

> In all technologically advanced countries, the media are central to the political arena. They are inevitably the primary link between citizens and state, governors and governed. Their political importance lies first in the huge audiences they reach, and the way those audiences transcend and cut across other social divisions and political constituencies. Equally significant is the massive presence of the media at political institutions. Their pressures for disclosure have transformed political processes and created tensions about the control and dissemination of information and impressions.[8]

The media contribute significantly to political accountability, as another author in the Oxford Companion wrote:

> The media play an increasingly significant role in democratic accountability. They provide a forum for reporting and reinforcing the scrutiny exercised by specialised accountability agencies, such as parliament, the Auditor-General and the Ombudsman. They also engage in their own critical dialogue with politicians and officials, forcing them to answer directly to the public.[9]

To the somewhat limited extent that the media report the activities and views of the integrity agencies, they deserve to be considered at least as collaborators in the integrity process. Insofar as they have their own interactions with politicians and officials, they give the impression that they are playing the political game.

Media academic, Professor Matthew Ricketson of the University of Canberra, who assisted former Federal Court judge Ray Finkelstein, in his review of media regulation, refers to what many of us call serious journalism as ‘accountability journalism’. He said recently:

> There is much more media available to anyone who has access to a smartphone or internet connection, but the bulk of accountability journalism is still coming from the major news organisations and it is those – Fairfax and News here – which are struggling to a degree. The number of people doing accountability journalism does appear to be diminishing and that is a real problem for democracy.[10]

One more media commentator, the executive director of the Sydney Institute, Gerard Henderson, wrote under the headline *Power of the press a lot less muscular than some imagine*:

> Politicians tend to overestimate the importance of the media and, in particular, media proprietors…
> …journalists frequently overestimate the significance of their own role…
> There is also a tendency for journalists to overestimate their role in facilitating public debate…
> In this overcrowded media market, journalists need politicians more than politicians need journalists…[11]

Having spent more than 40 years in journalism, I can see merit in each of those observations. I certainly agree with Ricketson that accountability journalism is decreasing and with Henderson’s view that politicians and journalists overestimate the importance of the media’s contribution to politics. While the media is still entitled to regard itself, and be regarded generally, as the fourth estate, I do not believe it has established itself as part of the fourth branch, the integrity branch. Indeed, much of its performance as the fourth estate probably disentitles it to any such recognition, even though occasionally its accountability journalism may contribute to integrity in government.

In what way can citizens be empowered/enlisted into the fourth branch?

The internet (in its various emanations) is supposed to make us all free to take part in the integrity function, using FOI/RTI, searching websites, questioning politicians; to be citizen-

journalists, with our own websites, , or latching onto the facilities developed by others, like Crikey, for example. We can carry out our research, using search engines, or sites developed by others – such as Open Australia. We are empowered far more than 20 years ago. Should we be enlisted?

I think we are already, though the various integrity agencies perhaps need to be more encouraging. I receive dozens of requests/demands each year that I should investigate or do something about alleged misbehaviour (actually, those who contact me don not allege, they insist that they know that some evil has occurred, generally affecting them personally) by police, public servants or the government. I used to get about the same number when I was contributing editor of *The Courier-Mail*. In my present position I am unable to investigate or respond positively to them, because my functions are tightly circumscribed by the Integrity Act. But I know that other integrity agencies receive many more complaints than I do. In Queensland the Ombudsman now has on its website a page labelled 'It's ok to complain' that lists the various independent complaint agencies, State and Commonwealth, and their respective functions. Not everyone goes to the appropriate authority, but it helps.

However, I think that in the foreseeable future, the integrity branch will remain the preserve of independent or autonomous agencies established by government, and of those branches of government that have an integrity function as part of their ordinary activities.

Independence – institutional autonomy

Like Professor Ackerman, I can see advantages in there being an integrity branch that is quite distinct and separate from the other branches of government. It would probably be more effective, not least because citizens could see what it was doing. But that is not our system. As Spigelman explains, each of the three branches of government – executive, legislature and judiciary – has taken on an integrity function in some way. Each can be effective. There would be no advantage in trying to remove those functions and send them off to a fourth branch.

What is important is that those individual agencies that have been created primarily to perform an integrity function, from the Auditor-General to the Ombudsman and to various specialised complaints and investigatory bodies, should have the appropriate degree of independence from government, or at the very least, operational autonomy. That independence/autonomy will not be a measure of whether a body has an integrity function, but it will be one characteristic to be considered in classifying it as a part of the fourth (integrity) branch.

Endnotes

1 James J. Spigelman AC *'The Integrity Branch of Government'*, AIAL National Lecture Series on Administrative Law, Sydney, 29 April 2004, 2.
2 Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review*.
3 Spigelman, 5.
4 Spigelman, 5.
5 Spigelman, 4.
6 S 6.
7 Gary Crooke QC, 'Five Years as Integrity Commissioner: a Retrospective' (Paper presented at the Australian Public Sector Anti-Corruption Conference, July 2009), 1.
8 Rodney Tiffin, 'Media and Politics', in Brian Galligan and Winsome Roberts (eds), *The Oxford Companion to Australian Politics*, Melbourne 2007, 336.
9 Richard Mulgan, 'Accountability', in Brian Galligan and Winsome Roberts (eds), *The Oxford Companion to Australian Politics*, Melbourne 2007, 13.
10 Matthew Ricketson, quoted by Debra Jopson, 'It's All About the Journalism, Stupid', *Sydney Morning Herald News Review*, June 23-24 2012, 6.
11 Gerard Henderson, 'Power of the Press a Lot Less Muscular than Some Imagine' *Sydney Morning Herald*, 26 June 2012, 13.