

# The integrity branch – Parliament’s failure or opportunity?

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Since former NSW Chief Justice Jim Spigelman focussed our attention on ‘the integrity branch or function of government’ in 2004, a considerable amount has been written about what constitutes the integrity branch and about its various attributes. Last year the Australian Institute of Administrative Law devoted much of its annual conference to the topic.<sup>1</sup> This year it was one of the main concerns of an Open Government Policy Forum held by the Queensland Government in August. That forum was in part prompted by the publication of the review of the Crime and Misconduct Act by former High Court Justice Ian Callinan AC and Professor Nicholas Aroney, which was highly critical of Queensland’s integrity ‘industry’ or ‘regime’.<sup>2</sup> I will be taking up here some of the matters raised at the forum and in the Callinan/Aroney report, and also a chapter in a yet-to-be published book on administrative law, by Professor A J Brown, of Griffith University.<sup>3</sup>

Chief Justice Spigelman said ‘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’.<sup>4</sup> The Chief Justice pointed out that many of the existing institutions of the three recognised branches of government – parliament, the executive and the judiciary – collectively constitute the integrity branch of government. This is because many of them have integrity functions. He pointed out that many of the institutions of the integrity branch appear to be emanations of the executive, and gave as examples audit offices and anti-corruption commissions, as well as Ombudsmen. He also mentioned Integrity Commissioners. The Chief Justice was particularly concerned to highlight the role of the courts as part of the integrity branch in judicial review (particularly the High Court) and in administrative law (the Federal Court and

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1 See (2012) 70 AIAL Forum.

2 Hon IDF Callinan AC and N Aroney, *Review of the Crime and Misconduct Act [Qld 2001] and Related Matters: Report of the Independent Advisory Panel*, Queensland Government, Brisbane, 28 March 2013, 142, 204. (Redacted Version: Parliamentary Paper 5413T2447, Parliament of Queensland, 18 April 2013); see <<http://www.justice.qld.gov.au/cmareview>>

3 By Matthew Groves.

4 James J. Spigelman AC *The Integrity Branch of Government*, AIAL National Lecture Series on Administrative Law, Sydney, 29 April 2004, 2.

the State and Territory Supreme Courts). This emphasis draws one back to his definition of the ‘integrity branch or function...’<sup>5</sup>. It is useful to demonstrate and remind us that the three recognised branches of government each has an integrity function. However, it is somewhat confusing, and in my view unhelpful, to suggest that makes them part of an integrity **branch**. There are candidates enough to demonstrate there is, these days, an integrity branch, without drawing into it the organs of government that have other primary functions – parliament, the executive and the judiciary. Professor A J Brown makes a similar point in his forthcoming chapter on the integrity branch in Groves book on Administrative law. During a lengthy discussion he says,

From the integrity system assessment work conducted in Australia, and internationally, together with other similar evaluations in OECD countries, we can see that these long lists of institutions may be important to the operation of the integrity system, but do not necessarily define which institutions are members of the integrity *branch*. Integrity systems can be seen as reliant on a range of both core institutions (generalist or specialist), established solely or primarily to carry out integrity functions; and distributed integrity institutions which are embedded in the internal accountability and governance systems of every organisation ...On one view, all these institutions can be seen as part of the integrity system; but only the core institutions ... might potentially qualify as members of the branch.<sup>6</sup>

The confusion between integrity *system* and integrity *branch* is reflected in the Callinan/ Aroney report which, in my view, leads the authors to overstate the degree of complexity and overlap that can be said to exist in Queensland’s integrity branch. In the introduction to their report they say,

At an early stage of the Review, it started to become apparent that there existed an extraordinary multiplicity of agencies, statutory office holders, departmental ethical standards units and other persons concerned in what has been characterised as Queensland’s public sector ‘integrity regime’, with functions primarily of maintaining or adjudicating on, of overseeing, of promoting integrity in the public sector, or of investigating conduct which is said to run counter to it. We are far from confident that we have been able to identify all of those offices and bodies but can say that they include the following statutory office holders, agencies and institutions:

- c. the Ombudsman;
- d. the Integrity Commissioner;
- e. the Privacy Commissioner;
- f. the Information Commissioner;
- g. the Coroner;
- h. Public Service Commission;
- i. the Auditor-General and the Queensland Audit Office (QAO);
- j. the Public Interest Monitor;

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5 Emphasis added.

6 Brown, 8.

- k. the CMC;
- l. the Queensland Civil and Administrative Tribunal (QCAT) (quasi-judicial);
- m. the Health Quality and Complaints Commission;
- n. the Electoral Commissioner;
- o. the Parliamentary Crime and Misconduct Commissioner (the Parliamentary Commissioner);
- p. the Parliamentary Ethics Committee;
- q. the Parliament Crime and Misconduct Committee (the Parliamentary Committee).<sup>7</sup>

My own list would be considerably shorter, by a factor of about 50 per cent. First, the Privacy Commissioner (like the Right to Information Commissioner) while a statutory office holder, actually sits within the office of the Information Commissioner. Secondly, it is difficult to justify the suggestion that the Coroner and QCAT are 'primarily' concerned with integrity issues. The same may be said of the Public Interest Monitor, the Electoral Commissioner, the Parliamentary Commissioner (who acts to assist the Parliamentary Committee), the Parliamentary Committee and the Parliamentary Ethics Committee. The Parliamentary bodies are just that. And the Public Service Commission, at least in Queensland, is primarily part of the machinery of the executive government, with a public sector management role and a very limited integrity function. The Health Quality and Complaints Commission is being replaced by a Health Ombudsman. This is not the place to debate the merits of the Callinan/Aroney review and its recommendations, which if implemented could impact across the whole of the public service – for example, by removing or greatly reducing departmental ethics units and by requiring 'managers to manage' rather than outsourcing integrity matters to external agencies. However I agree with comments made by Professor A J Brown at the Open Government Forum when he said,

I think we can actually use international experience and our own experience to say we know that there are those four key values in integrity that operationalise integrity: honesty, fairness, openness and diligence—fulfilment of purpose, if you like—which have been articulated. The interesting thing is that we do have four independent statutory integrity agencies that are precisely aligned or are meant to be precisely aligned with each of those four values: the Ombudsman for fairness and consistency in due process in particular; the Information Commissioner for transparency; for due diligence and fulfilment of purpose including value for money, which is actually another constitutional principle you have the Auditor-General; and then for honesty you are supposed to have the anti-corruption body. Looking at integrity systems around the country and around the world, those are the four that you would not merge, that you would keep independent and then the question becomes about all the other ones how do they fit into the system.<sup>8</sup>

He went on to question whether the CMC was too involved in complaint handling, rather than being an investigative body, an issue that many of the recommendations of the review were directed to meeting and changing.

<sup>7</sup> Callinan and Aroney, 6–7.

<sup>8</sup> Queensland Government, 'Open government policy forum', 13 August 2013, transcript, 15–16.

In an earlier article, I identified what I thought were the key members of the integrity branch in Queensland as being the Auditor-General, the Ombudsman, the Information Commissioner, the Crime and Misconduct Commission and the Integrity Commissioner.<sup>9</sup> At that time I also included the Public Service Commission but in the past year the PSC has largely shed its integrity functions and been stripped of its independence from government, and as I indicated above I no longer consider that it should be counted as part of the integrity branch. As I said then, I consider that the individual agencies that can be said to constitute the integrity branch have been created primarily to perform and integrity function, and that they ‘should have the appropriate degree of independence from government, or at the very least, operational autonomy’.<sup>10</sup> This article is concerned with the relationship of the integrity branch to the parliament. Again I will focus on the situation in Queensland, though I will occasionally refer to the situation elsewhere. The first matter to note is that these members of the integrity branch are all statutory bodies, and that other than the Chairperson of the CMC, each is designated as an ‘officer of the Parliament’ by their respective legislative charters. Each is tied to a Parliamentary Committee (or committees) which reviews and reports to the parliament on their activities. This is not to say that the relationship between each of the integrity agencies and the parliament is the same. I will return later to examine the nature and utility of the designation ‘officer of the parliament’.

## QUEENSLAND’S INTEGRITY BRANCH

It is useful and informative to trace briefly the evolution of the different integrity agencies in relation to the parliament, beginning with the oldest of the institutions, the Auditor-General. As I noted in my earlier article, the first Australian Auditor-General was appointed by the NSW Governor in 1824, Tasmania had its first Auditor-General two years later, and Western Australia three years later. Each of the colonies made appointments shortly after self-government to monitor spending by government officials.<sup>11</sup> The office of the Commonwealth Auditor-General was created by the fourth Act of the first parliament in 1901 and the Auditor-General took office from the beginning of 1902. The audit office in each case was seen as an adjunct to, and part of, the executive government. However parliaments in the Westminster tradition have long been concerned to monitor the work of Auditors-General. As Gareth Griffith has pointed out the history of Public Accounts Committees dates back to 1861 when the House of Commons appointed a Parliamentary Select Committee of Public Accounts.<sup>12</sup> Interestingly, this actually preceded the appointment of the first UK Auditor-General.<sup>13</sup> Some of the Australian colonies

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9 David Solomon, ‘What is the Integrity Branch?’, AIAL Forum No. 70, 26–32.

10 Solomon, 32.

11 Solomon, 27.

12 Gareth Griffith, ‘Parliament and Accountability’ Australasian Parliamentary Review, Autumn 2006, Vol 21(1), 7–47, at 19.

13 Kate Jones and Kerry Jacobs, ‘Governing the Government: The paradoxical place of the Public Accounts Committee’, paper presented to the Australasian Study of Parliament Group, 2005. 11.

experimented with PACs during the 19th century while the Commonwealth established its PAC in 1913, though this was suspended during the Depression as a cost-saving measure and not recreated until 1951.<sup>14</sup> The inter-relationship of the Auditor-General and the relevant PAC is important, perhaps crucial. The Auditor-General reports, the PAC follows up, investigates, expands sometimes on the findings, and makes its own recommendations to the parliament for governments to note, and in many cases put into effect. It is interesting to note that in Queensland, the **absence** of a PAC became a matter of political controversy in the early 1980s. The Liberal Party's determination to create a PAC led to the break-up of its coalition with the National Party and to the National Party governing alone. Later, one of the first results of the departure of Sir Joh Bjelke-Petersen was the creation of a PAC. Regrettably, the reorganisation of the parliamentary committee system in Queensland in 2011 eliminated the PAC and shared its functions among the newly created portfolio committees.

The next integrity branch officers were the Ombudsman, which were created in each state and the Commonwealth between 1972 and 1979. Queensland's first Ombudsman was appointed in 1974 to investigate complaints about the administrative actions of government departments and authorities and to help to improve the quality of decision-making and administrative practice in agencies. The Ombudsman's formal title was Parliamentary Commissioner for Administrative Investigations, and in some other states the title of Parliamentary Commissioner was also used. Here parliament was creating an entity to carry out, among other things, a function that individual Members of Parliament would previously have performed, that is, listening to complaints from their constituents about administrative decisions and actions by the government, and trying to have them resolved to the satisfaction of the complainant. In fact, the Ombudsman is better equipped to redress grievances than MPs. MPs did not surrender this important function completely, but the bulk of complaints about the executive government from their constituents went directly to the Ombudsman, once the parliament brought this new entity into existence. While parliaments generally made provision for annual and other reports by Ombudsmen, in Queensland it was only in the past few years that the Ombudsman was linked directly with a parliamentary committee, the Legal Affairs and Community Safety Committee, which is required to monitor and review the activities of the Ombudsman. The Crime and Misconduct Commission (CMC), referred to earlier, is a successor to the Criminal Justice Commission (CJC) which was created in 1989 on the advice of the Fitzgerald inquiry to clean up the Queensland Police Service and to help counter misconduct in the public sector generally. In 2002 it was merged with the Queensland Crime Commission to form the CMC. From its beginnings the CJC was seen as a key integrity body. While independent, its functions were essentially of a kind related to executive government (e.g. supervising and investigations activities of police). But like the NSW Independent Commission Against Corruption, which was created a year earlier, it was made accountable to a parliamentary committee. The Queensland Parliamentary Committee was later provided with access to a Parliamentary Commissioner, who had power to examine the agency's internal working documents when investigating complaints against

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<sup>14</sup> Jones and Jacobs, 14.

the CMC that had been referred to him or her by the Parliamentary Committee. The position of Information Commissioner was created in Queensland in the *Freedom of Information Act 1992* to hear appeals under that Act. However, the government assigned the role to the then Ombudsman. In 2009 the FOI Act was replaced by the Right to Information Act (RTI Act) and an Information Privacy Act. They gave statutory independence to the Information Commissioner, a Right to Information Commissioner and a Privacy Commissioner, designating the Information Commissioner as an officer of the Parliament. They have power to hear appeals and investigate complaints about RTI matters. The Information Commissioner is responsible for advancing the RTIs pro-disclosure of information agenda generally, and within the executive government. The Act makes a parliamentary committee responsible for monitoring and reviewing the Information Commissioners performance and allows it to request special reports.

The position of Integrity Commissioner was created in 1999 in amendments to the *Public Sector Ethics Act 1994*. The Commissioner was an appendage to the executive government, reporting to the Premier, and able to provide advice, if asked, to a ‘designated person’ – ministers and the staff, chief executives and statutory officers, and senior public servants – about conflict of interest issues. All told, about 5,000 people were allowed to seek advice. In 2009, all MPs were added to the list of designated persons. In 2010 the provisions concerning the Integrity Commissioner were transferred to a new *Integrity Act 2009*. The Commissioner became responsible for giving a wider range of advice – any ethics or integrity matter – was made an officer of the parliament and became answerable to a parliamentary committee. The Commissioner also assumed responsibility for the Register of Lobbyists and a Lobbyists Code of Conduct which he had power to change after consultation with the parliamentary committee.

## **THE ROLE OF PARLIAMENTS IN THE GROWTH OF THE INTEGRITY BRANCH**

To what extent has the growth of the integrity branch been caused by the parliaments’ failure or inability to put in place sufficient measures to make the executive accountable for the exercise of executive powers? First, a reality check. Is there any point discussing what parliament does or does not do in such a way as to suggest that it acts independently of government? Particularly when referring to what happens in Queensland where the upper house abolished itself (at the instigation of the government) more than 90 years ago and, in the territories, which are unicameral. More generally though, in Australian jurisdictions, where legislation, other than in exceptional circumstances, reflects the policy of the government, or at the very least, does not run counter to the government’s wishes.

For the most part the answer has to be ‘no’, but it may be different – at least some of the time – when dealing with integrity branch issues. An example first, of how one backbencher can make a difference. I referred earlier to the re-creation by the federal parliament in 1952 of its Public Accounts Committee following its demise during the depression for budgetary reasons. This happened only because of the campaign of a Liberal backbencher, elected

in 1951, F. A. Bland, who had recently retired as Professor of Public Administration at Sydney University. 'In his maiden speech he criticized the Menzies government for allowing increasing power in the hands of the executive. By re-establishing the joint committee of public accounts, he mocked the traditional wisdom that parliamentary committees were rendered ineffectual by the strong party system. ... One of Bland's academic successors claimed that it was among the most effective committees that has ever existed in an Australian parliament.'<sup>15</sup> A second example concerns the position of Queensland Integrity Commissioner. Before the Beattie Government introduced the amendments to the Public Sector Ethics Act to create the position, it held extensive discussions with the opposition to reach agreement about the need for such a position and how it would function.<sup>16</sup> A third example is provided by the creation of the Criminal Justice Commission.

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Both the government and opposition in effect committed themselves in advance to implement whatever policies were recommended by Tony Fitzgerald QC in the 1969 report of his Commission of Inquiry into police corruption in Queensland.

Australian parliaments generally have been unable to free themselves of executive domination except when the government has been in a minority in the upper house, or when it has been dependent on the support of independents or minority parties in the lower house. The means, normally adopted

to achieve reforms in such cases, has been a strengthened committee system. Parliament has few other options given that constitutionally governments alone can initiate the spending of public moneys and funding is required for measures to establish and maintain the integrity branch.

## PARLIAMENT'S RESPONSE TO THE INTEGRITY BRANCH

This has left the initiative for the creation of the integrity branch with the executive. The development of the branch, as indicated by the brief history set out earlier, has been essentially *ad hoc*. There has been no grand master plan evident (though the agreements reached by Prime Minister Julia Gillard with the independents and Greens after the 2010 federal election had elements of such a plan). One consequence of this is that there are some variations in the way in which members of the integrity branch relate to the parliament, even within the one jurisdiction. In Queensland, however, these are becoming

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<sup>15</sup> Ross Curnow, Bland, Francis Armand (1882–1967), Australian Dictionary of Biography, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/bland-francis-armand-9525/text16771>, accessed 5 September 2013.

<sup>16</sup> Information provided by then Deputy Opposition Leader, Joan Sheldon.

more standardised as legislation is updated. Take, for example, the appointment of these officers. In Queensland the Chair of the Crime and Misconduct Commission is appointed by the Minister, after consultation with the relevant parliamentary committee. The appointment can only be made with the bipartisan support of the committee – that is, the Opposition has a veto over any appointment (and this has been used on a number of occasions in the past). However the appointment of the Auditor-General, the Ombudsman, the Integrity Commissioner and the Information Commissioner require the relevant minister only to ‘consult’ with the parliamentary committee. However, this is given substance and a proper balance between government and parliament is obtained by making the chair of the relevant parliamentary committee a member of the selection committee. Termination of the appointment of the Chair of the CMC also requires bipartisan support on the parliamentary committee, plus a resolution of the parliament. The Auditor-General, the Ombudsman, the Integrity Commissioner and the Information Commissioner similarly may be dismissed after an address by the parliament to the Governor following approval by a majority of members of the parliamentary committee, other than a majority consisting only of the members of the political party or parties in government in the Legislative Assembly. Provisions such as these recognise and contribute to the independence of these members of the integrity branch and give the parliament a significant role in relation to them. This is in addition to the requirement that the parliamentary committees monitor and review the performance by these officers of their statutory functions.

## OFFICERS OF THE PARLIAMENT

As noted earlier, many of the members of the integrity branch have been designated as Officers of the Parliament. In most jurisdictions in Australia the term has little meaning. When the Commonwealth Auditor-General received this title in 1997, the Opposition shadow Treasurer, Gareth Evans, described it as ‘cosmetic and meaningless’ and ‘mere window dressing without any substance’.<sup>17</sup> I think that applies to Queensland also but, in my view, it is desirable that it should have some real meaning, such that it would add to the independence of the integrity branch. In 2003 the Constitution Unit at University College London published a paper on Officers of Parliament that included research on the position in Britain and some Commonwealth countries, including Australia and New Zealand.<sup>18</sup> It set out ‘to explore the nature and status of Officer of Parliament, and how it could be enhanced. The aim would be to develop the roles both of such Officers and of Parliament in achieving the key constitutional functions of parliament such as scrutiny of the executive and protection of the interests of citizens.’<sup>19</sup> They said the term was often misunderstood ‘but is used as a device to denote a special relationship with Parliament’. They said that using examples from other Commonwealth countries, the ‘core’ officers were

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17 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 March 1997, pp 1743–1744 (Gareth Evans).

18 Oonagh Gay and Barry K Winetrobe, ‘Officers of Parliament – Transforming the role’, April 2003, The Constitution Unit UCL.

19 At 9.



state auditors, Ombudsmen, electoral officers/commissioners and parliamentary ethics commissioners. Other watchdogs who were sometimes categorised as officers included privacy, information, human rights, equality, civil/public service and public appointments commissioners.<sup>20</sup> One of the countries they studied was New Zealand, where in 1989 the Finance and Expenditure Committee set out five criteria for the creation of an Officer of Parliament. As reported by Lesley Ferguson, 'The committee considered that an officer of Parliament must be created only to provide a check on the arbitrary use of power by the executive; that an officer of Parliament must discharge only functions which the House itself, if it so wished, might carry out; that an officer of Parliament should be created only rarely; that the House should, from time to time, review the appropriateness of each officer of Parliaments status as an officer of Parliament; that each officer of Parliament should be created in separate legislation principally devoted to that position.'<sup>21</sup> Ferguson concluded, 'New Zealand has benefited from the set of criteria devised by the Finance and Expenditure Committee in 1989 for consideration when investigating creating an officer of Parliament. Since 1989, the framework has evolved sufficiently to allow New Zealands officers of Parliament to operate effectively in the era of new public management and still preserve their independence. However, independence has not exempted them from accountability to the House for the stewardship of public funds and for their offices performance. New Zealands officers of Parliament seem to have accepted being held accountable in this way as long as their independent judgement is not challenged, specifically their forming of opinions, reports, selection of work, and exercise of any statutory discretions. The FECs criteria along with the definitions of other accountability-type agencies established in New Zealand by enactment of the Crown Entities Act 2004 have gone a long way to clarifying the understanding of the role of an officer of Parliament.'<sup>22</sup>

Currently, a Greens member of the ACT Legislative Assembly has launched an important initiative in this matter. Shane Rattenbury, a minister in the ACT government, tabled the 'Officers of the Assembly Legislation Amendment Bill 2013'. His explanatory memorandum says the Bill recognises the Auditor-General, the Ombudsman and the three Electoral Commissioners as Officers of the Assembly. This would recognise the 'special relationship' that each has with the assembly. It says<sup>23</sup>

The Bill provides that each of these officers is independent and creates a much clearer separation between these officers and the executive. Reporting will be done through the Speaker of the Assembly and appropriations for the officers must be included with the Appropriation Bill for the Office of the Legislative Assembly.

In addition to ensuring independence, the Bill articulates the requirements for appointment of the officers, who will be appointed by the Speaker on behalf of the

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20 At 7.

21 Lesley Ferguson, 'Parliaments Watchdogs – NZs Officers of Parliament' *Australasian Parliamentary Review*, Spring 2010, Vol 25( 2), 133–45, at 135.

22 At 144.

23 Explanatory memorandum, *Officers of the Assembly Legislation Amendment Bill 2013*, ACT Legislative Assembly, 15 August 2013, p. 3.

Territory rather than by the executive, as well as setting out a framework for the suspension and dismissal of the officers and creates a new obligation for the executive to respond to reports to the Assembly by the officers, similar to the current requirement to respond to petitions and committee reports under the standing orders.

The Bill will also create a relationship between each officer of the Assembly and an Assembly Committee. ...

At time of writing, the Bill had yet to be debated but, in my view, its most important provision is that which requires appropriations for these officers to be included in the appropriations for the Assembly. If enacted, this would set an important precedent and do much to further secure the independence of the integrity branch from the executive. For this to spread to other jurisdictions would require the acquiescence of executive governments but parliaments, led by the committees to which the integrity branch officers report, and pressed to act by those officers, should do what they can to encourage this reform.